

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "SMC" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER

ITA.Nos.4707/Del./2018
Assessment Year 2010-2011

Smt. Babita Khurana, B-7/100, Safdarjung Enclave Extn., New Delhi. PAN AJEPK0089L	vs.	The DCIT, Central Circle, Noida.
(Appellant)		(Respondent)

For Assessee :	Shri Sanjay Kumar Garg & Shri Akarsh Garg, Advocates.
For Revenue :	Shri S.L. Anuragi, Sr. D.R.

Date of Hearing :	26.02.2019
Date of Pronouncement :	08.03.2019

ORDER

This appeal by assessee has been directed against the order of Learned CIT(A)-IV, Kanpur, Dated 25th April, 2018, for the assessment year 2010-2011, challenging the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961.

2. Briefly the facts of the case are that original return of income was filed by the assessee on 22nd October, 2010, declaring total income of Rs.5,44,730/-. A search and

seizure operation was conducted under section 132 of the Income Tax Act on 9th October, 2013 on the business premises of the assessee comprising Shubhkamna Buildtech Group of cases. Notice under section 153A was issued and the assessee, in response thereto, declared total income of Rs.14,19,729/-. The assessing officer noted that in the return filed under section 153A, the assessee has shown income from short term capital gains to the tune of Rs.8,75,000/- which was not shown in the original return of income under Section 139(1) by her. The assessing officer, however, noted that assessee purchased a property at Gurgaon for a total cost of Rs.1,73,25,000/-. In assessment year under appeal, assessee has sold the same vide sale deed dated 7th December, 2009, in which, sale consideration has been shown at Rs.1,30,00,000/- and stamp duty expenses had been shown at Rs.9,10,000/-. The back side of the relevant page regarding computation of circle rate is not available. However, it has been found that the stamp duty expenses are 5% of the circle rate value. Thus, the circle rate of the property sold by the assessee comes to

Rs.1,82,00,000/-. The provisions of Section 50C was attracted in this case. Therefore, assessee filed revised return of income under section 153A declaring short term capital gain of Rs.8,75,000/- and has shown total income of Rs.14,19,730/-. The assessing officer accepted the return of income. However, the assessing officer mentioned in the assessment order *“penalty proceedings under section 271(1)(c) is initiated for concealment of income/filing inaccurate particulars of income.”* The assessing officer completed the assessment under section 143(3)/153A vide Order Dated 30th March, 2016. The assessing officer vide separate order, initiated the penalty proceedings against the assessee and issued show cause notice under section 274 read with section 271(1)(c) of the Income Tax Act on 25th February, 2015 for compliance on 14th May, 2016. But, no compliance was made by assessee, therefore, fresh notice was issued on 21st June, 2016 for levy of the penalty. The assessing officer, vide separate order, levied the penalty under section 271(1)(c) of the Income Tax Act, 1961 which is confirmed by the Learned CIT(A).

3. Learned Counsel for the Assessee submitted that prior to that the A.O. issued show cause notice before levy of the penalty under section 274 read with section 271 of the Income Tax Act, Dated 30th March, 2016, in which, the assessing officer has mentioned as under :

“why penalty u/s.271(1)(c) of IT Act may not be imposed upon you. Why penalty u/s 271B of IT Act may not be imposed upon you.”

3.1. He has submitted that prior to that assessing officer issued show cause notice on 25th February, 2015 for compliance on 14th March, 2016. However, by that time no assessment order under section 153A was passed. Therefore, the show cause notices issued are illegal and bad in law, particularly, it did not specify as to under which limb of Section 271(1)(c) of the Income Tax Act, penalty have been initiated against the assessee. In support of the said contention, he has relied upon order of ITAT, Delhi G-Bench in the case of Jagdamba Prasad Gupta, Delhi vs. ACIT, Circle-35(1), New Delhi, in ITA.No.1834/Del./2016, Order

Dated 21.01.2019. He has further submitted that no incriminating material was found during the course of search against the assessee and that addition in assessment year was made only on account of deeming provision under section 50C of the Income Tax Act. Therefore, it is not a case of concealment of income or filing inaccurate particulars of income.

4. On the other hand, Learned Departmental Representative submitted that merely because assessee declared the income in the return under section 153A is no ground to cancel the penalty. The Learned Departmental Representative relied upon the following orders.

- (1) Pr. CIT-21 vs. Dr. Vandana Gupta (2018) 92 taxmann.com 229 (Del.)
- (2) Sundaram Finance Ltd., vs. ACIT (2018) 403 ITR 407 (Mad.)
- (3) CIT vs. Smt. Meera Devi (2012) 212 Taxman 68 (Del.)
- (4) Shourya Towers (P) Ltd., vs. DCIT (2013) 359 ITR 523 (Del.).

5. After considering the rival submissions, I am of the view that penalty is not leviable in the matter. The assessing officer in the assessment order has mentioned that assessee was subjected to search and that assessment order was passed under section 153A of the Income Tax Act, 1961. The assessing officer did not mention anything in the assessment order, if any, incriminating material was found against the assessee during the course of search, so as to make the impugned addition account of short term capital gain. The assessing officer on the basis of the return of income filed by the assessee under section 153A, found that assessee has declared short term capital gains in a sum of Rs.8,75,000/-. The assessing officer, on further enquiry found that there is a difference in the purchase cost and the sale price as per circle rate, therefore, Section 50C was applied against the assessee. The assessing officer, however, accepted the return of income. It would, therefore, show that assessing officer accepted the return of income under section 153A and has not pointed-out, if any, material was recovered during the course of search in connection with

income declared on account of short term capital gains. Therefore, there is no question of considering it to be a case of concealment of income or furnishing inaccurate particulars of income because the addition was made by applying deeming provision of Section 50C of the Income Tax Act, 1961 and that return of income have been accepted under section 153A of the Income Tax Act, 1961. The Hon'ble Delhi High Court in the case of Principal CIT vs. Neeraj Jindal & Ankur Aggarwal (2017) 393 ITR 1 (Del.) held as under :

“Held, that since the return under section 153A had been accepted by the Assessing Officer there was no concealment of income. Moreover, for the relevant assessment years, 2005-06 and 2006-07, no material was recovered during the search. Rather, the assessee added Rs.21,65,932 in the return filed pursuant to notice under section 153A. That amount was not relatable to any sum recovered or article seized. Therefore, the question of adding or not adding amounts after the search

and falling within the mischief of Explanation 5 to section 271(l)(c) could not arise in the facts and circumstances of this case. The deletion of penalty was justified.”

5.1. Further it may be noted that the assessment order has been passed on 30th March, 2016 under section 153A of the Income Tax Act, 1961. Learned Counsel for Assessee referred to the show cause notice issued before levy of the penalty Dated 30th March, 2016 i.e., on the same day on which assessment order have been passed. The said notice is reproduced above, in which, the assessing officer has not mentioned as to under which limb of Section 271(1)(c) of the Income Tax Act, 1961, whether for concealment of income or filing inaccurate particulars of income, such notice have been issued. Further, the assessing officer, in the assessment order has initiated penalty proceedings under both the limbs of Section 271(1)(c). The assessing officer in the penalty order has also mentioned that he has issued show cause notice dated 25th February, 2015 for compliance on 14th March, 2016. This

show cause notice is prior to passing of the assessment order under section 153A on Dated 30th March, 2016 and as such, it would show that assessing officer, without any justification has issued show cause notice for levy of the penalty and would also show the assessing officer was bent open to levy the penalty against the assessee, even prior to passing of the assessment order. Such a course adopted by the assessing officer, is not permissible under Law. The issue is covered by the decision of Hon'ble Karnataka High Court in the case of M/s. SSA Emerald Meadows reported in 73 taxmann.com 241 under the similar circumstances because notice was found to contain both the limbs of Section 271(1)(c) of the Income Tax Act. The Judgement of the Hon'ble Karnataka High Court is confirmed by the Hon'ble Supreme Court by dismissing the SLP of the Department reported in 73 taxmann.com 248. Thus, the decisions relied upon by the Learned Departmental Representative would not support the case of the Revenue. In this view of the matter, I am of the view that penalty is

not leviable in the matter. I, Accordingly set aside the orders of the authorities below and the cancel the penalty.

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

Order pronounced in the open Court.

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 08th March, 2019

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.