



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK**

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER

ITA Nos.189 & 190/CTK/2023

Assessment Year : 2009-10

Santosh Kumar Agarwala, Sector-6, CDA, Cuttack	Vs.	ACIT, Circle-2(1), Cuttack
PAN/GIR No.AASPA 3698Q		
(Appellant)	..	(Respondent)

Assessee by : Shri Mohit Sheth, AR
Revenue by : Shri S.C.Mohanty, Sr. DR

Date of Hearing : 13/07/2023
Date of Pronouncement : 13/07/2023

ORDER

ITA No.189/CTK/2023

This is an appeal filed by the assessee against the order of the Id CIT(A)-2,Bhubaneswar dated 30.3.2023 in Appeal No.Cuttack/10374/2016-17 for the assessment year 2009-10.

2. Shri Mohit Sheth, Id AR appeared for the assessee and Shri S.C.Mohanty, Id Sr DR appeared for the revenue.

3. It was submitted by Id AR that two additions have been contested in this appeal, first being the addition of Rs.2,45,066/- and the second being the addition of Rs.1,50,000/-. It was the submission that Rs.2,45,066/-

representing the undisclosed income brought to tax by the Assessing Officer and Rs.1,50,000/- representing the interest on housing loan, which was a fresh claim made in the return in response to notice u/s.148 of the Act. It was the submission that there was a survey in the premises of the assessee, who is in the business of Rice Mill on 29.6.2015. Certain documents had been found and on the basis of such documents, for the assessment year 2008-09, the assessee had made declaration of Rs.38,33,933/-. It was the submission that for the financial year 2008-09, the assessee and his two brothers had made declaration of Rs.42,45,066/-. It was the submission that at the time of filing of the return, the assessee and his brothers had jointly declared Rs.40,00,000/-. It was the submission that the difference of Rs.2,45,066/- had not been offered. It was the submission that the consolidated declaration for the four financial years was more than what was found. It was the submission that the Assessing Officer has made the addition of Rs.2,45,066/- in the hands of the assessee. It was the submission that on appeal, the Id CIT(A) took the stand that for the assessment year 2008-09, the assessee had disclosed Rs.40 lakhs and as the AO had not brought to tax the same, the assessee was not entitled to relief in respect of this amount of Rs.2,45,066/-. It was the submission that if at all the addition of Rs.2,45,066/- was to be made, then it would be divided on the same proportionate of the declaration made by three brothers in their returns in the relevant assessment years. It was the

submission that in respect of the assessee, the declaration made was Rs.10 lakhs out of Rs.40 lakhs and consequently, the corresponding addition, if at all, in respect of Rs.2,45,066/- in respect of the assessee would be only Rs.61,266/-. It was the submission that the addition may be reduced to Rs.61,266/-.

4. In reply, Id Sr DR submitted that the assessee was the president of the Rice Mills' Association and as the assessee had not disclosed the amount of Rs.2,45,066/-, the amount was liable to be brought to tax in the hands of the assessee. It was the submission that the Id CIT(A) had rightly found that the assessee had escaped payment of tax on Rs.40 lakhs disclosed in the assessment year 2008-09 being the immediately preceding assessment year. It was the submission that the assessee is not entitled to any relief.

5. I have considered the rival submissions. Each assessment year is separate. The facts in the present case clearly shows that the declaration made by the assessee and his brothers together on the basis of seized materials is Rs.42,45,066/- for the assessment year 2009-10. A perusal of the returns filed for the relevant assessment year by three brothers shows that the return has been filed disclosing Rs.40 lakhs, thus there is shortfall of Rs.2,45,066/-. This Rs.2,45,066/-, admittedly, does not belong entirely to the assessee. This being so, the said amount of Rs.2,45,066/- is to be divided among three brothers in the same proportion as they have declared in their declaration. Once this is considered, the addition of Rs.2,45,066/-

as made by the AO and confirmed by the Id CIT(A) would stand reduced to Rs.61,266/-. Here, it must be mentioned that the addition in the hands of other three brothers is not considered because this Tribunal is not adjudicating on the issue in respect of the assessee, who are not before it. Consequently, this issue is partly allowed and the addition is reduced to Rs.61,266/-.

6. Coming to the issue of denial of deduction of the interest on housing loan to an extent of Rs.1,50,000/-, it was submitted by Id AR that the assessee has filed the return in response to notice issued u/s.148 by the Assessing Officer and the assessee has, for the first time, made the claim in the respective assessment year in his return in response to notice u/s.148 of the interest on the housing loan. It was admitted that this interest on housing loan had not been claimed by the assessee in the original return filed. It was the submission as the return was filed in response to notice u/s.148, it will be deemed as a fresh return u/s.139 of the Act. The assessee is entitled to claim deduction of Rs.1,50,000/- towards interest on housing loan.

7. In reply, Id Sr DR submitted that the issue must be restored to the file of the AO for verification as to whether the loan has been taken for the purpose of construction of the house property. It was the submission that the period of construction of house would also have to be considered.

8. I have considered the rival submissions. A perusal of the present facts clearly shows that in para 7.1 of the assessment order, the Assessing Officer has denied the deduction of the claim on the ground that the said claim is not in the original return. If there was any other reason, he could have specifically mentioned the same in the assessment order. The fact that the Assessing Officer has restricted the disallowance only on the ground that it is a fresh claim and as it is noticed that the assessee has filed return in respect to notice u/s.148 and therefore, the return filed is deemed to be filed under section 139 of the Act and the assessee is entitled to claim deduction of interest on housing loan paid to the extent of Rs.1,50,000/-. Hence, this issue is decided in favour of the assessee.

9. In the result, appeal of the assessee stands partly allowed.

ITA No.190/CTK/2023

10. This is an appeal filed by the assessee against the order of the Id CIT(A)-2,Bhubaneswar dated 30.3.2023 in Appeal No.Cuttack/10031/2017-18 confirming the levy of penalty u/s.271 of the Act in respect of addition of Rs.2,45,066/- treated as undisclosed income and Rs.1,50,000/- representing the interest on housing loan for the assessment year 2009-10.

11. As I have already deleted the addition of interest on housing loan of Rs.1,50,000/-, the penalty levied on the said amount is no more survive. In respect of addition of Rs.2,45,066/-, the addition has been restricted to

Rs.61,266/-. Consequently, the penalty can be considered only in respect of said addition of Rs.61,266/-. The said addition is admittedly an estimated addition and no penalty on an estimated addition is permissible. It is an admitted fact that Rs.2,45,066/- was part of the amount of Rs.42,45,066/- found during the course of survey.

12. It must be mentioned here that the addition as specific to the assessee, is on common declaration made by the three brothers. Therefore, I am of the view that the addition of Rs.61,266/- is an estimated addition. Further, on perusal of the penalty order shows that no penalty has been levied by the Assessing Officer in respect of declaration of Rs.10 lakhs found during the course of survey on the assessee. This being so, the penalty as levied by the AO and confirmed by the Id CIT(A) stands deleted.

13. Ld AR has further submitted that the notice u/s.274 r.w.s 271(1)(c) of the Income tax Act is ambiguous as the Assessing Officer has not mentioned as to whether the penalty has been levied for concealment of income or for furnishing of inaccurate particulars. The Id AR has further filed written submission as follows:

“Per AO-

Penalty Imposed u/s.271(1)(c) amounting to Rs.3,15,563/-

As per CIT(A) –

That the appellant not paid tax against the disclosed income relating to A.Y. 2008-09. I am of the considered view that the appellant does

not deserve any relief on this issue. This penalty u/s.271(1)(c) of the I.T.Act is confirmed. This ground is dismissed.

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.27.12.2016 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(l)(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(l)(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 Shroff vs. JCIT (291 ITR 519) (SC)

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 impugned 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 in the interest of justice and the same should be deleted.

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

Shyam Medical Agencies vs ITO, Ward-1,Baripada in ITA No.28/CTK/2023

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

14. Ld Sr DR submitted that the penalty levied is on the difference between the revised return and the original return and the assessed return. It was the submission that the penalty is liable to be confirmed.

15. I have considered the submissions. A perusal of the assessment order shows that the Assessing Officer was not sure as to whether the assessee "has concealed the particulars of income or furnished inaccurate particulars of his income". Perusal of the show cause notice also shows that the Assessing Officer has not categorically specified as to whether the penalty is being levied for concealment particulars of income or furnished inaccurate particulars of income. In view of the decision of Hon'ble Supreme Court in the case of Dillip N.Shroff vs JCIT(supra), the penalty as levied by the AO and confirmed by the Id CIT(A) stands deleted.

16. In the result, appeal of the assessee stands allowed.

Order dictated and pronounced in the open court on 13/07/2023.

Sd/-
(George Mathan)
JUDICIAL MEMBER

Cuttack; Dated 13/07/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Santosh Kumar Agarwala,
Sector-6, CDA, Cuttack
2. The Respondent: ACIT, Circle-2(1),
Cuttack
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack