

।आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "B" :: PUNE

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No.917/PUN/2023
निर्धारण वर्ष / Assessment Year :2016-17

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|---|--------|---------------------------------------|
| Sharad Bhaskarrao Gaikwad, T.No.1, Vanai Apartment, Gangapur Road, Behind Kulswamini Apart, Nashik – 422005. PAN: ADSPG2339R | V s | The Income Tax Officer, Nashik. |
| Appellant/ Assessee | | Respondent /Revenue |

| | |
|-----------------------|------------------------------------|
| Assessee by | Miss Abhilasha Sanjay Pawar-CA, AR |
| Revenue by | Shri Sourabh Nayak – Addl.CIT(DR) |
| Date of hearing | 14/02/2024 |
| Date of pronouncement | 19/02/2024 |

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This is an appeal filed by the assessee against the order of Ld.Commissioner of Income Tax(Appeals)[NFAC], passed under section 250 of the Income Tax Act, 1961 dated 02.05.2023 emanating from penalty order dated 17.02.2022 passed under section 271(1)(c) of the Income Tax Act, 1961

Submission of ld.AR :

2. The ld.Authorised Representative(ld.AR) of the assessee filed written submission. Vide written submission Ld.AR invited our

attention to the notice dated 24.03.2021 for A.Y. 2016-17 issued by Assessing Officer(AO) which was the first notice with reference to the penalty. Ld.AR in the written submission explained that nowhere in the notice section 271(1)(c) is mentioned. Nowhere in the notice, the Assessing Officer has clarified, whether it is for concealment of income or for filing inaccurate particulars.

2.1 The ld.AR filed copy of show cause notice dated 01.01.2022 for A.Y.2016-17 and pleaded in the written submission that even in this notice, there is no mention whether assessee has concealed the income or has filed inaccurate particulars of income.

2.2 Therefore, the ld.AR pleaded that there is no application of mind by the Assessing Officer. Ld.AR relied on the order of the ITAT Pune.

2.3 Ld.AR explained in the written submission that even in the penalty order, AO has not specifically mentioned whether the penalty is for concealment of income or for filing inaccurate particulars of income. Therefore, the ld.AR pleaded that penalty shall be deleted.

Submission of ld.DR :

3. The ld.DR relied on the order of the Assessing Officer and ld.CIT(A).

Findings & Analysis :

4. We have heard both the parties and perused the records. In this case Assessment Order was passed on 24/03/2021 under section 147 of the Act. The copy of the impugned noticed dated 24.03.2021, referred by the Id.AR in the written submission, is scanned and reproduced here as under :

| | | | |
|---|-----------------------------|----------------------|---|
| To, SHARAD BHASKARRAO GAIKWAD T NO 1 VANAI APARTMENT, GANGAPUR ROAD BEHIND KULSWAMINI APART NASHIK 422005, Maharashtra India | | | |
| PAN: ADSPG2339R | Assessment Year: 2016-17 | Date : 24/03/2021 | DIN : ITBA/PNL/S/271(1)(c)/2 020-21/1031716708(1) |

Ms/Mr/M/s,

3. You are required to submit your reply online electronically in 'e-Proceeding' facility through your account in e-filing website (www.incometaxindiaefiling.gov.in) by the midnight (23:59 hours) of 15/04/2021.

4. In case reply is not submitted, the order shall be passed without the benefit of your explanation.

4.1 The copy of the noticed dated 01.01.2022, referred by the Id.Authorised Representative in the written submission, is scanned and reproduce as under :

| | | | |
|--------------------|-----------------------------|----------------------|---|
| PAN: ADSPG2339R | Assessment Year: 2016-17 | Date : 01/01/2022 | DIN : ITBA/PNL/F/271(1)(c)/2021- 22/1038342936(1) |
|--------------------|-----------------------------|----------------------|---|

Show Cause Notice for penalty under section 271(1)(c) of the Income-tax Act, 1961

Ms/Mr/M/s,

Faceless Penalty Scheme was launched on 12/01/2021 and henceforth all penalties will be disposed of in a faceless manner similar to Faceless Assessment.

2. Kindly refer to penalty proceedings under section 271(1)(c) initiated vide notice dated 24/03/2021 bearing DIN ITBA/PNL/S/271(1)(c)/2020-21/1031716708(1), in your case for the aforementioned Assessment Year.

3. You are required to show cause why order imposing penalty under section 271(1)(c) of Income-tax Act, 1961 should not be passed as initiated by the penalty notice referred above.

4. Kindly submit your response along with supporting documentary evidence(s) if any, electronically in 'e-Proceeding' facility through your account in e-filing website (www.incometax.gov.in) by the midnight (23:59 hours) of 03/01/2022.

5. If required, you may request for personal hearing so as to make oral submissions or present your case after filing of written reply. On approval of the request, personal hearing shall be conducted exclusively through video conference.

4.2 Thus, on perusal of the first notice dated 24.03.2021 vide which impugned penalty was initiated, the AO has not mentioned any section. The AO has not mentioned whether the penalty is for concealment of income or for filing inaccurate particulars of income either in the notice dated 24.03.2021 or notice dated 01.01.2022. Admittedly, as per the penalty order only two notices were issued which were dated 24.03.2021 and 01.01.2022. Thus, it explains that there is no application of mind by the Assessing Officer. Primarily, the Assessing Officer has not initiated penalty under section 271(1)(c) as the section is not mentioned in the notice dated 24.03.2021. Also the charge is not specified.

4.2.1 We have already mentioned that the Assessment order was passed on 24//03/2021. In the Assessment Order the last sentence is as under :

“Penalty Proceedings u/s271(1)(c) for furnishing inaccurate particulars of income are being initiated separately as detailed above.”

4.2.2 Thus, the impugned Penalty proceedings under section 271(1)(c) was to be separately initiated. Therefore the AO issued impugned notice dated 24/03/2021, however, as mentioned above, the Assessing Officer has not specifically mentioned any section in the impugned notice dated 24/03/2021. Therefore, by issuing

notice dated 24/03/2021, the AO has not legally initiated Penalty proceedings under section 271(1)(c) of the Income tax Act 1961, as the Assessing Officer has failed to mention any section in the impugned notice.

4.3 The Hon'ble Delhi High Court in the case of CIT Vs. Rajinder Kumar Somani 125 ITR 756 (Delhi)[30-04-1980] has observed as under regarding initiation of penalty :

Quote, "In the present case, unfortunately, it seems to us that the requirements of the statute have not been fulfilled. There is no direction for issue of penalty notice in the assessment order. All that the ITO has observed is that penalty proceedings are to be initiated separately. These are words indicative not of an initiation of steps for levy of penalty but only of possible future initiation. On behalf of the department, Sri Mukerjee submitted that the words used in the assessment order should not be construed narrowly and that the sentence at the end of the assessment order (extracted earlier) should be treated as sufficient for the purpose. We are unable to accept this submission. As explained above the language of section 275 envisages some positive step on the part of the ITO being taken before the completion of the assessment. In our opinion It not enough for the officer to record that penalty proceedings are to be or will be initiated separately. There should be some other step such as an actual direction to the office to issue a penalty notice (which thereafter needs only ministerial compliance), the actual issue of a penalty notice, a reference to the IAC or some other similar action. It is also not without significance that in this case, though the assessment was completed on November 28, 1963, the penalty notices were issued by the ITO only as late as December 16, 1963. As rightly pointed out by

the Tribunal, in cases where the ITO has initiated action during the assessment proceedings, the usual course is for the penalty notices to be issued and served simultaneously with the assessment order and the demand notice. In the present case, even that was not done. The penalty notices were served upon the assessee only after the service of the assessment order and the demand notice. All these circumstances clearly justify the conclusion of the Tribunal that no action had been initiated in the course of the assessment proceedings for the levy of penalty. The conclusion of the Tribunal is one of fact based on the facts and circumstances of the case with which this court will not interfere in a reference.” Unquote.

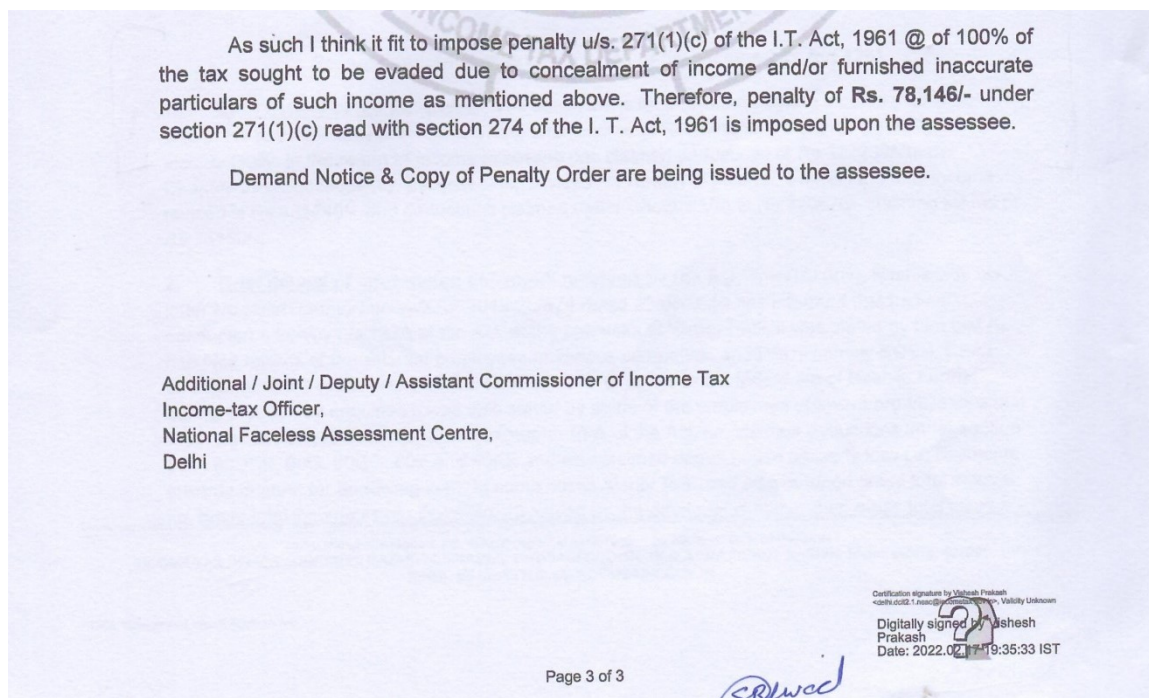
4.4 Thus, Hon’ble High Court (supra) has categorically held that there should be some positive step by the Assessing Officer for initiating Penalty.

4.5 In the case of the assessee also the AO has merely mentioned in the Assessment Order, that ‘penalty proceedings are being initiated separately’, this is not legal initiation of Penalty proceedings u/s 271(1)(c) as held by Hon’ble High Court (supra). In the case of the Assessee, admittedly the AO issued a notice on 24/03/2021 i.e.during the Assessment proceedings, but the AO failed to mention any section on the impugned notice. Therefore, respectfully following Hon’ble High Court (supra), the Notice dated 24/03/2021 cannot be held to be proper legal notice for

initiation of Penalty u/s 271(1)(c) of the Income Tax Act 1961.

Therefore, the Penalty Order is bad in law.

4.6 In addition to this, we are hereby reproducing the last paragraph of the impugned penalty order as under :



5. As can be observed in this final concluding paragraph the AO has levied penalty “*for concealment of income and/or furnished inaccurate particulars of income*”. Thus, this final concluding sentence explains that the AO was not sure whether he is levying penalty “*for concealment of income or for filing inaccurate particulars of income*”. This also explains that there is no application of mind by the Assessing Officer even at the time of levying penalty.

5.1 The Hon'ble Jurisdictional High Court in the case of Pr.CIT Vs. Jehangir H.C.Jehangir[2023] 155 taxmann.com 209 (Bombay) has held as under :

7. Therefore, it is clear from the law as laid down that if one of the irrelevant matters is not struck off, it would mean that AO himself was not sure while issuing the show-cause notice whether he had proceeded on the basis that assessee had concealed his income or he had furnished inaccurate particulars. If without being sure as to what was the basis on which he was planning to impose the penalty on assessee, such a notice, in our view, would indicate nonapplication of mind and the notice would be not valid.

5.2 In this case, as mentioned notice dated 24.03.2021 had not mentioned any section. Notices had not mentioned the charge i.e. whether it is for Concealment of income OR for filling inaccurate particulars of income. Therefore, notices were defective notices. In addition to this, the AO had not categorically stated in the penalty order also whether penalty is levied "*for concealment or filing inaccurate particulars*". This explains that the AO had not arrived at the satisfaction whether the Penalty was to be for Concealment of Income OR for filling inaccurate particulars of Income or for both. This demonstrates absolute lack of application of mind.

5.3 Therefore, for all the reason discussed above, penalty order under section 271(1)(c) is bad in law and hereby quashed.

Accordingly, appeal of the assessee is allowed.

6. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 19th February, 2024.

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Sd/-
(DR. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 19th Feb, 2024/ SGR*

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, “बी” बेंच,
पुणे / DR, ITAT, “B” Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.