

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI BR BASKARAN, AM AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No. 2895/Mum/2023

(निर्धारण वर्ष / Assessment Year: 2010-11)

S Sagar Enterprise BE-5010, Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (East), Mumbai-400051.	बनाम/ Vs.	DCIT, CC-1(1) Pratishtha Bhavan, Old CGO Annexe, Maharishi Karve Road, Mumbai- 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGFS8866G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Rahul Sarda (Adv)	
Revenue by:	Shri Nayanjyoti Nath (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 05/02/2024

घोषणा की तारीख /Date of Pronouncement: 13/02/2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-47, Mumbai dated 22.06.2023 for the assessment year 2010-11.

2. The main grievance of the assessee as discernable from perusal of grounds of appeal is against the action of the Ld. CIT(A) confirming the penalty levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961, Act (hereinafter "the Act") to the tune of Rs.16,17,140/-.

3. The assessee has challenged the penalty levied by AO u/s 271(1)(c) of the Act by urging *inter-alia* that the notice proposing penalty issued by the AO dated 30.12.2017 u/s 274 r.w.s 271 of the Act is bad in law, since assessee has been called upon to defend both the faults for non-levy of penalty. For buttressing this contention, he drew our attention to the copy of the notice which is found placed at



ITA No.2895/Mum/2023
A.Y. 2010-11
S Sagar Enterprises

page no. 35 of PB. On perusal of the same it reveals that the notice are in the nature of an omnibus show cause notice issued without deleting or sticking down the in-applicable part. And same is the case with the penalty order dated 07.02.2022 passed u/s 271(1)(c) of the Act, which also does not spell out as to which limb of section 271(1)(c) of the Act has been found to have been committed by assessee for levy of penalty. Thus, we find that assessee was in the dark [at the stage of notice] as to what fault it is being proceeded against for levy of penalty. In other words, the assessee after reading the notice was guessing as to what fault it has committed for which the AO proposed to levy penalty; and since both faults figured in the notice, as such the assessee was handicapped in defending/explaining against the proposed penalty. Therefore, since show-cause notice itself does not spell out clearly as to what fault assessee is being proceeded against for levy of penalty, the notice itself is bad in law, and consequently the penalty levied is vitiated. In this context, we find that same issue has come up for consideration before the Full bench of the Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bombay) dated 11.03.2021 wherein their Lordships has held that the show cause notice issued prior to levy of penalty without specifying the fault/charge against which the assessee would vitiate the penalty itself. And thus the Hon'ble Full Bench of the High Court upheld the view of the division bench order in the case of PCIT Vs. Goa Dourado Promotions (P.) Ltd. (Tax Appeal No.18 of 2019, dated 26.11.2019) and held that the contrary view taken by another division bench in the case of CIT Vs. Smt. Kaushalya (1995)



ITA No.2895/Mum/2023
A.Y. 2010-11
S Sagar Enterprises

216 ITR 660 (Bom) does not lay down the correct proposition of law. Moreover, we find that in the quantum assessment estimated addition of 100% of purchases was made by AO, which was reduced to 30% of purchase by the Ld. CIT(A). In such a scenario, penalty u/s 271(1)(c) of the Act was not warranted because estimated addition has inherent subjectivity involved. Therefore, no penalty is warranted. Therefore, we direct the deletion of penalty.

4. Coming to ground no. 4 of the assessee's appeal wherein assessee claims to have inadvertently remitted fees of Rs.10,000/- vide challan no. 01338 dated 03.07.2023 towards fees of this penalty appeal, whereas according to assessee, the correct fees was only Rs.500/-. Hence, assessee pleads for refund of the excess fees paid bonafide by the assessee and drew our attention to the decision of Tribunal (Amritsar) in the case Kiranjit Singh V ACIT (2006)(101 TTJ 424) reads as under: -

“2. At the outset, the learned counsel for the assessee, Sh. S.K. Bansal, submitted that this appeal relates to an order passed by the CIT, Patiala, under s. 263 of the Act and does not relate to income computed by the AO. Therefore, the case of the assessee is covered under the residuary cl. (b) of sub-s. (6) of s. 253 of the Act. He submitted that the assessee was required to pay only a fee of Rs. 500: As against the same, the assessee had paid a fee of Rs. 5,521. The assessee vide his counsel's application dt. 31st Jan., 2006 requested for refund of the excess fee paid of Rs. 5,021. At the time of hearing of the appeal, the learned counsel drew our attention to the booklet titled as "*A Fine Balance : Law and Procedure before Income-tax Appellate Tribunal*" published



ITA No.2895/Mum/2023

A.Y. 2010-11

S Sagar Enterprises

by All India Federation of Tax Practitioners, where in reply to question No. 29, it has been mentioned that the assessee can make an application before the Tribunal for claiming the refund of the excess Tribunal fee paid for which directions can be issued by the Bench to the AO for granting a refund of the same.

3. The learned Departmental Representative did not make any specific submission in the matter on the ground that this relates to procedure for filing the appeal before the Tribunal.

4. We have heard both the parties. Admittedly, the appeal in this case relates to an order passed under s. 263. Therefore, the case of the assessee is covered under a residuary cl. (b) of sub-s. (6) of s. 253 of the Act. The assessee was required to pay only a fee of Rs. 500. In view of the above, the assessee is entitled to refund of excess fee paid of Rs. 5,021. The AO is directed to refund this amount either by way of adjusting the same against the outstanding demand, if any, or by way of grant of refund within a period of one month from (the date of receipt of this order. We order accordingly.”

5. According to assessee by mistake it has remitted appeal fees of Rs.10,000/- while filing the captioned appeal; and according to assessee, the correct appeal fees as per law is only Rs.500/-. So, assessee prays for refund of excess fees remitted by it while filing the captioned penalty appeal. In this regard, it is noted that Section 253 of the Act, prescribes the appeal fees an assessee has to remit while filing an appeal before the Tribunal. The assessee’s submission is that since the captioned appeal is penalty appeal, fees need to be deposited as per sub-clause (d) of sub-section (6) of section 253 of the Act. As per sub-



ITA No.2895/Mum/2023

A.Y. 2010-11

S Sagar Enterprises

clause (d) of sub-section (6) of section 253 of the Act, while filing the penalty appeal before the Tribunal, the assessee need to have remitted Rs.500/- for an appeal. In the light of the aforesaid discussion, the AO is directed to refund this amount either by way of adjusting the same against the outstanding demand, if any, or by way of grant of refund within a reasonable period. We order accordingly.

6. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this 13/02/2024.

Sd/-
(BR BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

Mumbai; Dated 13/02/2024.
Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार //(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai