

IN THE INCOME TAX APPELLATE TRIBUNAL  
PUNE BENCH "B", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND  
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

ITA No. 1645/PUN/2018

निर्धारण वर्ष / Assessment Year : 2013-14

ACIT, Circle-9, Pune	Vs.	M/s. East West Developers, N.B. Arcade, Near PCMC School, Main Road, Akurdi, Pune 411 035 PAN : AACFE0773C
Appellant		Respondent

Assessee by Shri Kishor Phadke  
Revenue by Shri Arvind Desai

Date of hearing 11-08-2022  
Date of pronouncement 16-08-2022

आदेश / ORDER

PER R.S. SYAL, VP :

This appeal by the Revenue is directed against the order passed by the CIT(A)-8, Pune on 12-07-2018 deleting the penalty of Rs.1,99,19,766/- imposed by the Assessing Officer u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2013-14.

2. Briefly stated, the facts of the case are that the assessee filed its return on 30-09-2013 declaring total income of Rs.6,56,97,090/-. The total income included a sum of

Rs.6,44,65,263/- declared by the assessee as additional income during the course of survey u/s.133A of the Act conducted on 25-10-2012. The Assessing Officer (AO) completed the assessment at the returned income and thereafter imposed the penalty u/s.271(1)(c) of the Act amounting to Rs.1,99,19,766/- on the surrendered income. The reason given by the AO was that the assessee disclosed additional income only as a result of the survey carried out u/s.133A of the Act. The penalty came to be deleted in the first appeal.

3. Having heard the rival submissions and gone through the relevant material on record, it is observed that the assessee was subjected to survey on 25-10-2012. During the course of survey proceedings, the assessee surrendered income of Rs.6.44 crore, which was promptly included in the return of income filed afterwards. The AO accepted the returned income and did not make any addition. After that, he imposed penalty on the amount offered by the assessee in the return of income pursuant to survey. Under these circumstances, a question arises as to

whether the assessee can be visited with penalty u/s.271(1)(c) on such income?

4. Explanation 1 to section 271(1) provides that where in respect of any facts material to the computation of total income, the assessee fails to offer an explanation or offers explanation which is found by the AO etc. to be false or he is unable to substantiate, “then the amount added or disallowed in computing total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed”. On going through the mandate of the Explanation, it becomes overt that the penalty is leviable in respect of the amount of *income added or disallowed in the computation of total income*. A particular income can be added only when it is not offered in the return of income. If it is offered in the return of income, then it cannot be said to be added by the AO for the purposes of Explanation 1 to section 271(1). Explanations 5 and 5A of section 271(1) deal with the imposition of penalty under this provision even where the income in the given

circumstances is declared in any return of income. The Explanations apply only in the case of search u/s.132 and not the survey u/s.133A of the Act. If the Explanations are excluded from the purview, which are applicable only in search cases and not otherwise, then, addition to income is *sine qua non* for imposition of penalty u/s.271(1)(c) of the Act. In the absence of any addition or disallowance made by the AO in the computation of total income, there can be no question of any penalty on the income *suo motu* offered by the assessee in his return of income.

5. The judgment of the Hon'ble Supreme Court in *MAK Data Pvt. Ltd. Vs. CIT (2013) 358 ITR 593 (SC)* does not come to the rescue of the Revenue. The assessee in that case filed his return on 27-10-2004 declaring income of Rs.16.17 lakh. Prior to that, a survey action was taken against the assessee on 16-12-2003. No income was offered during the course of survey and as such nothing was included in the return filed after the date of survey on that count. It was during the course of assessment proceedings and in reply to show cause notice filed

on 22-11-2006 that the assessee made an offer of surrendering a sum of Rs.40.74 lakh. The AO accordingly completed the assessment by making this addition and thereafter imposed penalty. It was in that backdrop of the facts that the Hon'ble Supreme Court held that the penalty u/s.271(1)(c) was rightly imposed because the disclosure of the assessee was immaterial. The Hon'ble Supreme Court observed that "Explanation to section 271(1) raises a presumption of concealment, *when difference is noted by the AO, between reported and assessed income*". It was in this factual scenario where the income reported by the assessee in the return of income was lower than the income finally assessed by the AO, that the Hon'ble Supreme Court held that the penalty was rightly leviable.

6. Turning to the facts of the extant case, it is found that the reported income and the assessed income of the assessee remain the same. The AO has imposed penalty only with reference to the amount of Rs.6.44 crore which was *suo motu* declared by the assessee in the return. In that view of the matter, the *ratio* laid down in *MAK data Pvt. Ltd. (supra)* has no application to

the facts of the extant case as the income under consideration, forming the foundation for the penalty, is not the one which was added by the AO beyond the income returned. In view of the fact that the assessee voluntarily offered the income, declared in the survey, in the return of income and the assessment was made without making any addition on that score, we hold that such an income cannot constitute the bedrock for the imposition of penalty u/s.271(1)(c) of the Act. We, therefore, affirm the impugned order.

7. In the result, the appeal is dismissed.

Order pronounced in the Open Court on 16<sup>th</sup> August, 2022.

Sd/-  
**(PARTHA SARATHI CHAUDHURY)**      Sd/-  
**JUDICIAL MEMBER**                      **(R.S.SYAL)**  
**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 16<sup>th</sup> August, 2022

*Satish*

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-8, Pune
4. The Pr.CIT-7, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "B" /  
DR 'B', ITAT, Pune
6. गार्ड फाईल / Guard file

**आदेशानुसार/ BY ORDER,****// True Copy //**

Senior Private Secretary  
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	11-08-2022	Sr.PS
2.	Draft placed before author	11-08-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
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10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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