

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH, BANGALORE**

**BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.1180/Bang/2015
(Assessment year: 201-011)

Asst. Commissioner of Income-tax,
Circle- 3(1)
Hubballi-580025. ... Appellant

Vs.

Shri Raju H Patadia,
Prop.M/s.Gold Palace,
Durgadbail,
Hubballi. ... Respondent
PAN: ACVPP 8998B

AND

Cross Objn.No.12/Bang/2016
(In ITA No.1180/Bang/2015)
(Assessment year: 201-011)

Shri Raju H Patadia,
Hubballi. ... Cross-Objector

Vs.

Asst. Commissioner of Income-tax,
Hubballi. ... Respondent

Revenue by : Shri V.Sridhar, CA
Assessee by : Smt.Meera Srivastava, Addl.CIT(DR)

Date of hearing : 29/09/2016
Date of pronouncement : 19/10/2016

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the revenue directed against the order of the Commissioner of Income-tax (Appeals)[CIT(A)], Hubballi, dated 29/05/2015 for the assessment year 2010-11

deleting penalty levied u/s 271(1)(c) of the Income-tax Act,1961 [‘the Act’ for short]. The assessee has come up in cross objections.

2. The revenue raised the following grounds of appeal:

1. The order of the CIT(A) is opposed to law and facts of the case.
2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the penalty levied u/s. 271(1)(c) without appreciating that the assessee had failed to disclose the income of Rs. 38,19,474 declared at the time of survey and failed to pay taxes thereon.
3. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the penalty levied u/s. 271(1)(c) without appreciating that the assessee had concealed his income and furnished inaccurate particulars by undervaluing his stock to the extent of Rs. 38,19,474/-.
4. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) without appreciating that the assessee concealed his income to the extent of Rs. 38,19,474/-, which was detected only during the course of the survey proceedings and a sum of Rs. 7,60,800/-, which was determined during the course of assessment proceedings; both these amounts, aggregating to Rs. 45,80,274/-, not having been declared by him in the Return of Income filed by him for the relevant Assessment Year.
5. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) by not appreciating the facts that the assessment order in which the concealed income was brought to tax in the hands of the assessee & on which the impugned penalty was levied, has been accepted by the assessee and not disputed in appeal.
6. The appellant craves leave to add, alter, amend and delete any of the grounds of appeal.

3. Briefly facts of the case are as under: The assessee is an individual and is engaged in the business of dealing in gold ornament..., buillion/stones. Return of income for the assessment year 2010-11 was filed on 15/10/2010 declaring total income of Rs.21,55,710/-. Subsequently, survey operations u/s 133A of the Act were conducted on 21/10/2010 in the business premises of the respondent-assessee. During the course of survey proceedings the assessee made a declaration of additional income

of Rs.38,19,474/- on account of under-valuation of the closing stock. The respondent-assessee also undertaken to file revised return offering additional income but failed to do so. Further, a sum of Rs.7,60,800/- was detected on account of undervaluation during the course of assessment proceedings. Thus, the Assessing Officer [AO] made addition of Rs.45,80,274/- to the returned income. However, additions have not been agitated before the appellate authorities. Thus, assessment reached finality.

4. Subsequently, the AO issued show cause notice calling upon the assessee to show cause why an order imposing penalty for concealment of particulars of income. In response to show cause, it was submitted that the assessee had not concealed any particulars of income and the addition was made only on account of disallowance of expenditure on estimate basis and therefore penalty should not be levied. The above explanation was not accepted by the AO by holding that the addition was not made on estimate basis but the addition was made on the ground of undervaluation of stock. The AO further inferred that had the intention of the assessee had not been to conceal particulars of income, assessee would have chosen to file revised return declaring additional income. It is only due to survey operations u/s 133A undervaluation was detected. Therefore he proceeded to levy penalty of Rs.13,23,380/- vide order dated 27/9/2013.

5. Being aggrieved, an appeal was preferred before the CIT(A) who had deleted the penalty by holding that penalty is not leviable on account of additions made on estimate basis. In support of this proposition, he relied on the plethora of decisions.

6. Being aggrieved, revenue is in appeal before us.

6.1 Learned Departmental Representative vehemently contended that the assessee had declared additional income only on account of detection made by the department on account of survey operations. Had the survey operations not taken place, assessee would not have disclosed additional income and thus it is a clear case of concealment of particulars of income and therefore penalty is leviable. Thus, he prayed for sustenance of order of penalty.

6.2 On the other hand, learned AR of the assessee contended that additional income was disclosed only on account of undervaluation of closing stock. There is no difference in quantitative stock. The assessee has been following Last-in-first-out [LIFO] for the purpose of valuation but for the insistence of the AO, the above has been valued at First-in-first-out [FIFO] method. On account of this, the addition was offered on a condition not to levy penalty u/s 271(1)(c) of the Act. He prayed that there was no particulars of income have been furnished by the assessee. Therefore penalty cannot be levied.

7. We heard rival submissions and perused the material on record. The only issue in the present appeal is whether the AO is justified in levying penalty of Rs.13,23,380/- u/s 271(1)(c) of the Act. No doubt additions have been made by the AO based on the disclosure made by the assessee during the course of survey operations u/s 133A of the Act. There was no allegation by the assessee that disclosure was made by him out of duress and coercion by the department. No doubt, addition was on account of undervaluation of closing stock and it is no body case there is any difference in quantitative closing stock. The submission of the assessee that the addition was offered to tax on account of change in the method of closing stock from LIFO and FIFO at the insistence of the AO, is not borne out of record. Therefore, it follows that the difference in valuation arisen on account of adopting wrong method of valuation of closing stock which amounts to concealment of particulars of income. Therefore, in our considered opinion, the AO was justified in levying penalty u/s 271(1)(c) of the Act.

The reasoning of the CIT(A) that penalty cannot be levied in estimate basis, cannot be applied to the facts of the present case as no addition was made on estimate basis and the CIT(A) has allowed appeal on wrong premise. We reverse the finding of the CIT(A) and in this context ratio of the decision of the Hon'ble Supreme Court in the case of *MAK Data (P) Ltd. vs. CIT* (2013) 358 ITR 598 is squarely applicable wherein, it has been held that

addition made on voluntary disclosure does not absolve the assessee from penal provisions of the Act. The relevant paras. are reproduced below:

“6. We have heard counsel on either side. We fully concur with the view of the High Court that the Tribunal has not properly understood or appreciated the scope of Explanation 1 to Section 271(1)(c) of the Act, which reads as follows :-

"Explanation 1 - Where in respect of any facts material to the computation of the total income of any person under this Act, -

- (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or*
- (B) Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

7. The AO, in our view, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on

the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(l)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961. ”

8. Respectfully following the decision of the Hon'ble Supreme Court in the case of *MAK Data (P) Ltd.* (supra) the appeal filed by the revenue is allowed.

9. The assessee has raised the following grounds of cross objections :

1. The notice issued by the then Assistant Commissioner of Income tax, Circle 2(1), Hubli under section 271(1)(c) is bad in law. It suffers from incurable defect.
2. The notice issued by the then Assistant Commissioner under section 271(1)(c) is vague and does not specify in particular the default of the respondent. There was non-application of mind while issuing the show cause notice to the assessee to levy penalty u/s 271(1)(c).
3. The order of the learned Assessing Officer in passing the order u/s 271(1)(c) is without jurisdiction.
3. The notice issued by the then Assistant Commissioner under section 271(1)(c) is liable to be struck down as it is not in accordance with law.
4. The notice issued by the then Assistant Commissioner under section 271(1)(c) is liable to be held as invalid in view of the decision of the jurisdictional High Court and consequently the order levying penalty is liable to be cancelled.
5. Without prejudice, it is submitted that the order of the Commissioner of Income tax is legal and sustainable in total.
6. The appeal filed by the appellant is frivolous and liable to be dismissed.

15. We shall deal with the very maintainability of the present cross-objections. From the grounds of cross objections, it is clear that the assessee has raised the issue of validity of show cause issued u/s 274 r.w.s. 271(1)(c) of the Act. The provisions governing filing of cross-objections are found at sub-sec.(4) of sec.253 of the Act which read as under:

“Appeals to the Appellate Tribunal.

“253(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) or the Assessing Officer in pursuance

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*of the directions of the Dispute Resolution Panel has been preferred under sub-section (1) or sub-section (2) or sub-section (2A) by the other party, may, notwithstanding that he may not have appealed **against such order or any part thereof**; within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Assessing Officer (in pursuance of the directions of the Dispute Resolution Panel) or Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3) or sub-section (3A)."*

16. From a bare perusal of the above provision, it is clear that the legislature has chosen to use the expression 'against such order or any part thereof' which means that cross-objections can be filed with reference to same ground of appeal which is adversely decided against the respondent in appeal. If, there has been no adjudication on any of the grounds of appeal raised before the CIT(A), the cross objections cannot be filed on such a ground, though raised but not decided specifically. If the assessee is aggrieved by non-adjudication *per se*, assessee can come before the Tribunal only by way of an appeal only. Thus, having regard to plain provisions of statute, in absence of non-adjudication of ground by the CIT(A), assessee can come only by way of appeal before the Tribunal, not by way of cross objections. In the present case, the CIT(A) had no occasion to deal with the issue raised by way of cross objections, as the assessee never contested this issue either before the AO or before the CIT(A). The cross objections do not widen the scope of subject matter of

appeal. Therefore, the cross objections are not maintainable and dismissed as such.

Order pronounced in the open court on 19th October, 2016

sd/-

(ASHA VIJAYARAGHAVAN)
JUDICIAL MEMBER

Place : Bangalore
D a t e d : 19/10/2016

sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

srinivasulu, sps

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)-II Bangalore
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore