

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH : CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष
**BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos.113, 114, 115, 116, 117, 118 & 119/Mds/ 2017

निर्धारण वर्ष /Assessment years : 2003-04, 04-05, 05-06, 06-07,
07-08, 08-09 & 2009-2010.

The Assistant Commissioner
of Income Tax,
Central Circle 2(1)
Investigation Wing,
Chennai 600 034.

Vs. M/s. Sri Muthukumaran Educational
Trust,
No.61, Old No. 641,
Ramasamy Salai,
K.K. Nagar, Chennai 600 078.

[PAN AABTS 6980L]

आयकर अपील सं./I.T.A. Nos.120, 121, 122, 123, 124, 125 & 126/Mds/ 2017

निर्धारण वर्ष /Assessment years : 2003-04, 04-05, 05-06, 06-07,
07-08, 08-09 & 2009-2010.

The Assistant Commissioner
of Income Tax,
Central Circle 2(1)
Investigation Wing,
Chennai 600 034.

Vs. M/s. Meenakshi Ammal Trust,
No.61, Old No. 641,
Ramasamy Salai,
K.K. Nagar, Chennai 600 078.

[PAN AAATM 4676Q]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by : Mrs. Ilavarasi, Addl. CIT.
प्रत्यर्थी की ओर से /Respondent by : Shri. S. Sridhar, Advocate

सुनवाई की तारीख/Date of Hearing : 02-05-2017
घोषणा की तारीख /Date of Pronouncement : 31-05-2017

आदेश / ORDER**PER BENCH:**

These are appeals filed by the Revenue directed against orders dated 28.10.2016 of Id. Commissioner of Income Tax (Appeals)-18, Chennai.

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2. Grounds taken by the Revenue for both the assesseees for all the years are similar except for the quantum of the penalty levied and these are reproduced hereunder:-

1. *"The order of the learned Commissioner of Income Tax (Appeals) is erroneous on facts of the case and in law.*
2. *The Ld. CIT(A) is not justified in deleting the penalty levied u/s:271(1)(c) of Rs. 1,80,000/- , in the penalty order passed for the A.Y 2003-04.*
 - 2.1. *The Ld CIT(A) erred in holding that penalty ought to have been initiated u/s.271AAA of the I.T. Act for the A.Y's from 2003-04 to 2009-10.*
 - 2.2 *The Id.CIT(A) erred in stating that penalty is exigible only u/s 271AAA of IT Act whereas on the facts and circumstances of the case penalty is exigible only under the provisions of 271(1)(c) of IT Act and not under the provisions of Section 271AAA of the IT Act.*
 - 2.3 *The Id.CIT(A) has failed to appreciate that penalty u/s 271AAA of the IT Act is exigible only to the assessment years relevant to the specified previous years as per the provisions of sub-section (1) to Section 271AAA read with explanation to sub-section (4) of that section, whereas on the facts and circumstances of the case for the assessment*

year under consideration viz., the AYs 2003-04 to 2007-08 do not qualify as the specified previous years in accordance with the aforesaid provision of Section 271AAA of the IT Act.

3. The Ld CIT(A) ought to have noted the fact that the assessee trust did not admit such income in its returns either u/s.139 or u/s.153A of the I.T. Act for the A.Y's 2008-09 to 2009-10 and hence, did not fulfill the criteria as envisaged u/s. 271AAA of the I.T. Act leaving the A.O with no other option than to levy the penalty u/s. 271(1)(c) of the I.T. Act, 1961.

3.1 The Id.CIT (A) has failed to appreciate that for other than the specified years penalty is attracted automatically as per the provisions of Section 271(1)(c) of IT Act in view of the specific provision of Explanation SA to Section 271(1)(c) of IT Act applicable only to search cases.

4. For these grounds and for any other ground including amendment that may be raised during the course of the appeal proceedings, the order of learned CIT (Appeals) may be set aside and that of the Assessing Officer be restored.

3. Facts apropos are that both the assesseees were subjected to a search u/s. 132 of the Income Tax Act, 1961 (in short "the Act") on 29.09.2008. Both the assesseees were running number of educational institutions and had common trustees namely Smt. R. Gomathi, Shri. A.N. Radhakrishnan and Smt. D. Meenakshi Ammal. These assesseees were also registered u/s. 12AA of the Act vide orders dated 02.12.1999 by the DIT(Exemption), Chennai. Pursuant to the search, assessments

for impugned assessment years were completed making additions for voluntary contributions shown by the assessee and for deposits made by the assesseees in one M/s. RMG Benefit Fund Ltd. Former addition was based on a finding that voluntarily contributions were capitation fee received from parents of the students who were admitted to the various educational institutions run by the trusts and taxable under section 115BBC of the Act. Latter addition was for violation of Sec. 11(5) of the Act since M/s. RMG Benefit Fund Ltd was a company which was closely held by the trustees of the trusts alongwith their family members.

4. Assessee's appeals on such additions before Id. Commissioner of Income Tax (Appeals) met with partial success. Id. Commissioner of Income Tax (Appeals) held that addition for violation of Sec. 11(5) of the Act had to be confined to quantum of the deposits made during the corresponding previous years. Id. Commissioner of Income Tax (Appeals) also deleted the additions made u/s. 115BBC of the Act. It seems the Tribunal on further appeals by the Revenue had upheld the order of the Id. Commissioner of Income Tax (Appeals) in this regard.

5. Thereafter Id. Assessing Officer initiated proceedings u/s. 271(1)(c) of the Act for all the impugned assessment years for both the assesseees. In culmination of such proceedings, Id. Assessing

Officer levied penalty for the additions made in relation to deposits made to M/s. RMG Benefit fund to the extent such additions were sustained by the Id. Commissioner of Income Tax (Appeals), for all impugned assessment years except assessment years 2007-08, 2008-09 and 2009-2010. For these three assessment years, Id. Assessing Officer levied penalty on the difference between the income originally returned by the assessee pursuant to notice u/s. 153A of the Act, and revised returns filed when the assessments were reaching finality. As per the Id. Assessing Officer assessee had disclosed income from anonymous donation in the revised returns only when the seized materials were put across to it.

6. Both the assessees moved appeals before Id. Commissioner of Income Tax (Appeals), wherein it assailed the merits of the penalty levied u/s. 271(1)(c) of the Act. Contention of the assessees was that there was no concealment of income or furnishing of inaccurate particulars. However in the submissions filed before Id. Commissioner of Income Tax (Appeals), assessees also pointed out that Sec. 271AAA of the Act introduced by Finance Act, 2007 w.e.f. 01.04.2007 alone could be applied and penalty could not be levied u/s. u/s. 271(1)(c) of the Act. Assessees relied on an order of this Tribunal in the case of *Shri. A.N. Radhakrishnan vs. ACIT in ITA 684 to 686/Mds/2013, 650,*

1076 and 1077/Mds/2013, dated 05.08.2016, which was in respect of one of the trustees Shri. A.N. Radhakrishnan. Ld. Commissioner of Income Tax (Appeals) after considering the submissions held that for the impugned assessment years penalty could not be levied u/s. 271(1)(c) of the Act but only under Sec. 271AAA of the Act. He allowed the appeals and deleted levy of penalty for the impugned assessment years.

7. Now before us, Id. Departmental Representative strongly assailing the orders of the Id. Commissioner of Income Tax (Appeals) submitted that Sec. 271AAA of the Act applied to the previous year which had ended before the date of search, where, the date of filing of return u/s. 139 of the Act had not expired, and assessee had not furnished a return of income. As per Id. Departmental Representative only other year that could come within the ambit of Sec. 271AAA of the Act was the year in which the search was conducted. According to her, search was conducted on 29.09.2008 and the date for filing return of income for assessment year 2008-2009 was 30.09.2008. As per Id. Departmental Representative, assessee had not filed return of income for the assessment year 2008-2009 prior to 30.09.2008. Hence as per Id. Departmental Representative, assessment year 2008-2009 might come under section 271AAA of the Ac. Further as per Id.

Departmental Representative the only other year for which Sec. 271AAA of the Act could be invoked was previous year ending 31.03.2009 viz assessment year 2009-2010. Thus, according to Id. Departmental Representative except for assessment years 2008-2009 and 2009-2010 for all the other assessment years Id. Assessing Officer was well within his powers to levy penalty u/s. 271(1)(c) of the Act. Even for these two years, as per Id. Departmental Representative, just because a wrong section was invoked by the Id. Assessing Officer the penalty should not have been cancelled.

8. Per contra, Id. Authorised Representative fairly admitted that Sec. 271AAA of the Act applied only for assessment years 2008-09 and 2009-2010. However, according to him, for the earlier years merits of the levy of penalty assailed by the assessee, before Id. Commissioner of Income Tax (Appeals) was not considered by the Id. Commissioner of Income Tax (Appeals). In so far as assessment years 2008-09 and 2009-2010 were concerned, as per Id. Authorised Representative, Id. Assessing Officer had no powers to proceed under section 271(1) (c) of the Act.

9. We have considered the rival contentions and perused the orders of the authorities below. Section 271AAA of the Act is reproduced hereunder:-

“(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent. of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,-

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived ;

(ii) substantiates the manner in which the undisclosed income was derived ; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

Explanation - For the purposes of this section,-

(a) “undisclosed income” means-

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has-

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year ; or

(B) otherwise not been disclosed to the Chief

Commissioner or Commissioner before the date of the search ; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted ;

(b) "specified previous year" means the previous year-

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date ; or

(ii) in which search was conducted".

Specified previous year is defined in Explanation (b). The search was conducted on both assesseees on 29.09.2008. It is not disputed that both the assesseees had not filed any return for assessment year 2008-2009, before the due date which was 30.09.2009. Thus, assessment year 2008-2009 will fall within limb (i) of Explanation (b) to Sec. 271AAA of the Act. Search having been conducted on 29.09.2008, assessment year 2009-2010 will also be a specified previous year within the meaning of limb (ii) of Explanation (b) to Sec. 271AAA of the Act. It is clear from the sub-section (1) to Sec. 271AAA of the Act, the said section applies only to the specified previous years. The bar against proceedings under section 271(1) (c) of the Act are only for the specified previous years. This is clear from sub section (3) of

Section 271AAA of the Act. There is no bar on the Id. Assessing Officer for proceeding u/s. 271(1) (c) of the Act, if other conditions are satisfied, in respect of all other years. Thus the finding of the Id. Commissioner of Income Tax (Appeals) that Id. Assessing Officer could have levied penalty u/s. 271AAA of the Act only for all the impugned assessment years, in our opinion, is not correct. Id. Assessing Officer was within his powers to initiate proceedings u/s. 271(1) (c) of the Act for all assessment years except, assessment years 2008-2009 and 2009-2010. However for these two assessment years, Id. Assessing Officer had no power to initiate or levy penalty under section 271(1) (c) of the Act, due to the specific bar in sub-section (3) to Sec. 271AAA of the Act. We are unable to accept the contention of the Id. Departmental Representative that it was mere mentioning of a wrong section, since the set of conditions under which penalty can be levied under section 271AAA and 271(1) (c) of the Act differ vastly. Hence the orders of the Id. Commissioner of Income Tax (Appeals) for all the impugned assessment year, except 2008-09 and 2009-2010, are set aside and remitted back to the Id Commissioner of Income Tax (Appeals) for considering merits of the levy of penalty under section 271(1) (c) of the Act. In so far as assessment years 2008-09 and 2009-2010 are concerned, we are one with the Id. Commissioner of Income Tax (Appeals) that penalty proceedings could have been only

u/s. 271AAA of the Act and not u/s. 271(1) (c) of the Act. We confirm the order of the Id. Commissioner of Income Tax (Appeals) for these two years.

10. In the result, we set aside the orders of the Id. Commissioner of Income Tax (Appeals) for both the assesseees for all the impugned assessment years except assessment years 2008-09 and 2009-2010, and remit the appeals for these years back to him for considering the merits of the levy of penalty under section 271(1) (c) of the Act. For assessment years 2008-09 and 2009-2010 order of the Id. Commissioner of Income Tax (Appeals) is confirmed. Appeals of the Revenue for assessment years 2003-2004 to 2007-08 are allowed for statistical purposes, whereas its appeal for assessment year 2008-09 and 2009-2010 are dismissed.

Order pronounced on Wednesday, the 31st day of May, 2017, at Chennai.

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 31st May, 2017.

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आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant

2. प्रत्यर्थी/Respondent

3. आयकर आयुक्त (अपील)/CIT(A)

4. आयकर आयुक्त/CIT

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P. GEORGE)

लेखा सदस्य/ACCOUNTANT MEMBER

5. विभागीय प्रतिनिधि/DR

6. गार्ड फाईल/GF