IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA Nos.316 & 317/Bang/2017
Assessment year : 2008-09

M/s. Raicon Engineers, No.11, Cascading Meadows, T C Palya Main Road, K R Puram, Bengaluru – 560 036. **PAN: AAFFR 9137A**	Vs.	The Income Tax Officer, Ward 8(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Sharma, Advocate
Respondent by	:	Dr.P.V. Pradeep Kumar, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.06.2019
Date of Pronouncement	:	04.06.2019

O R D E R

Per N.V. Vasudevan, Vice President

ITA 317/Bang/2017

This appeal by the assessee is against the order of CIT(Appeals)-4, Bangalore dated 31.08.2016.

2. The assessee is a partnership firm engaged in the business of civil construction. There was a survey u/s. 133A of the Income-Tax Act, 1961 ["the Act"] in the case of assessee on 26.02.2009. The due date for filing return of income for AY 2008-09 was 31.10.2008. On the date of survey,

the assessee had not filed return of income for AY 2008-09. In the course of survey it was noticed by the Officer conducting the survey that assessee had not deducted tax at source on expenditure to the tune of Rs.30,09,087 on which tax was deductible as per the provisions of Chapter XVIIB of the Act. It was also noticed at the time of survey that there were expenditure to the tune of Rs.28,94,491 which were incurred in cash above the limits specified u/s. 40A(3) of the Act and was therefore liable to be disallowed (not allowable as deductible expenditure in computing income from business).

3. Since the assessee had not filed return of income for AY 2008-09, a notice u/s. 148 dated 27.02.2009 was issued by the AO. In response to the same, assessee filed return of income on 21.12.2009 declaring income of Rs.89,80,010. In the said return of income, the assessee had disallowed and added to the total income a sum of Rs.30,09,087 which was expenditure disallowable u/s. 40(a)(ia) and a sum of Rs.28,97,491 which was disallowable u/s. 40A(3) of the Act. The return filed by the assessee was accepted by the AO and an order of assessment was passed on 29.12.2009. In the order of assessment, the AO initiated penalty proceedings u/s. 271(1)(c) for furnishing inaccurate particulars. It is to be mentioned here that return of income was accepted by the AO, no additions were made and therefore initiation of penalty proceedings for furnishing inaccurate particulars of income appears to be not in order.

4. Against the aforesaid assessment order, the assessee filed appeal before the CIT(Appeals) and there was a delay of 725 days in filing the appeal before the CIT(A). When the returned income is accepted, the need for filing an appeal before CIT(A) is not discernible from the grounds of appeal filed by Assessee before CIT(A). The CIT(A) refused to condone

the delay in filing the appeal before him and dismissed the appeal of the assessee.

5. Aggrieved by the aforesaid order of CIT(Appeals), the assessee has filed this appeal before the Tribunal. At the time of hearing of appeal, the ld. counsel for the assessee filed a letter dated 03.06.2019 withdrawing the appeal of assessee. The appeal of the assessee is accordingly dismissed as withdrawn.

ITA 316/Bang/2017

6. We have already seen that in the assessment concluded for AY 2008-09 and the order dated 29.12.2009 passed u/s. 143(3) r.w.s. 147 of the Act that the AO accepted the income returned by the assessee, but nevertheless initiated penalty proceedings against the assessee for furnishing inaccurate particulars of income in respect of disallowance of expenses u/s. 40(a)(ia) and 40A(3) of the Act. The AO issued a show cause notice u/s. 274 of the Act for imposing penalty on the assessee u/s. 271(1)(c) of the Act. It is the case of the revenue that but for the survey u/s. 133A of the Act, the assessee would not have disallowed expenditure on which TDS was not deducted in view of the provisions of section 40(a)(ia) of the Act and expenses incurred in cash in violation of section 40A(3) of the Act. The plea of the assessee was that when the assessee has declared in the return of income the total income after making disallowance u/s. 40(a)(ia) and 40A(3) of the Act and when such return of income is accepted by the AO, there was no case for imposition of penalty u/s. 271(1)(c) of the Act, as there was neither concealment of particulars nor furnishing of inaccurate particulars of income. The revenue authorities (AO & CIT(A)) did not agree with the view taken by the assessee and held that the assessee concealed and furnished particulars of income and

imposed penalty u/s. 271(1)(c). Aggrieved by the action of CIT(A) in confirming the order of the AO imposing penalty, the assessee has filed appeal before the Tribunal.

7. The ld. counsel for the assessee filed before us show cause notice issued u/s. 274 before imposing penalty u/s. 271(1)(c) of the Act. He pointed out that in the aforesaid show cause notice, the AO has not struck off the irrelevant portion viz., as to whether the penalty is being proposed for concealing particulars of income or furnishing inaccurate particulars of income. He relied on the decision of the ITAT Bangalore Bench in the case of *Arun Kumar v. ACIT in ITA No.117/Bang/2016, order dated 16.12.2016* wherein the Tribunal following the decision of the Hon'ble High Court of Karnataka in the case of *CIT v. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar)* wherein it was held that when show cause notice imposing penalty does not specifically state that the ground on which penalty is sought to be levied viz., as to whether it is for furnishing inaccurate particulars of income or for concealment of income, the order imposing penalty is liable to be held as invalid. The ld. counsel for the assessee also brought to our notice the decision of ITAT Bangalore Bench in the case of *Vasavi Shelters in ITA Nos.499 & 500/Bang/2012 dated 22.2.2013* wherein the Tribunal on identical facts such as the case of assessee in the present appeal held that there should be no imposition of penalty when the income declared in the return of income is accepted as such by the AO. The following relevant observations are brought to our notice :-

> "13. There can be no concealment or non-disclosure, as the assessee had made a complete disclosure in the IT return and offered the surrendered amount for the purposes of tax and therefore no penalty under s. 271(1)(c) could be levied. The words 'in the course of any proceedings under this Act' in Sec. 271 (1)(c) of the Act are prefaced by the satisfaction of the AO or the CIT(A). When a survey

is conducted by a survey team, the question of satisfaction of AO or the CIT(A) or the CIT does not arise. One ITA Nos.499 & 500/Bang/2011 has to keep in mind that it is the AO who initiates penalty proceedings and directs the payment of penalty. He cannot record any satisfaction during the course of survey. Decision to initiate penalty proceedings is taken while making assessment order. It is, thus, obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the IT return filed by it. The assessee can furnish the particulars of income in his return and everything would depend upon the IT return filed by the assessee. This view gets supported by Explanations 4 as well as 5 and 5A of s. 271. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Sec. 271(1)(c) has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non- disclosure as the assessee had made a complete disclosure in the IT return and offered the surrendered amount for the purposes of tax."

8. The ld. DR relied on the order of CIT(Appeals).

9. We have considered the rival submissions and are of the view that in the given facts and circumstances, imposition of penalty cannot be justified. Firstly, the disallowances u/s.40(a)(ia) and Sec.40A(3) of the Act are statutory disallowances and there is no dispute about the genuineness of these expenses or that they were unrelated to the business of the Assessee. On such statutory disallowances, there cannot be imposition of penalty, especially when the Assessee had not made claim for deduction of these expenses in a return of income filed.

10. Secondly, there cannot be any penalty on income which is declared in a return of income, on the facts and circumstances of the present case. Penalty u/s.271(1)(c) of the Act is imposed for "concealing particulars of income or furnishing inaccurate ITA Nos.499 & 500/Bang/2011 particulars of income". When an income which is ultimately brought to tax is declared in a return of income, there can be no question of treating the Assessee as having "concealed particulars of income or furnished inaccurate particulars of income". The starting point of determining concealment for imposing penalty is the return of income. If the return of income declares income which is ultimately brought to tax there can be no complaint by the revenue that the Assessee is guilty of "concealing particulars of income or furnishing inaccurate particulars of income. The decision of the Tribunal in the case of *Vasavi Shelters (supra)* supports the plea of assessee in this regard.

11. Apart from the above, we also find that the show cause notice (at pages 31 & 32 of PB) issued by the AO before imposing penalty does not specify the charge against the assessee for which the penalty is sought to be imposed viz., as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. In the circumstances, the decision of the Hon'ble High Court of Karnataka in the case of *Manjunatha Cotton & Ginning Factory (supra)* will apply and imposition of penalty has to be held to be not sustainable in view of the aforesaid decision. We therefore hold that penalty imposed u/s. 271(1)(c) of the Act is not sustainable and the same is directed to be cancelled.

12. In the result, ITA No.316/Bang/2017 is allowed, while ITA No.317/Bang/2017 is dismissed.

Pronounced in the open court on this 4th day of June, 2019.

Sd/-	Sd/-
(B.R. BASKARAN) Accountant Member	(N.V. VASUDEVAN) VICE PRESIDENT

Bangalore,
Dated, the 4th June, 2019.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.