

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR
श्री रमेश सी शर्मा, लेखा सदस्य एवं श्री विजय पाल राव, न्यायिक सदस्य के समक्ष
BEFORE: SHRI RAMESH C SHARMA, AM & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./ITA No. 675/JP/2017
निर्धारण वर्ष / Assessment Year :2008-09

Shri Harish Chand Narang, Prop. - M/s Gaurav Stone, Murrki Tehsil Bayana, Distt. - Bharatpur-321401.	बनाम Vs.	A.C.I.T., Circle- Bharatpur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACSPN 1776 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Manish Agarwal (CA)
राजस्व की ओर से / Revenue by : Shri Ashok Khanna (JCIT)

सुनवाई की तारीख / Date of Hearing : 26/03/2019
उदघोषणा की तारीख / Date of Pronouncement : 11/06/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by the assessee against the order of Id.CIT(A), Alwar dated 01/06/2017 for the A.Y. 2008-09 in the matter of imposition of penalty U/s 271(1)(c) of the Income Tax Act, 1961 (in short the Act). Following grounds have been taken by the assessee:

"1 On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in confirming levied by Ld. AO by ignoring the fact that penalty proceedings were initiated for furnishing inaccurate particulars of income whereas penalty was levied for concealment of income as well as for furnishing inaccurate

particulars of income, which is not in accordance with law. It is therefore prayed that penalty levied u/s 271(1)(c) is not accordance with law and deserves to be deleted.

2. *On the facts and in the circumstances of the case the Ld. CIT(A) has grossly erred in confirming penalty of around 80,936/- levied u/s 271(1)(c) of the income Tax Act, 1961 on the additions of Rs.2,61,930/- made by Ld. AO, alleging the same as Shortage of Stock arbitrarily solely relying upon conclusions drawn in assessment proceedings though penalty proceedings are separate and distinct proceedings, thus the penalty so confirmed deserves to be deleted.*
3. *The appellant craves the right to add, delete or amend any of the grounds of appeal either before or at the time of hearing of appeal.”*

2. Rival contentions have been heard and record perused. From the record we found that a survey under section 133A of the Act was conducted at the business premises of the assessee on 18/03/2008. During the course of survey operation, short stock of Rs. 7,77,010/- was detected on physical verification and after addition on account of perceived sale of short stock, a total addition of Rs. 2,61,930/- was made in the assessment. The CIT(A) and thereafter the ITAT, Jaipur Bench in its order dated 08/02/2017 have confirmed the addition of Rs. 2,61,930/-. The A.O has levied penalty u/s 271(1)(c) of the Act on this amount.

3. By the impugned order, the Id. CIT(A) has confirmed the action of the A.O. for levy of penalty, against which the assessee is in further appeal before us.

4. It was argued by the Id. AR of the assessee that the penalty proceedings in the case of assessee were specifically initiated for furnishing inaccurate particulars of income as has been evident from the perusal of the assessment order at page 15 para 1. However, while imposing the penalty, Id. AO has recorded the conclusion that assessee has concealed the income in addition to furnishing of inaccurate particulars of income.

5. The Id AR has further submitted that while initiating penalty u/s 271(1)(c) of the Act the AO has recorded satisfaction and directed initiation of penalty for 'furnishing of inaccurate particulars of income', which is evident from the assessment order, whereas in the penalty order the same has been levied alleging 'concealment of income and also furnishing of inaccurate particulars of income. According to provisions of sec. 271 (1)(c), the AO has to show that the assessee has either concealed his income or has furnished inaccurate particulars of income. Concealment of income is quite different from furnishing inaccurate particulars of income and the satisfaction recorded during

assessment proceedings regarding the kind of charge i.e. whether penalty proposed is for furnishing inaccurate particulars or for concealment of income has to be confirmed in the penalty order. Thus, if penalty is proposed for one charge the assessee cannot be found guilty of another while imposing penalty.

6. Reliance was placed on the decision of the Hon'ble ITAT Amritsar bench, in the case of HPCL Mittal Energy Ltd. Vs. ACIT in ITA No. 554 & 555/ Asr/2014 dated 03.05.2018. wherein it has been held that where satisfaction of the AO while initiating penalty proceedings u/s 271(1)(c) of the I T Act is with regard to alleged 'concealment of income' by the assessee, whereas imposition of penalty is for 'Concealment/ furnishing inaccurate particulars of income', the levy of penalty is not sustainable.

7. On the other hand, the Id DR has submitted that no objection was raised by the assessee either before the A.O. or before the Id. CIT(A) with regard to recording of satisfaction for initiating the penalty. He has further submitted that quantum addition was made with reference to the survey carried out at the assessee's business premises wherein physical stock was taken and it was found that the assessee has sold the goods without entering in the regular books of

account, accordingly, profit on such unaccounted sale was brought to tax which amounts to concealment of income. Accordingly, the A.O. was justified in levying the penalty U/s 271(1)(c) of the Act.

8. We have considered the rival contentions and carefully gone through the orders of the authorities below. We had considered the written submissions filed by the assessee wherein various judicial pronouncements were relied upon. We had deliberated all these judicial pronouncements with reference to the factual matrix of the case. With regard to illegality of the penalty, the Id AR has relied on the decision of Amritsar Bench of the ITAT in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra). As per the Id AR while initiating the penalty proceedings with regard to alleged "concealment of income" and imposing penalty for the other charge i.e. furnishing of inaccurate particulars/concealment, the levy of penalty is not sustainable. We had carefully gone through the order of the Amritsar Bench of the ITAT in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra) wherein the Tribunal have observed that after insertion of sub-section (1B) to Sec. 271 w.e.f. 01/4/1989, the A.O. need not specifically record in the quantum order as to whether each item of addition/disallowance is a case of concealment of particulars of

income or furnishing of inaccurate particulars of income. The Tribunal have further observed that deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income.

9. With regard to levy of charge at the stage of initiation of penalty by issue of notice U/s 274 vis a vis charge levied in the penalty order U/s 271(1)(c) of the Act, the precise observation of the Tribunal was as per para 15 which reads as under:

"15. The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of

income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s 271(1)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law."

10. The sum and substance of above decision is that the nature of specification of charge by the A.O. at the stage of initiation of penalty proceedings at the time of issue of notice U/s 274 read with Section 271(1)(c) of the Act and at the time of passing the penalty order U/s

271(1)(c) should not be at variance. If there is any variance between the charge levied at the time of initiation of penalty proceedings and the charge levied at the time of imposition of penalty, the penalty order will be vitiated and penalty cannot be sustained. However, if the charge are same then no fault can be found with regard to defect in notice so as to hold that the penalty is not leviable.

11. Now we consider the facts of the instant case with reference to the judicial pronouncements discussed hereinabove, we found that for initiating the penalty the A.O. has issued notice U/s 274 of the Act on 27/12/2010 for "concealment and furnishing of inaccurate particulars of his income". Thereafter considering the assessee's contention, the A.O. has passed order on 18/03/2015 wherein the penalty was levied after having the following observation:

"In view of the above discussion, the assessee has concealed his income and also furnished inaccurate particulars of his income. Thus, it is a fit case for imposing penalty U/s 271(1)(c) of the I.T. Act."

12. It is clear that both at the time of initiation of penalty as well as at the time of imposing the penalty, the charge of the A.O. was same i.e. "concealment of income and also for furnishing inaccurate particulars of income". This situation is covered by the proposition laid down by the

Coordinate Bench in the case of HPCL Mittal Energy Ltd. Vs ACIT (supra). Accordingly, we hold that the penalty has been correctly levied in so far as the charge for initiation of penalty as well as charge while levying the penalty was same. Thus, we do not find any merit in the contention of the Id AR.

13. With regard to merit of penalty so imposed U/s 271(1)(c) of the Act, we found that there was survey at the business premises of the assessee wherein it was found that the assessee has made unaccounted sales, therefore, stock was found short on physical verification. To the extent of profit on such short stock, addition was made. This addition was confirmed by the Id. CIT(A) and thereafter by the ITAT. Thus, there is no dispute with regard to the concealment of income and furnishing of inaccurate particulars of income, in so far as the addition has been upheld up to the last extent. It has not been shown by the Id AR as to whether the order of the Tribunal was challenged before the Hon'ble High Court and the Hon'ble High Court has accepted substantial questions of law so as to suggest that it is debatable issue. Accordingly, we do not find any infirmity in the penalty so imposed.

14. Considering the totality of facts and circumstances of the case and the judicial pronouncements, we are inclined to agree with the Id DR that the A.O. was justified in imposing penalty for the discrepancy found in the stock at the time of survey at assessee's premises.

15. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 11th June, 2019.

Sd/-
(विजय पाल राव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Sd/-
(रमेश सी शर्मा)
(RAMESH C SHARMA)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 11th June, 2019

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Harish Chand Narang, Bharatpur.
2. प्रत्यर्थी / The Respondent- The A.C.I.T., Circle- Bharatpur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 675/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar