

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.693/Ind/2016

Assessment Year 2008-09

Shri Varad Mehta, B-4/301, Paras City, Arera Colony, Bhopal (Appellant)	Vs.	DCIT 1(1), Bhopal (Respondent)
PAN No.AFLPM6733Q		

Revenue by	Shri Rajeeb Jain, Sr.DR
Assessee by	Shri Girish Agrawal,CA
Date of Hearing	27.11.2018
Date of Pronouncement	06.12.2018

ORDER

PER MANISH BORAD, AM.

The above captioned appeal is filed at the instance of assessee pertaining to Assessment Year 2008-09 and is directed against the orders of Ld. Commissioner of Income Tax (Appeals)-I (in short 'Ld.CIT(A)'), Bhopal dated 21.03.2016 which is arising out of the order u/s 271(1)(c) of the Income Tax Act 1961(In short the 'Act') dated 28.03.2013 framed by DCIT-1(1), Bhopal.

2. Apart from raising an additional ground challenging the legality of the initiation of penalty proceedings u/s 271(1)(c) of the Act on merits the assessee has raised following grounds of appeal;

“1. In the facts and circumstances of the case and in law, Ld.CIT(A)-1, Bhopal erred in confirming the penalty of Rs.16,00,000/- u/s 271(1)(c) levied by Ld.A.O which is contrary to the facts and the applicable law”

3. We find that though the assessee has not raised the legal ground at the time of filing the appeal but in our considered opinion and following the ratio of judgment of Hon'ble Apex Court in the case of National Thermal Power Company Limited 229 ITR 383(SC) as well as in the case of Jute Corporation of India 178 ITR 668 (SC) the additional legal grounds raised before us deserves to be admitted for adjudication in as much as the same involves point of law which does not require any further investigation of facts. It is also clear that the issues raised in the additional ground of appeal goes to the root of the jurisdiction of the Assessing Officer to levy the penalty u/s 271(1)(c) of the Act and therefore the same are relevant to determine the liability of the assessee for penalty u/s 271(1)(c) of the Act. Accordingly the additional ground is admitted for adjudication.

4. Briefly stated facts as culled out from the records are that the assessee is an individual carrying out the business of running marriage garden. Income of Rs.12,93,110/- shown as income in the income tax return filed on 31.03.2009. A survey u/s 133A of the I.T. Act was conducted at the premises of the assessee on 22.02.2008. The appellant had accepted undisclosed income of Rs.10 lakhs during the survey and the said surrendered income was duly shown by the appellant in the return of income filed by him. The assessment u/s 143(3) of the Act was completed by adding payments made out of undisclosed sources at Rs.40,00,000/-, 5,00,000/- and Rs.6,00,000/- with the income returned at Rs.12,93,110/- thus assessing the total income at Rs.63,93,110/- Subsequently penalty proceedings u/s 271(1)(c) of the Act were initiated for concealing the income by furnishing wrong particulars of income. The assessee remained non compliant to the notices of hearing given by the Learned Assessing Officer (In short 'Ld.A.O') on various occasions. Penalty proceedings completed after levying penalty of Rs.16,00,000/- on the concealment of income of Rs.51,00,000/- for the alleged payments made out of undisclosed sources of income for purchase of

immoveable property.

5. Aggrieved assessee preferred an appeal before Ld.CIT(A) and again did not appear for almost 12 occasions which was sufficient to infer by Ld.CIT(A) that the assessee has nothing material to place on record to challenge the findings of Ld. A.O. Ld.CIT(A) confirmed the levy of penalty u/s 271(1)(c) of the Act.

6. Aggrieved assessee is now in appeal before the Tribunal challenging the legality of the penalty proceedings as well as raising grounds on merits challenging the penalty levied u/s 271(1)(c) of the Act at Rs.16,00,000/-.

7. Ld. Counsel for the assessee submitted that as per provisions of Section 271(1)(c) of the Act the penalty can be initiated either for concealing the particulars of income or for furnishing inaccurate particulars of income, whereas the Ld.A.O has recorded the charge as 'furnished wrong particulars and concealed the income'. Placing reliance on the judgments mentioned in the written submission reproduced below, the Ld. Counsel for the assessee contended that the Ld.A.O has failed in comply the provisions of section 271(1)(c) of

the Act by initiating the penalty proceedings with no specific charge. The relevant extract of written submissions given by Ld. Counsel for the assessee are reproduced below;

“Ground No.1:In the facts and circumstances of the case and in law, Ld. CIT(A)-I, Bhopal erred in confirming the penalty of Rs. 16,00,000 u/s 271{1}(c) levied by Ld. AO which is contrary to the facts and the applicable law.

1. The quantum appeal for the above on which penalty proceedings have been initiated was filed before the Hon'ble Bench vide ITA No. 122/IND/2012 which was disposed off for non prosecution vide order dated OB.05.2012.

2. Appellant had filed an MA against this order of the Hon'ble Bench vide MA No. 64/IND/2016. This application of the appellant was dismissed being barred by limitation vide order dated 16.09.2016. Presently, appellant is before Hon'ble High Court against the order disposing the MA.

3. Ld. AO had initiated penalty proceedings u/s 271(1)(c) by stating that assessee has furnished wrong particulars and concealed the income. [AO Page 2 para 6]

4. Ld. AO has failed to apply the provisions of section 271 which reads as under-

(1) .

(c) "has concealed the particulars of his income or furnished inaccurate particulars of such income, or”

From the plain reading of the section, it is very clear that penalty under

section 271(l)(c) can be initiated either for concealment of particulars of income or for furnishing inaccurate particulars of income.

Ld. AO has recorded the charge as –“furnished wrong particulars and concealed the income.”

Ld. AO has failed in applying the provisions of Section 271(l)(c) by initiating the penalty proceedings with no specific charge as to concealment or furnishing of inaccurate particulars.

5. Reliance is placed on following judicial precedents-

a. Hon'ble Kolkata Bench of ITAT in the case of Chandra Prakash Bubna - [2015] 64 taxmann.com 155 - order dated 21.05.2015 - Para 10 - "In this case, the Assessing Officer has not brought out any specific charge for which the penalty has been imposed on the assessee u/s 271(1)(c) of the Act. He has not brought out whether the assessee has concealed the particulars of income or whether the assessee has furnished inaccurate particulars of income.

Para 11- "The Assessing Officer in this case levied the penalty for both the charges without mentioning any specific charge. In CIT v. Atul Mohan Bindal [2009] 317 ITR 1/183 Taxman 444 (SC), where Hon'ble Supreme Court was considering the same provision, it observed that the assessing officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. Thus the satisfaction of the Assessing Officer about the concealment of particulars of income or furnishing of inaccurate particulars of such income is essential before levying any penalty u/s 271(1)(c). The Assessing Officer as is apparent from the penalty order has not satisfied about the concealment of particulars of income or furnishing of inaccurate particulars of income on the part of the

assessee. On this basis itself the penalty deleted." [emphasis supplied]

In the instant case, as Ld. AO failed to initiate the penalty proceedings without creating any specific charge, appellant contends that the penalty order be quashed.

6. While passing the penalty order, Ld. AO has imposed penalty on concealment of particulars of income and the same is confirmed by Ld. CIT(A) by stating that the appellant has not offered any explanation in regard to concealment of income either during penalty proceedings or during appeal proceedings. [CIT(A) order page 6 para 11]

Appellant, had already offered detailed explanation on the various property deals relating to the addition made by the Ld. AO in his statement recorded u/s 133A during the course of survey proceedings. Ld. CIT(A) failed to consider the same while disposing the appeal. [PB 11- 23]

7. From the assessment order, the additions made are without reference to any specific section under which they are made. It merely states - "Payments made out of undisclosed sources". [AO Para 7]
8. Even if it is presumed that Ld. AO without referring any specific provision meant addition falling in one of the sections from 69 to 69D of the Act, these are all deeming provisions.
9. A deeming provision may be intended to enlarge the meaning of a particular word or to include matters which otherwise may not fall within the main provision. In construing a legal fiction, it is necessary to assume all those facts on which alone the fiction can operate, but, it cannot be extended beyond the purpose for which it is created or beyond the language of the section by which it is created. It cannot be extended by importing another fiction.

10. A legal fiction cannot be extended further by so interpreting it as to go beyond the Legislature's intention in creating the fiction. This is because legal fictions are created only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond their legitimate field. A legal fiction, no doubt, has to be carried to its logical conclusion but, that must be within the framework of the purpose for which it is created. It cannot be carried to an illogical length. One should not allow oneself to be so carried away by a legal fiction as to ignore the words of the very section which introduces it or its content or setting in the statute which contains that section. Also one should not lose sight of the purpose for which the legal fiction was introduced.

Accordingly, in the instant case, the provisions of Section 69 to 69D being deeming provisions cannot be extended to create another fiction for imposing penalty.

11. Reliance is placed on the following judicial precedents-

a. Hon'ble Gujarat High Court in the case of Baroda Tin Works - [1996] 221 ITR 661 - order dated 21.09.1995 - HEAD NOTE - Section 271(1)(c), read with section 69 of the Income-tax Act, 1961 - Penalty - For concealment of income _ Assessment year 1971-72 - Whether Explanation to section 271(1)(c) inserted with effect from 1-4-1976 by which presumption of concealment of particulars of income is raised on account of additions having been made or deductions being disallowed in returned income cannot be held to be retrospective in operation - Held, yes _ Whether fiction created under sections 68, 69, 69A, 69B and 69C by itself, cannot be extended to penalty proceedings to raise a presumption about concealment of such income - Held, yes - Whether on a finding that return of income which is less than 80 per cent of assessed income is not result of fraud or gross or wilful neglect, penalty cannot be sustained by raising a presumption of concealment of income under the

Explanation to section 271(1)(c) - Held, yes .

b. Hon'ble Karnataka High Court in the case of M.M. Gujamgadi - [2007] 162 Taxman 211 - order dated 08.02.2005 - HEAD NOTE - Section 271(1)(c), read with section 68, of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessing Officer found a sum of Rs. 2,01,000 in books of account of assessee - Assessing Officer issued notice to assessee asking him to explain source of said amount - Assessee replied that he borrowed same from different creditors - However, despite best efforts, assessee could not secure creditors as witnesses to substantiate his claim - Having no other alternative, assessee voluntarily offered to treat said amount as cash credit - On basis of submission of assessee, Assessing Officer passed an assessment order adding said amount to total income and on that amount assessee paid taxes - Subsequently, Assessing Officer imposed penalty under section 271(1)(c) treating aforesaid amount as concealed income of assessee - Tribunal, however, set aside penalty order - Whether it could be said that explanation of assessee for non-inclusion of amount in question in his return of income was bona fide - Held, yes - Whether, therefore, order passed by Tribunal setting aside penalty proceedings was just and proper - Held, yes

c. Hon'ble Chennai Bench of ITAT in the case of T. Kodeeswaran - [2009] 33 SOT 3 - order dated 20.10.2008 - HEAD NOTE - Section 271(1)(c), read with sections 144 and 132, of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 1986-87 - Whether there could be no concealment of income for a particular year, within meaning of section 271(1)(c), if for that year no return of income was filed by assessee - Held, yes - Whether where additions made were worked out on basis of pure estimation and those additions did not represent money, bullion, jewellery or other valuable article or thing, of

which assessee was found to be owner in course of search, provisions of Explanation 5 to section 271(1)(c) were wrongly applied to such additions
- Held, yes

d. Hon'ble Jurisdictional Bench of Indore ITAT in the case of Shri Jayesh Parmar - ITA No. 279/IND/2013 - order dated 20.09.2015 - following the above mentioned decisions deleted the penalty imposed. .'

Considering the above facts of the case, circumstances, submissions made, documents on record, judicial precedents, the penalty imposed for Rs. 16,00,000 ought to be deleted”.

8. Reliance was placed on following judgments;

(i) Chandra Prakash Babna (2015) 64 taxmann.com 155 (Kolkatta-Trib)

(ii) Baroda Tin Works (1996) 221 ITR 661 (Gujrat)

(iii)M.M. Gujamgadi (2007) 162 Taxman211 (Jar.)

(iv) T. Kodeeswaran (2009) 33 SOT 3 (Chennai) (URO)

(v) Dhanya Kumar Jain (2016) 27 ITJ 505 (Trib. Indore)

(vi)Jayash Parmar (2016) 27 ITJ 515 (Trib. Indore)

9. Ld. Counsel for the assessee also placed reliance on the judgments of Hon'ble jurisdictional High Court in the case of CIT V/s Kulwant Singh Bhatia ITA No.9/2018 dated 9.5.2018, judgment of Hon'ble High Court of Karnataka in the case of CIT V SSA's Emeralad Meadows ITA No.380/2015 dated 23.11.2015 and

also the judgment of Hon'ble High Court of Karnataka in the case of CIT V/s Majunatha Cotton Ginning Factory(2013) 359 ITR 565 in support of the legal ground that existence of conditions stipulated in Section 271(1)(c) of the Act are necessary for initiation of penalty proceedings u/s 271(1)(c) and the Assessing Officer has failed to mention the specific charge in the penalty notice issued u/s 274 r.w.s. 271(1)(c) of the Act.

10. Per contra Departmental Representative vehemently argued supporting the orders of lower authorities.

11. We have heard rival contentions and perused the records placed before us. The issues raised by the assessee revolves around the levy of penalty at Rs.16,00,000/- levied by the Ld. A.O and confirmed by Ld.CIT(A) on the addition of Rs.51,00,000/- from undisclosed sources for purchase of immovable properties. Perusal of records shows that the assessee remaining negligent and non compliant to various opportunities provided by the Ld. A.O as well as Ld.CIT(A) during the course of penalty proceedings as well as appellate proceedings towards the levy of penalty.

12. Now the assessee is in appeal before the Tribunal, firstly raising the legal issue pleading that Ld. A.O has wrongly initiated the penalty proceedings by not specifying the charge for levy of penalty i.e. whether the penalty proceedings has been initiated for concealing of particulars of income or for furnishing the inaccurate particulars of income. It was also pleaded by the Ld. Counsel for the assessee that though the Ld. Assessing Officer has made proper satisfaction on record in the assessment order for initiating penalty proceedings but in the notice issue u/s 274 r.w.s. 271(1)(c) of the Act, but Ld. A.O remained silent by not specifying as to which charge the penalty proceedings have been initiated. To examine this fact we have gone through the impugned notice issued for initiating the penalty proceedings u/s 271(1)(c) of the Act which is placed at Page-52 of the Paper book and the relevant extract is reproduced below:

To

Shri Varad Mehta

239, Sunny Palace M P Nagar Zone-1,

Bhopal

Sir / Madam,

Sub:- Penalty proceeding u/s .. 271(1) (c) ..

of the Income Tax Act 1961 for the AY 2008.09

In connection with the penalty proceedings u/s, 271(1) (c) for the assessment year(s) 2008-09 you are requested to attend my office on 18.01. 2010 at 11.00 AM to show cause why penalty should not be imposed. However, if you do not wish to be heard in person in this regard, you may submit your written submissions so as to reach me by the above date which will be considered before disposal of the matter.

Sd/-

(Shrikant Namdeo)

Deputy Commissioner of Income Tax-1(1), Bhopal

Bhopal

13. From perusal of the above show cause notice we find that the Ld.A.O has merely mentioned the section but the specific charge i.e. whether the penalty have been initiated for concealment of particulars of income or for furnishing inaccurate particulars of income has not been mentioned. Now whether such type of notice which does not speak about the specific charge leveled against the assessee is valid and tenable in the eyes of law needs to be examined.

14. We find that similar issue came up before the jurisdictional High Court in the case of Shri Kulwant Singh Bhatia (supra)

wherein the Hon'ble Court discussed the judgment of Hon'ble High Court in the case of CIT V/s Manjunatha Cotton Ginning Factory (*supra*) and CIT V/s SSA's Emerald Meadows (*supra*) held that "on due consideration of the arguments of the Ld. counsel for the appellant, so also considering the fact that the ground mentioned in show cause notice would not specify the requirement of law, as notice was not specific, we are of the view that Ld. Tribunal has rightly allowed the appeal of the assessee and set side the order of penalty enforced by the authority".

15. Similarly in the case of CIT V/s Manjunatha Ginning Factory, Hon'ble High Court of Karnataka held that "the notice issued u/s 274 r.w.s. 271(1)(c) of the Act should specifically mention the ground in section 271(1)(c) whether concealment of income or for furnishing in accurate particulars of income. Sending printed form where all ground of section 271(1)(c) would not mentioned the specific requirement of law. Assessee should know the grounds on which he has charged specific otherwise opportunities of natural justice denied. On the basis of such proceedings no penalty could be imposed to the assessee. Taking up the penalty proceedings on one

limb and finding the assessee in another limb is bad in law”.

Though in the instant appeal the Ld. A.O has made proper satisfaction in the body of the assessment order but in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act he failed to mention the limbs for which penalty proceedings have been initiated. It is the negligence of the Ld. A.O in not making proper specific charge in the notice u/s 274 about the addition for which penalty proceedings have been initiated. Ld. A.O should be clear as to whether the alleged addition goes under the limb of “concealment of particulars of income” or “furnishing inaccurate particulars of income”. Merely issuing notice in general proforma will negate the very purpose of natural justice as held by the Hon'ble Apex Court in the case of Dilip N Shraf 161 Taxmann 218 that “the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice.

14. We therefore respectfully following above referred judgments and in the given facts and circumstances of the case are of the considered view that the alleged notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 31.12.10 is invalid, untenable and suffers

from the infirmity of non application of mind by the Assessing Officer. We accordingly direct to delete the penalty of Rs.16,00,000/- imposed u/s 271(1)(c) on this ground itself. We accordingly allow the additional ground raised by the assessee on the legality of the penalty proceedings initiated u/s 271(1)(c) of the Act. Since the penalty u/s 271(1)(c) also has been dealt on the preliminary points other arguments of the assessee dealing with the merits of the levy of penalty are not been dealt with, as the same are rendered academic in nature and the appeal of the assessee for the Assessment Year 2008-09 is allowed.

15. In the result appeal of the assessee is allowed.

The order pronounced in the open Court on 06.12.2018.

Sd/-

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

दिनांक /Dated : 06 December, 2018

/Dev

Copy to: The Appellant/Respondent/CIT concerned/CIT(A)
concerned/ DR, ITAT, Indore/Guard file.

By Order,
Asstt.Registrar, I.T.A.T., Indore