

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “B”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA Nos.383 & 384/M/2021
Assessment Years: 2008-09 & 2011-12**

Mr. Suresh Henry Thomas, 305, 2a, Raheja Classique, New Link Road, Oshowara, Andheri (West), Mumbai – 400 061 PAN: AAAPT4832B	Vs.	Income Tax Officer- 9(2)(3), Room No.601A, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Chirag Wadhwa, A.R.
Revenue by : Shri Chetan M. Kacha, D.R.

Date of Hearing : 30 . 03 . 2023
Date of Pronouncement : 18 . 04 . 2023

O R D E R

Per Bench:

At the very outset it is brought to the notice of the Bench by the Ld. A.R. for the appellant Mr. Suresh Henry Thomas (hereinafter referred to as the assessee) that aforesaid appeals filed by the assessee are delayed by 357 days and sought to condone the delay by moving an application supported with an affidavit filed by the assessee on the grounds inter-alia that he has earlier engaged Shri Anil Thakrar to file the appeal who has not filed the same in time due to unprofessional behavior and also ill-advised assessee;

that he has neither filed appeal nor arranged the documents required; that during the period of delay the assessee has faced huge loss of resources including financial resources and when he realized his resources he has changed his authorized representative to file the appeals; that due to business loss his finances and wealth has been continuously dwindling and he has sold even his flat at Raheja Classique and now he is residing in a rental premises.

2. However, on the other hand, the Ld. D.R. for the Revenue opposed the application for condonation of delay on the ground that the late filing of appeals in this case is apparently malafide due to callous attitude of the assessee and prayed for dismissal of the application.

3. Keeping in view the grave financial hardships faced by the assessee during the period of delay due to which he has lost all his resources and had to sell his residential flat at Raheja Classique and now residing in a rental premises and that even his authorized representative namely Shri Anil Thakrar has also not advised him properly due to unprofessional conduct, may be due to financial crunch being faced by the assessee, the assessee could not file the appeal in time which is a reasonable cause to our mind and sufficient to condone the delay in view of the law laid down by the Hon'ble Supreme Court in case of Land Acquisition Collector vs. MST Katiji & Others 167 ITR 471 (SC) wherein it has been held that "it is on contention of delay that when substantial justice and technical considerations are pitted against each other, the case of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a

non deliberate delay.” Consequently delay in filing both the aforesaid appeals of 357 days is hereby condoned and appeals are ordered to be registered and is being heard on merits.

4. The assessee by filing the present appeals sought to set aside the impugned orders both dated 31.10.2019 passed by the Commissioner of Income Tax (Appeals) (hereinafter referred to as the Ld. CIT(A)] confirming the penalty levied by the Assessing Officer (AO) to the tune of Rs.18,92,513/- and Rs.13,20,370/- for A.Y. 2008-09 & 2011-12 respectively under section 271(1)(c) of the Income Tax Act, 1961 (for short ‘the Act’) by raising identically worded grounds except the difference in the penalty amount (grounds of A.Y. 2008-09 are taken for the sake of brevity) inter-alia that:

“1) The Id. A.O as well as Ld CIT(A) is erred in confirming Penalty of Rs.18,92,513/-.

2) The appellant Prays to delete the Penalty levied on this account.

3) The appellant craves to add, alter or omit any or all of the above grounds of appeal with prior permission of your honor.”

5. Briefly stated facts necessary for consideration and adjudication of the issues at hand in both the appeals are : on the basis of assessment framed under section 143(3) of the Act and order passed by the AO giving effect to the order dated 25.03.2014 passed by the Ld. CIT(A) giving part relief to the assessee making addition/confirmation of Rs.32,00,358/-, Rs.4,28,434/-, Rs.12,50,000/- and Rs.32,84,000/- on account of sundry creditors, debit of closing stock, excess salary claimed and cash deposits respectively for A.Y. 2008-09 and making/confirming addition of Rs.38,73,500/- & Rs.3,99,535/- on account of claim of cessation of

liability and salary disallowance respectively for A.Y. 2011-12, initiated the penalty proceedings under section 271(1)(c) of the Act.

6. Declining the contentions raised by the assessee the AO proceeded to levy the penalty to the tune of Rs.18,92,513/- & Rs.13,20,370/- for A.Y. 2008-09 & 2011-12 respectively @ 100% and tax sought to be evaded under section 271(1)(c) of the Act.

7. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the penalty by dismissing the appeals. Feeling aggrieved with the impugned orders passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeals.

8. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

9. Undisputedly after the decision of the Tribunal on quantum appeals the assessee has accepted the addition on the basis of which penalty has been levied. It is also not in dispute that the assessee had paid the taxes along with interest on the additions made on the basis of which penalty has been levied.

10. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the Ld. Lower Authorities and argument addressed by the authorized representative of the parties to the appeals the sole question arises for determination in this case is:

“As to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during the assessment proceedings?”

11. The Ld. A.R. for the assessee contended that at the time of framing assessment the AO has failed to apply his mind by recording valid satisfaction as to which of the limb of section 271(1)(c) of the Act i.e. for concealing particulars of income or furnishing inaccurate particulars of such income penalty proceedings are being initiated rather vague and ambiguous satisfaction which is invalid under the law has been recorded. In A.Y. 2008-09 the AO has also wrongly levied the penalty on the amount of Rs.12,50,000/- on account of excess salary claimed by the assessee as the same has been allowed by the Ld. CIT(A) by directing the AO to allow the same after due verification of the payment.

12. However, on the other hand, the Ld. D.R. for the Revenue by relying upon the penalty order passed by the AO and confirmed by the Ld. CIT(A) contended that during the assessment proceedings it is duly proved that the assessee has furnished inaccurate particulars of income and as such penalty has been rightly levied and confirmed and relied upon the decision rendered by the Hon'ble Supreme Court in case of Sundaram Finance Ltd. vs. Dy.CIT (2018) 99 taxmann.com 152(SC) and the decision rendered by the Hon'ble Madras High Court in case of Gangotri Textiles Ltd. vs. Dy.CIT (2020) 121 taxmann.com 171 (Madras).

13. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light

of the facts and circumstances of the case and law applicable thereto.

14. So far as first contention raised by the Ld. A.R. for the assessee that the AO has not applied his mind while recording his satisfaction to initiate the penalty proceedings under section 271(1)(c) of the Act is concerned, we have perused the order passed by the AO for A.Y. 2008-09 wherein in case of addition of sundry creditors AO has recorded his satisfaction that “penalty proceedings under section 271(1)(c) of the Act are initiated separately by issue of notice under section 274 of the Act”; addition made in case of closing stock again the AO recorded his satisfaction that “penalty proceedings under section 271(1)(c) of the Act are initiated separately by issue of notice under section 274 of the Act”.

15. Further, in case of addition on account of claim of excess salary by the assessee the AO again recorded the satisfaction that “penalty proceedings under section 271(1)(c) of the Act are initiated separately by issue of notice under section 274 of the Act”. Similarly in case of addition on account of cash deposits the AO recorded the satisfaction that “he is satisfied that the assessee had concealed the particulars of income and furnished inaccurate particulars of such income, therefore, penalty proceedings under section 271(1)(c) of the Act are initiated separately by issue of notice under section 274 of the Act.”

16. Similarly in case of assessment year 2011-12 qua addition on account of cessation of liability, the AO recorded the satisfaction that penalty proceedings under section 271(1)(c) of the Act are initiated separately for furnishing inaccurate particulars of

income/concealment of income. Similarly in case of adhoc addition by disallowing the expenditure incurred under the head “salary and wages” @ 20% the AO recorded the satisfaction that penalty proceedings under section 271(1)(c) of the Act are initiated separately for furnishing inaccurate particulars of income.

17. When we examine the satisfaction recorded by the AO to initiated the penalty proceedings under section 271(1)(c) of the Act in the light of the settled principle of law that in order to invoke the provisions contained under section 271(1)(c) of the Act i.e. as to whether the assessee has furnished inaccurate particulars of income or concealed particulars of income need to be invoked specifically but in the instant case the AO has failed to apply his mind at the time of recording his satisfaction at the time of framing assessment to initiate the penalty proceedings under section 271(1)(c) of the Act as to under which limb of section 271(1)(c) of the Act, the penalty proceedings are being initiated, rather vague and ambiguous satisfaction has been recorded as discussed in the preceding paras. This is a mechanical satisfaction recorded by the AO which shows that the AO was himself not aware as to whether the assessee has concealed the particulars of income or furnished inaccurate particulars of such income.

18. Not only this, when we examine penalty levied on account of salary disallowance in A.Y. 2011-12 to the tune of Rs.3,99,535/- the AO has merely made adhoc addition by way of guess work and the AO has not arrived at a definite decision that the assessee has made wrong claim qua the expenditure on account of salary and wages. It is also settled principle of law that on the basis of any

adhoc addition penalty proceedings under section 271(1)(c) of the Act cannot be levied.

19. Similarly when we examine the penalty order passed by the AO and confirmed by the Ld. CIT(A) for A.Y. 2008-09 on account of disallowance of excess salary to the tune of Rs.12,50,000/-, this addition has been deleted by the Ld. CIT(A) subject to the verification of the figures by the AO but the AO proceeded to levy the penalty on this amount also which shows that the entire process of initiating penalty proceedings were mechanical, without any application of mind.

20. So far as reliance by the Ld. D.R. on the decision rendered by Hon'ble Madras High Court and confirmed by the Hon'ble Supreme Court in case of Sundaram Finance (Supra) is concerned, we have perused the judgment passed by the Hon'ble Madras High Court and confirmed by the Hon'ble Supreme Court which is not applicable to the facts and circumstances of the case at hand. The AO has failed not only to make himself satisfied at the time of making disallowance/additions in assessment order if the assessee has furnished inaccurate particulars of income or has concealed particulars of his income rather he has to be on the safer side invoked both the limbs of section 271(1)(c) of the Act. It is not only the case of invalid satisfaction rather the AO has levied the penalty in case of the addition as discussed in the preceding para which have been deleted or made on adhoc basis. So the decisions relied upon by the Ld. D.R. for the Revenue are not applicable to the facts and circumstances of the case.

21. The Ld. D.R. for the Revenue further relied upon the decision rendered by the Hon'ble Supreme Court in case of Gangotri Textile (supra). We have persued the judgment rendered by the Hon'ble Supreme Court which is not applicable to the facts and circumstances of the case, because in the case at hand when very initiation of the penalty proceedings is not sustainable in the eyes of law for want of valid satisfaction recorded by the AO further proceedings by way of issuance of notice under section 274 read with section 271(1)(c) of the Act are not to be looked into.

22. In view of what has been discussed above, penalty levied by the AO and confirmed by the Ld. CIT(A) under section 271(1)(c) of the Act for A.Y. 2008-09 and 2011-12 is not sustainable in the eyes of law, hence ordered to be deleted.

23. Resultantly, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 18.04.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated:18.04.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.