

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**Before Shri George George K., Judicial Member
and**

Ms. Padmavathy S., Accountant Member

ITA No. 850/Coch/2022 (Assessment Year: 2016-17)		
Amina Anvar City Opticals, Pipson Complex Pada South, Karunagappally Kollam Kerala-690 518 PAN – AGMPA5574B (Appellant)	vs	DCIT,Circle -1 Alappuzha (Respondent)

Assessee by:	Sri. Rajakannan, Advocate
Revenue by:	Smt. J.M. Jamuna Devi, Sr. AR

Date of hearing:	02.03.2023
Date of pronouncement:	09.03.2023

ORDER

Per: George George K., J.M.

This appeal at the instance of the assessee is directed against the order of the CIT(A)/NFAC, Delhi dated 30.06.2022 passed under Section 250 of the Income Tax Act, 1961 (the Act). The relevant assessment year is 2016-17.

2. The solitary issue that arises for our consideration is whether the ld.CIT(A) is justified in confirming the imposition of penalty u/s. 271(1)(c) of the I.T.Act amounting to Rs. 38,669/-.

3. The brief facts of the case are as under: -

The assessee an individual filed the return of income for AY 2016-17 on 29.08.2018 declaring total income of Rs. 9,25,430/-. The assessment was reopened and reassessment was completed u/s. 143(3) r.w.s. 147 of the I.T.Act assessing the total income at Rs. 10,75,430/-. The AO made the disallowance u/s. 37 of the I.T.Act to the tune of Rs. 1,50,000/- pertaining to claim of expenses relatable to purchases made.

4. Pursuant to the reassessment order passed u/s. 143(3) r.w.s. 147 of the I.T.Act, 1961, the penalty proceedings were initiated u/s. 271(1)(C) of the Act. Subsequently, the AO/NFAC passed penalty order u/s. 271(1)(C) of the Act on 10.02.2022 (penalty imposed Rs. 38,669/- being 100% of the tax sought to be evaded).

5. Aggrieved by the order imposing penalty. The assessee filed appeal before the first appellate authority. The Id.CIT(A) rejected the appeal of the assessee, since assessee did not file any written submissions in spite of two e-notices being issued to the assessee. The relevant findings of the Id.CIT(A) reads as follows:

During appellate proceedings, two e-notices for providing written submissions were issued to assessee on 18.04.2022 and 23.06.2022 which remained un-complied with till date. Appellant has also not provided the details of expenses pertaining to purchases made of Rs.1,50,000/- which was added u/s. 37 of the Act. Appellant could have availed this opportunity to explain her position during the appellate proceedings, but it did not comply. Meaning thereby, assessee did not have anything to furnish substantiate its contentions. It is also pertinent to note that if the case had not been scrutinized the transaction to the tune of Rs.1,50,000/- would have not been unearthed. Keeping in mind these facts and circumstances of the case, I find that penalty order passed u/s. 271(1)(c) of the Act is a valid order and ample opportunities of being heard have also been accorded to the assessee. I do not find any reason for further intervention in the penalty order so passed, therefore order passed u/s. 271(1)(c) of the Act is hereby sustained.

6. Aggrieved by the order of the Id.CIT(A) confirming the imposition of the penalty u/s. 271(1)(c) of the Act. The assessee has filed the present appeal before the Tribunal by raising the following grounds.

1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 by striking off the printed portion of the notice " have concealed the particulars of income" in the show cause notice dated 30.12.2019 and imposing penalty under section 271(1)(c) for "concealing the particulars of such income" is bad in law.

2. Under the facts and circumstances of the case and In law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s. 271(1)(c) of the I.T.Act, 1961 is void ab intitio deserves to be quashed as no satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income,

4. Unless any positive concealment is found no penalty is leviable on basis of addition made on estimate.

5. The addition to the income of the assessee in this case is based on estimate basis whereas the concealment implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. Therefore, in a case the additions were made on the basis of estimation and as agreed to by the assessee, the penalty cannot be levied on such additions.

6. Drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law.

7 . The satisfaction regarding the grounds mentioned in section 271(1)(c) is essential for the Revenue to initiate the penalty proceedings.

8. The penalty proceedings must be confined only to those grounds specifically stated in the notice so that the assessee could meet those grounds. It is not open to the authority, to impose a penalty on the grounds other than what the assessee was called upon to meet.

9. The assessment was completed without giving proper opportunity to your appellant. The appellant sought an adjournment on 25-06-2022 upto 12-07 2022,which was not considered by the CIT NFAC, and dismissed the appeal on 30-06- 2022.In view of this, . the order of the CIT NFAC is invalid.

10. Any other grounds that may be adduced at the time of hearing may also be considered.

7. The Id. AR submitted that penalty has been initiated for “furnishing inaccurate particulars” by the issue of show-cause notice date 30.12.2019,

whereas the penalty has been imposed for “concealing particulars of such income”. It was submitted the change in the ground on the basis of which the penalty has been initially initiated and later imposed has violated principles of natural justice. It was submitted that penalty provision have to be strictly construed. In this context, the ld. AR relied on the judgment of the Hon’ble Gujarat High Court in the case of A.M.Shah & Company vs CIT reported in 238 ITR 415 (Gujarat).

8. The ld. DR on the other hand supported the orders of the AO and the ld.CIT(A).

9. We have heard the rival submissions and perused the material available on record. The Penalty u/s. 271(1)(c) of the Act can be initiated for i) concealment particulars of income or ii) furnishing inaccurate particulars of such income. Admittedly, in this case penalty proceedings was initiated in the assessment order for the latter limb namely “furnishing inaccurate particulars of such income”. Further, the notice u/s. 274 r.w.s. 271(1)(c) of the Act (notice dated 30.12.2019) was issued for “furnishing inaccurate particulars of such income”. However, we noticed the penalty has been imposed vide order dated 10.02.2022 by referring to the first limb of section 271(1)(c) of the Act namely “concealment particulars of income”. Initiation of penalty on one of the limb and imposing the same on another limb of section 271(1)(c) of the Act does not satisfy the requirement of law. The imposition of penalty has to be clear as to the limb for which it is imposed. The Hon’ble Gujarat High Court in the case of A.M.Shah & Company vs. CIT (supra) had held that if very basis for penalty proceedings initiated by the AO disappears, then the penalty imposed on a different footing altogether cannot be sustained. The relevant finding of the Hon’ble Gujarat High Court reads as follows:-

“ Learned counsel also read before us the decisions of this Court in CIT vs. Manu Engineering Works [1980] 122 ITR 306 and K.M.Bhatia (Quarry) v. CIT [1992] 193 ITR 379, in which the ratio of the decision of this court in Lakhadir Lalji’s case [1972] 85 ITR 77, was reiterated. There can obviously be no dispute about a proposition that if the very basis for the penalty proceedings against the assessee initiated by the Income-tax Officer disappeared, then the penalty imposed on a different footing altogether cannot be sustained.”

10. The Hon’ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton and Ginning Factory reported in 359 ITR 565 has held the levy of penalty has to be clear as to the limb for which it is imposed and when the position being unclear, the penalty is unsustainable. The relevant finding of the Hon’ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton and Ginning Factory reads as follows:-

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is

concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.

11. Therefore, initiating the penalty in one limb and imposing the same on another limb does not satisfy the requirement of the law in view of the aforesaid judicial pronouncement. The levy of penalty has to be clear as to the limb for which it is imposed and the position in the instant case is unclear, hence, the penalty is not sustainable. Therefore, when the AO proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Not only that the penalty should be imposed under the same limb. Hence, respectively following judgments of the Hon'ble High Courts cited (supra), we direct the AO to delete the penalty imposed u/s. 271(1)(c) amounting to Rs. 38,669/-. It is ordered accordingly.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 09th March, 2023.

Sd/-
(Padmavathy S.)
Accountant Member

Sd/-
(George George K.)
Judicial Member

Bengaluru, Dated: 09th March, 2023

Copy to:

- 1. The Appellant*
- 2. The Respondent*
- 3. The NFAC, Delhi*
- 4. The DR, ITAT, Cochin*
- 5. Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Cochin

Thirumalesh, Sr.PS