

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

श्री सी.एम.गर्ग, न्यायिक सदस्य एवं श्री एल.पी.साहु, लेखा सदस्य के समक्ष

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./ITA Nos.40 to 45/CTK/2019

(निर्धारण वर्ष / AYs. : 2010-2011 to 2015-2016)

Dr. Subash Chandra Jena, Plot No.5/52, Gajapati Nagar, Bhubaneswar-751001	Vs.	ACIT, Central Circle, Cuttack
स्थायी लेखा सं./PAN No. : ABRPJ 2247 E		

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
------------------------	----	---------------------------

निर्धारिती की ओर से /Assessee by	:	Shri J.M.Pattnaik, Advocate
राजस्व की ओर से /Revenue by	:	Shri Piyush Kolhe, CIT-DR

सुनवाई की तारीख / Date of Hearing	:	17/12/2019
घोषणा की तारीख/Date of Pronouncement	:	08/01/2020

आदेश / ORDER

Per Bench :

These are the appeals filed by the assessee against the two separate orders of CIT(A)-2, Bhubaneswar, i.e. one dated 11.12.2018 for the assessment years 2010-2011 & 2011-2012 and other dated 28.11.2018 for the assessment years 2012-2013 to 2015-2016.

2. First we shall take up appeals of the assessee for assessment years 2010-2011 & 2011-2012 in ITA Nos.40 & 41/CTK/2019, wherein the sole issue involved is with regard to confirming the penalty levied u/s.271(1)(c) of the Act.

3. Brief facts of the case are that the assessee was working in Government of Odisha as a Doctor and also engaged in private practice

in nursing home of his wife Smt. Ranjita Jena in the name of 'Jena & Jena Nursing Home' and filed his original return of income on 17.08.2010 for the assessment year 2010-2011 disclosing total income at Rs.5,82,150/- and for the assessment year 2011-2012 the assessee filed his return of income on 26.08.2011 declaring total income at Rs.7,37,250/-. A search and seizure action u/s.132 of the Act was conducted against the assessee on 03.09.2015 in the business premises of Companies at Cuttack and residential premises of the Directors at Cuttack and Bhubaneswar and residential premises of above assessee at Talcher. In consequence to that search, the AO issued notice u/s.153A of the Act and in pursuance to the same the assessee filed his return of income on 16.02.2017 disclosing total income of Rs.5,82,279/- and revised return was filed on 21.11.2017 disclosing total income of Rs.6,45,586/-. Similarly, the assessee in pursuance to notice u/s.153A of the Act filed his return of income for the assessment year 2011-2012 on 16.02.2017 disclosing his total income at Rs.7,11,720/- and revised return was filed on 21.11.2017 declaring total income at Rs.7,91,720/-. During the course of assessment proceedings, the AO found that the assessee has disclosed additional income of Rs.1,00,000/- under the head professional income as compared to the income disclosed in the return filed u/s.139(1) of the Act for A.Y.2010-2011 and Rs.54,470/- for the assessment year 2011-

2012. During the course of assessment proceedings, Rs.50,000/- was discovered from the bank statement as unexplained investment also. Accordingly, the AO completed the assessment u/s.153A of the Act assessing total income of the assessee at Rs.6,95,590/- for the assessment year 2010-2011 and Rs.7,91,720/- for assessment year 2011-2012. Consequently, the AO initiated penalty u/s.271(1)(c) of the Act and penalty order was passed on 28.06.2018 levying penalty of Rs.46,350/- for A.Y.2010-2011 and Rs.24,436/- for the assessment year 2011-2012, respectively.

4. Feeling aggrieved with the penalty order, the assessee preferred appeals before the CIT(A), however, the CIT(A) after considering the submissions of the assessee and findings of AO, upheld the penalty so levied by the AO u/s.271(1)(c) of the Act for both the assessment years under consideration.

5. Further feeling aggrieved with the order of CIT(A), the assessee is in appeals before the Income Tax Appellate Tribunal.

6. Ld. AR before us submitted that the AO while imposing the penalty u/s.271(1)(c) of the Act on the ground that the assessee has disclosed excess income over and above the income declared in the original return, the same was not mentioned in the body of the show cause notice issued by the AO. It was also the contention of ld. AR that the assessee has challenged the penalty in both the appeals on two

grounds, firstly, when the assessee filed revised return and the return filed by the assessee u/s.153A of the Act was accepted as such by the AO and that income disclosed by the assessee u/s.153A of the Act was higher than the income in the original return filed u/s.139(1) of the Act, then such disclosure of additional income will not automatically lead to penalty. In this regard ld. AR relied on the decision of Hon'ble High Court in the case of Neeraj Jindal, (2017) 393 ITR 1 (Del). Accordingly, ld. AR submitted that the penalty imposed in both the appeals deserves to be deleted.

7. On the other hand, ld. DR relied on the orders of both the authorities below and submitted that in the returns filed in response to notice u/s.153A of the Act, the assessee has claimed that additional income has been received by him, which was not declared by him, in the returns furnished before the date of search for A.Y.2010-2011 & 2011-2012, therefore, the provisions of section 271(1)(c) r.w. Explanation 5A are applicable. It was also the contention of ld. DR that the assessee has not given any reasonable cause as to why the additional income was not disclosed earlier. Accordingly, ld. DR submitted that the penalty imposed by the AO and confirmed by the CIT(A) deserves to be upheld for the both the assessment years under appeals.

8. After considering the submissions of both the parties and perusing the entire material available on record, we find that in consequence of search, the AO issued notice u/s.153A of the Act and in response to which the assessee filed his return on 16.02.2017 disclosing total income of Rs.5,82,279/- and subsequently it was revised on 21.11.2017 disclosing total income of Rs.6,45,586/- for A.Y.2010-2011 and Rs.7,91,720/- for A.Y.2011-2012. During the course of assessment proceedings, the AO found that the assessee has disclosed additional income of Rs.1,00,000/- under the head professional income and Rs.50,000/- as unexplained investment as compared to the income disclosed in the return filed u/s.139(1) of the Act for A.Y.2010-2011 and Rs.54,470/- for the assessment year 2011-2012. It was also noted by the AO that the assessee could not disclose the said additional income u/s.139(1) of the Act, against which the AO initiated penalty proceedings u/s.271(1)(c) of the Act for concealment of particulars of income. In the appellate proceedings the CIT(A) observed that had there been no search, the additional income would not have been disclosed by the assessee. In this case, the date of search was 03.09.2015 and both the two previous years had ended before the date of search. In the returns filed in response to notice u/s.153A of the Act the assessee claimed that additional income has been received by him and the same was not declared by him in the returns filed before the

date of search, therefore the CIT(A) has rightly observed that provisions of Explanation 5A to section 271(1)(c) of the Act are applicable on account of concealment of particulars of his income or furnished inaccurate particulars of income, because all the conditions laid down in Explanation 5A have been met and the deeming provisions of section 271(1)(c) of the Act are clearly applicable to both the cases of the assessee. In view of the above, it is established beyond doubt that the assessee has concealed particulars of its income to the extent of additional income received by him. Ld. AR before us also could not bring any cogent material to controvert the above findings of the authorities below. Accordingly, we do not see any good reason to interfere in the orders of both the authorities below and, hence, we uphold the same and dismiss both the appeals of the assessee for A.Y.2010-2011 & 2011-2012, respectively. Thus, appeals of assessee for A.Y.2010-2011 & 2011-2012 in ITA Nos.40&41/CTK/2019 are dismissed.

9. Now, we shall take up the appeals of the assessee for assessment years 2012-2013 to 2015-2016 in ITA Nos.42 to 45/CTK/2019.

10. The sole issue involved in all these appeals is that the CIT(A) erred in confirming the action of the Assessing Officer in levying penalty u/s.271(1)(c) of the Act of Rs.34,427/- for A.Y.2012-2013,

Rs.50,540/- for A.Y.2013-2014, Rs.33,793/- for A.Y.2014-2015 and Rs.15,207/- for A.Y.2015-2016, respectively.

11. Since the issues involved in all the appeals are identical to each other, except different in figure, therefore, with the consent of both the parties, all the appeals are heard analogously and disposed off by this consolidated order. For the sake of convenience, we shall take into consideration the facts mentioned in ITA No.42/CTK/2019 for the assessment year 2012-2013 for deciding all the appeals.

12. Brief facts of the case are that the assessee was working in Government of Odisha as a Doctor and also engaged in private practice in nursing home of his wife Smt. Ranjita Jena in the name of 'Jena & Jena Nursing Home' and filed his original return of income on 21.09.2012 for the assessment year 2012-2013 disclosing total income at Rs.7,43,880/-. A search and seizure action u/s.132 of the Act was conducted against the assessee on 03.09.2015 in Cuttack Hospitals (P) Limited and group of cases and residential premises of the above assessee. In consequence to that search, the AO issued notice u/s.153A of the Act and in pursuance to the same the assessee filed his return of income on 16.02.2017 disclosing total income of Rs.8,74,000/- . During the course of assessment proceedings, the AO found that the assessee has disclosed his income of Rs.8,74,000/- in the return filed u/s.153A of the Act, whereas the assessee has shown total income in the return

filed u/s.139(1) of the Act at Rs.7,43,880/-. Therefore, the AO added the differential amount of Rs.1,30,120/- to the total income of the assessee as undisclosed income as the assessee failed to disclose the income before the proceedings u/s.153A of the Act and completed the assessment u/s.153A of the Act determining total income of the assessee at Rs.8,74,000/-. Consequently, the AO initiated penalty u/s.271(1)(c) of the Act and penalty order was passed on 28.06.2018 levying penalty of Rs.34,427/- for A.Y.2012-2013, Rs.50,540/- for A.Y.2013-2014, Rs.33,793/- for A.Y.2014-2015 and Rs.15,207/- for A.Y.2015-2016, respectively.

13. Feeling aggrieved with the penalty order, the assessee preferred appeals before the CIT(A), however, the CIT(A) after considering the submissions of the assessee and findings of AO, upheld the penalty so levied by the AO u/s.271(1)(c) of the Act for the above assessment years under appeals.

14. Further feeling aggrieved with the order of CIT(A), the assessee is in appeals before the Income Tax Appellate Tribunal.

15. Before us, ld. AR submitted that the AO in the assessment order has simply initiated penalty proceedings stating therein that penalty proceedings u/s.271(1)(c) of the Act has been initiated on the differential amount disclosed in the return of income filed u/s.153A of the Act, however, in the penalty order dated 28.06.2018, the AO has

used both the expression i.e. penalty is imposed by reason of concealment of income or furnishing inaccurate particulars of such income. It was also contended by the ld. AR that both assessment and the penalty order do not specify as to on which limb the AO intends to impose penalty u/s.271(1)(c) of the Act either for concealment of particulars of income or for furnishing of inaccurate particulars of such income. However, the CIT(A) without considering the above factual aspect, has upheld the action of the AO. Therefore, penalty levied by the AO and confirmed by the CIT(A) in all the appeals under consideration deserves to be deleted.

16. On the other hand, ld. DR relied on the orders of both the authorities below and submitted that in the returns filed in response to notice u/s.153A of the Act, the assessee has claimed that interest income and long term capital gain/short term capital gain has been received by him, which was not declared by him, in the returns furnished before the date of search for the assessment years under consideration, therefore, the provisions of section 271(1)(c) r.w. Explanation 5A are applicable. It was also the contention of ld. DR that the assessee has not given any reasonable cause as to why the bank interest and long term capital gain/short term capital gain was not disclosed earlier. Accordingly, ld. DR submitted that the penalty

17. After considering the submissions of both the sides and perusing the entire material available on record, we find that the AO in the assessment has initiated penalty u/s.271(1)(c) of the Act on the differential amount disclosed in the return of income filed u/s.153A of the Act by the assessee without mentioning either of the two limbs as provided under the provisions of Section 271(1)(c) of the Act i.e. for concealment of particulars of income or for furnishing of inaccurate particulars of such income. Thereafter in the penalty order dated 28.06.2018, also the AO while levying penalty u/s.271(1)(c) of the Act has used both the expression. For more clarification, we would like to reproduce the relevant observations made by the AO for A.Y.2012-2013 while passing the penalty order as under :-

“Under the provisions of section 271(l)(c) of the Income Tax Act, 1961, if the Assessing Officer in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income he may direct that such person shall pay by way of penalty in addition to tax, if any, payable by him, a sum which shall not be less than, but which j shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Therefore, considering the above mentioned facts and in the circumstances of the case, I deem this as a fit and proper case for imposition of penalty under section 271(l)(c) of the Income Tax Act, 1961.

Tax on the return filed u/s 153A of Rs.8,74,000/- - Rs.1,10,416 /-
Tax on the return filed u/s 139(1) of Rs.7,43,880/- -Rs. 75,989/-
Tax sought to be evaded - Rs. 34,427 /-

Minimum penalty imposable is 100% of tax sought to be evaded by reason of concealment of income or furnishing inaccurate particulars of such income, i.e. 100% tax Rs.34,427 /-

Maximum penalty imposable is 300% Imposed penalty of Rs.1,03,281 /- under section 271 (i)(c) of the Income Tax Act, 1961 on the assessee.

I hereby impose penalty of Rs.34,427/- (being 100% of tax sought to be evaded) u/s 271(l)(c) of the I. T Act, 1961 on the assessee. This order is passed with the prior approval of the Joint Commissioner of Income Tax, Central Range, Bhubaneswar, Issued demand notice and copy of the order to the assessee."

18. On perusal of the above, no doubt, it is clear that the AO is not sure on which count he intends to levy penalty as per the provisions of Section 271(1)(c) of the Act either for concealment of particulars of income or for furnishing of inaccurate particulars of such income. Both these situations are contradictory to each other. Neither the assessment order nor the penalty order nowhere states the specific charge of alleged concealment and/or furnishing of inaccurate particulars of income. Therefore, in our opinion, the entire penalty imposed by the AO and confirmed by the CIT(A) stands vitiated and, therefore, is not sustainable. In this regard, we would like to place reliance on the decision of Hon'ble Gujarat High Court in the case of Snita Transport Pvt. Ltd., 42 taxmann.com 54, wherein it is held that while passing final order, the AO has to record a specific finding accepting the fact that penalty is being imposed for concealment of particulars of income or for furnishing of inaccurate particulars of such

income. The relevant observations of the Hon'ble Gujarat High Court at para 9 read as under:-

"9. Regarding the contention that the Assessing Officer was ambivalent regarding under which head the penalty was being imposed namely for concealing the particulars of income or furnishing inaccurate particulars, we may record that though in the assessment order the Assessing Officer did order initiation of penalty on both counts, in the ultimate order of penalty that he passed, he clearly held that levy of penalty is sustained in view of the fact that the assessee had concealed the particulars of income. Thus insofar as final order of penalty was concerned, the Assessing Officer was clear and penalty was imposed for concealing particulars of income. In light of this, we may peruse the decision of this Court in case of Manu Engineering Works (supra). In the said decision, the Division Bench came to the conclusion that language of "and/or" may be proper in issuing a notice for penalty, but it was incumbent upon the Assessing Authority to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by them. If no such clear cut finding is reached by the authority, penalty cannot be levied. It was a case in which in final conclusion the authority had recorded that "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income." It was in this respect the Bench observed that "Now the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasicriminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."

19. Further, in all the cases, the revised return filed by the assessee has been accepted by the AO. Admittedly, it is also a fact that in the all the cases, both returned income and the assessed income are same. Therefore, when the revised return is accepted and the income is assessed as per the revised return, there is no scope for penalty. In this regard, we would like to place reliance on the order of the Delhi Bench of the Tribunal in the case of M/s OSE Infrastructure Ltd., ITA Nos.5891

to 5895/Del/2016, order dated 14.08.2018, wherein the Tribunal in para 15, 16 & 17, has held as under :-

“15. Be that as it may, as the facts indicate the entire dispute relates to the question whether the business is set up or not. Whether the assessee did any business or not is not relevant if the business is set up during the year under consideration. This is a debatable issue and was not finally decided by the AO because the assessee withdrew their claim by revising the return of income. As is held in the case of Neeraj Jindal (supra) and other cases relied upon by the assessee, the return of income filed pursuant to the notice u/s 153A takes the place of the return filed u/s 139(1) which was validly revised by the assessee even before any defect was pointed out by the learned AO. In such circumstances, in view of the decision in the case of CIT vs Reliance Petro Products P. Ltd. (2010) 322 ITR 158 (SC), no penalty could be levied.

16. Lastly, when the revised return is accepted and the income is assessed as per the revised income, there is no scope for penalty. In the case of Kirit Dahyabhai Patel vs ACIT, (2017) 80 Taxmann.com 162 (Guj), the Hon'ble High Court held that in view of specific provision of Section 153A, the return of income filed in response to notice u/s 153A is to be considered as return filed u/s 139, as the AO has made assessment on the said return and, therefore, the return has to be considered for the purpose of penalty u/s 271(1)(c) of the Act and the penalty is to be levied on the income assessed over and above the income returned u/s 153A, if any. Admittedly, in this matter both the returned income and the assessed income are nil. On this ground also, we cannot sustain the penalty order.

17. Viewing from any angle, we do not find any ground to sustain the penalty, as such, we find that the penalty proceedings have to be quashed. We do so accordingly.”

20. Considering the factual aspects of the matter as discussed in the foregoing paragraphs as well as respectfully following the judicial precedence, relevant observations of which reproduced above, we are of the view that the penalty levied by the AO u/s.271(1)(c) of the Act and confirmed by the CIT(A) is not sustainable in all the appeals under consideration. Accordingly, we set aside the impugned order passed by the CIT(A) and direct the AO to delete the penalty levied u/s.271(1)(c) of the Act of Rs.34,427/- for A.Y.2012-2013, Rs.50,540/- for A.Y.2013-

2014, Rs.33,793/- for A.Y.2014-2015 and Rs.15,207/- for A.Y.2015-2016, respectively and allow the sole ground raised in all the appeals under consideration. Thus, appeals of the assessee for A.Y.2012-2013 to 2015-2016 are allowed.

21. In the result, appeals of the assessee in ITA Nos.40&41/CTK/2019 are dismissed and ITA Nos.42 to 45/CTK/2019 are allowed.

Order pronounced in the open court on 08/01/2020.

Sd/-
(C.M.GARG)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(L.P.SAHU)

लेखा सदस्य / ACCOUNTANT MEMBER

कटक Cuttack; दिनांक Dated 08/01/2020

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रतिलिपि //True Copy//

आदेशानुसार/ BY ORDER,

(Senior Private Secretary)

आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack