

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI
BEFORE SHRI B R BASKARAN, AM AND MS. KAVITHA RAJAGOPAL, JM

ITA Nos. 1099 & 1100/Mum/2022
(Assessment Years: 2008-09 & 2007-08)

Ravindra Walia Flat No. 15, 10 th Floor, Menoti Mahal, Near Aarya Samaj Mandir, Opp. Being Human Store, Santacruz (W), Mumbai-400 054	Vs.	Asst. CIT-16(1) Mumbai
PAN/GIR No. AAJPW 9207 C		
(Appellant)	:	(Respondent)
Assessee by	:	Shri Hiro Rai
Revenue by	:	Shri Soumendu Kumar Dash
Date of Hearing	:	30.06.2023
Date of Pronouncement	:	22.09.2023

ORDER

Per Kavitha Rajagopal, J M:

These appeals have been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Years ('A.Y.' for short) 2007-08 and 2008-09.

2. The assessee has challenged the order of the Id. CIT(A) in confirming the levy of penalty u/s. 271(1)(c) of the Act by the learned Assessing Officer ('Id.A.O.' for short) on account of unexplained expenditure, unaccounted cash, expenses and bank deposits. As both the appeals are on identical facts, we hereby pass a consolidated order by taking ITA No. 1100/Mum/2022 as the lead case.

3. The brief facts are that the assessee is an individual and a proprietor of a film production company by the name M/s. Rising Star Entertainment. The assessee has filed his return of income dated 29.10.2007, declaring a loss at Rs.1,55,00,270/- and the same was processed u/s. 143(1) of the Act. The assessee's case was selected for scrutiny and the assessment order dated 29.12.2009 was passed u/s. 143(3) of the Act where the Id. A.O. had determined the total income at Rs.2,23,71,500/- by making various additions/disallowances. The Id. A.O. also initiated the penalty proceedings and thereby passed the penalty order u/s. 271(1)(c) of the Act dated 28.03.2012, where the Id. A.O. had levied a penalty of Rs.1,27,50,502/-.

4. The assessee was in appeal before the Id. CIT(A), challenging the penalty order by the Id. A.O.

5. The first appellate authority upheld the order of the Id. A.O.

6. The assessee is in appeal before us, challenging the impugned order.

7. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that the Id. A.O. had levied penalty on the addition made towards unexplained expenditure amounting to Rs.2,88,14,556/- and unaccounted cash expenses and bank deposits amounting to Rs.90,59,009/- and also an additional penalty was levied for the difference of Rs.59,009/- on the ground of concealment of income. The Id. AR contended that the assessee has neither concealed the income nor has filed inaccurate particulars. The Id. AR for the assessee argued on ground no. 3 being the legal ground where it was contended that the Id. A.O. has failed to strike out the irrelevant limb of the impugned

notice u/s. 274 r.w.s. 271 of the Act dated 29.12.2009. The ld. AR relied on the order of the Hon'ble Jurisdictional High Court in the case of *Mohd. Farhan A. Shaikh vs. Dy. CIT* [2021] 320 CTR (Bom) (FB) 26 wherein it was held that non striking of the irrelevant limb vitiates the penalty proceedings.

8. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said facts and stated that the ld. A.O. has levied penalty for the reason that the assessee has concealed the particulars of his income as well as furnished inaccurate particulars. The ld. DR further stated that the assessee has been non compliant throughout the assessment proceedings. The ld. DR relied on the orders of the lower authorities.

9. We have heard the rival submissions and perused the materials available on record. It is observed that there was a survey action u/s. 133A of the Act conducted on the assessee where certain incriminating documents containing entries of expenditure expenses amounting to Rs.2,88,14,556/- under various heads were found. The assessee had claimed it to be merely an estimate of expense and not the actual expenditure incurred. The assessee had also declared additional amount of Rs.90 lacs during the year under consideration for which the ld. A.O. had made an addition of Rs.3,78,80,282/- along with the difference of Rs.59,009/-. The assessee has also contended that the copies of the impounded documents pertaining to the estimation of expenses were not furnished to the assessee during the survey proceedings. The assessee has also challenged the quantum addition made by the ld. A.O.

10. In light of the above facts, the Id. A.O. had initiated the penalty proceedings for the additions made by the Id. A.O. and vide order dated 28.03.2012 levied the impugned penalty of Rs.1,7,50,502/- being 100% of the tax sought to be evaded on the income of Rs.3,78,80,282/- on the ground that the assessee has concealed the particulars of his income by furnishing inaccurate particulars as per the provision of section 271(1)(c) of the Act.

11. The Id.CIT(A), on the other hand, has upheld the penalty levied by the Id. A.O. on the ground that the Id. CIT(A) in the quantum appeal had confirmed the addition made by the Id. A.O. and the Tribunal vide an *ex parte* order dated 19.04.2019 had set aside the appeal back to the file of the Id. CIT(A) and subsequently the addition was confirmed by the Id. CIT(A) vide his order dated 15.03.2022. The Id. CIT(A) in an appeal against the penalty order has held that the assessee has concealed the particulars of his income which were unearthed only during the survey proceeding u/s. 133A of the Act and the same was not found in the books of accounts. The Id. CIT(A) further held that one of bank account of the assessee was also not included in the books of accounts and that the assessee has removed certain entries pertaining to cash from his computer during the year under consideration. The Id. CIT(A) held that there was concealment of income and as a consequence was by furnishing inaccurate particulars of income of the assessee and, hence, the Id. A.O. had rightly mentioned that it was a case of concealment of income by furnishing inaccurate particulars. The Id. CIT(A) upheld the penalty levied by the Id. A.O.

12. It is evident that the impugned notice dated 29.12.2009 relevant to A.Y. 2007-08 was issued by Id. A.O. without striking out the irrelevant limb thereby not specifying as for what reason penalty in the case of the assessee was levied. The Id. AR placed reliance on the full bench decision of the Hon'ble Jurisdictional High Court in the case of *Mohd. Farhan A. Shaikh* (supra), wherein it was held that non striking of the inapplicable ground in the notice would vitiates the penalty proceedings. The propositions laid down by the Hon'ble High Court are that there should be no ambiguity caused in the mind of the assessee due to the non striking of the inapplicable portion of the notice. It was further held that it was a mandatory procedure which ought to have been adhered while issuing the statutory notice.

13. From the above observation, we are of the considered opinion that the facts of the assessee's case is squarely covered by the decision of the Hon'ble High Court in the case of *Mohd. Farhan A. Shaikh* (supra) where the Id. A.O. has failed to strike out the irrelevant limb in the statutory notice issued for levy of penalty, thus, in our opinion is not a curable defect and would vitiates the penalty proceeding in toto. We, therefore, direct the Id. A.O. to delete the impugned penalty. As we have decided this issue on the legal ground, the other grounds of appeal become academic in nature.

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

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15. The assessee has challenged the penalty levied u/s. 271(1)(c) of the Act made by the Id. A.O. and upheld by the Id. CIT(A) on identical grounds as that in ITA No. 100/Mum/2022.

16. The ld. AR for the assessee submitted that in the present case the ld. CIT(A) upheld the penalty of Rs.8,60,000/- u/s. 271(1)(c) of the Act for which the ld. A.O. vide letter dated 12.01.2018 had cancelled the penalty levied amounting to Rs.8,60,000/-. The ld. AR further stated that as the penalty order vide already been cancelled, this appeal filed by the assessee would become infructuous.

17. The ld. DR, had nothing to controvert the same. We, therefore, dismiss this appeal as infructuous.

18. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open court on 22.09.2023

Sd/-

Sd/-

(B R Baskaran)
Accountant Member

(Kavitha Rajagopal)
Judicial Member

Mumbai; Dated : 22.09.2023

Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai