

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, DELHI
BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER &
MS.MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 3173/Del/2014

Nova Promoters and Finlease Pvt. Ltd. 7, Kapil Vihar, Pitampura, Delhi – 34	Vs.	ITO, Ward 13(3) ITO Building, I.P. Estate
स्थायीलेखासं. / जीआइआरसं. / PAN/GIR No: AAACN9562D		
Appellant	..	Respondent

Appellant by :	None
Respondent by :	Shri Anshul

Date of Hearing	30.05.2024
Date of Pronouncement	06.08.2024

O R D E R

PER MADHUMITA ROY, JM:

The instant appeal filed by the assessee is directed against the order dated 28.02.2014 passed by the CIT(A)-XVI Delhi, under Section 271(1)(c) of the Income Tax Act (hereinafter referred to as ‘the Act’) arising out of the order dated 22.08.2012 passed by the ITO, Ward 13(3) New Delhi, for Assessment Year 2000-01.

2. At the time of hearing of the instant appeal none appeared on behalf of the assessee. It appears from the record that nobody represented the assessee before us earlier whenever the matter was taken up. Hence, we have decided to proceed with the matter ex-

parte on the presumption that assessee is not interested to proceed with the matter.

3. Levy of penalty of Rs.46,85,932/- made by the ld. AO further confirmed by the First Appellate Authority is under challenge before us.

4. The brief fact leading to the issue is this that on the basis of information received from the DIT(Investigation) New Delhi in regard the 16 entry operators and beneficiaries who had given accommodation entries to several persons including the assessee in the garb of share application money amounting to Rs.118,50,000/- during the year under consideration, the case was reopened under Section 147 of the Act. It further appears that the assessee also paid commission of Rs.2,96,250/- to the said entry operator, details whereof are appearing in the order passed by the ld. AO.

5. During the course of reassessment proceedings in order to examine the genuineness and creditworthiness of the companies who had given entries to the assessee, summons were issued namely to Mukesh Gupta & Shri Rajan Jassal on 23.10.2007 and 26.11.2007 respectively. Summons were also issued to the other companies who had given accommodation entries to the assessee companies, but no compliance were made by the first two persons mentioned hereinabove and also other companies those were issued the summons; some of the summons were received back with an endorsement 'unserved'. In that view of the matter independent inquiries through ward Inspector on the given addresses were made

wherein it was found that no such persons and/or companies were available in the said addresses. Notice, therefore, dated 23.10.2007 were served upon the assessee to produce share applicants and the Principle Officers of the companies from which it had received share application money but remained uncomplied. Upon making independent inquiry, therefore, by the Id. AO through ITI, when no companies were found to have been in existence the genuineness of such transactions were found not been proved by the AO and thus concluded that the assessee company introduced its own money through non-existing companies using their banking channel in the shape of share application money. The entire share application money of Rs.118,50,000/- and the commission paid to the tune of Rs.2,96,250/- was found to be unexplained transactions and added back to the income of the assessee under Section 68 of the Act which stood deleted by the First Appellate Authority and further confirmed by the Id. Tribunal.

5. Aggrieved by the said order passed by the First Appellate Authority appeal was preferred by the Revenue before the jurisdictional High Court. The Hon'ble Court by and under the order dated 15.02.2012 imposed cost of Rs.30,000/- on the assessee and decided the appeal in favour of the revenue which fact is reflecting from the order impugned in the following manner:

“The Hon'ble High Court while deciding the appeal in favour of revenue held that in the case before it not only did the maternal before the Assessing Officer show the link between the entry providers and the assessee company, but the Assessing Officer had also provided the statements of Mukesh Gupta and Rajan Jassal to the assessee in compliance with the rules of natural justice. Out of 22 companies whose names figured in the information given by them to the

Investigation Wing, 15 companies had provided the so-called "share application money to the assessee There was thus specific involvement of the assessee company in the modus operandi followed by Mukesh Gupta and Rajan Jassal thus, an crucial factual aspects the present case stands on a completely different footing from the case of CIT v Oasis Hospitalities P. Ltd in the light of the above discussion, we are unable to uphold the order of the Tribunal confirming the deletion of the addition of Rs. 1,18,50,000/ made under section 68 of the Act as well as the consequential addition of Rs 2.96,250/-."

6. Thereafter the Ld. AO issued a show cause notice dated 26.07.2012 under Section 274 r.w.s. 271 of the Act. Since nothing was forthcoming, the Ld. AO finally came to a finding that the assessee failed to prove the genuineness, creditworthiness and identity of the share applicants. Finally on the basis of the High Court order whereby and whereunder the addition made by the AO has been confirmed, penalty under Section 271(1)(c) of the Act to the tune of Rs.46,85,932/- has been imposed upon the assessee.

7. Before the ld. CIT(A) the same stood confirmed with the following observation:

"4.6 In the appellate proceedings the submission of the AR before me was that while show cause notice was issued the AO was not sure and definite whether it is case of "furnishing Inaccurate particulars of income" or "has concealed his income". It was submitted that this fact stands verified from the final findings given by the AO in the penalty order who has concluded that it is beyond doubt the assessee has concealed his income or furnished inaccurate particulars of his income as such it is a fit case for imposing a penalty u/s 271(1)(c) of the IT Act, 1961. It was submitted that when penalty is initiated, the AO should be definite while issuing the notice whether it is as case of concealment of particulars of income or it a case of furnishing inaccurate particulars of income, in the absence of which the penalty proceedings may not be considered as valid initiation of the penalty proceedings and the penalty imposed on the basis of such proceedings cannot be sustained. The above submission of the A/R is without any merit because the AO while initiating the penalty proceeding has clearly recorded that the appellant has concealed income of Rs. 1,21,71.250/- and penalty proceeding u/s 271(1)(c) of the IT Act is initiated for concealment of income. Thus, at the end of the assessment order AO records:

“I am satisfied that the assessee has concealed income of Rs. 1,21,71,250/- and penalty proceedings u/s 271(1)(c) of the 11 Act, 1961 for concealment of income is hereby initiated”

From the above it is evident that the AO has initiated the penalty proceeding u/s 271(1)(c) for concealment of particulars of income. AO at the time of initiation of penalty proceeding was definite that the appellant has concealed income. Therefore, no infirmities is caused in the initiation of penalty proceeding and the penalty proceeding initiated are valid in law. In *M Sajjanraj Nahar & Ors. v. CIT (Mad) 283 ITR 230* and *Nainu Mal Het Chand v. CIT (All) 294 ITR 185* Hon'ble courts have held that mentioning of the words "penalty proceedings initiated separately in assessment order is sufficient for invoking penalty action.

4.7 While imposing the penalty u/s 271(1)(c) of Rs. 46,85,932/- the AO has recorded that it is beyond doubt that the assessee has concealed his income or furnished inaccurate particulars of his income for the assessment year under consideration, therefore, it is a fit case for imposing a penalty u/s 271(1)(c) of the IT Act. Thus, in the penalty order the AO has not specifically mentioned the offences. However, from the assessment order it is evident that penalty proceedings have been initiated by the AO for concealment of income

4.8 Further, the facts of the case as indicated above and the findings given by Hon'ble High Court as discussed in the preceding paragraphs coupled with the fact that the assessee has not adduced any evidence even in the penalty proceedings to prove the genuineness of the credits of Rs. 1,21,71,250/-, clearly establish the charge of concealment of income against the assessee. The appellant is found to have accepted the share capital from the companies which are used for providing bogus accommodation entry by the entry operators Mukesh Gupta and Rajan Jassal. The statement of the persons involved were also recorded by the department who admitted to providing such accommodation entries to the assessee against receipt of cash. Further, genuineness & existence of the companies which gave share application money to the appellant are not proved. Enquiries were made by the Assessing Officer during the course of assessment proceedings, letters addressed to all companies were either returned by the postal authorities unserved or not complied with. Inspector deputed by the Assessing Officer also reported that none of the parties were existing at the given addresses. The results of such enquiries were duly confronted to the assessee and assessee was directed to produce the share applicants which the assessee failed to comply. Affidavits retracting the earlier statements of entry operators were filed after more than three years of original statement. Affidavits of Directors of various companies were identically worded and these were not notarized. Summons issued by the AO to deponents of affidavits remained uncomplied with and none of the deponents appeared before the AO. Despite repeated opportunities the deponents of affidavits were not produced by the appellant before the AO for examination. Affidavits without cross-examination of deponents has no force. The entry operators Mukesh Gupta and Rajan Jassal in their joint letter to the department stated that they were operating the bank accounts of the companies from which the assessee company accepted the share capital. The link between

the material gathered by the investigation wing and the assessee company stands not only established at the stage at which notice under Section 148 was issued, but also in the course of the assessment proceedings. Appellant failed to prove his bonafide during the course of assessment proceedings as well as during the penalty proceedings. It is no doubt true that both assessment proceedings and penalty proceedings are separate proceedings but the material gathered during the course of assessment proceedings is quite relevant for deciding the issue of penalty under section 271(1)(c). Even during the course of penalty proceedings, the assessee has not made any effort to lead any evidence than what was adduced before the various authorities during the quantum appeals. In the light of evidence already collected by the Assessing Officer, which also remained uncontroverted by the assessee till date, no further material was required to be adduced by the revenue to prove the charge of concealment against the assessee.

4.9 The assessee has only raised a technical objection that the Assessing Officer has not recorded a finding whether penalty was initiated for concealment of income or for furnishing inaccurate particulars of income. But the assessee has not been able to make any submission as to how the case of the assessee was prejudiced on account of failure on the part of the revenue to clearly mention these facts. Taking into account the totality of the facts and circumstances of the case, it is evident that concealed income of the appellant was introduced in the garb of share capital by taking accommodation entry from the entry operators in the name of the share applicants. Considering the above, penalty under section 271(1)(c) is clearly leviable on the assessee for concealment of income. It is a settled legal position that powers of Commissioner (Appeals) in course of his appellate jurisdiction are co-terminus with powers of Assessing Officer, and the Commissioner (Appeals) can do what the Assessing Officer could do but has not done. I find support for my above view from the decision of *Ellel Hotels & Investments Ltd. v. JCIT* [2005] 2 SOT 659 (MUM), *CIT v Poddar Swadesh Udyog Pvt. Ltd.* [2008] 168 Taxman 182 (Gau) and *International Airports Authority of India Ltd. V. DCIT*, clearly [2005] 95 ITD 101 (Delhi). Therefore, even though AO has not mentioned the specific offence, keeping in view of the above facts of the case, the penalty is clearly imposable for concealment of income. Further, the sequence of events as detailed above and the stand taken by the assessee before various authorities also establish the obstructionist and frivolous conduct on the part of the assessee.

4.10 The reliance placed by the AR on the decisions in the cases of *CIT v. Oasis Hospitalities (P.) Ltd.* 333 ITR 119 (DEL), *Vijay Power Generators Limited v. ITO* 180 Taxman 102 (Del)(Mag) and *CIT v. Net Ram Ram Swarup* 88 ITR 213 (ALL) are not applicable to the instant case. In the case of *Oasis Hospitalities (P) Ltd.* (supra) the assessee produced before the AO the 5 persons who had introduced the share capital in the company, whose statements were also recorded by the AO. In view of the above circumstances it was held by Hon'ble High Court that in so far as penalty proceedings are concerned, case against the assessee of concealment is not made out. However, in the instant case none of the deponents of the affidavits are produced before the AO. None of the companies are found to be existing at the given addresses.

4.11 In the case of Vijay Power Generators Limited v. ITO (supra) it was held that penalty was not imposable because evidence produced before the CIT(A) against the assessment order have not been examined by the AO or the CIT(A) in the penalty proceedings. It was held that since the assessee has adduced the evidences which had not been found to be unsubstantiated, therefore, it is not the case that the assessee has concealed income or furnished inaccurate particulars of income. However, in the instant case the evidences adduced by the assessee in the penalty proceedings were the same that were adduced before the AO and CIT(A) in the quantum proceedings. All these evidences adduced before the AO and the CIT(A) had been examined by the Hon'ble High Court while upholding additions made by the AO in the quantum proceedings. Further, in the penalty proceedings the assessee had not made any efforts to lead any evidence than what was adduced during the quantum appeals. Moreover, the evidences adduced by the assessee during the quantum proceedings had been found to be unsubstantiated.

4.12 The case of CIT v. Net Ram Ram Swarup (supra) relates to AY 1955-56 and 1956-57 which were prior of amendments to the provisions of sec 271(1)(c) where it was held that penalty could not be imposed on the assessee because the burden of proving deliberate concealment was on the department which had not been satisfactorily discharged by the department. However, provisions of sec 271(1)(c) have been amended w.e.f. 01.04.1964 where the word "deliberately" was omitted from the section and explanation I to sec 271(1)(c) was inserted. After the amendment it is now no longer necessary that the department must go further and establish that there was deliberate concealment of particulars of income by the assessee.

4.13 The decisions in the cases of CIT v. Whiteford India Limited 38 taxmann.com 15 (Guj.), CIT v. Manu Engineering Works 122 ITR 306 (Guj.) and New Sorathia Engg Co. v. CIT 155 Taxman 513 (Guj.) relied on by the AR are also not applicable in the instant case because the AO in the assessment order has clearly mentioned that penalty proceedings have been initiated for concealment of income and I am also of considered view that penalty is leviable for concealment of income.

4.14 On similar issue in the case of Om Parkash Gupta v. ITO [2002] 81 ITD 55 (Chd.), Hon'ble ITAT Chandigarh while upholding the imposition of penalty u/s 271(1)(c) have held:

"10.5 We are unable to appreciate whether the Assessing Officer had initiated penalty proceedings for concealment of income or for furnishing inaccurate particulars of income or for both, though it appears from the assessment order that penalty proceedings have been initiated for concealment of income. In the penalty order the Assessing Officer has mentioned both the offences. The facts of the case as indicated above and the findings given by the various authorities, ie the CIT(A), the Settlement Commission and the ITAT as discussed in the preceding paragraphs coupled with the fact that the assessee has not adduced any evidence before any of the authorities to prove the genuineness of the credits of Rs. 4.08,300 establish the charge of concealment of income against the

assessee. This is further so that enquiries made by the Assessing Officer during the course of assessment proceedings, where letters addressed to all creditors were returned by the postal authorities unserved and inspector deputed by the Assessing Officer also reported that none of the parties were existing at the given addresses. Though the results of such enquiries were duly confronted to the assessee, but he made no efforts either during the course of assessment proceedings or during the penalty proceedings to prove his bona fide. It is no doubt true that both assessment proceedings and penalty proceedings are separate proceedings but the material gathered during the course of assessment proceedings is quite relevant for deciding the issue of penalty under section 271(1)(c). Even during the course of penalty proceedings, the assessee has not made any effort to lead any evidence than what was adduced before the various authorities during the quantum appeals. In the light of evidence already collected by the Assessing Officer, which also remained uncontroverted by the assessee till date, what further material was required to be produced by the Assessing Officer to prove the charge of concealment against the assessee. The assessee has only raised a technical objection that the Assessing Officer has not recorded a finding whether penalty was initiated for concealment of income or for furnishing inaccurate particulars of income. But the assessee has not been able to make any submission as to how the case of the assessee was prejudiced on account of failure on the part of the Assessing Officer to clearly mention these facts. Taking into account the totality of the facts and circumstances of the case, we are of the view that penalty under section 271(1)(c) is leviable even for concealment of income where the onus on the revenue is greater in establishing the concealment of income. The sequence of events as detailed above and the stand taken by the assessee before various authorities also establish the contumacious conduct on the part of the assessee."

4.15 On identical issue of penalty being imposed u/s 271 (1) (c) considering the addition made by the A.O. u/s 68, Hon'ble ITAT Mumbai in B.R. TV vs. ACIT [2011] 14 Taxman.com 2 (Mum.) and in ITO vs. Heaven Distillery (P) Ltd. (2010) 41 SOT 88 (Mum.) have upheld the penalty levied by the A.O. as under

BR TV v. ACIT (2011) 14 Taxman.com 2 (Mum.)

"It is well-settled proposition of law that mere furnishing of explanation is not sufficient but it has to be substantiated with evidence. In the absence of substantiating explanation with evidence, the Assessing Officer was justified, in the circumstances of the case, in coming to the conclusion that the explanation is false and the assessee introduced a sum of Rs.5,50,000/- which has to be treated as unexplained cash credit. Addition made u/s 68, under the deeming provisions, has to be taken to its logical conclusions by which one has to assume that the assessee furnished inaccurate particulars and concealed income to the extent of Rs.5,50,000/- without any satisfactory explanation. Therefore, penalty levied by the Assessing Officer vis à vis addition of Rs.5,50,000/- is justified."

ITO vs Heaven Distillery (P) Ltd. (2010) 41 SOT 88 (Mum)

"As regards unsecured loans and addition made under section 68, the case of the Assessing Officer was that the assessee had failed to prove the identity, genuineness and creditworthiness of the creditors. In view of the fact that initial onus was upon the assessee to prove identity, genuineness and capacity of the loan creditors and the assessee having failed to prove genuineness and creditworthiness, the Assessing Officer disallowed cash credits to the tune of Rs. 11,50,728 under section 68 and in the absence of any further material produced even during the penalty proceedings, he concluded that it was a fit case for levy of penalty. In the assessment order, it was mentioned that in the month of January, 2003, summons were issued to various loan creditors and nobody responded to the summons. Though non-attendance in response to summons was in the knowledge of the assessee, yet even in the penalty proceedings the assessee did not choose to furnish either the correct address or ensured attendance of some of the creditors. At any rate, no information was furnished to prove the creditworthiness of the creditors. Under these circumstances, claim of the assessee that confirmatory letters were sufficient compliance to the requirements under section 68 was not in accordance with law. An explanation tendered by the assessee in the penalty proceedings should be substantiated with documentary evidence which should prima facie show that the credits are genuine. In the instant case, the Assessing Officer mentioned that most of the loan creditors were not income-tax assesseees and the assessee failed to establish identity and genuineness of the creditors, apart from the fact that they did not have creditworthiness. Therefore, it could not be said that explanation of the assessee was substantiated with proper material and, thus, Assessing Officer was justified in levying penalty under section 271(1)(c) with reference to the addition made under section 68. Thus, the order passed by the Commissioner (Appeals) on this aspect was to be set aside [Para 27]"

416 In CIT v. Prathi Hardware Stores 1993] 203 ITR 641 (ORL) Hon'ble Orissa High Court on identical issue have upheld imposition of penalty u/s 271(1)(c) and held:

"Where, in respect of any item of credit, the assessee has offered an explanation which the taxing officer has considered to be false or the assessee has offered an explanation but no material or evidence to substantiate it, he shall be deemed to have concealed such income within the meaning of section 271(1)(c). In the instant case, the explanation of the assessee so far as the genuineness of credit of the lender was concerned was not accepted. The assessee's appeal before the AAC failed. It was observed that the assessee offered an explanation but no material or evidence to substantiate the same. The Tribunal came to a presumptuous conclusion that the assessee may have succeeded in the appeal had it come before the Tribunal against the addition. No basis or reason had been indicated for such conclusion. The facts would go to

show that the AAC and the Tribunal did not consider the case of the assessee keeping in view the new Explanation I applicable on and after 1-4-1976. By operation of the Explanation, the onus lay on the assessee and findings given at the time of assessment were relevant and have probative value where the assessee offered nothing beyond the explanation offered at the assessment stage. In such cases, it could not be said that the assessee had discharged the onus even by a preponderance of probabilities. The initial burden which lay on the assessee was not discharged. There was total absence of material to rebut the presumption. The assessee's plea did not stand the test of preponderance of probabilities. Therefore, the deletion of penalty imposed by ITO was not valid."

4.17 In identical case of CIT V. Frostair Pvt. Ltd. [2012] 26 taxmann.com 11 (Delhi) assessee has accepted share capital from some companies which were engaged in providing bogus entries in the form of loan and share application money. Assessing officer discerned that PAN, GIR of the share holders was not correct, they were not found at the addresses given and they were not filing their ITRs with concerned officers. Hon'ble Delhi High Court considering the above facts held that since the assessing officer had examined all the facts in exhaustive manner, therefore, additions u/s 68 and imposition of penalty u/s 271(1)(c) were justified

4.18 It may further be mentioned at the cost of repetition that provisions of section 271(1)(c) have been amended w.e.f. 1-4-1964, where the word "deliberately" was omitted from the section and Explanation 1 to section 271(1)(c) was inserted. After these amendments, the judgment of Hon'ble Supreme Court in the case of CIT v. Anwar Ali [1970] 76 ITR 696, no longer holds good. This position has been accepted by Hon'ble Punjab & Haryana High Court in the case of Vishwakarma Industries v. CIT [1982] 135 ITR 652, and Hon'ble Supreme Court in the cases of CIT v. Mussadilal Ram Bharose [1987] 165 ITR 14, CIT v. K.R. Sadayappan [1990] 185 ITR 49 and Addl. CIT v. Jeevan Lal Sah [1994] 205 ITR 244, though the penalty proceedings continue to be penal proceedings. The Hon'ble Supreme Court has also held that it is now no longer necessary that the department must go further and establish that there was conscious concealment of particulars of income or a deliberate failure to furnish accurate particulars. One cannot forget that the State depends upon the revenue out of the tax collected by the department. Section 271(1)(c) has to be strictly applied in the larger interest of discipline in disclosing correct income by the assessee. Considering the fact that the assessee has not been able to lead any evidence about the source and genuineness of credits of Rs. 1,18,50,000/- and in the light of the finding recorded as above that the assessee has concealed the above income of Rs. 1,18,50,000/-, therefore, I am of the considered view that penalty of Rs. 46,85,932/- under section 271(1)(c) has been rightly imposed by the AO."

8. After careful consideration of the entire aspect of the matter and the order passed by the Ld. AO and further the order passed by the Hon'ble jurisdictional High Court, we find that the order passed by the ld. CIT(A) is just and proper so as not to warrant interference. The further issue raised that the imposition of penalty without giving the final finding as to whether it is on account of concealment of income or furnishing of inaccurate particulars of income is not required to be addressed at this stage considering the order passed by the Hon'ble High Court whereby and whereunder after detailed discussion the addition made by the ld. AO has been confirmed particularly in the absence of any assistance rendered by the assessee before us.

9. The appeal filed by the assessee is therefore found to be devoid of any merit and thus dismissed.

Order pronounced in the open court on 06.08.2024

Sd/-

(S.Rifaur Rahman)
ACCOUNTANT MEMBER

Sd/

(Madhumita Roy)
JUDICIAL MEMBER

Dated 06.08.2024

PS: Rohit

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI