

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 1332/Mum/2023
Assessment Year: 2011-12)

Neel Controls

407, Sapphire Arcade, 42,
Mahatma Gandhi Road, Vs.
Rajawadi, Ghatkopar (E),
Mumbai-400077
PAN No. **AAAFN0627J**

Commissioner of Income-tax
(Appeals), National Faceless
Appeal Centre,
Delhi.

Appellant)

Respondent)

:

Appellant by
Respondent by

: Sh. Parag Modi, Ld. CA
: Sh. Ashok Kumar Ambastha, Ld.
Sr. DR

Date of Hearing : 11.07.2023
Date of Pronouncement : 18.07.2023

O R D E R

Per N. K. Choudhry, JM:

The Assessee/Appellant herein has preferred this appeal against the order dated 22.02.2023 impugned herein passed by National Faceless Appeal Centre (NFAC), Delhi {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. As per the Assessing Officer (AO) case, the Assessee made purchases from M/s Pune Electronics during the year under consideration, therefore, in order to verify the transactions, a notice under section 133(6) of the Act was issued by the AO to the said entity, on the address provided by the

Assessee, which remained un-served, therefore, the Assessee was asked to furnish the correct/new address of the above party but the Assessee failed to provide the same. Though the Assessee filed the supporting documents such as purchase invoice, delivery challans, copy of ledger accounts, etc. and related ledger in the books of accounts and also claimed to have made payments by A/c Payee cheques, however, the said reply and documents were not found acceptable by the AO on the ground that from submissions of purchase invoice, delivery challans or details of payments, such payments through A/c Payee cheques would not make the Assessee eligible to claim any expenses, when the expenses of the parties are not established, genuineness of transactions cannot be accepted. The AO ultimately treated the payment of Rs. 3,88,157/- as bogus purchases under section 69C of the Act and added to the total income of the Assessee and simultaneously also initiated penalty proceedings under section 271(1)(c) of the Act on dated 20.03.2014 and ultimately vide penalty order dated 23.03.2018 held that the Assessee had furnished inaccurate particulars of income by debiting bogus purchases in his Profit & Loss A/c. This is clear case of furnishing inaccurate particulars of income. The AO consequently levied the penalty of Rs. 1,19,940/- @ 100% of the tax sought to be evaded under section 271(1)(c) of the Act.

3. The Ld. Commissioner by impugned order decided the appeal of the Assessee as ex-parte and upheld the imposition of the penalty.

4. At the outset, the Ld. AR claimed that impugned order is not only perverse but also suffers from impropriety and illegality, hence not sustainable.

5. On the contrary the Ld. DR supported the orders passed by the authorities below and submitted that order under challenge does not suffer from any perversity, impropriety and/or illegality and hence needs no interference .

6. We have given thoughtful consideration to the peculiar facts and circumstances of the case and observe that the AO has initiated penalty proceedings under section 271(1)(c) of the Act not only for concealment of income but also for furnishing inaccurate particulars of income and accordingly issued the notice dated 26-03-2015 under section 274 r.w.s. 271(1)(c) of the Act for concealment of income **or** for furnishing inaccurate particulars of income and ultimately levied the penalty against the Assessee for deliberately concealment of its income and due to negligence to furnish correct & accurate particulars about the nature of income.

6.1 For clarity, the conclusion drawn by Ld. AO reads as under:

15. *I am of the opinion that the **Assessee has deliberately concealed its income filed inaccurate particulars of income** within the meaning of section 271(1)© of the IT Act, 1961.*

16 *Therefore, I am firmly of the opinion and belief that this is a fit case for imposition of penalty u/s 271(1)© of the Act. I , therefore , hold that the Assessee has sought to evade tax on Rs. 3,88,157/- on account of bogus purchase u/s 69C and penalty u/s 271 (1) © read with explanation 1 of the IT Act 1961 is leviable in this case **due to negligence on the part of the Assessee to furnish correct & accurate particulars about the nature of income.***

6.2 The Assessee has challenged the penalty order on the basis of notice u/s 274 of the Act, as well, therefore we deem it appropriate to decide the legal issue involved in the instant case first, instead of going into merits of the case.

6.3 The Hon'ble Apex Court in case of M/s. SSA's Emerald Meadows, (2016) 73 taxmann.com 248(SC) dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by Hon'ble High Court of Karnataka wherein legality of notice issued under section 274 r.w.s. 271(1)© of the Act was under challenge. Operative part of the judgment in case of M/s. SSA's Emerald Meadows (supra) decided by Hon'ble High Court of Karnataka is reproduced below:-

"2. This appeal has been filed raising the following substantial questions of law:

- (1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?*
 - (2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid in spite of the amendment of Section 271(1) B with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?*
 - (3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued, under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?*
- 3. The Tribunal has allowed the appeal filed by the Assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the Assessee, has relied upon the decision of the Division Bench of*

this Court rendered In the case of commissioner or income tax -vs- manjunatha cotton and ginning factory (2013) 359 ITR 565.

4. *In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court, the appeal is accordingly dismissed."*

6.3 The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) observed 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 also held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clause would lead to an inference of non-application of mind by the Assessing Officer and levy of penalty would suffers from non-application of mind.

6.4 In the case of CIT vs. Manu Engineering Works (122 ITR 306) the Hon'ble Gujarat High Court has also dealt with the ultimate finding for imposition of penalty and held as under:

Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it is incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the Assessee or whether any inaccurate particulars of such income had been furnished by the Assessee. No such clear-cut finding was reached by the IAC in instant case and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.

6.5 Subsequently the Hon'ble Gujarat High Court in the case of Snita Transport Pvt. Ltd vs. ACIT {42 taxmann.com 54} affirmed the decision in CIT vs. Manu Engineering Works (supra) by holding as under:

9. *"Regarding the contention that the Assessing Officer was ambivalent regarding under which head the penalty was being imposed namely for concealing the particulars of income or furnishing inaccurate particulars, we may record that though in the assessment order the Assessing Officer did order initiation of penalty on both counts, in*

the ultimate order of penalty that he passed, he clearly held that levy of penalty is sustained in view of the fact that the assessee had concealed the particulars of income. Thus insofar as final order of penalty was concerned, the Assessing Officer was clear and penalty was imposed for concealing particulars of income. In light of this, we may peruse the decision of this Court in case of Manu Engineering Works (supra). In the said decision, the Division Bench came to the conclusion that language of "and/or" may be proper in issuing a notice for penalty, but it was incumbent upon the Assessing Authority to come to a positive finding as to whether there was concealment of income by the Assessee or whether any inaccurate particulars of such income had been furnished by them. If no such clear cut finding is reached by the authority, penalty cannot be levied. It was a case in which in final conclusion the authority had recorded that "I am of the opinion that it will have to be said that the Assessee had concealed its income and/or that it had furnished inaccurate particulars of such income." It was in this respect the Bench observed that "Now the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."

6.6 From the aforesaid judgments it is clear that the penalty provisions of section 271(1)(c) of the Act are attracted, where the Assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is also a well-accepted proposition that the aforesaid two limbs of section 271(1)(c) of the Act carry different meanings. Therefore, it is imperative for the Assessing Officer to specify the relevant limb in the Notice, so as to make the Assessee aware as to what is the charge made against him so that he can respond accordingly. The AO also supposed to come to a positive finding, as to whether there was concealment of income by the Assessee or whether any inaccurate particulars of such income have been furnished by Assessee. If no such clear cut finding is reached by the authority, then penalty cannot be levied.

6.7 In the background of the aforesaid legal position and, having regard to the manner in which the Assessing Officer though initiated the penalty

proceedings under both of the limbs, however issued the notice under section 274 r.w.s. 271(1)(c) for concealment of income **or** for furnishing inaccurate particulars of income i.e. without specifying any particular limb under which the penalty proceedings have been initiated and proceeded with, and finally imposed the penalty against the Assessee for deliberately concealment of its income and due to negligence to furnish correct & accurate particulars about the nature of income, apparently goes to prove that the AO initiated the penalty proceedings and issued the notice in a stereotyped manner without applying mind and ultimately imposed the penalty without giving clear cut findings, and therefore the levy of penalty is bad in law and consequently not sustainable, hence the same is deleted .

7. In the result, appeal filed by the Assessee stands allowed.

Orders pronounced in the open court on 18-07-2023.

Sd/-
(PRASHANT MAHARISHI)
Accountant Member

Sd/-
(N. K. CHOUDHRY)
Judicial Member

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. CIT
5. Guard File

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai