

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH MUMBAI
BEFORE SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER
AND
SHRI SUNIL KUMAR SINGH, JUDICIAL MEMBER

ITA No.4316/MUM/2023
Assessment Year: 2012-13

MithalalRatanchand Jain 2 nd floor, Shanti Niwas, New Golden Nest Phase-XIII, 100 ft. Road, Bhayander(East), Mumbai – 401105 (PAN : AAPPJ1942F)	Vs.	Commissioner of Income Tax (A)-11, Pune
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Vimal Punmiya, CA
Respondent by : Smt. Mahita Nair, Sr.DR

Date of Hearing : 06.05.2024
Date of Pronouncement : 08.05.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A)-11, Pune, vide order no. ITBA/APL/S/250/2023-24/1058068301(1) dated 20.11.2023 passed against the assessment order by Assistant Commissioner of Income Tax, Central Circle 3, Thane, u/s. 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 21.03.2018 for AY 2012-13.

2. The only ground raised in this appeal is towards imposition of penalty of Rs.4,10,250/- u/s. 271(1)(c) of the Act.

3. Brief facts of the case are that the assessee is an individual and a partner in M/s Sonam Builders. A search action u/s 132 of the Act was conducted on the assessee on 12.09.2012. Assessee filed his

return of income on 30.09.2012 reporting total income at Rs. 53,49,093/-. In response to notice u/s 153A of the Act, assessee filed his return on 31.07.2013 reporting total income at Rs. 54,04,284/-. During the search assessment proceedings, it was noticed that the assessee had sold plots at Dhule on 18.10.2011, however, no capital gain on such sale was declared in the original return of income. The Assessing Officer accordingly made an addition of Rs. 25,81,038/- on account of shortterm capital gain on sale of the plots. Penalty proceedings u/s 271(1)(c) of the Act were also initiated while completing the assessment.

4. Aggrieved, assessee filed appeal before the CIT(A). During the appellate proceedings before the Id. CIT(A), assessee filed the details of working of capital gain as under:

Survey No.	Cost	Legal	Paid Meenaxi Fabrics	to Total Cost	Sale consideration as per sale deeds
476	9,84,150	1,39,128	6,62,873	17,86,851	18,31,430
477	9,39,600	1,34,428	6,39,686	17,13,714	17,67,368
482/1+486/1@ 50% because only half part sold	7,01,663	97,240	4,49,255	12,48,858	11,75,733
483	7,00,000	99,447	4,70,558	12,70,005	13,00,089
Total	33,25,413	4,70,243	22,22,372	60,18,028	60,74,620

4.1 Assessee had claimed land development expenses paid to Meenaxi Fabrics Pvt. Ltd. towards cost of improvement while computing capital gain. Ld. CIT(A) found that there was no contract with Meenaxi Fabrics and the said company was a defunct company. No evidence for incurring these expenses were filed by the assessee. Since the assessee failed to substantiate the expenses on account of payment claimed to have been made to Meenaxi Fabrics, same was held as unallowable expenses by the ld. CIT(A). Accordingly, addition of Rs. 22,22,372/- was confirmed by the ld. CIT(A).

4.2 After the disposal of aforesaid first appeal, Assessing Officer took up the penalty proceedings and imposed a penalty of Rs. 8,20,500/- u/s 271(1)(c) of the Act on the addition confirmed by the ld. CIT(A). Aggrieved by the imposition of penalty, assessee went in appeal before the ld. CIT(A).

5. In the appellate proceedings before the ld. CIT(A), assessee furnished copy of the order of Co-ordinate Bench of ITAT in the assessee's own case against the quantum addition in appeal number ITA. 2747/PUN/2016, dated 08.07.2019. In the said appeal, relating to quantum addition, the Co-ordinate Bench had confirmed disallowance to the extent of Rs.11,11,186/- by restricting it to 50%. Observations made by the Co-ordinate Bench in this respect is as under:

“6. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to disallowing the leveling expenses to the extent of Rs.22,22,372/- stated to have been paid to Meenaxi Fabrics Pvt. Ltd. Before us, it is assessee's submission that the expenses were incurred towards the improvement of land filling in A.Y. 2011-12 and not in A.Y. 2012-13 which is the impugned year under consideration. It is further submitted that the cost of improvement in A.Y. 2011-12 has been accepted by the Revenue. Before us, assessee has further pointed out that Meenaxi Fabrics Private Limited to whom the y and assessee has paid the land development

cost is not a defunct company a that the disallowance made by Ld.CIT(A) is only on the basis of presumption. Before us, Revenue has not controverted the submissions made by Ld.A.R. It is also a fact that in support of contention that assessee had incurred the expenses towards the land leveling in A.Y. 2011-12 and not in A.Y. 2012-13 no evidence has been placed by the assessee before us. Considering the totality of the aforesaid facts and considering the alternate submission of Ld.A.R. we are of the view that the ends of justice shall be met if the disallowance is restricted to 50% made by Ld.CIT(A). We therefore hold that the disallowance be made of Rs.11,11,186/-. Thus, the grounds of the assessee are partly allowed.”

5.1 In the first appellate proceedings, ld. CIT(A) by considering this decision of the Co-ordinate Bench of ITAT, observed that assessee could not substantiate the land development expenses claimed to have been paid to Meenaxi Fabrics Pvt. Ltd. in full because of which 50% of the said expenses were disallowed. According to him, assessee had not offered any satisfactory explanation regarding the claim for land development expenses and thus he upheld the imposition of penalty u/s. 271(1)(c) with a direction to re-work the amount of penalty in accordance with the addition upheld by the Co-ordinate Bench of the ITAT in the quantum appeal. Aggrieved, assessee is in appeal before the Tribunal.

6. Before us,Ld. Counsel for the assessee referred to para 6 of the order of Co-ordinate Bench of ITAT in the quantum appeal (*supra*) to point out the observations noted by the Bench that expenses were incurred towards the improvement of land filling in AY 2011-12 and not in AY 2012-13. Further, the cost of improvement paid to Meenaxi Fabrics Pvt. Ltd. towards land development expenses is not a defunct company. The Co-ordinate Bench observed that Revenue has not controverted the submissions made by the ld. AR. It is because of certain evidences which could not be placed by the assessee and considering the alternate submission,in order to meet the ends of justice, the disallowance was restricted to 50% made by the ld. CIT(A).

6.1 Thus, ld. Counsel for the assessee contended that it is a case of estimation for disallowing the expense claimed by the assessee. He further stated that ld. AO has not treated the expenses as non-genuine. Ld. Counsel also asserted that assessee has disclosed all the facts before the authorities below. He thus claimed that penalty imposed is on an addition made on an estimate basis by applying 50%.

7. Per contra ld. Sr.DR placed reliance on the orders of the authorities below and asserted that it is not a case of estimation. It was because assessee could not substantiate his claim by bringing on record relevant documents that the disallowance was restricted to 50%, more particularly when assessee himself had made an alternate plea of making a reasonable disallowance.

8. We have heard the rival contentions and perused the material on record and have taken note of the fact about the decision of Co-ordinate Bench in the quantum appeal whereby to meet the ends of justice, disallowance has been restricted to 50% of the claim of expenses made by the assessee. Facts relating to the claim of expenses are uncontroverted. Before us, ld. Counsel for the assessee had submitted that in a case of estimation of income/disallowance, no penalty u/s.271(1)(c) is warranted. In the present case, the explanation of the assessee though not accepted in its entirety, there is no material on the basis of which it would be held that the same was not *bonafide*. In other words, the explanation given by the assessee has not been disproved.

8.1. It is a settled position that on the addition /disallowance made on an estimate basis, no penalty u/s. 271(1)(c) is leviable. For the purpose of levying penalty under 271(1)(c), the AO has to clearly prove that the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income. Considering the undisputed fact that disallowance on which the penalty has been imposed is on an estimate basis i.e. 50% of the claim made, we are of the view that penalty so imposed u/s. 271(1)(c) is not justified. Accordingly, we delete the penalty imposed on the assessee. Thus, the ground taken by the assessee is allowed.

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

Order is pronounced in the open court on 08 May, 2024.

Sd/-
(Sunil Kumar Singh)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 08 May, 2024

MP, Sr.P.S.

Copy to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai