

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.332/Nag./2024
(Assessment Year : 2008-09)

Girdharilal Motilal Agrawal
Wankhede Layout, Near Laddhad Hospital
At Post Taluka Buldhana 443 001
PAN – BGLPA4128D

..... Appellant

v/s

Income Tax Officer
Ward-1, Khamgaon

..... Respondent

Assessee by : Shri Abhay Agrawal
Revenue by : Shri Abhay Y. Marathe

Date of Hearing – 18/12/2024

Date of Order – 26/12/2024

ORDER

PER K.M. ROY, A.M.

This appeal by the assessee is against the impugned order dated 14/02/2024, passed by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], for the assessment year 2008-09, confirming penalty under section 271(1)(c) of the Income Tax Act, 1961 (*the Act*) levied by the Assessing Officer.

2. In its appeal, the assessee has raised following grounds:-

"1. *Whether on the facts and in law, the order passed by learned CIT(A) u/s 250 of the Act is bad in law.*

2. *Whether on the facts and in law, the learned CIT(A) erred in upholding action of learned AO in levying penalty under section 271(1)(c) of Rs. 5,48,421/-.*

3. Whether on the facts and in law, the notice issued for levy of penalty under section 274 r.w.s 271(1)(c) dated 24/07/2013 is vague and defective since, it does not specify the limb under which penalty under section 271(1)(c) was initiated.

4. Whether on the facts and in law, the learned CIT(A) erred in not appreciating that the assessee had offered an explanation that, the credit/cash entries in the bank account pertains to the past savings, business receipts, withdrawal made in the bank account and agriculture income.

5. The Assessee craves to add, alter, vary omit, amend or delete one or more of the above grounds of appeal before, or at the time of, hearing of the appeal, so as to enable the Hon'ble Tribunal to decide this appeal according to law."

3. There is a delay of 40 days in filing the appeal. The relevant affidavit is reproduced below:-

"Sufficient Cause explaining the delay in filing the Appeal

C. That the order was passed by learned CIT(A) dated 14.02.2024. That the order was uploaded in the IT portal and presumably sent to registered email id. The assessee duly apprised the legal counsel of the circumstances and furnished all pertinent documentation, except copy of penalty order passed by the learned AO dated 25.03.2014 which could not be located in the files with the assessee due to being old order, having been issued in the year 2014.

D. Subsequently, the legal counsel proceeded to draft the appeal. However, the filing thereof was hindered due to the non-inclusion of the Learned AO's penalty order within the appeal documentation. The assessee endeavored to locate the order issued by the Learned AO on the 25.03.2014. After diligent efforts, the said order was eventually retrieved from records maintained by assessee's former tax consultant. Upon receipt of the AO's order, the assessee promptly forwarded the soft copy to the counsel. The counsel expeditiously prepared the appeal and transmitted the necessary documents to the assessee for signature. Due to procedural requirements and logistical considerations, the completion of this process incurred a considerable amount of time. Consequently, the appeal is being filed on 24 May 2024, resulting in a delay of 40 days.

E. The assessee prays that, the delay of 40 days be condoned in light of aforesaid circumstances. That there was no malafide intention on assessee's part for delay in filing the appeal. In view of above it is submitted that there was a bonafide lapse in delay in filing the appeal before your Honour.

Hence, there is an unintentional delay in filing the appeal before your Honour. By delaying the filing of appeal, no undue benefit or advantage is taken by the assessee. Accordingly, in the interest of justice, the assessee wishes to challenge the assessment order passed by the learned CIT(A) by way of appeal filed before your Honour with a request for condonation of delay.

In view of this, it is prayed that the delay of 4 days may kindly be condoned in order to render the justice."

4. Being satisfied that there is a sufficient and reasonable cause, we condone the delay. Now we proceed to decide the appeal on merit.

5. Facts in Brief:- The assessee was engaged in the activity as a contractor. Initially, for the year under consideration, the assessee did not file his return of income. During the assessment proceedings, the Assessing Officer found that the assessee had deposited cash aggregating to ₹ 43,72,390, in Savings Bank Account in Khamgaon Urban Co-operative Bank Ltd., Buldhana Branch, Buldhana. Accordingly, the assessee's case was re-opened under section 147 of the Act and statutory notices were issued to the assessee in response to which the assessee filed his return of income declaring total income at ₹ 1,91,400. The assessee offered explanation that the source of these cash deposits comprised contract receipts for the year, agricultural income, opening cash balances, withdrawals from the bank account and accumulated past savings. The Assessing Officer had considered and accepted the explanation of the assessee and completed the assessment proceedings under section 143(3) r/w section 147 of the Act and restricted the addition to ₹ 16,97,990, on account of unexplained cash credit under section 68 of the Act for want of supporting documentary evidences. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Act.

6. During the penalty proceedings, the assessee reiterated his explanation and submitted that he had accepted the addition and opted to co-operate

with the Department to avoid further litigation. The Assessing Officer did not accept assessee's explanation and levied the penalty.

7. On appeal, the learned CIT(A) confirmed the penalty levied by the Assessing Officer. The learned CIT(A) held as under:—

"Determination & Decision:

6. All the notices were delivered. The same is evidenced from the details available on the e-filing portal.

7. During the appellate proceedings, the appellant has submitted its reply which is reproduced below:—

"The learned AO during assessment proceedings had accepted the submission of the assessee that, the credit/ cash entries in the Bank account pertains to the receipts from business, withdrawals made in the bank account and from past savings, agriculture income etc. However, the learned AO only provided the benefit with regards to the opening cash balance and cash withdrawals made from the bank account to be available against the cash deposits. The learned AO did not provide any benefit of the cash availability with the assessee from past savings accumulated and agriculture income shown over the number of years. The learned AO did not appreciate that, the cash deposits also included the business receipts which were received in cash and deposited in bank. Further, the assessee had already offered the net business income in the return of income which was accepted by the learned AO. Therefore, the assessee submits that the addition made by the learned AO of Rs. 16,97,990 was unjustified, unwarranted, and bad in law (Copy of assessment order is enclosed as Attachment 1).

2. Without prejudice to the submission on merits as above, the assessee submits that, under the facts circumstances, it cannot be said that the assessee had not offered an explanation with respect to the cash deposits made. The assessee did offer an explanation which was not accepted by learned AO. However, the same was not accepted by the learned AO and hence the addition was made. Thus, under such facts, penalty should not be levied u/s 271(1)(c). Reliance is placed on following:

Penalty is discretionary, not automatic and has to be exercised judicially

The Supreme Court had, in the case of Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26 held that (Copy enclosed at Attachment 2):

"Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances."

3. Without prejudice to the above, the Assessee submits that, the notice issued for levy of penalty under section 274 r.w.s 271(1)(c) dated 24/07/2013

is defective since, it is not specify the specifically under which penalty under section 271(1) he was initiated. Copy of notice is enclosed as Attachment 3. The assessee relies on the decision of Hon'ble Bombay High Court full bench in the Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT in Tax Appeal No. 51 and 57 of 2012 dated 11.03.2021 (Copy is enclosed as Attachment 4) wherein it has been held that no specification of charge in the penalty notice leads to same becoming void and penalty on that count is to be deleted. Hon'ble Court held as under

"S.271(1)(c): Penalty Concealment -Non-striking off of the irrelevant part while issuing notice under section 271(1)(c) of the Income-tax Act, Order is bad in law - Assessee must be informed of the grounds of the penalty proceedings-only through statutory notice. An omnibus notice suffers from the vice of vagueness."

In view of above, the assessee submits that, penalty levied u/s 271(1)(c) is unjustified. unwarranted, and bad in law and may kindly be deleted."

On perusal of the submissions filed by the appellant, it is observed that firstly the A.O has already given credit to the submission filed by the appellant during the penalty proceedings. Further during the appeal proceedings, the appellant is merely saying that the cash deposits pertain to the past savings or accumulated agricultural income However this contention of the appellant is without any concrete documentary evidence So the claim of the appellant cannot be accepted on this issue and it cannot be said that the penalty was not rightly levied by the A.O. In addition to the above, the appellant has also raised issue of non striking of any limb in penalty notice whether it is concealment/ inaccurate particulars. Again this stand of the appellant is not right as in the penalty notice the AO has ticked Concealment of income making it clear as to which limb the penalty notice pertains to. In view of the above facts, the penalty levied by the A.O. is hereby confirmed."

8. At the very outset, we find that the determination of the Assessing Officer in making addition was based on estimate & nebulous and is based only on a complete mathematical calculation. We find that the impugned penalty order passed under section 271(1)(c), however, does not specify which limb of section 271(1)(c) has been invoked. Para-6 and 7 of the order dated 25/03/2014, is reproduced below:-

"6. The assessee is 55 year age matured person residing in District place and performing contract work for 7 Agencies. For the financial year under consideration the assessee was not holding a status as "Purely Agriculturist". In this situation assessee out to have calculated his tax liability and file the return of accordingly. Whereas assessee acquired the PAN on 12/03/2013. The addition of Rs. 16,97,990/- is made as assessee failed to explain the source of cash deposit. Thus, the assessee's reply that cash deposited have been explained by him and addition is made for non of A. O. is untrue.

There is no reason with the assessee for non filling of return of income, non acquiring of PAN and explanation given by the assessee for non levy of penalty is not acceptable. With the above remarks, I am satisfied that this is the fit case for levy of penalty u/s. 271(1)(c) explanation 2 & 3 for tax on total income assessed."

9. The Assessing Officer has not clearly established whether the penalty has been levied on account of concealment of income or for furnishing of inaccurate particulars of income. The learned A.R. submitted that penalty show cause notice was also vague and relevant limb was not marked/ struck off. The assessee had raised the legal argument before learned CIT(A), citing the Hon'ble Bombay High Court decision in Mr. Mohd. Farhan Shaikh v. ACIT (Tax Appeal No.51 and 57 of 2012 dated 11/03/2021). The learned CIT(A) did not find any defects in the explanation offered by the assessee for explaining cash deposits but upheld penalty in a routine and mechanical manner without any fruitful discussion. He did not bother to refer to the notices where relevant portion has not been struck off. Upon consideration of the overall facts and circumstances, it is evident that the assessee did offer an explanation which has been found bona fide, and the addition was partly restricted due to a lack of supporting documentary evidences. Such explanation was not found to be false or bogus. Furthermore, the penalty order is devoid of satisfaction regarding the applicability of specific limb of section 271(1)(c), which is a prerequisite for levy of penalty. It is beyond comprehension that as to the non-compliance of PAN or filing of return of income attract penalty under section 271(1)(c) of the Act. Moreover, penalty order is conspicuously absent about the particular limb of section 271(1)(c) of the Act under the aegis of which penalty is levied. It is excruciating to note

that while calculating penalty concealed income has, for the first time, brought on record. But the satisfaction in the order which is of prime importance is altogether absent. The impugned order passed by the learned CIT(A) has merely echoed the order passed by the Assessing Officer and the same ergo is fit to be jettisoned. Therefore, considering the overall facts and merits of the case, we are of the view that the provisions of section 271(1)(c) are not attracted in this case. Consequently, the penalty levied under section 271(1)(c) of the Act for ₹ 5,84,421, is hereby directed to be deleted. Thus, all the grounds raised by the assessee are allowed.

3. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open Court on 26/12/2024

V. DURGA RAO
JUDICIAL MEMBER

K.M. ROY
ACCOUNTANT MEMBER

NAGPUR, DATED: 26/12/2024

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Nagpur; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur