

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAMIT KOCHAR, AM

ITA No.7263/Mum/2012

(A.Y:2003-04)

Shri Kushal H. Dharod, 63, Goyal Shoppig Centre, S.V.Road, Borivali (W), Mumbai 400 092 PAN: AABPD 8991J	Vs.	The Asst. Commissioner of Income Tax, CC-34, Aayakar Bhavan, M. K. Road, Mumbai 400 020
Appellant	..	Respondent
Appellant by	..	Shri V. G. Ginde, AR
Respondent by	..	Shri A. K. Dhondial, DR
Date of hearing	..	20-10-2016
Date of pronouncement	..	20-10-2016

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the assessee is arising out of the order of the CIT-(A)-41, Mumbai in appeal No.CIT(A)-41/DCCC-34/IT-310/11-12 dated 11-10-2012. Assessment was framed by the ACIT, Central Circle-34, Mumbai for the assessment year 2002-03 vide his order dated 16-12-2010 u/s 143(3) read with section 147 of the Income Tax Act, 1961 (hereinafter ‘the Act’). Subsequently, penalty u/s 271 (1) (c) of the Act was levied by the ACIT, CC-34, Mumbai vide his order dated 30-06-2011.

2. The only issue in this appeal of the assessee is against the order of the CIT (A) confirming levy of penalty u/s 271 (1) of the Act.

3. Briefly stated facts are that the assessee is proprietor of M/s Benzer Matching Centre engaged in the business of dealing in cloths. A search and seizure operation u/s 132 of the Act was carried out on Gangadhar S. Sethi Group cases on 20-08-2009 and the assessee’s residence was also covered u/s 132 of the Act. During the course of search, the assessee admitted undisclosed income of Rs.22.50 lacs u/s 132(4) of the Act for the relevant assessment year and declared the same in the return of income filed in response to notice u/s 147 read with section 148 of the Act for the assessment year 2003-04. The assessee filed working of additional income declared u/s 132(4) of the Act on 16-12-2010 during the course of assessment proceedings. The AO considered the

submissions of the assessee and accepted the additional income declared for the relevant assessment year at Rs.22.50 lacs u/s 132(4) of the Act. The AO initiated penalty proceedings u/s 271 (1) (c) of the Act but on what charge whether for concealment of income or for furnishing of inaccurate particulars of income, nothing is mentioned while initiating penalty proceedings. The AO subsequently levied penalty u/s 271 (1) (c) of the Act on the additional income offered u/s 132(4) of the Act amounting to Rs.22.50 lacs. The assessee before the AO in response to notice u/s 274 read with section 271 (1) (c) of the Act contested the initiation of penalty proceedings and filed reply vide letter dated 08-06-2011 as under:-

- “..... a) *The additional income offered was at Rs.22,50,000/-*
 b) *On perusal of our submission dated 16.12.2010 filed before your office during the course of assessment proceeding, your good self will appreciate that*
- i) *The offered of income is for the cash deposits in the bank accounts of third party and not in the account of the assessee. The assessee has offered the additional income to avoid further multiple litigations and to buy peace of mind. The said additional income was in form of cash deposited in the bank a/c. of M/s. Samrat Investment (firm) where assessee is not partner. Further the cash deposited in bank a/c of M/s. Samrat investment, as share sub broker, could not proved by the assessee or M/s. Samrat investment since same were collected from old debtors who had not repaid their outstanding to the firm aroused out of share transactions carried out during share market crash in period 2000-2002 and after sever follow up man debtors paid of their dues in cash subsequently since most of its client and the firm have incurred huge loses and arranged fund from sources known to them.*
- ii) *Further, there was adhoc lump sum declaration of income for the period 1.4.2002 to 20.08.2009. There was no specific finding or specific working of income by the income tax department so as to prove that the assessee had concealed particulars of income or furnished inaccurate particulars of income in the impugned assessment year.*
- c) *The assessee has never stated that the offer is on account of his concealed income.”*

The AO was not convinced with the reply of the assessee and levied penalty for furnishing of inaccurate particulars of income. The AO also observed that the assessee has concealed the particulars of his income by not furnishing his true

and correct accounts, thereby concealing the income to that effect. Hence, penalty u/s. 271 (1) (c) is very well attracted in the assessee's case. Further, the AO observed that the assessee has not preferred any appeal before the CIT (A) and that return of income filed by the assessee cannot be said as return voluntarily / suo moto filed. The return of income was filed only after the survey has been conducted and it should be appreciated that had it not been surveyed the assessee's wrong claim would have remained undetected. Hence, the assessee has deliberately indulged in furnishing inaccurate particulars of income and thereby concealed the income. Hence, the assessee is liable to be penalized u/s 271 (1) (c). Aggrieved, the assessee preferred appeal before the CIT (A), who also confirmed the action of the AO on similar reasoning. Aggrieved, the assessee came in second appeal before the Tribunal.

4. Before us, the learned Counsel for the assessee raised additional ground vide ground No.2 regarding specific charge for levy of penalty. The relevant additional ground No.2 reads as under:-

“Additional Ground No.2:

“On the facts and in the circumstances of the case, and in law, the impugned penalty order is bad in law inasmuch as the Ld. Assessing Officer finally imposed penalty for furnishing of inaccurate particulars of income whereas the charge stated in the body of the impugned order was concealment of income. The appellant, therefore, prays that the impugned penalty order be quashed.”

Admittedly, the assessee declared total income u/s 132(4) of the Act and included the same in the return of income for the relevant assessment year 2003-04. The assessee also explained the manner of income earned by the assessee and paid taxes accordingly. The assessee has also disclosed income in the return of income after the search. Now before us the issue is whether the assessee officer can levy penalty in the section 271 (1) (c) of the Act on the charge of concealment of income whereas the penalty was initiated for the charge of furnishing of inaccurate particulars of income. Even otherwise the assessee has concealed the income and not the other way round that he has concealed the particulars of income as charged by the AO. According to us, charge must be precise, and imposition only on that footing. We are of the view that before a penalty is

imposed on the assessee, the AO must apprise the assessee of the precise charge brought against him. He must be told distinctly whether he is held guilty of having concealed the particulars of his income or of having furnished inaccurate particulars thereof. Section 271 (1) (c) read with section 274 (1) of the Act provides for a reasonable opportunity to be given to the assessee so that he can meet the charge. Where the penalty proceedings under section 271(1) (c) of the Act are commenced against the assessee on a particular footing, viz., of concealment of particulars of income but the final conclusion of levying the penalty is based on a different footing altogether, viz., on the footing of furnishing inaccurate particulars of his income, it cannot be said that in such circumstances the assessee had been given a reasonable opportunity of being heard before the order imposing the penalty was passed. In such a case the penalty imposed is not justified. Accordingly, we delete the penalty levied by AO and confirmed by CIT (A) on the additional ground raised by assessee on the assumption of jurisdiction. This appeal of the assessee is allowed.

5. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 20-10-2016.

Sd/
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Sd/
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 20-10-2016
LakshmiKanta Deka/Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file. //True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI