

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

**BEFORE SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER AND  
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 933/MUM/2023 (A.Y: 2012-13)**

Ashwin Liladhar Shah C/o. D.C. Bothra & Co. LLP (CA) (Formerly known as D.C. Bothra & Co.) 297, Tardeo Road, Wile Mansion 1 <sup>st</sup> Floor, Opp. Bank of India Nana Chowk, Mumbai - 400007  <b>PAN: ABEPS5329R</b>	v.	National Faceless Appeal Centre Delhi
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Rajkumar Singh</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri Ujjawal Kumar</b>
<b>Date of Conclusion of Hearing</b>	<b>:</b>	<b>15.06.2023</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>23.08.2023</b>

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

1. This appeal is filed by assessee against order of Learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter in short "Ld.CIT(A)"] dated 06.02.2023 for the A.Y. 2012-13.

**2.** Brief facts of the case are, Assessment Order u/s. 143 r.w.s. 147 of Income-tax Act, 1961 (in short "Act") was completed on 20.12.2019 at an income of ₹.5,23,890/-. In this case, assessee did not file his return of income for the A.Y. 2012-13 u/s. 139 of the Act and filed its return of income only in response to notice issued u/s 148 of the Act and the assessee has sold immovable property of ₹.75,00,000/- during the F.Y.2011-12 (relevant to A.Y. 2012-13). Further, assessee is a lawyer and solicitor by profession and partner of M/s S. Ashwinikumar & Co. The assessee's source of income consisted income from house property, income from capital gain, income from business / profession and income from other sources.

**3.** During the assessment proceedings the Assessing Officer treated the entire assessed income as the concealed income of the assessee since he has not filed return of income within the time prescribed u/s.139(1)/139(4) of the Act despite having taxable income. The Return of income was filed only on 17.07.2019 in response to notice issued u/s.148 of the Act, Accordingly, the penalty proceedings u/s. 271(1)(c) of the Act for concealment of particulars of income were initiated by issue of show cause notice dated 28.12.2019 and 06.04.2021.

4. After considering the submissions of the assessee, Assessing Officer found that reply of the assessee is not found satisfactory and assessee has nothing to say in the matter and admits its default. Therefore, in the absence of any satisfactory explanation, Assessing Officer sustained the addition and Assessing Officer proceeded to impose the penalty of 100% of the tax sought to be evaded.

5. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and before the Ld.CIT(A) assessee filed detailed submissions which are reproduced below: -

*"3.2. Before proceeding to make our submission in respect of the above appeal ground we would like to reproduce the relevant facts leading to imposition of impugned penalty hereinunder: - -*

*For initiating the impugned penalty proceeding the Ld. A.O. in para no. 5 of the assessment order dated 20/12/2019 has recorded as under:*

*"The assessee had not filed the return of income within the time limit prescribed u/s. 139(1), 139(4) of the I.T. Act, 1961 despite having taxable income. Return of income was filed only on 17/07/2019 in response to the notice u/s. 148 dated 31/03/2019 declaring total income at Rs. 5,23,890/-. In view of this, the entire assessed income is treated as the concealed income of the assessee. Notice u/s. 274 r.w.s. 271 of the I.T. Act, 1961 is being issued initiating penalty proceedings u/s 271(1)(c) of the IT Act for concealment of income."*

*3.3. However, the Id. A.O. did not issue any penalty show cause notice u/s. 274 r.w.s. 271(1)(c) on passing of the subject assessment order on 20/12/2019 and 1st penalty show cause notice u/s.274 read*

*with section 271(1)(c) in this case was issued only on 28/12/2019 therefore non issuance of penalty show cause notice u/s.271(1)(c) simultaneously along with the assessment order and notice of demand u/s. 156 renders the impugned penalty order bad in law and without jurisdiction at its inception stage itself therefore on this ground alone impugned penalty order passed: without and in contravention of legal provisions requires be quashed and impugned penalty levied may be deleted.*

*3.4 Now we would like to reproduce hereinunder findings and reasons given in subject assessment order and various penalty show cause notices (SCN) issued for initiating the impugned penalty proceeding in the case:*

<b>Sr. No.</b>	<b>Relevant Assessment Order/SCN dated</b>	<b>Reason Given for Initiating the impugned Penalty Proceeding u/s.271(1)(c)</b>
1	Para 5 of the Assessment Order dated 20/12/2019	For concealment of income
2	SCN dated 28/12/2019	Concealment of Particulars of income
3	SCN dated 06/04/2021	No specific charge only referred the earlier SCN and assessment order

*However, while passing the impugned penalty order dated 11/11/2021 the Id. for imposing the impugned penalty in para 6 on page no.2 of it has held as under:*

*"6. Keeping in view of the facts narrated herein above, it is held that assessee has committed default u/s.271(1)(c) of IT. Act, 1961. I am satisfied that the assessee has concealed its income/furnished inaccurate particulars of its income to the tune of Rs.1,06,262/- as per section 271(1)(c) of IT. Act. Hence it is fit case for imposition of penalty u/s. 271(1)(c) which is calculated as under:*

Income Concealed	Rs.5,23,890/-
Tax	Rs.1,06,262/-
Tax sought to be evaded	Rs.1,06,262/-
Maximum penalty imposable @300%	Rs.3,18,786/-
Minimum penalty imposable @100%	Rs.1,06,262/-
penalty imposed @100%	Rs.1,06,262/-

*On perusal of finding given in the assessment order to initiate the impugned penalty proceeding and show cause notices issued and conclusion drawn by Id. A.O. to impose the penalty your honor will*

*appreciate that same is not only without jurisdiction but also bad in law on the following stated grounds:*

*1. While concluding his finding in above referred para no. 6 of impugned penalty order the Id. AO has held that assessee concealed/furnished inaccurate particulars of income amounting to Rs.1,06.262/- however in computation part he has stated income concealed at Rs.5,23,890/-*

*2. As narrated hereinabove in the assessment order and also in penalty show cause notices issued it has been alleged that assessee has concealed the income however for imposing the impugned penalty the Id. AO in concluding para no.6 of the impugned penalty order has held the assessee guilty on both the limbs specified in Section 271(1)(c) i.e. concealment of income as well as furnishing of inaccurate particulars of income thus rendering the impugned penalty order as bad in law and without jurisdiction. Your honor will appreciate that as per provisions of section 271(1)(c) penalty proceeding under the said section can be initiated or imposed either for concealment of income or for furnishing inaccurate particulars of income. It is legally settled position that expression concealment and furnishing inaccurate particulars carries different connotation and are not identical in details although they may lead to the same effect namely, keeping off a certain portion of income. It is apparent from the impugned penalty order that to impose the penalty under challenge the Id. A.O. has clearly concluded and held the assessee guilty of both the concealment of income and also for furnishing inaccurate particulars of income whereas as per finding given in the assessment order to initiate the impugned penalty proceeding and also in the penalty show cause notices issued allegation made is only in respect of concealment of income. In view of the above stated position your honor will appreciate that conclusion of the Id. A.O. to initiate and levy the alleged penalty both on different counts is unlawful and untenable therefore may kindly be quashed. In similar and identical facts as to the case of your appellant penalty imposed u/s. 271(1)(c) in number of cases has been quashed by the hon'ble High Courts including jurisdictional High Court of Bombay in the following mentioned judgements upon which we place our reliance:-*

*a. Manjunatha Cotton & Ginning Factory, (2013) 359 ITR 565 (KAR).*

b. *Shri Samson Perinchery vs. ACIT- Central Cir.- 18 & 19 (ITA No. 4625 to 4630/M/2013, A.Y.s 2003-04 to 2008-09, ITAT 'E' Bench, Mumbai, Order dt. 11/10/2013).:*

c. *CIT-11, Mumbai vs. Shri Samson Perinchery (Bom HC) Income-tax Appeal No. 1154, 953, 1097 & 1226 of 2014 order dt. 05.01.2017.*

*In view of the above stated facts in the case as default of alleged unintentional non- filing of ITR by assessee u/s.139(1)/139(4) of the Act has taken place due to above narrated bonafide reasonable reasons without any wilful or malafide intention on the part of assessee to defy the law or contumacious approach therefore we humbly pray your honor to kindly take the lenient view & delete the impugned penalty under reference and oblige."*

**6.** After considering detailed submissions of the assessee, Ld.CIT(A) sustained the penalty imposed by the Assessing Officer and observed that issues raised by the assessee that in the Assessment Order, and in penalty show cause notices, the Assessing Officer mentioned that assessee has concealed the income. However, while imposing the impugned penalty, the Assessing Officer in concluding Para No. 6 held that the assessee has committed default on both the limbs specified in section 271(1)(c) of the Act. Therefore, the assessee submitted that the impugned penalty order was bad in law and without jurisdiction. Further, assessee submitted that assessee had reasonable and sufficient cause for his failure to furnish the return of income due to which Explanation 3 of section 271(1)(c) was not attracted. However, the same was not properly appreciated by the Assessing Officer in his penalty order, after the above observation, the

Ld.CIT(A) held that the case of the assessee falls within the Explanation 3 of section 271(1)(c) and applies to the present case. Therefore, the assessee should be deemed to have concealed the particulars of income. Further, he observed that the Assessing Officer had clearly mentioned in Assessment Order as well as in the penalty notice in an unambiguous manner that penalty proceedings were initiated for concealment of income. However, in the final penalty order he has invoked both limbs of section 271(1)(c) of the Act to impose the penalty. He observed that mere conclusion drawn by the Assessing Officer itself will not make the penalty order bad in law, for that purpose he relied on section 292B and relied on following case laws to sustain the penalty levied by the Assessing Officer: -

- i. CIT v. Jagat Novel Exhibitors (P.) Ltd., [2012] 18 taxmann.com 138 (Delhi).*
- ii. CIT v. Bengal Iron galvanising Works (1987) 165 ITR 249 (Calcutta HC).*
- iii. Ganesh Textiles v. CIT [253 ITR 216 (Gujarat HC)].*

**7.** Aggrieved with the above order, assessee is in appeal before us raising following grounds in its appeal: -

"1. That on facts and circumstances of the case penalty imposed and confirmed by Id. A.O. & Id. CIT (Appeal) under section 271(1)(c) of the Income Tax Act, 1961 at Rs.1,06,262/- is legally untenable on

*the ground that for initiating the impugned penalty proceeding allegation made in the assessment order and also in penalty show cause notice issued was the concealment of particulars of income however, in the impugned penalty order passed Id. A.O. concluded and held the assessee guilty on both limb of default of concealment of income and also furnishing of inaccurate particulars of income therefore appellant prays that impugned penalty order passed against the settled judicial precedent may kindly be deleted.*

*2 That without prejudice to appeal ground no.1 even on merit of the case impugned penalty imposed being wrong on facts and bad in law therefore may kindly be deleted.*

*3. That the appellant craves the leave to amend, alter, substitute any of the above appeal grounds and or to raise new or additional grounds of appeal at the time of hearing."*

**8.** At the time of hearing, Ld. AR of the assessee brought to our notice the facts on record and made similar submissions what was submitted before the Ld.CIT(A) and he heavily relied on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Kar) and decision of the ITAT Mumbai Bench in the case of Shri Samson Perinchery v. ACIT in ITA.No. 4625 to 4630/Mum/2013 dated 11.10.2013. Further, on merits he relied on the submissions made before the Ld.CIT(A) and brought to our notice Page No. 2 of the Paper Book in which the assessee has submitted the reasons for delay and non-filing of the return of income in time, which are reproduced below: -

*"1.2 Assessee was also earlier holding directorship in one RBI registered NBFC namely; Arpan Leasing Company Limited which was a listed entity on Bombay Stock Exchange. Gradually, since 2005-06 onwards financial position of the said listed entity had started to deteriorate as the assets leased and financed by the said entity had mostly turned bad for recovery of which various cases in the court of law got filed which were pursued by the assessee personally and the said court proceedings in various courts lasted for several years due to which reason also the assessee could not pay attention to his personal matters and same got further complicated due to the accounting person employed by the assessee in his group concern and to look after his own tax matters leaving midway on account of financial crunch for the reason of either untimely or non-payment of salaries.*

*1.3 And later NBFC license of the said Arpan Leasing Company Limited got cancelled by RBI and trading of its shares was delisted by BSE.*

*1.4 Non-filing of return of income by the assessee was neither deliberate nor willful nor was it the intention of the assessee to defy law. Non-filing default u/s 139 has taken place for the above mentioned bonafide reasonable reasons. 1.5 And in assessment order dated 20/12/2019 passed u/s 143(3) r.w.s. 147 the Id. A.O. assessed the same income of assessee at Rs.5,23,890/- as was declared in the ITR filed after payment of due taxes in response to notice issued u/s. 148. As Id. AO in the assessment order passed accepted the income declared by assessee without any variation therefore there was no reason to file any appeal against the same."*

**9.** On the other hand, Ld. DR relied on the penalty order and findings of the Ld.CIT(A). He submitted that case of the assessee falls within the ambit of explanation 3 to section 271(1)(c) of the Act, therefore the penalty imposed by the Assessing Officer is justified in this case.

**10.** Considered the rival submissions and material placed on record, we observe that for the impugned assessment year 2012-13 assessee has not filed his return of income u/s. 139(1) and 139(4) of the Act. The assessee has filed the return of income only upon receipt of notice u/s. 148 of the Act which was dated 31.03.2019 and assessee has filed his return of income only on 17.07.2019. As per the facts on record, it is clear that assessee has not filed his return of income until issue of notice u/s. 148 of the Act. It is also facts available on record that there is a taxable income which assessee has not declared on time. Therefore, as per the facts on record the provisions of Explanation 3 to section 271(1)(c) of the Act is clearly attracted. We observe that the above factual matter was discussed by the Assessing Officer in Assessment Order itself and Assessing Officer also issued notice u/s. 274 by observing that assessee has concealed the income. However, while completing the penalty proceedings, Assessing Officer held that reply submitted by the assessee is not satisfactory and has nothing to say in the matter. In the absence of any satisfactory explanation, the case was decided on the basis of information available on record and while imposing the penalty the Assessing Officer has mentioned that the assessee has concealed its income / furnished inaccurate particulars of income.

**11.** We observe that the Assessing Officer while completing the Assessment Order clearly mentioned in the Assessment Order itself that the penalty is levied for concealment of income and also while issuing the show cause notice u/s. 274 of the Act, in the notice, Assessing Officer has mentioned only that the penalty proceedings were initiated by him for concealment of particulars of income. Only in penalty order, in Paragraph No. 4 also, the Assessing Officer reiterated the same. However, in the conclusion, he has used the expression concealed the income / furnished inaccurate particulars of income. Explanation 3 is a deeming provision, by which income declared in the belated return is deemed to be concealment of particulars of income. Under Explanation 3, there is no mention about furnishing of inaccurate particulars of income. Hence mentioning of "inaccurate particulars of income" in Para No. 6 of the penalty order will not alter Explanation 3 and will not vitiate the penalty order. In our considered view the Assessing Officer as well as assessee are well aware of the fact that the penalty proceedings were initiated only on the basis of concealment of income with the fact on record that assessee has filed his return of income only by the service of the notice u/s.148 of the Act.

**12.** The assessee has very much relied on the case of Manjunatha Cotton & Ginning Factory (supra) and also similar cases in which the penalty was deleted based on the fact the penalty notice was issued without indicating which limb of the penalty for which the proceedings were initiated. These cases are distinguishable to the facts on record that assessee was well aware of the fact that penalty proceedings were initiated only on the issue of concealment of income and mere mention of the other limb i.e. "furnishing inaccurate particulars of income" in the penalty order will not make the penalty order bad in law. Therefore, we are inclined to sustain the penalty levied by the Assessing Officer and we do not see any reason to disturb the findings of the Ld.CIT(A). Accordingly, appeal filed by the assessee is dismissed.

**13.** In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 23<sup>rd</sup> August, 2023.

**Sd/-**  
**(PAVAN K UMAR GADALE)**  
**JUDICIAL MEMBER**

Mumbai / Dated 23/08/2023  
Giridhar, Sr.PS

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**