

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.4549/Del./2011
(ASSESSMENT YEAR : 2001-02)

Shri Swami Saran Garg,
66, Kambal Wala Bagh,
Muzafarnagar.

vs. ITO, Ward 2 (3),
New Delhi.

(PAN : AATPG8622P)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri V. Raj Kumar, Advocate
REVENUE BY : Shri S.S. Rana, CIT DR

Date of Hearing : 20.09.2018

Date of Order : 03.10.2018

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

The appellant, Shri Swami Saran Garg (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 21.06.2011 passed by Ld. CIT (Appeals), Muzaffarnagar qua the assessment year 2001-02 on the grounds inter alia that:-

"1. That on the facts and in the circumstances of the case, the Ld. Commissioner Of Income Tax (Appeals) has erred in sustaining the levy of penalty U/S 271(1)(C) . He has not only failed to consider and appreciate the explanation given by the assessee in respect of the addition

of Rs 15,00,000/- but has solely limited his order to the findings of appeal orders emanating from the quantum assessment.

2. That the assessee pleaded vehemently of no reasonable opportunity having been provided by the Assessing Officer at the time of levying penalty. Only one notice dated 10-11-2009 is said to have been defaulted by the assessee, although it actually was not so, still the L'd Commissioner Of Income Tax (Appeals) has erred in disallowing application U/r 46A made by the assessee on this very flimsy ground and sustaining the hurried levy of penalty without giving a reasonable opportunity to the assessee.

3. That the powers and duty of the L'd Commissioner Of Income Tax (Appeals) are coextensive to the Assessing Officer and hence even if he felt that the penalty was unilaterally levied without opportunity to be correct, he failed in his duty to see that in arriving at the correct facts the appreciation of ample material presented before him in first appeal was of utmost importance. To this extent the L'd Commissioner Of Income Tax (Appeals) has erred in rejecting application U/r 46A and not considering the facts borne by cogent evidence before him.

4. That the L'd Assessing Officer has failed to appreciate that the agreement was executed on 01-12-2000 and after seven long years the Assessing Officer launched a manhunt for the purchaser company and its directors in October 2004. In this regard, he further failed to appreciate the law laid down in:

*CIT Vs Agarwal Pipe Company 240ITR 880 (Del.)
Kumar Agencies Vs ACIT 265 ITR 57 (Mumbai-TM)*

which were cited before him.

5. That the L'd Commissioner Of Income Tax (Appeals) has failed to see, that the assessee had originally filed the 'agreement to sell' with the return of income itself. In appeals regarding the quantum assessment, the assessee may have lost, but penalty proceedings, being quasi judicial, need extra evidence and material to work up to its levy.

6. That the authority of law propounded in :

*CIT Vs Value Capital Services P.Ltd. 307 ITR
334 (Delhi) and
CIT Vs Steller Investments Ltd 164 CTR 287 (SC)*

which were cited before him has completely escaped the kind attention of the L'd Commissioner Of Income Tax (Appeals) in as much as even-while the entry of Rs 15,00,000/- was treated as bogus, the evidence to prove that the assessee gave cash to purchase the said entry is absent.

7. That on page 9 para 7 of the assessment order the assessee has been held guilty of "furnishing inaccurate particulars", however on page 10 first para he has been held guilty of "concealment", Thus the charge against the assessee befitting the levy of penalty U/S 271(1)(C) is unspecific and hence the L'd Commissioner Of Income Tax (Appeals) has failed to appreciate that in these circumstances penalty was unexigible and further L'd CIT(A) has also not at all considered the law propounded by New Sorathia Engineering Co. Vs CIT 282 ITR 642 (Gujarat) which was cited before him.

8. That the L'd Commissioner Of Income Tax (Appeals) has failed to appreciate that the grounds for initiation of penalty U/S 271(1)(C) were never given to the assessee and a blind reliance was placed on the assessment only for levying penalty as in the impugned proceedings.

9. That the order of the L'd Commissioner Of Income Tax (Appeals) is arbitrary, against the facts and circumstances of the case, illegal and be therefore quashed outright.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : on the basis of completed assessment under section 143 (3)/147 of the Income-tax Act, 1961 (for short ‘the Act’) at the income of Rs.15,53,225/- after making addition of Rs.15,00,000/- on account of unexplained cash credit deposited in the bank u/s 68 of the Act, penalty proceedings were initiated u/s

271(1)(c) of the Act. On failure of the assessee to appear during the penalty proceedings, AO proceeded to conclude that the assessee has intentionally furnished inaccurate particulars of income regarding unexplained cash credit deposited of Rs.15,00,000/- in the bank and addition made thereon has been confirmed upto the Tribunal level, and levied the penalty of Rs.7,72,000/-.

3. Assessee carried the matter before the Id. CIT (A) by way of filing an appeal who has confirmed the penalty levied by the AO by dismissing the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Undisputedly, penalty of Rs.7,72,000/- has been levied u/s 271(1)(c) of the Act primarily on the ground of addition of Rs.15,00,000/- deposited in the bank in cash u/s 68 of the Act. It is also not in dispute that the addition of Rs.15,00,000/- has been confirmed upto the Tribunal. It is also not in dispute that the penalty has been imposed for intentionally furnishing “*inaccurate particulars of income*”.

6. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower Revenue authorities and arguments addressed by the Id. AR to the parties, the sole question arises for determination in this case is:-

“as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during assessment proceedings while interpreting the provisions contained u/s 271(1)(c) of the Act?”

7. The Id. AR for the assessee company challenging the impugned order contended inter alia that show-cause notice issued by the AO u/s 274, available at page 4 of the paper book is not a valid notice to initiate the penalty proceedings as the assessee company has not been made aware if it has concealed the particulars of income or has furnished inaccurate particulars of such income and relied upon the decision rendered by the Hon'ble Karnataka High Court in case of ***CIT vs. Manjunatha Cotton and Ginning Factory & Ors. 359 ITR 565 (Karn.)***; that the assessee has suo motu made disclosure of entire detail in the bank passbook which is not books of accounts but due to old age and ill health, he could not prove the facts.

8. However, Id. DR for the Revenue to repel the arguments addressed by the Id. AR for the assessee company contended inter

alia that the notice issued by the AO u/s 274 of the Act is not standalone document which is based on assessment order; that the notice has been issued in respect of furnishing inaccurate particulars of income and relied upon the cases of *Sundaram Finance Ltd. vs. CIT – (2018) 403 ITR 407 (Madras)*, *CIT vs. Smt. Kaushalya – (1995) 216 ITR 660 (Bombay)*, *Trimurti Engineering Works – 25 taxmann.com 363*, *Hybrid Rice International Pvt. Ltd. vs. CIT – ITA No.285/Del/2007*, *Earthmoving Equipment Service Corporation vs. DCIT - (2017) 166 ITD 113 (Mumbai)*, *DCIT vs. Shahrukh Khan – (2018) 93 taxmann.com 320 (Mumbai-Trib.)*, *Dhanraj Mills Pvt. Ltd. vs. ACIT – ITA Nos.3830 & 3833/Mum/2009*.

9. To proceed further, we would like to reproduce notice issued u/s 271(1)(c) of the Act for ready perusal :-

“NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME TAX ACT, 1961

Dated : 14.12.2007

To

***Sh. Swami Saran Garg,
66, Kambalwala Bagh,
Muzaffarnagar.***

Whereas in the course of proceedings before me for the assessment year 2001-02 it appears to me that you:-

~~Have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under Section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under Section 139(2)/148 of the Income-tax Act, 1961, No.....dated.....~~

have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139 (1) or by such notice.

~~have without reasonable cause failed to comply with a notice under section 22(4)(23(2) of the Indian Income-tax Act, 1922 or under Section 142(1)/143(2) Income-tax Act, 1961, No.....dated.....~~

Have concealed the particulars of your income or..... furnished inaccurate particulars of such income.

You are hereby requested to appear before me at 11.00 AM/PM on 28.12.2007 and show cause why an order imposing a penalty on you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271(1)(c).

Sd/-
(M.R. GUPTA)
Assessing Officer”

10. Undisputedly, additions made against the assessee during quantum proceedings have already been confirmed. It is settled principle of law that the penalty cannot be imposed merely on the ground that additions made in the income of the assessee has been confirmed rather to proceed with imposition of penalty u/s

271(1)(c), the AO has to prove that there was concealment of particulars of income or assessee has furnished inaccurate particulars of such income.

11. Bare perusal of the notice issued to the assessee u/s 271(1)(c) of the Act reproduced above goes to prove that assessee has not been called upon to explain if he has concealed the particulars of income or furnished inaccurate particulars of such income rather a tick has been marked against both the charges mentioned in the printed proforma. Hon'ble Karnataka High Court in case of *CIT vs. Manjunatha Cotton and Ginning Factory & Ors.* (supra) dealt with the identical issue threadbare and came to the following conclusion :-

“63. In the light of what is stated above, what emerges is as under:

- a) Penalty under Section 271(1)(c) is a civil liability.***
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.***
- c) Willful concealment is not an essential ingredient for attracting civil liability.***
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.***
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.***

f) Ever if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

i) The imposition of penalty is not automatic.

j) Imposition of penalty even if the tax liability is admitted is not automatic.

k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

m) If the explanation offered, even though not substantiated by the assessee, but is found to be

bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to

the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.”

12. So, following the law laid down by Hon’ble High Court, we are of the considered view that when the assessee has not been specifically made aware of the charges leveled against him as to whether there is a concealment of income or furnishing of inaccurate particulars of income on his part, the penalty u/s 271(1)(c) of the Act is not sustainable. The case law relied upon by the Id. DR are not applicable to the facts and circumstances of this case in the face of the decisions rendered by the Hon’ble High Court in *Manjunatha Cotton and Ginning Factory & Ors.* (supra), affirmed by the Hon’ble Apex Court.

13. On merits even, when we examine the copy of return along with computation of income, receipt and capital account and balance sheet at page nos.15 to 18 of the paper book, it contains the entire detail as to the amount held to be unexplained cash deposit in the bank by the assessee and in these circumstances, it does not amount to concealing the particulars of income or furnishing of inaccurate particulars of income during assessment proceedings.

Moreover, entry for the advance received by the assessee in his bank passbook cannot be termed as books of account so as to attract the provisions contained u/s 68 of the Act.

14. Hon'ble Supreme Court in a case cited as **CIT vs. Reliance Petro Products Pvt. Ltd. – 322 ITR 158 (SC)** decided the identical issue in favour of the assessee. Operative part of which is reproduced for ready reference as under :-

“A glance at the provisions of section 271(1)(c) of the I.T. Act, 1961 suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word “particulars” used in section 271(1)(c) would embrace the detail of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate

particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”

15. In view of what has been discussed above, we are of the considered view that AO/CIT (A) have erred in levying/confirming the penalty of Rs.7,72,000/- which is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 3rd day of October, 2018.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 3rd day of October, 2018
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Muzaffarnagar.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**