

आयकर अपीलीय अधिकरण, “एस.एम.सी” न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH CUTTACK

श्री जार्ज माथन, न्यायिक सदस्य के समक्ष ।

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं/ITA No.28/CTK/2023

(निर्धारण वर्ष / Assessment Year :2013-2014)

Shyam Medical Agencies, Baripada, Mayurbhanj	Vs	ITO, Ward-1, Baripada
PAN No. : ABBFS 4358 R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
निर्धारिती की ओर से /Assessee by	:	Shri Mohit Sheth, Advocate
राजस्व की ओर से /Revenue by	:	Shri S.C.Mohanty, Sr. DR
सुनवाई की तारीख / Date of Hearing	:	17/04/2023
घोषणा की तारीख/Date of Pronouncement	:	17/04/2023

आदेश / O R D E R

This is an appeal filed by the assessee against the order of the Id. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, dated 21.11.2022, passed in DIN & Order No.ITBA/NFAC/S/250/2022-23/1047532641(1), for the assessment year 2013-2014.

2. It was submitted by the Id. AR that the Id. CIT(A) has dismissed the appeal of the assessee on the ground that the Form No.35 submitted by the assessee contained wrong particulars being the quantum instead of Rs.91,325/- has been mentioned as Rs.10,000/-. It was the submission that in the penalty order passed by the AO, the AO has not mentioned as to whether the penalty has been levied for concealment of income or for furnishing of inaccurate particulars. Ld. AR placed before us copy of the notice issued u/s.274/271 of the Act dated 04.03.2016 and submitted that in view of the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, reported in 359 ITR 565 (Kar.),

which has been upheld by the Hon'ble Supreme Court in the case of SSA Emerald Meadows, reported in 73 taxmann.com 248 (SC), as the limb to which the penalty is levied, has not been mentioned, the penalty levied is liable to be annulled. Ld. AR has filed his written submission as follows :-

Per AO-

Penalty Imposed u/s.271(1)(c) amounting to Rs.91,325/- .

As per CIT(A) -

Since Form No.35 Contains wrong particulars, the appeal is dismissed as non maintainable.

Appellants Contention before your honour -

The addition by the AO in the assessment order was duly explained by the appellant during the course of hearing however, the AO did not accept the same. The explanation itself proves that neither the appellant concealed any particulars of income nor had furnished any inaccurate particulars of income.

Penalty Notice u/s.271(1)(c) r.w.s. 274 was issued.

The notice u/s.271(1)(c) r.w.s. 274 dt.04.03.2016 against the appellant is ambiguous, as it is not clear whether the default of the assessee is concealment of particulars of income or furnishing inaccurate particulars of income.

The proceedings by the AO is improper and illegal as notice being bad-in-law and charged against the assessee being ambiguous.

The levy of penalty is bad-in-law as it did not specify under which limb of Sec.271(1)(c) the penalty proceedings had been initiated i.e. whether for concealment of income or furnishing of inaccurate particulars of such income.

It is clear from the notice that the AO has issued invalid and defective notice u/s.271(1)(c) of the I T. Act. r.w.s. 274 of the I.T. Act. before levy of penalty. The entire penalty proceedings are vitiated and are liable to quashed.

The penalty provisions of Section 271(1)(c) of the I. T. Act are attracted were the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is a well-accepted proposition that the aforesaid two limbs of Sec.271(1)(c) of the IT. Act. carries different meanings. Therefore it is very much imperative for the AO to strike off the irrelevant limb so as to make the assessee aware as to what is the charge against him and as such the assessee can respond accordingly. In case of Dilip N Shroffvs. JCIT (291 ITR 519) (SC) has held that where the

AO issues notice u/s.274 of the LT. Act. in the standard proforma and the inappropriate words are not deleted the same would postulate that the AO was not sure as to whether he was to proceed on the basis that the assessee had concealed the particulars of his income or furnished inaccurate particulars of his income. As such in such a situation the Hon'ble Supreme Court states that the levy of penalty suffers from non-application of mind. In the case of the assessee the AO has issued notice u/s.274 for the aforesaid asst. year without striking off the irrelevant words/limb the penalty proceedings is thus unsustainable in the eye of law.

The fact of the appeal by the assessee are identical to the facts of the cases stated below.

Citations -

The appellant rely on

CIT vs. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar.)

Held that the levy of penalty has to be clear as to the limb under which it is being levied. As per Hon'ble High Court, where the Assessing Officer proposed to invoke first limb being concealment, then the notice has to be appropriately marked. The Hon 'ble High Court held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clauses would lead to an inference of non-application of kind by the Assessing Officer.

Jeetmal Choraria vs. ACIT, Circle-43(Kol.) ITA No.956/Kol/2016

CIT vs. SSA Emerald Meadows ITA No.380/2015

Gaganhihari Satrusalya vs. DCIT, Cir-2(1),BBSR ITA No.458/CTK/2017

CIT vs. Reliance Petro Products Pvt. Ltd. 322 ITR 158

The appellant also rely on the judgment of Hon'ble Jurisdictional High Court, Orissa in case of -

Ananta Gopal Karatkala v. ITO, Balasore ITA No.30 of 2005

The appellants case also covered by the decision of this Jurisdictional Hon'ble ITA T Cuttack Bench, Cuttack in case of :-

Jaiprakash Didwania IT A N 0.238 to 240 /CTKJ2020

Anita Didwania ITA No.241 to 243 /CTKJ2020

Bina Didwania IT AN 0.244 to 247 /CTKJ2020

Omprakash Didwania ITA No.248 to 251 /CTKJ2020

Mahavir Agri Processors Pvt. Ltd. ITA No.25 /CTKJ2021

Indu Devi Tibarewal Vs. ACIT, Central Circle-1,BBSR ITA No.196 /CTKJ2022

Prayer:

The appellant prays your honour to be kind enough to considered the submission and delete the levy of penalty.

3. In reply, Id. Sr. DR relied upon the decision of the Hon'ble Madras High Court in the case of Sundaram Finance Ltd., reported in [2018] 93 taxmann.com 250(Madras), which has been upheld by the rejection of the SLP by the Hon'ble Supreme Court. It was the submission that as no prejudice has been shown by the assessee on account of non-mentioning of the limb in respect of the penalty levied, the penalty is liable to be confirmed.

4. We have considered the rival submissions. A perusal of the facts of the present case clearly show that under similar circumstances, the coordinate bench of the Tribunal in the cases of Indu Devi Tibarewal & Siddardhini Nanda, passed in ITA Nos.196&197/CTK/2022, order dated 13.02.2023, following the decision of the Hon'ble Supreme Court in the case of SSA's Emerald Meadows, referred to supra, as on account of the fact that the notice does not show that the AO has struck off the inappropriate clause, had cancelled the penalty levied u/s.271(1)(c) of the Act. The observations of the coordinate bench of the Tribunal are as under :-

4. We have considered the rival submissions. A perusal of para 16 of the decision of the Hon'ble Madras High Court in the case of Sundaram Finance Ltd., cited by the Id.Sr. DR, clearly shows that the issue of striking off of the inappropriate limb in the notice u/s.274/271(1)(c) of the Act was a plea that was not taken by the assessee either before the AO or before the First Appellate Authority or before the Tribunal or before the Hon'ble High Court when the Tax Appeals were filed before the respective forums. Therefore, the Hon'ble Madras High Court had taken a view "even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under section 274 read with section 271" of the Act. Thus, it is not the principle of striking out of the relevant clause which has been decided by the Hon'ble Madras High Court. The Hon'ble High Court in the above

case has held that no prejudice has been caused to the assessee in the case of non-striking off, insofar as the assessee himself has not challenged the issue before the authorities during the appropriate time. Therefore, the decision of the Hon'ble Madras High Court in the case of Sundaram Finance Ltd. (supra) has no bearing to the facts of the present case. The issue of striking off of appropriate clause in the show cause notice issued u/s.274/271 of the Act has been held to be an absolute necessity by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, reported in [2013] 35 taxmann.com 250 (Karnataka), which has been approved by the Hon'ble Supreme Court in the case of SSA's Emerald Meadows, reported in [2016] 73 taxmann.com 243 (SC). It is also noticed that this principle had also been applied by the coordinate bench of the Tribunal in the case of Bishandayal Jewelers (supra) and in the case of S.M.Enterprises (supra). This being so, respectfully following the principle laid down by the Hon'ble Supreme Court and the principle of consistency, as it is noticed that in the show cause notice the AO has not struck off the inappropriate clauses, the penalty as levied by the Id. AO u/s.271(1)(c) of the Act and as confirmed by the Id.CIT(A) in the present appeals of both the assessees stand deleted.

5. Similarly, the Hon'ble Jurisdictional High Court in the case of Ananta Gopal Karatkala, passed in ITA No.30 of 2005, dated 10.04.2019 has following the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory, referred to supra, under the similar circumstances, confirmed the cancellation of the penalty.

6. Respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of Ananta Gopal Karatkala, referred to supra, as also the decision of the coordinate bench of the Tribunal in the cases of Indu Devi Tibarewal & Siddardhini Nanda, as the notice for initiation of penalty u/s.271(1)(c) of the Act does not show that the AO has struck off inappropriate clauses, the penalty as levied by the AO and as confirmed by the Id. CIT(A) is deleted.

7. In the result, appeal of the assessee is allowed.

Order dictated and pronounced in the open court on 17/04/2023.

Sd/-

(जार्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 17/04/2023

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
Shyam Medical Agencies,
Baripada, Mayurbhanj
2. प्रत्यर्थी / The Respondent-
ITO, Ward-1, Baripada
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR,
ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack