आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'A' BENCH, CHENNAI
श्री एस.एस. विश्वनेत्र रवि, न्यायिक सदस्य एवं श्री जगदीश, लेखा सदस्य के समक्ष ।
Before Shri S.S. Viswanethra Ravi, Judicial Member &
Shri Jagadish, Accountant Member

आयकर अपील सं./**I.T.A. No.2253/Chny/2024**
निर्धारण वर्ष/Assessment Year: 2016-17

The Deputy Commissioner of Income Tax, Central Circle 2(4), Chennai.	Vs.	JSR Infra Developers Private Limited, No. 4, 10A, East Cross Road, Gandhi Nagar, Vellore 632 006, Tamil Nadu. **[PAN:AADCJ4440P]**
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Nilay Baran Som, CIT
प्रत्यर्थी की ओर से/Respondent by	:	Shri R. Venkata Raman, C.A.
सुनवाई की तारीख/ Date of hearing	:	28.11.2024
घोषणा की तारीख /Date of Pronouncement	:	19.12.2024

आदेश /O R D E R

PER S.S. VISWANETHRA RAVI, JUDICIAL MEMBER:

This appeal filed by the Revenue is directed against the order dated 11.07.2024 passed by the ld. Commissioner of Income Tax (Appeals), Chennai-19, Chennai for the assessment year 2016-17.

2. The Appellant-Revenue raised 7 grounds of appeal amongst which, the only issue emanates for our consideration is to whether the ld. CIT(A) justified in cancelling the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 ["Act" in short].

3. Brief facts leading to the case are that the assessee is a company engaged in the business of infrastructure development. A search and seizure operation was conducted on 08.12.2016 in the group of SRS Mining under section 132 of the Act. An external hard disk was seized and found cash payments were unaccounted in its books of account. The assessee agreed to admit income of ₹.7,89,14,504/-. A notice under section 153C of the Act issued and in response to which, the assessee filed return of income declaring income of ₹.34,,49,56,240/-. Notices under section 143(2) and 142(1) of the Act issued and in response to which, the Authorized Representative appeared before the Assessing Officer. According to the Assessing Officer, in response to question No. 8, 9 & 10, the cash payments are made out of regular books of account, which are detailed in page 3 of the assessment order, cannot be allowed as deduction. Further, the Assessing Officer observed that an amount to an extent of ₹.7,89,14,504/- was declared by the assessee over and above the normal income in the return of income after claiming deduction under section 80IA of the Act. The Assessing Officer observed that the assessee claimed deduction under section 80IA of the Act for the first time and the assessee is not entitled to claim the same in the proceedings consequent upon to search. Accordingly, the Assessing Officer initiated penalty proceedings under section 271(1) Explanation 5A

of the Act and imposed penalty by holding that but for search and seizure action conducted by the Income Tax Department, the assessee would not have disclosed the unaccounted income vide his order dated 28.06.2019 passed under section 271(1)(c) of the Act.

4. The assessee challenged the same before the ld. CIT(A) by raising various grounds along with additional grounds which are reproduced in page 3 & 4 of the impugned order. The ld. CIT(A) considered the additional grounds of appeal, held that the Assessing Officer "*chosen to levy penalty upon the tax sought to be evaded by issuing a show-cause notice under section 274 r.w.s. 271(1) of the Act prior to the date of completion of assessment proceedings for under-reporting of income and further passed order under section 271(1)(c) of the Act for the tax sought to be evaded, which are totally inconsistent to each other.* Having aggrieved by the said order of the ld. CIT(A), the Revenue is in appeal before us by raising above mentioned ground of appeal.

5. Before us, the ld. DR Shri Nilay Baran Som, CIT submits that a sworn statement was recorded under section 132(4) of the Act on 11.12.2016 and requested the assessee to explain the source for the cash payment. The ld. DR referred to para 5 of the penalty order and submits that the assessee confirmed the said cash payments were out of

unexplained income and agreed to disclose the total sum of unaccounted income in the hands of the assessee in the respective financial years. He argued that the Assessing Officer correctly initiated penalty proceedings for under-reporting of the income. He further submits that the introduction of search assessment was to bring out the unaccounted income and not to facilitate an assessee. Sections 153C and 153A of the Act were inserted to bring out revenue to the exchequer from the unaccounted income, but, it is not to allow an assessee to make use of the chance and make a fresh claim. He argued vehemently that the assessee did not make claim of deduction under section 80IA of the Act in the original return of income, but, however, to cover up the unaccounted cash as agreed to be disclosed, the assessee, for the first time made claim of deduction under section 80IA of the Act in the return of income filed in response to the notice under section 153C of the Act. He further submits that the Assessing Officer is justified in holding that the assessee is not entitled to make a fresh claim in search proceedings and the penalty levied is fully justified. The ld. CIT(A) is not justified in deleting the penalty only on the ground that the Assessing Officer levied the penalty without making any finding. The ld. CIT(A) also did not take note of the fact that the claim of deduction under section 80IA of the Act was not made in the original return of income. Further, the ld. CIT(A) ignored the decision of

the Hon'ble High Court of Madras in the case of Gangotri Textiles ltd. v. DCIT 121 taxmann.com 171 (Madras). He prayed to allow the ground.

6. The ld. AR Shri R. Venkata Raman, C.A. submits that the arguments of the ld. DR are not correct to the extent that the Assessing Officer initiated penalty proceedings for making a new claim under section 80IA of the Act. He drew our attention to para 10 of the penalty order and submits that the Assessing Officer proceeded to *levy the minimum penalty of ₹.2,73,10,731/- being the tax sought to be evaded on the income brought to tax on account of search action amounting to ₹.7,89,14,504/-.* The ld. AR argued vehemently that the assessee admitted an amount of ₹.7,89,14,504/- in the return of income in response to notice under section 153C of the Act under the head 'additional income', which was accepted by the Assessing Officer. The penalty imposed by the Assessing Officer is not maintainable as the same was admitted, offered to tax and referred to para 6.6.2 of the impugned order. He supported the order of the ld. CIT(A) referring to his observation that while completing the assessment proceedings, the Assessing Officer has not made any specific findings about the concealment or furnishing inaccurate particulars of income in the assessment order and consequently quashed the penalty by placing reliance on the decision of

the Hon'ble High Court of Madras in the case of Shri Babuji Jacob v. ITO in TCA No. 30 of 2019 dated 08.12.2020.

7. Further, he referred to notice dated 30.12.2018 issued under section 274 r.w.s. 271(1) of the Act and submits that by observing *"have under reported your income for the above mentioned assessment year"* by giving an opportunity of being heard to show-cause why an order imposing penalty on you should not be made under section 270A of the Act, which will be considered before any such order is made under section 271(1) of the Act. He argued that such charge stated to have been incorporated in the provisions of section 270A of the Act with effect from AY 2017-18, which is not at all applicable for the year under consideration. He argued vehemently the very basis of notice issued for a charge, which is not applicable, is defective and penalty imposed thereupon is not sustainable. He argued that the decision of the Hon'ble High Court of Madras in the case of Gangotri Textiles Ltd. v. DCIT (supra) is not applicable as the revenue is not clear about how the said decision is applicable to the facts and circumstances of the given case. He placed on record the decision and argued that the ld. CIT(A) by placing reliance on the last decision of Hon'ble High Court of Madras in the case of Shri Babuji Jacob v. ITO 430 ITR 259 at page 32 of the paper book and

vehemently argued that the ld. CIT(A) rightly followed and deleted the penalty imposed by the Assessing Officer.

8. The ld. AR placed on record the order of this Tribunal in the case of Smt. Chidambaram Lathadevi v. ITO in ITA No. 1564/Chny/2018 dated 31.03.2022 and argued that this Tribunal, by following the latest decision of Hon'ble High Court of Madras in the case of Babuji Jacob v. ITO (supra) and decided the matter in favour of the assessee.

9. Further, he drew our attention to the order of the ITAT Delhi Benches in the case of Landcraft Developers (Pvt.) Ltd. v. ACIT in ITA No. 1062/Del/2019 dated 08.01.2024 placed at page 1 of the paper book and argued that the Delhi Benches of the Tribunal quashed the penalty levied under section 271(1)(c) of the Act by holding that the provisions under section 271(1)(c) and section 271AAB of the Act are mutually exclusive. Further, he referred to order of this Tribunal in the case of Shri Samiappagounder Dharmaraj v. Addl. CIT in ITA No. 1415/Chny/2023 dated 29.05.2024 and argued that the notice cannot be treated as mere formality and it requires strict compliance and therefore, all action following the defective notice are vitiated.

10. Further, he drew our attention to the satisfaction of the Assessing Officer recorded in the assessment order and vehemently argued that the very satisfaction initiated under Explanation 5A to section 271(1) of the Act is bad in law and refer to the decision of the Hon'ble High Court of Bombay in the case of PCIT v. Rajkumar Gulab Badgujar [2019] 111 taxmann.com 256 (Bombay) and argued that the initiation of penalty under Explanation 5A to section 271(1) of the Act is confined to searched person and would not apply to the person other than searched person.

11. Heard both the parties and perused the material available on record. We find no dispute with regard to the facts to the extent that there was a search in the group of SRS Mining concerning assessee and disclosure of an amount of ₹.7,89,14,504/- during the search, which has become part and parcel of return of income in response to the notice under section 153C of the Act, acceptance of the same by the appellant-revenue. Therefore, the only issue emanates for our consideration is whether the ld. CIT(A) is justified in quashing the penalty in terms of the additional grounds by holding that the Assessing Officer has failed to furnish as to under which limb of the Act, the Assessing Officer intent to impose penalty. We note that the Assessing Officer, in the show-cause notice, stated under-reporting of income, but, levied penalty upon tax

sought to be evaded. On perusal of the notice dated 30.12.2018 issued under section 274 r.w.s. 271(1) of the Act clearly shows that the charge made by the Assessing Officer that *"have under reported your income for the above mentioned assessment year",* which is the charge under section 270A of the Act, which is inserted by Finance Act, 2016 with effect from 01.04.2017 relevant to the AY 2017-18. In the present case, the assessment year being 2016-17 [relevant to the financial year 2015-16], we find no applicability of section 270A of the Act to the facts and circumstances of the case. Since the charge made by the Assessing Officer under section 270A of the Act in the notice dated 30.12.2018, in our opinion, is defective and consequently, the penalty imposed thereon fails.

12. Further, on perusal of the said notice that the Assessing Officer show-caused the assessee to avail an opportunity of being heard in person or through authorized representative in writing which will be considered before any such order is made under section 271(1) of the Act. The ld. CIT(A) discussed this aspect in para 6.6.15 of the impugned order and held *that the Assessing Officer chosen to levy penalty upon the tax sought to be evaded and issued show cause notice under section 274 r.w.s. 271(1) of the Act prior to the date of completion of assessment*

proceedings for under-reporting of income and further passed penalty order under section 271(1)(c) of the Act for the tax sought to be evaded, which are totally inconsistent to each other. Therefore, it is very much clear from the show-cause notice the Assessing Officer charged the assessee under-reporting of income, but, however, levied penalty for a charge under section 271(1)(c) of the Act. Thus, we totally agree with the finding of the ld. CIT(A) in quashing the penalty order by declaring the show-cause notice dated 30.12.2018 is defective on this aspect also.

13. Further, the ld. DR placed reliance on the decision of the Hon'ble High Court of Madras in the case of Gangothri Textiles Ltd. v. DCIT (supra) and vehemently argued that the ld. CIT(A) completely ignored the decision of the Hon'ble High Court of Madras and given relief to the assessee. The ld. AR submits that the case law as relied on by the ld. DR is not applicable and referred to the latest decision of Hon'ble High Court of Madras in the case of Babuji Jacob v. ITO (supra) at page 32 of the paper book. We note that the Hon'ble High Court, in the case of Babuji Jacob v. ITO (supra), vide para 13 of its order observed that "the first aspect to be considered is as to whether the notice issued under section 271(1)(c) of the Act is legally valid and proper" and "found the notice did not specifically mention as to whether the assessee concealed particulars

of income or furnished inaccurate particulars or both, thus, the Hon'ble High Court was pleased to hold that such notices are bad in law, consequently, the penalty proceedings initiated are held to be invalid by placing reliance in the case of CIT v. Original Kerala Jewellers in TCA No. 717 of 2018 dated 18.12.2018". We find the decision in the case of Babuji Jacob v. ITO (supra) is latest to the decision in the case of Gangothri Textiles Ltd. v. DCIT (supra) and we find no infirmity in the order of the ld. CIT(A) in following the latest decision of the Hon'ble High Court of Madras in the case of Babuji Jacob v. ITO (supra).

14. Further, the Tribunal, in the case of Smt. Chidambaram Lathadevi v. ITO (supra), deleted the penalty by following the latest decision of the Hon'ble High Court of Madras in the case of Babuji Jacob (supra) on similar facts and circumstances.

15. Further, we find the order of the ITAT Delhi Benches in the case of Landcraft Developers (Pvt.) Ltd. v. ACIT (supra) placed at page 1 of the paper book. On perusal of the same, we find that the Tribunal quashed the penalty proceedings under section 271AAB of the Act by holding the format for issuing show-cause notice for penalty under section 271(1)(c) of the Act cannot be used for initiating penalty proceedings under section 271AAB of the Act since the provisions of each are mutually exclusive. In

the present case, as discussed above, the Assessing Officer made charges under section 270A and levied penalty under section 271(1)(c) of the Act, therefore, the order of the ld. CIT(A) is justified in quashing the penalty proceedings by holding that the charge in the show-cause notice and penalty imposed are inconsistent to each other.

16. With regard to the satisfaction of the Assessing Officer in the assessment order regarding initiation of penalty under Explanation 5A to section 271(1)(c) of the Act, we find, admittedly, the assessment under section 153C of the Act was made in the hands of the assessee vide order dated 31.12.2018, whereas, the Hon'ble High Court of Bombay in the case of PCIT v. Rajkumar Gulab Badgujar (supra) held that the Explanation 5A below section 271(1)(c) of the Act would apply only in case of searched person, which clearly implies non-applicability of such Explanation 5A to a person other than searched person. Therefore, we find force in the arguments of the ld. AR that the order of the ld. CIT(A) is fully justified in quashing the penalty of ₹.2,73,10,731/- on an admitted amount during the course of search. Thus, we find no interference is warranted on the impugned order. Thus, the ground Nos. 1 to 7 raised by the Revenue fails and are dismissed.

17. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced on 19th December, 2024 at Chennai.

Sd/-	Sd/-
(JAGADISH)	(S.S. VISWANETHRA RAVI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Chennai, Dated, 19.12.2024

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant,
2.प्रत्यर्थी/ Respondent,
3. आयकर आयुक्त/CIT, Chennai/Madurai/Coimbatore/Salem
4. विभागीय प्रतिनिधि/DR &
5. गार्ड फाईल/GF.