

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH KOLKATA

**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI RAKESH MISHRA, ACCOUNTANT MEMBER**

**ITA NoS.1188 TO 1191/KOL/2023
Assessment Years: 2010-11 TO 2013-14**

Kalipada Saha Vivekananda Nagar, Pandua, Hooghly, West Bengal-712149. (PAN: APYPS8000D)	Vs	Income Tax Officer, Ward- 24(3), Hooghly
(Appellant)		(Respondent)

Present for:

Appellant by : N o n e
Respondent by : Shri B. K. Singh, Addl. CIT

Date of Hearing : 06.06.2024
Date of Pronouncement : 12.06.2024

ORDER

PER RAKESH MISHRA, ACCOUNTANT MEMBER:

All these appeals filed by the assessee are against the separate orders of Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi (hereinafter referred to as “the Ld. CIT(A)” passed u/s. 250 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for AYs 2010-11 to 2013-14 dated 27.09.2023 passed against the penalty u/s. 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) passed by ITO, Ward-24(3), Hooghly.

2. Since the facts and issues involved are identical in the bunch of captioned appeals, except variation in amount, these are taken-up for disposal by this common order for the sake of convenience. ITA No.1188/Kol/2023 for AY 2010-11 is taken as the leading case and our decision shall apply *mutatis mutandis* to all the remaining

appeals, captioned above. The assessee in this appeal for AY 2010-11 has taken the following grounds of appeal:

“1. For the penalty order u/s. 250 of IT Act, 1961 is arbitrary, illegal and excess of jurisdiction. Hence the penalty order shall liable to be quashed.

2. That you petitioner voluntarily disclosed higher income and paid tax thereupon. Hence, the question of concealment and initiation of penalty proceedings does not apply in such case.

3. That the commissioner has no power to direct the AO to initiate penalty proceedings u/s. 271(1)(c) of IT Act, 1961 in exercise of Revisional Power u/s. 263 of IT Act, 1961.

4. That the petitioner craves leave to add/alter/delete/substitute any or all of the grounds during the time of final hearing.”

3. Brief facts of the case are that the assessee is an individual and had filed his return of income originally on 31.03.2011 declaring total income of Rs.3,89,990/-. In response to subsequent notice u/s. 148 of the Act, the assessee filed another return of income declaring total income at Rs.8,00,075/-. Assessment u/s. 147/143(3) of the Act in the instant case was completed on 29.11.2016 assessing the total income at Rs.8,49,190/-. Penalty proceedings u/s. 271(1)(c) of the Act were also initiated by the AO on 29.11.2016 for furnishing of inaccurate particulars of income on the difference between the income declared in the original return and the income assessed u/s. 147/143(3). Subsequently, the penalty proceedings were dropped by the AO. However, the order of the AO dropping the penalty was set aside by the Pr. CIT-8, Kolkata vide his revision order u/s. 263 dated 14.02.2019 and the penalty proceedings were taken up afresh by the AO which were completed ex parte vide the impugned penalty order dated 27.08.2019 levying the penalty of Rs.1,30,581/-. Aggrieved, the assessee preferred appeal before the Ld. CIT(A), who citing various decisions, upheld the action of AO levying penalty of Rs.1,30,581/- u/s. 271(1)(c) of the Act. Aggrieved, the assessee is now in appeal before us.

4. The appeal was filed on 09.11.2023 and adjournments were granted on several dates. On the last date of the hearing, the assessee did not appear but the Ld. Sr. DR was present along with the case records as were requisitioned during the course of hearing on 07.05.2024. It is also observed on perusal of the file that the assessee had filed a paper book on 20.02.2024 in which written submission and other documents viz. order u/s. 263, order u/s. 250, order u/s. 271(1)(c) of the Act and the assessment order were enclosed and a compilation of several case laws was also filed. Hence, the appeal is being decided on the basis of the written submission of the assessee and on perusal of the case record and arguments of the Ld. Sr. DR.

5. In the written submission filed, the assessee has raised two contentions as under:

(a) Whether penalty u/s. 271(1)(c) of the Act is maintainable where the assessee voluntarily disclosed higher income in response to the notice u/s. 148 and paid tax thereupon and ;

(b) That the Commissioner has no power to direct the AO to initiate penalty proceeding u/s. 271(1)(c) of the Act in exercise of Revisional Power u/s. 263 of the Act.

6. As regards the second contention relating to the CIT's power to direct the AO to initiate penalty proceeding in exercise of the revisional power u/s. 263 of the Act is concerned, the present appeal has been filed against the penalty imposed u/s. 271(1)(c) of the Act vide order dated 27.08.2019 and not against the order u/s. 263 of the Act dated 14.02.2019. The right to file an appeal is a statutory right and u/s. 253(1)(a), an appeal can be filed against the order passed by a Commissioner (Appeals) u/s. 250 of the Act and under clause (c) of sub-section (1) of section 253 an appeal can also be filed against an order passed by the Pr. Commissioner or the Commissioner u/s. 263 of the

Act. Since both the orders are separately appealable and the present appeal has been filed against the order u/s. 250 passed by the Ld. CIT(A) on the penalty imposed by the AO, therefore, the arguments relating to the validity of the order u/s. 263 do not pertain to the impugned order and are not adjudicated upon. Apparently no separate appeal has been filed against the order u/s. 263 of the Act passed by the Ld. CIT and, therefore, the order of the Ld. CIT has attained finality. Hence, ground no. 3 of the appeal is dismissed as being infructuous and not relating to the present appeal.

7. As regards ground no. 2 of the appeal, the assessee has made written submissions as under:

“A. whether penalty u/s 271(1)(c) is maintainable where petitioner voluntarily disclosed higher income in response to notice u/s 148 and paid tax thereupon -

1. That the Petitioner voluntarily disclosed total income of Rs.800075/- from Rs.389900/- for AY 2010-11 and paid full tax. So the question of concealment and imposition of penalty u/s 271(1)(c) does not arise

2. If the assessee disclosed higher income u/s 148 read with Section 147 than the actual income disclosed in original return, then it is an automatic process of enhancement of tax liability as there is a big difference between income shown in original return and the income which has been disclosed in 148 notice. This difference of tax liability should not be treated as concealment of income

3. It is an undisputed fact that the returned income has been accepted, there is no satisfaction recorded by the assessing officer that assessee had concealed income with reference to return of income filed by him in response to notice u/s 148. Hon'ble Supreme Court in Varkey Chacko v. CIT [1993] 203 ITR 885 has held that a penalty for concealment of particulars of income or for furnishing inaccurate particulars of income can be imposed only when the assessing authority is satisfied that there has been such concealment or furnishing of inaccurate particulars. A penalty proceeding, therefore, can be initiated only after an assessment order has been made which finds such concealment or furnishing of inaccurate particulars.

4. Hon'ble Madras High Court in the case of CIT v. K.R. Chinni Krishna Chetty [2000] 246 ITR 121 has held that under section 271(1)(c) of the Act the authority is given the discretion to levy a penalty if there is concealment of particulars of income and even as regards the quantum of the penalty there is a discretion. Of greater importance is the necessity for a definite finding that there is concealment, as without such a finding of concealment, there can be no question of imposing any penalty. In the assessee's case, the AO has not given any finding in assessment order that the assessee had concealed any income or furnished inaccurate particulars of such income. He had simply accepted the

returned income u/s 148. Hence assessee's case is covered by the decisions referred to above and penalty u/s 271(1)(c) will not be imposable.

5. In CIT v. Suresh Chandra Mittal [2001] 251 ITR 963 (SC) the assessee filed revised returns showing higher income after search and notice for reopening of assessment, to purchase peace and avoid litigation and Department simply rested its conclusion on the act of voluntary surrender done by the I.T.A. No. 327/Del/2014 Assessment year 2008-09 assessee in good faith, High Court was justified in holding that no penalty could be levied. The assessee's case is on more strong footing as that of Suresh Chand Mittal (supra) decided by Hon'ble Supreme Court. As held in earlier paragraphs there should be variation in assessed and returned income and such variation should be as a result of concealment. It is not the case of assessing officer that penalty u/s 271(1)(c) has been imposed on certain additions made to the returned income. Hon'ble Delhi High Court in the case of M/s. S.A.S. Pharmaceuticals (supra) while deciding the issue levy of penalty u/s 271(1)(c) in paragraph 15 has held as under:

"It necessarily follows that concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in the income tax return filed by it. There is sufficient indication of this Court in the judgment in the case of Commissioner of Income Tax, Delhi-I Vs Mohan Des Hassa Nand 141 ITR 203 and in Reliance Petro products Pvt. Ltd (supra), the Supreme court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income tax return filed by the assessee. "

8. We have gone through the written submissions filed. However, the cases relied upon are not applicable to the facts of the case as there was suppression of receipts which led to the issue of notice u/s. 148 and the disclosure of additional income was neither suo motu nor done voluntarily. As is mentioned above, consequent to the order of Ld. CIT passed u/s. 263 of the Act, the AO passed an order u/s. 271(1)(c) of the Act dated 27.08.2019. It was observed on perusal of the record that the reason for reopening was suppression of sale receipts and in response to the notice issued u/s. 148 of the Act, the assessee had filed return showing higher income than that file in the original return, thereby implying that the profit on the suppressed turnover was included in the return filed in response to the notice u/s 148 of the Act. The AO required the assessee to furnish explanation, papers/documents and since despite availing sufficient opportunities, the assessee did not avail the opportunity of being heard as the AO

imposed the penalty @ 100% of tax sought to be evaded by considering the difference between the total assessed income which included inaccurate particulars of income and the total income as per the return originally filed. Before the Ld. CIT(A), the assessee disputed the impugned penalty order and the Ld. CIT(A) relied upon clause 1B below Explanation 7 of section 271(1)(c) of the Act to uphold the issue relating to satisfaction of the AO for initiation of the penalty proceeding and also relied upon several judicial pronouncements to uphold the validity of the notice issued. As regards the penalty imposed, the Ld. CIT(A) relied upon explanation (1) to section 271(1)(c) of the Act and also the judicial pronouncements as per para 8.1 to uphold the order of the AO which are as under:

- (i) MAK Data P. Ltd. vs. CIT [38 taxmann.com 448 (SC),
- (ii) B.A. Balasubramaniam & Bros. Co Vs. CIT [116 Taxman 842]
- (iii) Union of India Vs. Dharmendra Textile Processors [2007] 295 ITR 244.

9. The Ld. CIT(A) held that the determination whether the penalty is leviable or not depend on the facts and circumstances of each case and cannot be brought into any straight jacket formula. The moot point for determination by the Ld. CIT(A) was whether any explanation for the additions made in the assessment order was given or not, and if any such explanation was given, then whether it was correct, substantiated and bona fide. Para 8.3 of the order of the Ld. CIT(A) upholding the penalty imposed is extracted as under:

“8.3 In the present case penalty has been imposed on account of suppression of income in the original return of income (Rs. 3,89,990) filed by the appellant vis a vis the assessed income of Rs.8,49,190. Even in the return filed u/s 148, the appellant declared income of Rs.8,00,075 only. From the available records, it is noted that the appellant has nowhere explained the reason for under declaration of income in the original return filed under section 139 by him neither during the course of penalty proceedings before the A.O. nor during the appeal proceedings

except for stating that it was due to a bona fide mistake on his part without substantiating the assertion in any manner. The appellant's contention that he had suo moto revised the return declaring the higher income of Rs. 8,00,075 and paid due taxes thereon and that, thus, he had no intention of any concealment of income or furnishing inaccurate particulars of income is not found tenable in view of the fact that the assessee had not filed any such revised return on his own motion. It was only after notice under section 148 was issued by the A.O. that the appellant declared higher income in the return filed in response to the said notice. Had the assessment not been reopened by issue of the notice u/s 148, the suppressed income, in all probability, would have remained unassessed. Even otherwise too, wilful concealment is not a necessary condition for imposition of penalty u/s 271(1)(c) as held by Hon'ble Supreme Court in the case of UOI vs Dharmendra Textiles Processors case (supra). The case laws relied upon by the appellant in his submissions are not applicable to the instant case being distinguishable on the facts. Therefore, in view of the facts & circumstances of the case discussed above and the fact that no credible explanation has been filed by the appellant attracting Explanation 1 to section 271(1)(c), I do not find any reason to interfere with the impugned order of the A.O. levying penalty of Rs.1,30,581 u/s 271(1)(c) in this case and, thus, hereby uphold the same."

10. Considering the totality of the facts and circumstances of the case, as the assessee had suppressed income from the suppressed sale in the return of income originally filed but for the issue of the notice u/s. 148, there was no occasion for the assessee to declare the suppressed income. It is relevant to mention that receipts were suppressed not only in AY 2010-11 but also in AYs 2011-12 and 2012-13 and AY 2013-14 and, therefore, the same cannot be said to be unintentional or due to any bona fide mistake. Hon'ble Supreme Court have held in the case of Union of India Vs. Dharmendra Textile Processor (supra) that the penalty u/s. 271(1)(c) is the civil liability for which wilful concealment is not an essential ingredient for attracting the provisions, unlike in the proceeding u/s. 276C of the Act. Had the notice u/s. 148 not been issued in all these four years, such income would not have been offered to tax. The assessee failed to give any justification for not showing the income and the income declared in the return filed in response to the notice u/s. 148 cannot be said to be voluntarily disclosed but the assessee was compelled to disclose the same as the information was in the knowledge of the AO. Hon'ble Supreme Court have also given

detailed justification in the case of MAK Data P. Ltd. vs. CIT (supra) in respect of this issue and the assessee could not furnish any explanation to rebut concealment of income or furnishing of inaccurate particulars of income. This was a case of deliberate suppression of income as has been rightly held by the AO and the assessee failed to discharge the onus which lay upon him as per Explanation (1) of section 271(1)(c) of the Act as no satisfactory explanation was offered, nor he could prove that the omission to declare the income was bona fide. Hence, in the above facts and circumstances of the case, there is no justification for dissenting with the view held by the Ld. CIT(A), who was rightly confirmed the penalty imposed u/s. 271(1)(c) of the Act by the AO. Hence, the order of the AO imposing the penalty u/s. 271(1)(c) @ 100% of the tax sought to be evaded as computed therein (which has also been confirmed by the Ld. CIT(A)) is hereby confirmed and ground no. 2 of the appeal of the assessee is dismissed.

11. Ground nos. 1 and 4 are general in nature and do not require any separate adjudication.

12. Since the issue in all the other three appeals viz. ITA Nos. 1189 to 1191/Kol/2023 are common as in the ITA No. 1188/Kol/2023, hence, following the finding in ITA No. 1188/Kol/2023 we dismiss the other three appeals also.

13. In the result, all the four appeals of the assessee are dismissed.

Order pronounced in the open court on 12th June, 2024.

Sd/-
(Rajpal Yadav)
Vice President

Sd/-
(Rakesh Mishra)
Accountant Member

Dated: 12th June, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A), NFAC, Delhi
 4. The CIT,
 5. DR, ITAT, Kolkata Bench, Kolkata
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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata