

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.977/Bang/2023
Assessment Year : 2011-12

DCIT, Circle – 2(1)(1), Bengaluru.	Vs.	M/s. EKA Software Solutions Pvt. Ltd., Building 2A, East Tower, Vrindavan Tech Village, Outer Ring Road, Devarbeesanhalli Village, Varthur Hobli, Bengaluru – 575 001. PAN : AABCE 3660 Q
APPELLANT		RESPONDENT

Assessee by	:	Shri. Ajay Rotti, CA
Revenue by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	14.02.2024
Date of Pronouncement	:	14.02.2024

ORDER

Per George George K, Vice President:

This appeal at the instance of the Revenue is directed against CIT(A)'s order dated 12.10.2023, passed under section 250 of the Income Tax Act, 1961 (hereinafter called 'the Act'). The relevant Assessment Year is 2011-12.

2. The grounds raised read as follows:

1. *The learned CIT(A) erred in law by deleting the penalty levied under section 271(1)(c) of the I.T. Act, 1961.*

2. *The learned CIT(A) erred in law in holding that penalty cannot be levied u/s 271(1)(c) of the Act due to the fact that the addition in the assessment proceedings was on an estimation basis.*
3. *The decision of the Ld. CIT(A) is not in accordance with the Explanation 1 of the section 271(1)(c) of the Act.*
4. *The Ld. CIT(A) failed to appreciate ratio laid down by the Hon'ble High Court of Delhi has decided similar issue in the case of Kalindi Rail Nirman Engineering Limited reported as [2014] 51 taxmann. com 523 (Delhi)/[2014] 365 ITR 304 (Delhi)[15-04-2014].*

3. Brief facts of the case are as follows:

Assessee is a company. For the Assessment Year 2011-12, return of income was filed on 29.11.2012 declaring 'Nil' income. Assessment was completed under section 143(3) of the Act vide order dated 31.12.2013. In the said Assessment Order, addition was made of Rs.6,39,42,814/- on account of disallowance of business service charges and excess claim under section 10AA of the Act (addition of Rs.6,39,20,948/- on account of disallowance of business service charges and Rs.21,866/- on account of excess claim under section 10AA of the Act). The appeal filed by the assessee against the quantum assessment was confirmed by the CIT(A) and the ITAT in ITA No.2114/Bang/2019 (Order dated 17.01.2020).

4. The AO issued show cause notice under section 274 of the Act directing the assessee to show cause as to why penalty under section 271(1)(c) of the Act should not be levied. Since there was no response by the assessee to the several notices issued by the AO, the AO presumed that assessee has no explanation to offer and levied minimum penalty at 100% of the tax sought to be evaded amounting to Rs.2,12,32,907/-.

5. Aggrieved by the Order of the AO in imposing penalty under section 271(1)(c) of the Act, assessee filed appeal before the First Appellate Authority. The CIT(A) allowed the appeal of the assessee. The CIT(A) held that penalty

under section 271(1)(c) of the Act cannot be imposed when addition in the assessment proceedings was on estimate basis. The relevant finding of the CIT(A) reads as follows:

“5. I have gone through the penalty order and facts of the case. Penalty u/s.271(1)(c) was levied in respect of addition Rs. 6,39,20,948/-. It is observed that addition has been made in the assessment proceedings on estimation basis. Penalty proceedings u/s 271(1)(c) were initiated and penalty was levied. It must be noted that the addition in the assessment proceedings was on an estimation basis and concealment of income or furnishing of inaccurate particulars has not been established by the Assessing Officer.

Therefore, penalty u/s 271(1)(c) cannot be levied. In support of this proposition, reliance is placed on the decision of ITAT, Mumbai in the case of Earthmoving Equipment Service Corporation v. Dy. CIT, 22(2), Mumbai [2017] 84 taxmann.com 51 (Mumbai - Trib.) wherein, on similar set of facts, it has been held that penalty u/s 271(1)(c) cannot be levied.

Further, in the case of M/s Chempure vs. ITO (ITA Nos 451, 452 & 453/M/2006), the income was estimated at 25% of alleged bogus purchases and Penalty u/s 271(1)(c) was levied on estimated income. The ITAT, Mumbai has held that penalty u/s 271(1)(c) cannot be levied on adhoc addition. The facts of the instant case are exactly identical to the facts of M/s. Chempure discussed above.

In the light of the foregoing discussion, the Assessing Officer is directed to delete the penalty u/s. 271(1)(c) of the I.T. Act, 1961 amounting to Rs. 2,12,32,907/-. The Grounds of Appeal are allowed.

6. Aggrieved by the Order of the CIT(A) deleting the penalty imposed of Rs.2,12,32,907/-, Revenue has filed the present appeal before the Tribunal. Learned DR strongly relied on the grounds raised.

7. The learned AR, on the other hand, submitted that though the quantum assessment has been dismissed in the order cited supra for Assessment Year 2011-12, the Tribunal had held that the addition made would go to swell the income of the assessee which would be entitled to the benefit of deduction under

section 10AA of the Act. Therefore, it was submitted that there would be no tax liability on the assessee though the addition has been sustained.

8. We have heard the rival submissions and perused the material on record. We find that the AO prior to imposing penalty under section 271(1)(c) of the Act had issued several show cause notices to the assessee. Since there was no response from the assessee's side to the notice issued, the AO imposed penalty under section 271(1)(c) of the Act. It is a claim of the assessee that there would be no tax liability though the addition has been sustained in the quantum assessment since the additional income would be entitled to the benefit under section 10AA of the Act, in view of the aforesaid Order of the Tribunal. It is a claim of the learned AR that Order of the Tribunal has attained finality. These aspects of the matter need to be examined by the AO since the assessee had not represented the case before him. Therefore, the matter is restored to the files of the AO. The AO shall reexamine the matter after affording reasonable opportunity of hearing to the assessee. The assessee shall co-operate with the Revenue and shall not seek unnecessary adjournment in the matter. It is ordered accordingly.

9. In the result, appeal filed by the Revenue is allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(CHANDRA POOJARI)
Accountant Member

Sd/-

(GEORGE GEORGE K)
Vice President

Bangalore.

Dated: 14.02.2024.

/NS/*

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| 1. Appellants | 2. Respondent |
| 3. DRP | 4. CIT |
| 5. CIT(A) | 6. DR, ITAT, Bangalore. |
| 7. Guard file | |

By order

Assistant Registrar,
ITAT, Bangalore.