

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER**

**ITA No. 3013/DEL/2018
Assessment Year: 1997-98**

DCIT, Circle-3(2), New Delhi.	<u>Vs</u>	Asian Consolidated Industries Ltd., 96 th Mile Stone, Delhi Jaipur Highway, Village Bawal, Distt. Rewari, Haryana-201541 PAN- AAACA 5887 A
APPELLANT		RESPONDENT
Assessee represented by	Shri Ved Jain, Adv.; Ms. Supriya Mehta, CA; & Shri Amit Sharma, CA	
Department represented by	Ms. Sunita Kumar, CIT(DR); & Shri Kanv Bali, Sr. DR	
Date of hearing	07.05.2024	
Date of pronouncement	28.05.2024	

ORDER

PER KUL BHARAT, JM:

This appeal, by the Revenue, is directed against the order of the learned Commissioner of Income-tax (Appeals)-10, New Delhi, dated 22.11.2017, pertaining to the assessment year 1997-98. The Revenue has raised following revised grounds of appeal:

"1. That Ld CIT(A) has erred in law and on facts in deleting the penalty of Rs.20,87,64,108/- imposed by the AO u/s 271(1)(c) of the Income-tax Act,

1961 without appreciating the facts brought on record by the Assessing Officer..

2. That the Ld CIT(A) while holding the AO was not sure about the defaults committed by the assessee and, therefore, the penalty proceedings initiated and levied are invalid, has failed to appreciate the fact that the intent and purpose of the AO while initiating the penalty proceedings u/s 271(1)(c) was that the assessee has furnished inaccurate particulars of income.

3. That the Ld CIT(A) has failed to appreciate that the show cause notice issued by the AO and the penalty order passed subsequently by the AO are in conformity with the intent and purpose of the Income-tax Act, 1961 and hence the infirmity, if any, in these are taken care of by the provisions of Section 292 B of the Income- tax Act.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

2. Brief facts of the case are that for A.Y. 1997-98 the assessee filed its income tax return on 30.11.1997 declaring a loss of Rs.63,98,20,165/-. The assessment was completed ex-parte u/s 144 of the Act on 21.03.2000, assessing the income at Rs. 5,31,15,324/-. Against this, the assessee filed petition u/s 264 of the Act before the Commissioner of Income-tax, who vide order dated 27.03.2015, passed u/s 264 of the Act, set aside the assessment order dated 21.03.2000 and directed the AO to make assessment de-novo. In compliance, the AO, vide fresh assessment order dated 08.03.2016, passed u/s 143(3) read with section 264 of the Act, completed the assessment at a loss of Rs. 6,07,24,160/- as against returned loss of Rs. 63,98,20,165/-, thereby making an addition of Rs. 57,90,96,001/- (Trading addition of Rs. 20,02,18,513/- and disallowance of project loss Rs. 37,87,77,488/-). The Assessing Officer (“AO”), while framing the assessment, also initiated penalty proceedings u/s 271(1)(c) of the Act by issuing notice dated 08.03.2016 u/s 274 read with section 271(1)(c) of the Act for the additions made in the assessment

order. Subsequently, vide penalty order dated 22.09.2016, the AO imposed a penalty of Rs. 20,87,64,108/- being 100% of tax sought to be evaded u/s 271(1)(c) of the Act. Aggrieved against this the assessee preferred appeal before the learned CIT(A), who vide impugned order dated 22.11.2017 deleted the penalty. Against this, now the Revenue is in appeal before us, assailing the deletion of penalty levied u/s 271(1)(c) of the Act.

3. Learned CIT(DR) submitted that the learned CIT(A) was not justified in deleting the impugned penalty levied by the AO. He relied on the penalty order of the AO.

4. On the other hand, learned counsel for the assessee opposed the submissions and submitted that the penalty notice dated 08.03.2016 is defective inasmuch as the AO has not struck off the inappropriate portion therein and the impugned notice does not mention the specific charge of default committed by the assessee i.e. whether the assessee has concealed its particulars of income; or furnished inaccurate particulars of such income. He submitted, therefore, the subsequent proceedings have become invalid. In support of his contention, learned counsel relied on the decision of Hon'ble Jurisdictional High Court of Delhi rendered in the case of PCIT & others Vs. M/s Sahara India Life Insurance Company Ltd. 2019 (8) TMI 409, dated 02.08.2019.

4.1 Learned counsel further submitted that the AO levied the impugned penalty on the basis of disallowance of estimated GP; expenses; and capital loss on sale of assets, on the ground that assessee failed to substantiate its claim of expenditure as well as its trading results with relevant evidences thereby leading to estimation of the assessee's gross profit, ignoring the explanation of the assessee that accounts of assessee were audited on the basis of books of accounts prepared by the assessee at

the relevant time and the books of account could not be produced before the AO at the time of assessment made u/s 143(3) read with section 264 of the Act, as the assessee did not receive the same from the Official Liquidator on revival of the company. He relied on the order of learned CIT(A) in deleting the penalty in question. Learned Counsel also reiterated the submissions as made in the synopsis. For the sake of clarity, the synopsis is reproduced as under:

“A. In absence of a particular limb, no penalty should have been levied on the assessee as the determination of such limb is sine qua non for imposition of penalty u/s 271(1)(c)

1. This is an appeal filed by revenue against the order dated 22.11.2017 passed by CIT(A) deleting the penalty of Rs.20,87,64,108/-levied by AO u/s 271(1)(c) of the Act.

2. It is relevant to note here that Ld. AO had initiated penalty proceedings vide issuing notice dated 08.03.2016 u/s 274 r.w.s. 271 of the Act. Copy of such notice is enclosed at PB Pg. 35.

3. However, while issuing such notice, the AO has failed to specify the limb under which the penalty u/s 271(1)(c) is being initiated i.e. whether it is for concealment of the particulars of the income or for furnishing inaccurate particulars of the income. This clearly indicates that the entire exercise of initiation of penalty proceedings has been done in a casual and cavalier manner.

4. It is a settled provision of law that notice issued by AO under Section 274 read with Section 271(1)(c) is bad in law if it did not specify which limb of Section 271(1)(c) of the Act is attracted and thus the penalty proceedings are liable to be quashed. Reliance is placed on the following judicial pronouncements in this regard:

- COMMISSIONER OF INCOME TAX & ANR. VERSUS M/S SSA'S EMERALD MEADOWS, 2016 (8) TMI 1145-SC ORDER, Dated: 5-8-2016

- PR. COMMISSIONER OF INCOME TAX, AND OTHERS VERSUS M/S. SAHARA INDIA LIFE INSURANCE COMPANY, LTD., 2019 (8) TMI 409-DELHI HIGH COURT, Dated: -2- 8-2019

- *PRINCIPAL CIT, CENTRAL 2, KOLKATA VERSUS BRIJENDRA KUMAR PODDAR, 2021 (12) TMI 24-CALCUTTA HIGH COURT, Dated: 23-11-2021*

- *COMMISSIONER OF INCOME TAX, BANGALORE AND THE INCOME TAX OFFICER, WARD-6 (3), BANGALORE VERSUS M/S SSA'S EMERALD MEADOWS, 2015 (11) TMI 1620-KARNATAKA HIGH COURT, Dated: 23-11-2015*

5. *Moreover, in the present case, the limb of Section 271(1)(c) has neither been specified in the quantum assessment order dated 08.03.2016 (PB Pg. 27-34, relevant PB pg. 31), nor in the penalty show cause notice dated 08.03.2016 (PB Pg. 35), nor in another show cause notice dated 13.07.2016 (PB Pg. 39). Infact, in the Penalty Order dated 22.09.2016 (PB Pg.74-79, relevant PB Pg.76) passed by the AO u/s 271(1)(c) of the Act, limb has again not been pointed out by the AO. This depicts a clear violation of the provisions of Section 271(1)(c) and non-application of mind of the AO.*

6. *Therefore, in the absence of specification of the limb, no penalty u/s 271(1)(c) could be initiated and the penalty notice issued to the assessee dated 08.03.2016 is defective and therefore the action of the CIT(A) in deleting the penalty is correct.*

B. No penalty can be imposed on additions which are based on estimates and mere disallowance of claims

1. *Brief facts of the case are that the assessee had filed its ITR on 30.11.1997 declaring a loss of Rs.63,98,20,165/- and the assessment proceedings for the year was completed on 21.03.2000 ex-parte when the company was under liquidation. Thereafter, the assessee filed an appeal u/s 264 of the Act wherein the assessment order dated 21.03.2000 was set aside to the file of the AO for making a de-novo assessment.*

2. *During the course of such set-aside proceedings, the assessee could not provide the books of accounts due to non-receipt of the books, vouchers and other documents by the Office of the Official Liquidator. In this regard, the assessee submitted the copies of minutes prepared by the Official Liquidator on 05.04.2000 and 06.04.2000 while allowing inspection of the records of the assessee. However, this explanation furnished by the assessee along with the evidences was completely ignored by the AO and the following two additions were made:*

i. *By estimating the income of the assessee by way of averaging the Gross profit shown in the earlier years.*

ii. *Disallowance of a claim of expenditure under the head administrative, selling and distribution expense*

3. *Thereafter, a penalty amounting to Rs.20,87,64,108/- was levied by the AO on the above- mentioned estimated amount of Gross profit and disallowance of claim of expenditure.*

I. As regards the penalty levied on estimated amount of Gross Profit addition:

i. *The fact that addition has been made by way of estimation of Gross Profit has been duly acknowledged by the AO at Pg. 2 second Para of the Penalty Order dated 22.09.2016 wherein it has been mentioned that "I therefore apply average G.P. of the above two AYs to arrive at a fair estimate of G.P. in the current year.." CIT(A) has also acknowledged this fact in his Order dated 22.11.2017 at Pg.8 of the Order wherein it has been mentioned that "From the above extract of the impugned order it is observed that the reason behind the imposition of penalty u/s 271(1)(c) by the impugned order is the inability of the appellant to substantiate its claim of expenditure as well as its trading results with relevant evidences thereby leading to estimation of the appellant's gross profit." Thereafter, CIT(A) has proceeded to rely on his order passed in the assessee's own case for AY 1998-99 wherein the facts of the case are exactly same and penalty had been deleted by holding that simply because certain profit has been estimated automatically could not lead to the conclusion that appellant has concealed its income.*

ii. *Reliance is also placed on the following judicial pronouncements wherein it has been held that no penalty u/s 271(1)(c) can be imposed when income is determined on estimated basis:*

- *COMMISSIONER OF INCOME-TAX VERSUS KRISHI TYRE RETREADING AND RUBBER INDUSTRIES, 2014 (2) TMI 21 - RAJASTHAN HIGH COURT, Dated: - 19-9-2013*
- *COMMISSIONER OF INCOME TAX VERSUS AERO TRADERS (P) LTD., 2010 (1) TMI 32 - DELHI HIGH COURT, Dated: 25-1-2010*

- *COMMISSIONER OF INCOME-TAX-III VERSUS MODI INDUSTRIAL CORPORATION, 2009 (11) TMI 891 - PUNJAB & HARYANA HIGH COURT, Dated: -25-11-2009*
- *Supertech Construction Company V. Assistant Commissioner of Income Tax, Circle 27(3), Mumbai, ITA No. 910/MUM/2023, IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI, Dated; 05.12.2023*
- *MOHD. JAWED VERSUS ITO WARD-3 (3) BIJNOR, UTTAR PRADESH, 2023 (6) TMI 381-ITAT DELHI, Dated: - 11-5-2023*
- *MACHINFABRIK VERSUS INCOME TAX (APPEALS), INCOME TAX DEPARTMENT, NATIONAL FACELESS APPEAL CENTRE, NEW DELHI, 2023 (5) TMI 30-ITAT MUMBAI, Dated: 27-4-2023*

iii. In view of the above-mentioned facts and circumstances of the case, the penalty levied by the AO u/s 271(1)(c) on the basis of addition which estimated by the AO has been rightly deleted by CIT(A).

II. As regards the penalty levied on disallowance of claim of expenditure:

i. It is pertinent to note here that the Apex Court in the case of COMMISSIONER OF INCOME-TAX VERSUS RELIANCE PETROPRODUCTS PVT. LTD., 2010 (3) TMI 80 - SUPREME COURT, Dated.- March 17, 2010 has held that mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee and thus the initiation of penalty proceedings in such case is bad and liable to be quashed.

ii. Thus, the issue is squarely covered in favour of the assessee by the judgement of the Hon'ble Supreme Court and the CIT(A) as well has relied upon the afore mentioned judgement while deleting the penalty levied by the AO.

Thus, considering the above-mentioned facts and circumstances of the case and case laws relied upon by the assessee, penalty amounting to Rs.20,87,64,108/- levied by the AO u/s 271(1)(c) of the Act has been rightly deleted by CIT(A).”

5. I have considered the order u/s 271(1)(c) of the Act, the submission of the AR and the extant position of law in this regard. At the outset it is necessary to point out that the facts of the case as submitted by the AR of the appellant are borne out from records. It is gathered therefrom that the

relevant assessment order [u/s 143(3)] contained the following additions / disallowances -

Estimated GP	Rs. 3,36,20,723/-
Expenses	Rs.37,87,77,488/-
Capital loss on sale of assets	Rs. 59,55,720/-

and penalty u/s 271(1)(c) was initiated for furnishing inaccurate particulars / concealment of income. By the impugned order, penalty u/s 271(1)(c) was levied for concealment of income. It is observed from the grounds of appeal at para 3 above that the grounds at (f) and (g) are general in nature and not pressed specifically during the course of appellate proceedings. However, as all the balance grounds of appeal mentioned therein relate to levy of penalty u/s 271(1)(c) of the Act, these are taken together and discussed in the underlying paras.

5.1 It is observed further from the impugned order that it is mentioned therein, *inter alia*, "...I have considered the submission of the assessee viz-a-viz the facts of the case there is no merit in the argument of the assessee. As is evident from the facts stated above, assessee has failed to substantiate its claim in the return with any material such as purchase sale bills, book of A/cs various expenses claimed, so as to accept the trading results disclosed by it in the Trading and Profit and loss A/c. Therefore, the AO is left with no other alternative but to estimate its gross profit in the absence of books of A/cs and other supporting details. As regards project loss of Rs. 16,66,97,790/- claimed also, no evidence whatsoever has been furnished either during assessment proceedings or during penalty proceedings to prove the genuineness of loss and allow/ability of the claim us 37

In view of these facts, I am of the view that the assessee has furnished inaccurate particular of its income to the extent of Rs. 57,90,96,001/- as per provision of section 271(1)(c) of the IT Act 1961 and it is a fit case for imposition of penalty u/s 271(1)(c) for concealment of income to the extent of Rs 57,90,96,000..."

From the above extract of the impugned order it is observed that the reason behind the imposition of penalty u/s 271(1)(c) by the impugned order is the inability of the appellant to substantiate its claim of expenditure as well as its trading results with relevant evidences thereby leading to estimation of the appellant's gross profit.

5.2 Section 271(1)(c) of the Act states that if the AO or the CIT (Appeal)/Pr. CIT/CIT in the course of any proceedings under the Act is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty a sum which shall not be less than, but which shall not exceed three times the amount of tax such to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income. Also, Explanation 1 thereof states that where in respect of any facts material to the computation of the total income of any person under this Act, such person fails to offer an explanation or offers an explanation which is found by the AO or the CIT (Appeals) or the Pr CIT or CIT to be false, or such person offers an explanation which he is not able to substantiate [and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him), then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed.

5.3 It is also observed from the available records that the initiation of the penalty u/s 271(1)(c) was made in the order u/s 143(3) under the limb 'furnishing inaccurate particulars of income. In fact, it is gathered from both the appellant's submissions filed during the course of the present appeals as well as the oral arguments adduced by its AR that penalty u/s 271(1)(c) was imposed by the impugned order although the appellant had submitted all details regarding its claim of expenses but could not produce its books of accounts in view of non-receipt thereof from the Official Liquidator on revival. However, the accounts were audited on the basis of books of accounts prepared by the appellant at the relevant time. It is also observed from the plethora of judicial precedents relied upon by the appellant that complete details filed in the return of income and its accompanying documents in a bona fide manner would take a case away from the clutches of penalty u/s 271(1)(c) especially the limb -furnishing inaccurate particulars of income in spite of the fact that the claim of deduction/exemption is not legally tenable. The principle behind this limb u/s 271(1)(c) is the necessity of contumacious conduct of the assessee which, in my view, is absent in the present case.

During the course of appellate proceedings, the appellant's AR relied on the orders of the first appellate authority in its own case and under similar circumstances for the AY 1998- 99 vide appeal order No. 346/16-17 (dated 26/07/2017) wherein penalty levied u/s 271(1)(c) on identical issue - estimation of profit and disallowance of loss due to the inability of the appellant to produce its books of account in view of their non-receipt from the custody of the Official Liquidator - has been cancelled following the reasoning that "...simply because certain profit has been estimated automatically could not lead to the conclusion that appellant has concealed its income..."

5.4 It is also observed from the available records that the initiation of the penalty u/s 271(1)(c) was made in the order u/s 143(3) under the limb 'furnishing inaccurate particulars of income' while in the notice u/s 274 there is no proper tick mark on the appropriate limb as required u/s 271(1)(c) and finally, the penalty is imposed for 'concealment of particulars of income'. Also, during the appeal hearing, the AR of the appellant mentioned that the appellant did not challenge the assessment before the CIT (A) as the assessment resulted in reduction of loss returned.

5.5 Thus, from the above paras it can be inferred that the disallowance of the appellant's claim of deduction was on not satisfying the stipulated condition for its allowability under the Act. This, in my view, can hardly come under the ambit of Section 271(1)(c) of the Act as it is a mere disallowance of a claim the present case does not fall under the limb 'furnishing inaccurate particulars of such income'. As the AR's submission at the appellate stage is borne out from records and is in sync with the extant law on the issue, I am in agreement with the arguments adduced by the appellant against the imposition of penalty u/s 271(1)(c). Further, in view of the similar circumstances in the AY 1998-99, I am in agreement with the reasoning of the decisions of the CIT (A) in his appellate order referred to above. Accordingly, with due deference to the decision of the apex court in CIT vs. Reliance Petro Products Pvt. Ltd. 322 ITR 158 (SC) as well as that in CIT vs. Manjunatha Cotton and Ginning Factory (2013) 35 taxmann.com 250 (Kar), the penalty (of Rs.20,87,64,108/-) u/s 271(1)(c) levied vide the impugned order is cancelled. The grounds of appeal at (a) through (e) above are allowed."

5. We have heard rival submissions and perused the material available on record. In penalty proceedings the stand of the assessee was that accounts of

assessee were audited on the basis of books of accounts prepared by the assessee at the relevant time and the books of account could not be produced before the AO at the time of assessment made u/s 143(3) read with section 264 of the Act, as the assessee did not receive the same from the Official Liquidator on revival of the company. The learned CIT(A) deleted the penalty in question, inter alia, by observing as under:

“5.4 It is also observed from the available records that the initiation of the penalty u/s 271(1)(c) was made in the order u/s 143(3) under the limb 'furnishing inaccurate particulars of income' while in the notice u/s 274 there is no proper tick mark on the appropriate limb as required u/s 271(1)(c) and finally, the penalty is imposed for 'concealment of particulars of income'. Also, during the appeal hearing, the AR of the appellant mentioned that the appellant did not challenge the assessment before the CIT (A) as the assessment resulted in reduction of loss returned.

5.5 Thus, from the above paras it can be inferred that the disallowance of the appellant's claim of deduction was on not satisfying the stipulated condition for its allowability under the Act. This, in my view, can hardly come under the ambit of Section 271(1)(c) of the Act as it is a mere disallowance of a claim the present case does not fall under the limb 'furnishing inaccurate particulars of such income'. As the AR's submission at the appellate stage is borne out from records and is in sync with the extant law on the issue, I am in agreement with the arguments adduced by the appellant against the imposition of penalty u/s 271(1)(c). Further, in view of the similar circumstances in the AY 1998-99, I am in agreement with the reasoning of the decisions of the CIT (A) in his appellate order referred to above. Accordingly, with due deference to the decision of the apex court in CIT vs. Reliance Petro Products Pvt. Ltd. 322 ITR 158 (SC) as well as that in CIT vs. Manjunatha Cotton and Ginning Factory (2013) 35 taxmann.com 250 (Kar), the penalty (of Rs.20,87,64,108/-) u/s 271(1)(c) levied vide the impugned order is cancelled. The grounds of appeal at (a) through (e) above are allowed.”

5.1 In our considered opinion the learned CIT(A), in coming to his conclusion, has thoroughly discussed the issue in detail. The Revenue could not bring on record any material to the contrary, so as to take a different view in the matter.

5.2 We also find force in the contention of learned counsel that penalty notice issued is defective. The notice issued by the AO mentions as under:

"have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1, 2, 3, 4 and 5."

5.3 It is seen that the AO has not struck off the inappropriate portion therein. The impugned notice does not mention the specific charge of default committed by the assessee i.e. whether the assessee has concealed its particulars of income; or furnished inaccurate particulars of such income. The issue is squarely covered against the assessee by the ratio of decision of Hon'ble Jurisdictional High Court of Delhi in the case of PCIT & others Vs. M/s Sahara India Life Insurance Company Ltd. (supra) has held as under:

"21. The Respondent had challenged the upholding of the penalty imposed under section 271(1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 35 taxmann.com 250/218 Taxman 423/359 ITR 565 and observed that the notice issued by the AO would be bad in law if it did not specify which limb of section 271(1)(c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in CIT v. SSA's Emerald Meadows [2016] 73 taxmann.com 241, the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.

22. On this issue again this Court is unable to find any error having been committed by the ITAT. No substantial question of law arises."

5.4 In the absence of any material to the contrary, we hold that the penalty notice issued by the AO is defective and does not meet the requirement of law. Therefore, the subsequent proceedings initiated by the Assessing Officer on the foundation of such notice cannot be sustained in the light of binding precedents.

5.5 Therefore, the order of learned CIT(A), cancelling the penalty levied by the AO u/s 271(1)(c) of the Act, is hereby affirmed. Grounds raised by the Revenue are rejected.

6. Revenue's appeal is dismissed.

Order pronounced in open court on 28.05.2024.

Sd/-
(BRAJESH KUMAR SINGH)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI