

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH “C”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1660/M/2023  
Assessment Year: 2012-13**

M/s. Pankaj Enterprises, Room No.806, 8 <sup>th</sup> Floor, Pratishtha Bhavan, Old CGO Annexe, Maharishi Karve Road, Mumbai – 400 020 <b>PAN: AACFP3044K</b>	Vs.	Asst. Commissioner of Income Tax, Central Circle 2(2), 124-A, Gokul Arcade, Subhash Road, Vile Parle (East), Mumbai – 400 057
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri S.L. Jain, A.R. &  
Shri Satish Jain, A.R.

Revenue by : Shri H.M. Bhatt, D.R.

Date of Hearing : 08 . 11 . 2023

Date of Pronouncement : 19 . 12 . 2023

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

The appellant, M/s. Pankaj Enterprises (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 02.05.2023 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] confirming the penalty levied by the Assessing Officer (AO) to the tune of Rs.60,61,805/- under section 271(1)(c) of the

Income Tax Act, 1961 (for short 'the Act') by raising grounds inter-alia that:

*“1. Ld. CIT (A) erred in directing to recomputed penalty impossible u/s 271(1)(c) after computing capital gain on Development Agreement as per directions of Hon ITAT in its Appellate order without considering the fact that all the relevant particulars necessary for such computation were submitted. On disclosed particulars capital gain was computed in Assessment Order at Rs. 16,68,07,905/-, in order giving effect to CIT(A) order at Rs.2,87,63,361/- and after considering further reliefs in Hon Tribunal order Capital Gain to be finally computed not likely to exceed Returned Capital Gain.*

*2. Ld. CIT(A) erred in confirming penalty u/s 271(1)(c) for filling inaccurate particulars, on addition of RS 1 ,30,000/- made based on certain rough diary found during survey and said sum explained to be personal expense incurred by the partners and not outgoing relating to Appellant Firm. Addition was made u / s 69C without any positive proof of expense being incurred, merely for addition being confirmed.*

*3. Ld. CIT (A) erred in confirming penalty u/s 271(1)(c) for filling inaccurate particulars, on addition of Rs.3,11,920/- being disallowance of part of interest based on fact that property was not used for earning taxable income. Ld. CIT (A) confirmed the penalty without considering Appellant's submission that said unit earned taxable income, just following findings of assessment order and without considering all the relevant facts were disclosed.*

*4. Ld. CIT (A) erred in confirming penalty u/s 271(1)(c) for filling inaccurate particulars without considering that Notice u/s 271(1)(c) was a non specific notice, not specifying the charge of 'Concealment' or 'Inaccurate Particulars' but both. Notice bad in law, no penalty ought to have been confirmed.*

*5. Appellant pray your honour's leave to add, alter or amend any ground of appeal at the time hearing or before.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of assessment framed under section 143(3) of the Act by making addition of Rs.15,06,920/-, Rs.1,30,000/- and Rs.16,68,07,905/- on account of disallowance of interest, by way of disallowance of expenses under section 69C of the Act and addition on account of Long Term

Capital Gain (LTCG) respectively, penalty proceedings have been initiated under section 271(1)(c) of the Act.

3. Declining the contentions raised by the assessee the AO proceeded to levy the penalty to the tune of Rs.60,61,805/- @ 100% of the tax sought to be evaded under section 271(1)(c) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly the AO has levied the penalty on the basis of three additions made vide assessment order dated 25.03.2019 passed under section 143(3), (1) addition on account of capital gain; (2) addition on account of disallowance of expenses under section 69C of the Act; and (3) addition on account of disallowance of the part of interest.

### **Ground No.1**

7. In the backdrop of the aforesaid undisputed facts the Ld. A.R. for the assessee contended that so far as penalty levied by the AO on account of addition of Rs.16,68,07,905/- made by the

AO is concerned, the said addition has been reduced by the Ld. CIT(A) to Rs.7,00,00,000/- and thereafter Tribunal vide order dated 06.07.2022 passed in ITA No.3773, 4875 & 4876/M/2017 ordered to recompute the capital gain which comes to negative figure as is evident from order dated 06.11.2023 passed by the AO giving effect to the order passed by the Tribunal which is as under:

**“ORDER GIVING EFFECT TO HON'BLE ITAT's ORDER**

In view of the Order of the Hon'ble ITAT dated 06.07.2022 in ITA No.3773, 4875 & 4876/MUM/2017 the Income of the Assessee is revised as under:

	Particulars	Amount in Rs.		
I	Income from House Property (as per OGE to CIT(A) order dated 25.09.2018)			10,73,644
II	Income from Business (As per Assessment order)			1,30,000
III	Income from Capital Gain (as per order of Hon'ble ITAT)			
	Full value of Consideration (42% of Cost of construction i.e. Rs.8,81,46,948)	-3,70,21,718		
Less:	Consideration relatable to loading TDR (as per DVO order)	(2,72,87,982)	97,33,736	
Less:	(I) Indexed cost of 6044 sq mtr (restricted to 42%) =(6044*10,764)*262*42%.	(71,58,940)		
	(ii) Index cost of. earlier construction	(44,67,290)	(1,16,26,230)	(18,92,494)
IV	Income from other sources as per Assessment order			53,860
	REVISED/TOTAL INCOME (I+II+IV)			12,63,504
	LTCLG Loss of Rs. 18,92,494 is carried forward			

8. In view of the matter penalty levied by the AO and partly confirmed by the Ld. CIT(A) on account of addition of capital gain is ordered to be deleted.

**Ground No.2**

9. So far as penalty levied on account of addition of Rs.1,30,000/- under section 69C is concerned, admittedly during the survey action a diary was found and on the basis of which addition of Rs.1,30,000/- was made on presumptive basis. Statement made during the survey proceedings was never found to be incorrect but accepted by the Revenue Authorities for want of explanation 1(B) to section 271(1)(c) of the Act, meaning thereby it is a deemed addition.

10. The Ld. A.R. for the assessee challenging the levy of penalty on the basis of this deemed addition relied on decision rendered by Hon'ble Bombay High Court in case of CIT vs. Dharmchand L. Shah (1993) 204 ITR 462 wherein identical issue has been decided in favour of the assessee.

11. We have perused the judgment rendered by Hon'ble Bombay High Court in case of Dharmchand L. Shah (supra) wherein it is held that in case the assessee fails to give an explanation or the explanation given by the assessee is not to the satisfaction of the ITO the addition made on this count would not automatically justify the imposition of penalty under section 271(1)(c) of the Act by returning following findings:

*"13. On due consideration of the submissions made on behalf of the parties and the material available on record coupled with the relevant provisions discussed above, we are of the view that no fault could be found in the order of the Tribunal under reference. It is by now a trite*

*law that the assessment proceedings and penalty proceedings are two separate and distinct proceedings. The fact that certain additions were made in the assessment proceedings would not automatically justify the revenue to impose penalty under section 271(1)(c). It is also well established principle that the provisions relating to penalty proceedings are quasi-criminal in nature and, therefore, the burden is cast on the revenue to establish the charge before imposing penalty under section 271(1)(c), more so, when the provision of the Explanation to that section has not been invoked. In the instant case, it is quite apparent from the order of the IAC that he has imposed penalty under section 271(1)(c) merely on the ground that certain additions were made in the assessment proceedings and that the assessee had accepted the same. The provisions of section 69A are enabling provisions for making certain additions, if the assessee fails to give an explanation or the explanation given by the assessee is not to the satisfaction of the ITO. Surely, the additions made on this count would not automatically justify the imposition of penalty under section 271(1)(c). In our view, since the IAC had failed to invoke the provision of the Explanation to section 271(1)(c), there is no possibility of confirming the penalty imposed by him under section 271(1)(c)."*

12. We have also perused the findings returned by the Tribunal in quantum proceedings wherein the addition of Rs.1,30,000/- made by the AO and confirmed by the Ld. CIT(A) merely for the reason that the assessee has failed to furnish explanation of the said expenditure by bringing on record the capital account or withdrawal by the assessee and his family member to substantiate the source of expenditure. In these circumstances by following the decision rendered by Hon'ble Bombay High Court in case of Dharmchand L. Shah (supra), we are of the considered view that since the penalty proceedings as well as assessment proceedings are separate and distinct proceedings penalty under section 271(1)(c) of the Act will not automatically follow on addition made by the AO and since provisions contained under section 69C of the Act are the enabling provisions and merely on account of failure of the assessee to furnish explanation penalty would not be the automatic result under section 271(1)(c) of the Act. So in view of the matter penalty

imposed by the AO and confirmed by the Ld. CIT(A) on account of addition made under section 69C is ordered to be deleted.

**Ground No.3**

13. So far as penalty levied by the AO on account of disallowance of part of interest to the tune of Rs.3,11,920/- on the ground that the property was not used for earning taxable income is concerned, the Ld. A.R. for the assessee moved an application for entertaining additional evidence to substantiate its claim that the property in question was used for earning taxable income by bringing on record "leave and license agreement" dated 20.01.2012.

14. No doubt the Tribunal in the quantum appeal has held that the assessee has failed to establish as to how the interest paid to ECL Finance Ltd. is deductible under the income from house property as he has failed to establish that the said borrowing was incurred for acquisition or construction of the house property from which income was offered under the head income from house property.

15. However, the leave and license agreement was not earlier brought on record by the assessee before the AO/CIT(A). In order to decide the issue once for all and to substantiate the cause of justice we are of the considered view that the additional evidence brought on record by the assessee is required to be examined by the AO to decide afresh the issue as to levying of penalty on account of addition of Rs.3,11,920/- for filing inaccurate particulars being disallowance on part of the interest by providing opportunity of being heard to the assessee. So the penalty levied by the AO and confirmed by the

Ld. CIT(A) on account of addition of Rs.3,11,920/- is set aside and remanded back to the AO to decide afresh.

16. Consequently ground raised by the assessee in this regard is partly allowed.

**Order pronounced in the open court on 19.12.2023.**

**Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 19.12.2023.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.