

**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
(DELHI BENCH 'B' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.2911/Del/2019, A.Y. 2015-16

M/s. Unitech Realty Pvt. Ltd. Basement , 6, Community Centre, Saket Delhi-110017 New Delhi PAN : AAACR4290E	Vs.	DCIT, Circle - 27(1), New Delhi
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. Sachit Jolly, Adv.
Revenue by	Sh. T. James Singson, CIT, DR

Date of hearing:	13.07.2023
Date of Pronouncement:	19.07.2023

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has filed this appeal against the order dated 21.01.2019 passed by the Commissioner of Income Tax (Appeals)-28, Delhi confirming the penalty levied by the Assessing officer u/s 271(1)(c) of the Income Tax Act, 1961. Penalty proceedings u/s 271(1)(c) was initiated for concealment of income.

2. The facts in brief are the assessment was completed on 22.12.2017 u/s 143(3) of the Act based upon the request of assessee wherein it was requested by the assessee as follows;

“This is with reference to above mentioned assessment proceedings for the A.Y. 2015-16, we would like to request your good self that the assessee company has filed its Return of Income (“ROI”) by claiming business loss amounting to Rs. 17,87,88,640/-, however inspite of the above irrefutable position the assessee in good faith and, to avoid undue litigation, harassment and, to buy peace of mind is willing to get assessed at NIL income instead of declared loss of Rs. 17,87,88,640/- subject to the condition that no penalty/prosecution proceedings would be initiated against the assessee company under any other provisions of the Act including penalty proceedings u/s 271(1)(c) of the Act.”

2.1. Taking into consideration the aforesaid request of assessee, the Ld. AO made following conclusion:

“The AR of the assessee company to buy peace of mind, to avoid undue litigation and harassment, vide his above stated letter, offered that the loss of the company may be reduced and assessed at NIL. After considering all the facts and circumstances of the case and after the perusal of the above submission filed by the A.R., the income of the assessee company is assessed at NIL. Penalty proceedings u/s 271(1)(c) is being initiated separately for concealment of income.”

3. Subsequently, notices were issued to the assessee initiating penalty proceedings u/s 271(1)(c) of the Act for concealment of income and the impugned penalty order was passed which has been sustained by Ld. CIT(A) and the assessee is in appeal raising following grounds :-

“1. The order passed by the Learned Commissioner of Income Tax (Appeals) -28 (“Ld. CIT(A)”) under section 250 of the Act is bad in law and on the facts and circumstances of the case.

2. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case in upholding the order passed by

the ld. Assessing Officer (“Ld. AO”) thereby levying penalty of Rs. 6,07,70,258 us/ 271(1)(c) of the Act.

3. The order passed by the Ld. CIT(A) upholding the order passed by the Ld. AO levying penalty is bad in law and liable to be set aside as the notice issued under section 271(1)(c) was ambiguous as it did not specify the offence alleged to be committed. The order levying penalty is not sustainable in law as it violates the principles of natural justice as the appellant was not provided a fair opportunity to defend its case.

4. Without prejudice, the penalty order passed by the Ld. AO and upheld by the Ld. CIT(A) is unsustainable on the facts and circumstances of the respective merits of the quantum issues / additions in the assessment order.

5. The order passed by the Ld. CIT(A) is bad in law and liable to be set aside as the same has been passed without appreciating the facts and circumstances of the case and has been passed mechanically without application of mind. The Ld. CIT(A) has chosen to pass the impugned order in utter ignorance of the submissions made by the appellant.

6. The order passed by the Ld. CIT(A) is bad in law and liable to be set aside as the same has been passed by incorrect application of law and judicial precedents. The impugned order has been passed by the Ld. CIT(A) in utter ignorance of the principles of judicial discipline.

7. The above grounds of appeals are independent and without prejudice to one another.

8. The appellant may be allowed to add/ withdraw or amend any ground of appeal at the time of hearing.”

4. Heard and perused the record.

5. Ld. Counsel of appellant submitted that the whole penalty proceedings are vitiated as at one end Ld. AO failed to give any findings with regard to any concealment of income while passing the assessment order and at the same time the notices issued were ambiguous with regard to the limb under which they were issued u/s 271(1)(c) of the Act. It was also submitted that even otherwise when the assessee had made a representation that his business loss return be assessed at 'Nil' income which was accepted, there was no question of any concealment. He submitted that Ld. CIT(A) failed to appreciate the law which was cited before him of Hon'ble Supreme Court of India in the case of **CIT & Anr. Vs. M/s SSA's Emerald Meadows in CC dated 05.8.2016 [2016]73 Taxmann.com 248 (SC)** and preferred to rely judgment of Hon'ble Madras High Court in case of Sundaram Finlease Ltd. vs. ACIT 403 ITR 407.

5.1 Ld. DR however, defended the orders of Ld. Tax Authorities below.

6. Appreciating the matter on record, it comes up that there is no dispute to the fact that Ld. AO had not made any enquiry to discredit the claim of loss and had accepted the plea of bargain of the assessee to be assessed at Nil income instead of declared loss subject to the condition that no penalty / prosecution proceedings would be initiated against the assessee company under any other provisions of the Act including penalty proceedings u/s 271(1)(c) of the Act. The operative part of the findings of Ld. AO, as reproduced above, establish that this plea of assessee was accepted without observing anything to the contrary on the condition laid by assessee, still Ld. AO made an observation that penalty proceedings u/s 271(1)(c) are being initiated separately for concealment of income.

7. The Bench is of considered opinion although there is no provision for such plea of bargain under the Act so as to act as estoppels upon Ld. AO. In

any case, if Ld. AO was not accepting the conditional plea then assessee should have been show caused for the same in assessment proceedings. At the same time it comes up that there is no substance in the form of enquiry and evidence that there was a concealment of income. No such observations were made at the time of assessment order. Then at the time of penalty proceedings also factual analysis of the claim of loss was not made but Ld. AO has drawn inferences from the act of assessee to have made the plea to get assessed at NIL

8. Further, Ld. Counsel for the assessee has cited that the notices issued, the copy of which are available in the paper book at page no. 168 and 197 do not have specific attribution of the allegation as to if the notices are issued was for concealment of income or for furnishing inaccurate particulars of income. Ld. CIT(A) has failed to consider the judgment of Hon'ble Supreme Court of India in the case of **CIT vs. SSA's Emerald Meadows** (supra) while relying judgment of Hon'ble Madras High Court in **Sundaram Finlease Ltd. vs. ACIT** (supra). Ld. CIT(A) failed to take note of the facts in Sundram Finlease Case where Hon'ble High Court has taken note of the following specific fact to not sustain the plea of assessee;

“This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised.”

9. However in the case in hand the plea was raised before the Ld. CIT(A) at first opportunity and he ought to have followed the binding precedent of Hon'ble Supreme Court in **CIT vs. SSA's Emerald Meadows**, (supra) where the Hon 'ble Apex Court looked into the facts before them

that Tribunal relying on the decision of the Division Bench of the Hon 'ble Karnataka High Court in the case of '**CIT and Another vs. Manjunath Cotton & Ginning Factory**' [2013] 359 ITR 565 (Karn.), allowed the appeal of the assessee, holding that notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Act was bad in law, as it did not specify under which limb of section 271(1)(c) of the Act, penalty proceedings has been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. When the matter travelled upto the High Court, it supported the judgment of the Hon 'ble Karnataka High Court in the case of '**CIT and Another vs. Manjunath Cotton & Ginning Factory**'(supra) and decided that there was, therefore, no substantial question of law to be decided. Thereafter, an SLP was filed before the Hon'ble Apex Court and the Apex Court dismissed the SLP of the Revenue finding no merit therein and confirming the issue in favour of the assessee.

9.1 In '**CIT and Another vs. Manjunath Cotton & Ginning Factory**', [2013] 359 ITR 565 (Karn.), it has been held by the Hon'ble High Court that notice under section 274 read with section 271(1)(c) of the Act should specifically state the grounds mentioned in section 271(1)(c) of the Act, i.e., whether it is for concealment of income or for furnishing of inaccurate particulars of income. Sending printed form, where all the grounds mentioned would not satisfy the requirement of law. The assessee should know the grounds which he has to meet Otherwise, the principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Penalty proceedings are distinct from assessment proceedings, though it emanates from the assessment proceedings; still it is separate and independent proceedings all together.

9.2 In ‘**Meherjee Cassinath Holdings Pvt. Ltd vs. ACIT (ITAT Mumbai)**’, ITA No. 2555/MUM/2012, order dated 28/04/2017, the observation of the Bench was that penalty proceedings under section 271(1)(c) of the Act are “quasi-criminal” proceedings and ought to comply with the principles of natural justice. The non striking of the irrelevant portion in the show-cause notice means that the Assessing Officer is not firm about the charge against the assessee and the assessee is not made aware as to which of the two limbs of section 271(1)(c) he has to respond.

9.3 Hon'ble Delhi High Court in case of **Pr. CIT vs. Sahara India Life Insurance Company Ltd.** (ITA No.475/2019 order dated 20.08.2019 while deciding the identical issue held as under :-

"21. The Respondent had challenged the upholding of the penalty imposed under Section 271 (1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1) (c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 Taxman.com 241 (Kar) , the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of2016 by order dated 5th August, 2016."

9.4 Thus to conclude, following the decisions rendered in the cases of CIT vs. Manjunatha Cotton and Ginning Factory, (Supra), CIT vs. SSA's Emerald Meadows and Pr. CIT vs. Sahara India Life Insurance Company Ltd. (supra), the Co-ordinate Benches of the Tribunal are taking the consistent view that when the notice issued by the AO is bad in law being

vague and ambiguous having not specified under which limb of section 271(1)(c) of the Act the penalty notice has been issued, the penalty proceedings initiated u/s 271(1)(c) are not sustainable.

10. As sequel to the aforesaid discussion the grounds raised are sustained.

The appeal is allowed. The impugned orders are set aside.

Order pronounced in the open court on 19th July, 2023.

**Sd/-
(N.K.BILLAIYA)
ACCOUNTANT MEMBER**

**Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER**

Dated :19th /07/2023

Binita, Sr. PS

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

Assistant Registrar,
ITAT, Delhi