

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos. 482 to 485/Ind/2023
Assessment Years : 2003-04 to 2005-06 and 2007-08

Shri Vijay Choudhary, 905-906, Indra Darshan, Building No. 19, Near Millat Nagar, Andheri (West), Mumbai (Appellant/Assessee)	<u>बनाम/</u> Vs.	ACIT-1(2), Indore (Respondent/Revenue)
PAN: ABNPC7872L		
Assessee by	Shri S.S. Deshpande, CA	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	16.04.2024	
Date of Pronouncement	22.04.2024	

आदेश / O R D E R

Per Bench:

Feeling aggrieved by four separate appeal-orders all dated 29.02.2016 and all passed by learned Commissioner of Income-tax (Appeals)-II, Indore ["CIT(A)"], which in turn arises out of respective penalty-orders all dated 26.03.2013 and all passed by learned ACIT-1(2), Indore ["AO"] u/s 271(1)(c) of the Income-tax Act, 1961 ["the Act"] for assessment-years ["AY"] 2003-04 to 2005-06 & 2007-08, the assessee has filed these appeals. All these

appeals challenge the penalties imposed/upheld by lower-authorities u/s 271(1)(c).

2. Since the issues are identical, we proceed to dispose of these appeals by this common order for the sake of clarity, convenience and brevity.

3. At the start of hearing, Ld. DR for revenue/respondent raised a concern that these appeals have been filed by assessee/appellant on 28.11.2023 whereas the impugned orders are dated 29.02.2016. Therefore, prima facie, there appears a delay in filing appeals although the assessee has mentioned '01.11.2023' against 'date of service' and 'no' against 'whether there is any delay in filing of appeal' in Form No. 36. When we countered this to Ld. AR for assessee, the Ld. AR submitted that the impugned orders, though passed on 29.02.2016 were in fact served only on 01.11.2023 and that too when the assessee demanded under 'Right To Information Act, 2005' and hence the information provided in Form No. 36 are correct and there is no delay. The Bench directed Ld. DR to submit report of concerned authorities in this regard. Vide letter dated 10.04.2024, Ld. DR for revenue has filed a letter dated 08.04.2014 from the office of CIT(A), U-II, Indore admitting that although the impugned orders were "*dispatched from this office on 05.04.2016, but could not deliver to the assessee*". Ld. DR therefore dropped his concern and asserted standing at the Bar that these appeals can be treated as having been filed in time.

Consequently, we take on record that these appeals are filed in time and proceed to decide on merit.

I.T.A. No. 482/Ind/2023 for A.Y. 2003-04:

4. The grounds raised in this appeal are as under:

- "1. The Ld. CIT(A) has erred in maintaining the penalty of Rs. 91,900/- u/s 271(1)(c) of the Income-tax Act, 1961.*
- 2. The assessee has neither concealed any income nor furnished any inaccurate particulars of income.*
- 3. The levy of penalty is bad-in-law and hence be deleted."*

5. Thus, the assessee is assailing the penalty of Rs. 91,900/- imposed by AO u/s 271(1)(c). The AO has imposed penalty *qua* the addition made in assessment-order on account of low household withdrawals. To explain the factual background of underlying addition made by AO, Ld. AR for assessee carried to the relevant orders of quantum proceeding. He carried us to Page No. 8 of assessment-order dated 30.12.2010 wherein the AO estimated household expenses @ Rs. 50,000/- per month i.e. 6,00,000/- for whole year and after deducting household withdrawals of Rs. 2,28,079/- declared by assessee, made an addition of Rs. 3,71,921/-. However, the assessee contested this addition in further appeals. During first-appeal, the CIT(A) reduced addition to Rs. 3,06,149/-. The assessee was, however, not satisfied and carried matter to ITAT, Indore whereupon the ITAT, in a consolidated order in IT(SS)A No. 89 & 90/Ind/2011 for AY 2003-04 and 2004-05 dated 22.04.2013, passed following order:

"5. We have considered the rival contentions, carefully gone through the orders of the authorities below and found from the record that during the course of search nothing was found with respect to expenditure incurred by the assessee. The Assessing Officer has just estimated the expenditure by discussing the expenditure without pointing out that these expenditures were actually incurred. No material was brought on record to substantiate the estimation of expenditure at Rs. 50,000/- per month for the assessment year 2003-04 and Rs. 65,000/- per month for the assessment year 2004-05. Keeping in view standard of assessee's living, we deem it fair and reasonable to estimate household expenditure at Rs. 40,000/- per month in the assessment year 2003-04 and Rs. 50,000/- for the assessment year 2004-05 respectively. The assisting officer is directed to recompute the addition accordingly."

6. Referring to above Para of ITAT's order, Ld. AR successfully demonstrated that the underlying addition of low household withdrawals made by AO was not based on any incriminating material; it was purely on estimation. Ld. AR contended that the penalty u/s 271(1)(c) is imposable only where the assessee has concealed particulars of income or furnished inaccurate particulars of income but in the case of addition made purely on estimation, the penalty u/s 271(1)(c) cannot be imposed. Ld. DR could not rebut or controvert this proposition advanced by Ld. AR. On a mindful consideration, we too agree in line with numerous judicial rulings available in public domain that penalty u/s 271(1)(c) cannot be levied where addition is based on estimation. Therefore, the penalty cannot stand. Consequently, we delete the penalty imposed by AO. The assessee succeeds in this appeal.

I.T.A. No. 483/Ind/2023 for A.Y. 2004-05:

7. The grounds raised in this appeal are as under:

- “1. The Ld. CIT(A) has erred in maintaining the penalty of Rs. 1,67,800/- u/s 271(1)(c) of the Income-tax Act, 1961.
2. The assessee has neither concealed any income nor furnished any inaccurate particulars of income.
3. The levy of penalty is bad-in-law and hence be deleted.”

8. Thus, the assessee is assailing the penalty of Rs. 1,67,800/- imposed by AO u/s 271(1)(c). The facts of this issue are exactly same as in **I.T.A. No. 482/Ind/2023 for A.Y. 2003-04** dealt in foregoing paragraphs except change of figures. Therefore, our view in AY 2003-04 shall apply *mutatis mutandis*. Consequently, we delete the penalty imposed by AO. The assessee succeeds in this appeal.

I.T.A. No. 484/Ind/2023 for A.Y. 2005-06:

9. The grounds raised in this appeal are as under:

- “1. The Ld. CIT(A) has erred in maintaining the penalty of Rs. 2,04,900/- u/s 271(1)(c) of the Income-tax Act, 1961.
2. The assessee has neither concealed any income nor furnished any inaccurate particulars of income.
3. The levy of penalty is bad-in-law and hence be deleted.”

10. Thus, the assessee is assailing the penalty of Rs. 2,04,900/- imposed by AO u/s 271(1)(c). The AO has imposed penalty *qua* the addition made in assessment-order on account of dividend u/s 2(22)(e). The AO observed that the assessee was holding 49.20% shares in M/s Choudhary Innovative Business Pvt. Ltd. He further observed that M/s Choudhary Innovative Business Pvt. Ltd. had made advances of Rs. 35,00,000/- to assessee which

amounted to dividend u/s 2(22)(e) liable to taxation in the hands of assessee to the extent of accumulated profit of Rs. 6,82,751/- in possession of company. The assessee filed justification of advances and contended that the provisions of section 2(22)(e) were not applicable but the AO rejected assessee's submission. The matter ultimately travelled upto ITAT, Indore whereupon the ITAT, in a consolidated order for IT(SS)A No. 89 to 93/Ind/2011 dated 07.06.2012, upheld addition.

11. Assailing the penalty imposed by AO and upheld by CIT(A), Ld. AR for assessee made two-fold submissions:

(i) Firstly, our attention is drawn to the show-notice dated 30.12.2010 issued by AO u/s 274 read with section 271(1)(c), placed at Page 1 of Paper-Book. Referring to same, Ld. AR showed that the AO has mentioned as under:

"Whereas in the course of proceedings before me for the A.Y. : 2005-06 it appears to me that you:-

have concealed the particulars of your income or furnished inaccurate particulars of such income."

Ld. AR submitted that the notice u/s 274 sets in motion the penalty-proceeding. According to Ld. AR, the notice issued by AO is very much vague in as much it contains stereotype language of section 271(1)(c). The Ld. AR contended that by mentioning that the assessee has "*concealed the particulars of income or furnished inaccurate particulars of income*" and without striking the inapplicable part, the AO is himself not sure about the

default committed by the assessee. According to Ld. AR, there are innumerable decisions of the Hon'ble Courts and ITAT where it has been loudly held that if the show-cause notice does not spell out the specific charge of default committed by assessee, the notice and subsequent proceeding founded thereon are invalid. In support of his contention, the Ld. AR placed a strong reliance on the decision of Hon'ble Jurisdictional High Court of M.P. in the case of **Pr.CIT-I, vs. Kulwant Singh Bhatia, ITA No. 9 to 14 of 208, order dated 9th May 2018**, wherein it was held as under:

"8. In the case of CIT V/s. Manjunatha Cotton Ginning Factory (supra), it was observed by the Karnataka High Court in para 59 that the practice of the Department sending a printed form where all the ground mentioned in Section 271 are mentioned would not satisfy the requirement of law when the consequences of the assessee not rebutting the initiated presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the provisions have to be held to be strictly construed, notices issued under Section 274 should satisfy the grounds, which he has to meet specifically. Otherwise, principle of natural justice is offended if the show cause notice is vague. Even in the matter of search case where penalty is levied under Explanation 5A to Section 271(1)(c), it was held by the Karnataka High Court that the show-cause notice under Section 274 was defective as it does not spell out the ground on which the penalty is sought to be imposed and consequently penalty imposed was cancelled. The decision of CIT V/s. Manjunatha Cotton Ginning Factory (supra) was further followed by the Karnataka High Court in the case of CIT V/s. SSA'S Emerald Meadows, (2016) 73 taxman.com 248 (SC) / dated 23.11.2015 (ITA 380/2015), the High Court has dismissed the appeal of the revenue by observing that the Tribunal has allowed the appeal of the assessee holding that the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Act of 1961 was bad-in-law as it did not specify which limb of Section 271(1)(c) of the Act of 1961, the penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars. The Tribunal while allowing the appeal of the assessee, had relied on the decision of the Division Bench of Karnataka High Court decision in the case of CIT V/s. Manjunatha Cotton Ginning

Factory (supra). It is further pointed out that the SLP filed by the Deptt. before the Apex Court on 5.8.2016 in the matter of CIT V/s. SSA'S Emerald Meadows (supra) was dismissed. In the case of CIT V/s. Suresh Chandra Mittal, (2000) 251 ITR 9 (SC), the Apex Court has upheld the decision of M.P. High Court wherein, in similar circumstances, it was held that the initial burden lies on the revenue to establish that the assessee had concealed the income or had furnished inaccurate particulars of such income. In the present case, in show-cause notice the Assessing Officer has not specified specifically charges, there was no such mention.

11. On due consideration of the arguments of the learned counsel for the appellant, so also considering the fact that the ground mentioned in show-cause notice would not satisfy the requirement of law, as notice was not specific, we are of the view that the learned Tribunal has rightly relying on the decision of CIT V/s. Manjunatha Cotton Ginning Factory (supra) and CIT V/s. SSA'S Emerald Meadows (supra) rightly allowed the appeal of the assessee and set aside the order of penalty imposed by the authorities. No substantial question of law is arising in these appeals. ITA.No(s). 9/2018, 10/2018, 11/2018, 12/2018, 13/2018 and 14/2018, filed by the appellant have no merit and are hereby dismissed."

Ld. AR submitted that the present case of assessee stands fully covered by this binding decision of Hon'ble jurisdictional High Court and in view of the same, the penalty notice issued and consequently the penalty order passed by AO are invalid and deserves to be quashed.

(ii) On merit, it is submitted that the penalty imposed by AO is referable to 'deemed dividend' u/s 2(22)(e) and it is a settled law that the penalty u/s 271(1)(c) cannot be imposed for 'deemed income'.

12. Ld. DR, though could not contradict the applicability of decision of Hon'ble jurisdictional High Court on facts and in law, strongly supported the penalty-order passed by AO.

13. We have considered rival submissions of both sides and perused the case-records including the show-cause notice and order of penalty made by AO in the light of decision of Hon'ble Jurisdictional High Court. On perusal of the show-cause notice issued by AO, we observe that the notice contains both of the charges viz. "concealed the particulars of income" or "furnished inaccurate particulars of income" and the AO has not stricken-off any one. Therefore, the whole proceeding of penalty conducted by the AO is illegal and unsustainable as per the decision of Hon'ble jurisdictional High Court in **Kulwant Singh Bhatia (supra)**. The Ld. DR could not controvert the facts of the case or applicability of this judgement. Therefore, we are satisfied that the penalty imposed by AO is not valid on this very reasoning. Accordingly, without going into merits of penalty, we quash the penalty-proceeding at the very threshold on legality aspect itself as claimed by assessee. The assessee succeeds in this appeal.

I.T.A. No. 485/Ind/2023 for A.Y. 2007-08:

14. The grounds raised in this appeal are as under:

- 1. The Ld. CIT(A) has erred in maintaining the penalty of Rs. 1,63,800/- u/s 271(1)(c) of the Income-tax Act, 1961.*
- 2. The assessee has neither concealed any income nor furnished any inaccurate particulars of income.*
- 3. The levy of penalty is bad-in-law and hence be deleted."*

15. Thus, the assessee is assailing the penalty of Rs. 1,63,800/- imposed by AO u/s 271(1)(c). The facts of this issue are exactly same as in **I.T.A. No.**

484/Ind/2023 for A.Y. 2005-06 dealt in foregoing paragraphs except change of figures. Therefore, our view in AY 2005-06 shall apply *mutatis mutandis*. Consequently, we delete the penalty imposed by AO. The assessee succeeds in this appeal.

16. Resultantly, all these appeals are allowed.

Order pronounced in open court on 22.04.2024.

Sd/-
(VIJAY PAL RAO)
JUDICIAL MEMBER

sd/-
(B.M. BIYANI)
ACCOUNTANT MEMBER

Indore

दिनांक /Dated : 22.04.2024.

CPU/Sr. PS

Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

By order
Assistant Registrar
Income Tax Appellate Tribunal
Indore Bench, Indore