

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 219/Rjt/2022
निर्धारण वर्ष/Asstt. Years: 2013-2014

Shri Hareshbhai J Faldu, Angan Township, Block No.E 403, Opp. Amul Apartment, Timbawadi bypass, Junagadh. PAN: AACPF0492R	Vs.	A.C.I.T, Circle, Junagadh.
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Assessee by :	Ms Devina Patel, AR
Revenue by :	Shri Shramdeep Sinha, C.I.T DR

सुनवाई की तारीख/**Date of Hearing** : **03/01/2023**
घोषणा की तारीख /**Date of Pronouncement**: **31/03/2023**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals), Rajkot, dated 12/07/2022 arising in the matter of penalty order passed under s. 271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2013-14.

2. The assessee raised following ground of appeal

The learned Commissioner of Income tax (Appeals), National Faceless Appeal Centre, Delhi has erred in confirming the action of the assessing officer in respect of Levied the penalty

u/s.274 r.w.s 271(1)(c) of the IT Act amounting to Rs.42,902/- on the alleged ground of addition made by the Assessing Officer on account of unexplained profit for Land trading of Rs.4,44,000/- is unwarranted, unjustified and bad in law.

2.1 The assessee has vide application dated 03-08-2021 pleaded before us for admitting the additional ground of appeal which reads as under:

The Appellant above named most respectfully begs to raise the following additional ground of appeal before the Hon'ble Bench in respect of its above referred appeal.

"The Order passed u/s 271(1)(c) of the Act by ACIT, Circle, Junagadh is bad in law as Sec. 271AAA(3) debars levy of penalty u/s 271(1)(c) in respect of undisclosed income referred to in sub-section(1) of Sec. 271AAA of the Act".

Justification for filing additional ground:

The additional ground is wholly a legal ground which goes to the root of the issue, i.e. whether an order levying penalty can be passed u/s 271(1)(c) of the Act in respect of addition of undisclosed income in the specified previous year when Sec. 271AAA(3) specifically debars levy of penalty u/s 271(1)(c) in respect of undisclosed income referred to in Sec. 271AAA(1) of the Act.

Hence, it is prayed that the additional ground being wholly legal in nature can be raised at any stage of proceedings and may kindly be admitted for adjudication in the interest of justice.

3. It was pleaded by the assessee in the application filed for the admission of the additional ground that the issue raised in the additional grounds are legal ground and goes to the root of the matter. The necessary facts are already available on record as they are arising from the order of authorities below. Accordingly, it was prayed by the learned AR for the assessee that the same should be admitted for adjudication.

4. On the other hand, the learned DR opposed to admit the additional ground of objection on the reasoning that it was not raised before the authorities below.

5. We have heard both the parties and perused the materials available on record. The Hon'ble Supreme Court in the case of National Thermal Power Co. Limited vs. CIT reported in 229 ITR 383 has held as under:-

" Under section 254 of the Income-tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If,

for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier.

5.1 From the above, it is transpired that the view that the Tribunal is confined only to those issues arising out of the appeal before Commissioner (Appeals) is too narrow a view to describe the powers of the Tribunal. Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which were on record during the assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Since, the claim of the assessee is purely legal claim and entire facts are available on record. Thus, it is not justified in not admitting the purely legal ground raised by the assessee for the first time. Accordingly, we admit the additional ground raised by the assessee.

6. The facts in brief are that the assessee is an individual and claimed to have earned income from salary and other sources. The assessee also carried real estate development in association with other persons. There was search operation under section 132 of the Act dated 30-05-2012 carried out at the premises of the assessee where in a certain papers /documents were found and impounded. As per page 2 to 4 of Annexure A-17 of seized paper/document, the assessee along with three other partners entered into a transaction of sale of agricultural lands of 3 vigha and 1.5 vigha and earned unaccounted income. Accordingly, an addition of Rs. 4,44,000/- was made to total income of the assessee and penalty proceedings were initiated for concealing the particulars of income.

7. During the penalty proceedings, the assessee submitted that addition of alleged profit on trading of land/ property was made on the basis of estimates, presumption and guess work. The entire thrust of the AO for making addition was an unsigned dump document which neither has direct nexus and nor corroborated by any other evidence. Therefore, no penalty can be levied under the provisions of section 271(1)(c) of the Act for the addition made on estimation basis. It was submitted that it is not conclusive that the assessee has either concealed income or furnished inaccurate particulars of income. The assessee also contended that there was no material on record to suggest that there was willful attempt to conceal the particulars of income.

8. However, the AO disagreed with the contention of the assessee and held that the addition was made on the basis of material found during the search and not on the estimation basis. The penalty proceeding under section 271(1)(c) as held the Hon'ble supreme court in the case of Dharmendra Textile Processers reported in 306 ITR 227 are civil proceeding therefore establishment of willful attempt/mens-rea is not necessary to levy penalty. Further, the income was found during the search, had the search not been carried out, the income could have been concealed. Thus, the AO held that the assessee concealed the particulars of income and levied the penalty of Rs. 42,902/- only being 100 of the amount of tax sought to be evaded.

9. On appeal by the assessee, the learned CIT(A) also conformed the levy of penalty by observing as under:

c) It is a fact that documents which were found at Appellants premises which was subject to search and seizure action are presumed to be belonging to the person searched from whose possession or control these documents are found and the contents of such documents are true. This is clearly spelt out in Sec. 132 (4A) r.w.s 292C of the Act. This presumption casted is rebuttable one. However, in the present case the Appellant was not able to rebut this presumption with facts and documentary evidences. The CIT(A) has dismissed the appeal of Appellant against quantum addition and held that documents found from Appellants premises belong to Appellant as per sec 292C of the Act.

d) The other contention of Appellant is that these are dumb and uncorroborated documents. This is not correct. These are specific documents related to two land deals wherein profit earned on each of such land deals is specified. There are three partners involved in these land deals with Appellant being one of them and these documents were seized from Appellants premises.

e) The other contention of Appellant is that penalty u/s 271(1)(c) cannot be levied on estimated addition. This contention is not correct. As per the documents seized the Appellant and his two partners had earned profits of Rs. 10,70,000/- and Rs. 2,62,000/- from two land deals whose details are outlined in said documents. One third share of Appellant works out to Rs. 4,44,000/-. Thus, it is specific and factual addition and not an estimated addition.

f) The next contention of Appellant is that there is no finding of AO of willful neglect or fraud by Appellant. This is not correct. As per seized documents the profit of Rs. 4,44,000/- accrued to Appellant but he did not offer this Income in the ITR filed. It is a clear cut case of Willful neglect.

g) The Hon'ble Apex Court in MAK Data (P) Ltd. vs CIT (2013) in 358 ITR 593(SC) held that voluntary disclosure does not release an assessee from mischief of Penal proceedings u/s 271(1)(c). In terms of sec 271(1)(c), the AO has to satisfy whether penalty proceedings were initiated or not during the course of assessment proceedings and AO is not required to record his satisfaction in a particular manner or reduce it to writing.

h) The Hon'ble MP High Court in Steel In fots Vs CIT (2006) in 296 ITR 288 (MP) held that if assessee despite being afforded an opportunity to prove the transactions relied on by it for claiming benefits fails to substantiate the transactions, then a case for imposition of Penalty is made out.

i) The Hon'ble Bombay High Court in K K Motwani HUF Vs ACIT (2016) In 2016- TIOL-2910-HC-MUM-IT held that, direction of 'non inclusion of amount chargeable to tax' during reassessment cannot be termed as bonafide mistake, when no effort was made to file revised return or bring mistake before AO was done by assessee.

7.3 In view of the facts and respectfully following the judgments outlined in para 7.2 of this order the levy of Penalty u/s 271 (1)(c) of Act by the AO for concealment of Income is hereby confirmed and upheld. GOA no. 1 is dismissed. GOA no. 2 is routine and general in nature.

10. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

11. The learned AR before us through additional ground of appeal contended that search under section 132 of the Act was initiated dated 30th May 2012. As such, the date of search falls under the period specified under section 271AAA of the Act i.e. on or after 1st June 2007 but before 1st July 2012 and the year in dispute is the specified assessment year as provided under clause (b) of explanation to section 271AAA of the Act. Therefore, if any penalty is leviable, then the same has to be charged under the provisions of section 271AAA(1) of the Act and not under section 271(1)(c) of the Act. Therefore, the penalty levied under section 271(1)(c) of the Act is required to be quashed.

12. On the other hand, the learned DR vehemently supported the order of the authorities below.

13. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the year before us is the year in which the search was conducted and therefore it fulfils the conditions of the specified previous year as provided under explanation (b) of section 271AAA of the Act. Therefore, if any penalty is to be levied, then the same has to be charged under the provisions of section 271AAA of the Act. Furthermore, the provisions of subsection (3) of section 271AAA(1) of the Act specifically debars the revenue to levy the penalty under the provisions of section 271(1)(c) of the Act. The relevant provision of sub-section (3) of section 271AAA of the Act is extracted as under:

Penalty where search has been initiated.

271AAA. (1) ****

(2)*****

(3) No penalty under the provisions of clause (c) of sub-section (1) of [section 271](#) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

13.1 On perusal of the above, we are of the opinion that the penalty has been levied under the wrong provisions of the Act i.e. section 271(1)(c) of the Act and therefore the same is not maintainable. Hence the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 31/03/2023 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER
(True Copy)**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated
Manish

31/03/2023