

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 816/MUM/2018
Assessment Year: 2011-12**

BhaveshPravinchandraSheth
Sheth House, Gr. Floor,
Sandhurst Bridge,
Opera House,
Mumbai - 400007

Vs. Assistant Commissioner of
Income Tax- 12(2),
Room No. 123A,
Aayakar Bhavan,
Maharashi Karve Road,
Mumbai - 400020

**PAN No. AAVPS0801N
Appellant**

Respondent

Assessee by : Mr. Biren Gubhawala, AR
Revenue by : Ms. Jyoti Lakshmi Nayak, DR

Last Date of Hearing : 27/09/2019
Date of pronouncement: 30/09/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-55, Mumbai [in short 'CIT(A)'] and arises out of the penalty levied under Sec.271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

i) On the facts and in the circumstances of the case and in law the Ld. Assessing Officer has erred in computing the penalty u/s 271(1)(c) of the Income Tax Act. 1961 without considering the facts that revised return declaring higher income was filed on commencement of assessment proceedings but before any hearing or the assessment completion. The A.O.

did not mention reasons or particulars in the penalty notice. Therefore, the initiation and imposing penalty proceedings is wrong, bad in law, invalid and void ab-initio and CIT(A) was not justified in confirming the penalty u/s 271(1)(c) of the Act.

ii) On the facts and in the circumstances of the case and in law, the Assessing Officer has erred in imposing the penalty u/s 271(1)(c) of the Act without specifying the limb for reasons in the penalty notice to impose the penalty i. e. whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income. Therefore, the initiation and imposing of penalty proceedings is wrong, bad in law, invalid and void *ab initio* and CIT(A) has not justified in confirming the penalty u/s 271(1)(c) of the Act.

iii) On the facts and in the circumstances of the case and in law, the A.O. has erred in imposing penalty u/s 271(1)(c) of the Act of Rs. 7,55,811/- by considering concealed income of Rs. 29,32,657/- i. e. assessed income less income as per original return of income. Penalty levied is also on disallowances made though penalty proceedings have not been initiated in respect of said disallowance made in the assessment order u/s 143(3) of the Act. Therefore, the initiation and imposing of penalty proceedings on such disallowance is wrong, bad in law, invalid and void *ab-initio* and CIT(A) has not taken into account the action of AO in levying penalty u/s 271(1)(c) of the Act on disallowance.

iv) On the facts and in the circumstances of the case and in law, the A.O. has erred in imposing penalty on concealed income whereas there was no tax payable while filing revised return therefore there was no loss to exchequer as TDS on the increased income was also not claimed in original return. The learned CIT(A) has failed to appreciate the fact that there was a genuine error and the income was inadvertently omitted to be considered in the computation and the appellant had filed the revised computation of income and there was no intent on the part of the appellant to conceal or furnish inaccurate particulars of his income as contemplated under section 271 (1)

(c) of the Act. Therefore, the initiation and imposing of penalty proceedings is wrong, bad in law, invalid and void *ab-initio* and CIT (A) has not justified in confirming the penalty u/s 271 (1)(c) of the Act.

3. Briefly stated, the facts are that the appellant filed his return of income for the assessment year (A.Y) 2011-12 on 30.09.2011 declaring total income of Rs.9,733/-. The nature of business of the appellant is arranging finance for real estate developers. The case was selected for scrutiny assessment. Notice u/s 143(2) and 142(1) was served by the A.O on the appellant on 12.09.2019 and 15.09.2019 respectively. The appellant filed a revised return of income on 25.09.2012 on a total income of Rs.23,92,594/-.

The A.O noted that “assessee has revised its income to Rs.23,92,594/- from Rs.9,733/- after the service of notice under Sec.143(2) dated 12.09.2012. In the original return filed, total commission receipts are shown at Rs.20,51,000/- which have been increased to Rs.1,04,55,211/- in the revised return.”

The A.O noted that the appellant revised his income from Rs.9,733/- to Rs.23,92,594/- after the service of notice u/s 143(2) of the Act. It is also noted by the A.O that in the original return filed, the total commission receipts are shown at Rs.20,51,000/- which increased to Rs.1,04,55,211/- in the revised return after the service of notice under Sec. 143(2) dated 12.09.2012. The AO further noted that between the period of filing of original return of income and receipt of notice u/s 143(2), the assessee had a time of approximately one year but he failed to file a revised return of income. The AO thus held that it was an attempt on the part of the assessee to evade legitimate taxes due to the revenue and clearly it was a case of furnishing of inaccurate

of particulars of income leading to concealment. Therefore, the AO levied a penalty of Rs.7,55,811/- being 100% of the tax sought to be evaded.

4. In appeal, the Ld. CIT(A) agreed with the reasons given by the AO and confirmed the penalty of Rs.7,55,811/-.

5. Before us, the Ld. counsel for the appellant submits that the AO has erred in imposing the penalty u/s 271(1)(c) of the Act without specifying the limb for reasons in the penalty notice to impose the penalty i. e. whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income. Therefore, the initiation and imposing of penalty proceedings is wrong, bad in law, invalid and void *ab initio* and CIT(A) is not justified in confirming the penalty u/s 271(1)(c) of the Act.

Further reliance is placed by him on the decision in *ITO v. Fashionways* (2002) 77 TTJ 59 (Asr), *ACIT v. Ghodawat Foods* (ITA No. 1169/PUN/2016) for AY 2004-05 by ITAT Pune, *CIT v. Reliance Petroproducts Pvt. Ltd.* (Civil Appeal No. 2463 of 2010) by Supreme Court and *DCIT v. Nalwa Investments Ltd.* (ITA No. 3805/Del/2010) for AY 2005-06 by ITAT Delhi.

6. On the other hand, the Ld. DR submits that only after the issuance of notice u/s 143(2) dated 12.09.2012, the assessee revised return of income from Rs.9,733/- to Rs.23,92,594/-. Thus it is stated by her that in the original return of income filed on 30.09.2011, the assessee had suppressed the amount of income. Therefore, it is argued that the penalty of Rs.7,55,811/- levied by the AO u/s 271(1)(c) and confirmed by the Ld. CIT(A) be upheld.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the assessment order dated 20.03.2014, the A.O initiated the penalty proceedings u/s 271(1)(c) for concealing the income and filing inaccurate particulars of income. Subsequently, the A.O issued notice under Sec.274 r.w.s 271 to the assessee stating that he has concealed the particulars of his income.

As mentioned in the penalty order dated 23.09.2014, the AO initiated penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income. In response to the show cause notice dated 25.07.2014 issued by the A.O, the assessee filed a reply dated 04.08.2014 stating that:

“.....I would like to state that when the assessee had filed his original return of income he did not have an accountant who could finalise the books of accounts. When the assessee was in receipt of the notice, his accountant went through the accounts and return of income and it came to his notice that there were some errors in the return of income. Hence, revised return was filed to correct a bonafide mistake in the original return of income. Further, the return was revised *suo motu* without any inquiry or finding of the Income Tax Dept. The income offered in revised return is reflected in 26AS, corresponding TDS has been claimed and there is no tax payable in the revised return and also hence, there was no intention to evade tax.

Original Return was filed within the due date and the return has been revised only to correct a bona fide mistake in the original return of income. Also, as per section 139(5), the return can be revised before the expiry of one year from the end of relevant assessment year or before the completion of assessment whichever is earlier. If the law itself has a provision to revise the return before completion of assessment, it cannot be held that the assessee has concealed his income or had filed inaccurate particulars of income just because he revised the return after service of notice u/s. 143(2).”

In *Mak Data P. Ltd. vs. CIT* (Civil Appeal No.9772 of 2013), it is held by the Hon’ble Supreme Court that “ the AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing”.

In the case of *CIT vs. Smt. Kaushalya and Others* (1995) 216 ITR 660 (Bom), the Hon'ble Bombay High Court held:

"9. We will first take up the show-cause notice dated March 29, 1972, pertaining to the assessment years 1968-69 and 1969-70. The assessment orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In this background, it could not be said that either there was non-application of mind by the Income-tax Officer or the so-called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of *CIT v. Mithila Motor's (P.) Ltd.* [1984] 149 ITR 751 (Patna) (head note):

Under section 274 of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an

opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings."

Following the ratio laid down in *Mak Data P. Ltd* (supra) and *Smt. Kaushalya and Others*(supra), we hold that the AO has rightly initiated penalty proceedings u/s 271(1)(c) of the Act.

7.1 We discuss now the case-laws relied on by the Ld. counsel. In *Fashionways* (supra), the assessee filed its return of income for AY 1990-91 on 03.09.1990 declaring total income of Rs.52,290/-. Subsequently, the case was selected for scrutiny. Thereafter, the assessee filed revised/voluntary return and disclosed an income of Rs.1,42,378/- which was assessed at the same figure. Penalty proceedings u/s 271(1)(c) on the basis of the original return was also initiated. On appeal, the CIT(A) cancelled the penalty. On appeal by the revenue, the Tribunal held that since it was not in dispute that the Department accepted the revised return and no addition was made in figure disclosed in revised return, no penalty could be imposed on the assessee.

In the instant case, admittedly the assessee filed its return of income for the impugned assessment year on 30.09.2011 declaring total income of Rs.9,733/-. Notice u/s 143(2) was issued by the AO on 12.09.2012. The assessee filed its revised return of income on 25.09.2012 declaring income of Rs.23,92,594/-. Therefore, the instant case is distinguishable from the above decision.

In *Ghodawat Foods* (supra), the assessee filed its return of income for the AY 2004-05 on 01.11.2004 declaring total income of Rs.94,42,109/-. The AO issued notice u/s 143(2) to the assessee.

During the course of scrutiny assessment proceedings the Assessing Officer observed that the assessee has creditors to the tune of Rs.20,51,06,603/-. The total number of creditors shown by the assessee was 315. The Assessing Officer after detailed enquiry concluded that the assessee has not been able to prove the identity of creditors, failed to show creditworthiness of the creditors and genuineness of the creditors. The Assessing Officer *inter alia* made addition of Rs.18,68,90,938/- u/s. 68 of the Act on account of unproved creditors. In first appellate proceedings, the CIT(A) restricted addition to Rs.8,87,03,901/-. Thereafter, the assessee carried the matter in second appeal before the Tribunal. The Tribunal in ITA No. 866/PN/2009 for assessment year 2004-05 decided on 30-10-2013 further reduced the addition to 20% of the addition sustained by the CIT(A) i.e. 20% of Rs.8,87,03,901/- (Rs.1,77,40,780/-). The Assessing Officer levied penalty of Rs.64,91,794/- u/s. 271(1)(c) on account of furnishing inaccurate particulars of income to the extent of addition confirmed by Tribunal. Against the order passed u/s 271(1)(c) dated 13-08-2014, the assessee filed appeal before the CIT(A). The CIT(A) by placing reliance on the decision of Tribunal in assessee's own case for assessment years 2005-06 and 2006-07 deleted penalty in toto. The Tribunal held that no penalty u/s 271(1)(c) is sustainable where ad-hoc additions are made. The Tribunal further held that "the Assessing Officer was not clear of the charge u/s 271(1)(c) that has to be invoked for levy of penalty and hence mentioned both the limbs i.e. concealment of income, as well as, furnishing inaccurate particulars of income. However, the penalty has been levied only on the charge of furnishing inaccurate particulars of income". The Tribunal, therefore, set aside the order levying penalty.

In the above case, the Tribunal held that no penalty u/s 271(1)(c) is sustainable where ad-hoc additions are made. In the instant case, the addition is absolute, not at all ad-hoc and thus distinguishable from the above decision.

In the case of *Reliance Petroproducts Pvt. Ltd.* (supra), the assessee filed its return of income for the AY 2001-02 on 31.01.2001 declaring loss of Rs.26,54,554/-. This assessment was finalized u/s 143(3) on 25.11.2003 whereby the total income was determined at Rs.2,22,688/-. In this assessment, the addition in respect of interest expenditure was made. Simultaneously, penalty proceedings u/s 271(1)(c) were also initiated on account of concealment of income/furnishing of inaccurate particulars of income. The said expenditure was claimed by the assessee on the basis of expenditure made for paying the interest on the loans incurred by it by which amount the assessee purchased some IPL shares by way of its business policies. However, admittedly, the assessee did not earn any income by way of dividend from those shares. The company in its return claimed disallowance of the amount of expenditure of Rs.28,77,242/- u/s 14A of the Act. In this context, the Hon'ble Supreme Court held that "a mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee". On the above reasons, the appeal filed by the Revenue was dismissed.

In the instant case, there is a total difference in the items of the profit & loss account filed along with the original return of income submitted on 30.09.2011 and the revised return on 25.09.2012. It has resulted in difference in income of Rs.23,82,861/-(Rs.23,92,594/-

minus Rs.9,733/-). Therefore, the instant case is distinguishable from the above decision.

In *Nalwa Investments Ltd.* (supra), the assessee filed its return of income on 25.10.2005 declaring total loss of Rs.1,01,17,371/-. The return was accompanied by audited accounts and tax audit report. The assessment u/s 143(3) was completed on 24.08.2007 computing the total income at Rs.6,16,980/-. The main reason for the difference in returned and assessed income was on account of disallowance u/s 14A. Penalty proceedings were initiated in the course of assessment proceedings. These proceedings were disposed off on 30.03.2009, levying a penalty of Rs.39,27,976/-. The Tribunal dismissed the appeal filed by the Revenue on the reason that “the questions of disallowance and its quantification are quite disputable and can lead to bona fide difference in opinion between the assessee and the authorities. In such a situation, the levy of penalty will not be justified”.

In the above case, the main reason for the difference in returned and assessed income was on account of disallowance u/s 14A and penalty proceedings were initiated in the course of assessment proceedings. In the instant case, there is a total difference in the items of the profit & loss account filed along with the original return of income submitted on 30.09.2011 and the revised return on 25.09.2012. It has resulted in difference in income of Rs.23,82,861/- (Rs.23,92,594/- minus Rs.9,733/-). Therefore, the instant case is distinguishable from the above decision.

7.2 In *Union of India v. Dharmendra Textiles Processors* (2007) 295 ITR 244(SC), the Hon’ble Supreme Court has held that penalty u/s 271(1)(c) is a civil liability and the wilfull concealment is not an

essential ingredient for attracting civil liability, unlike the matter of prosecution u/s 276C. While considering an appeal against an order made u/s 271(1)(c), what is required to be examined is the record which the officer imposing penalty had before him and if that record can sustain the finding that there has been concealment, that would be sufficient to sustain penalty.

In *CIT v. Atul Mohan Bindal* [2009] 183 Taxman 444 (SC), the Hon'ble Supreme Court observed at para 11:

"11. A close look at section 271(1)(c) and *Explanation (1)* appended thereto would show that in the course of any proceedings under the Act, *inter alia*, if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. The quantum of penalty is prescribed in clause (iii). *Explanation 1*, appended to section 271(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false or the explanation offered by him is not substantiated and he fails to prove that such explanation is *bona fide* and that all the facts relating the same and material to the computation of his total income has been disclosed by him, for the purposes of section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income. The penalty spoken of in section 271(1)(c) is neither criminal nor quasi-criminal but a civil liability; albeit a strict liability. Such liability being civil in nature, *mens rea* is not essential.

The present factual matrix is to be tested on the anvil of the aforesaid enunciation law by the Hon'ble Supreme Court in *Dharmendra Textiles Processors* and *Atul Mohan Bindal*.

Let us examine the profit and loss account for the period under consideration filed along with the original return of income and the revised return of income.

Profit and Loss account for the year ended 31.01.2011 filed along with the original return of income

PARTICULARS	AMOUNT	PARTICULARS	AMOUNT (Rs.)
Audit Fees			
Bank Charges		Syndication Fees	20,51,000
Car Expenses		Interest From Other	17,056
Courier & Postage Charges			
Depreciation		Other Income	1,42,659
Donation			
Electricity Charges			
Insurance Charges			
Legal & Professional Fees			
Maintenance Charges			
Misc. Expenses	22,00,942		
Office Expenses			
Office Rent			
Printing & Stationery			
Registration Fess			
Repairs & Maintenance			
Salary & Bonus			
Staff Welfare			
Telephone Expenses			
Travelling & Conveyance			
Xerox			
To NET PROFIT	9,773		
	22,10,715		22,10,715

Profit & Loss Account for the year ended 31 March 2011 filed along with the revised return of income

PARTICULARS	AMOUNT	PARTICULARS	Sch.	AMOUNT
To Audit Fees	10,000	By Professional Fees		1,04,55,211
To Bank Charges	3,039	By Interest Income	11	27,588
To Business Promotion	5,95,846	By Other Indirect Incomes	12	3,18,926
To Vehicle Repairs, Maintenance & Insurance Charges	74,461			
To Telephone, Courier & Postage Charges	3,60,406	Other Income		
To Depreciation	4,53,066			
To Electricity Charges	1,56,527			
To Insurance Charges	37,545			
To Legal & Professional Fees	1,65,000			
To Maintenance Charges	1,71,548			
Office Expenses	8,39,902			
To Office Rent	4,82,400			
To Printing & Stationery	1,14,755			
To Repairs & Maintenance - Building	1,04,124			
To Repairs & Maintenance - Office equipments	28,127			
To Employee Cost	40,16,476			
Travelling & Conveyance A/c	6,65,903			
To Net profit/(Loss) C/f Balance Sheet	25,22,599			
	1,08,01,725			1,08,01,725

In the instant case, in the original return filed on 30.09.2011, the assessee has declared total income of Rs.9,773/-. The receipts were Rs. 22,10,715/- and expenses Rs.22,00,942/-, thus resulting in a net profit of Rs.9,773/-.As per the computation the tax comes to Rs. Nil.

The date of receipt of notice u/s 143(2) by the assessee which was issued by the AO was 12.9.2012.

The date of receipt of notice u/s 142(1) by the assessee which was issued by the AO was 15.9.2012.

However, in the revised return of income filed on 25.09.2012, the assessee has declared total income of Rs.25,22,599/-. The receipts were Rs. 1,08,01,725/- and expenses Rs.82,79,126/-, thus resulting in a net profit of Rs.25,22,599/-The tax payable on it as per the assessee comes to Rs.5,88,931/-.

Not claiming credit for tax deducted at source in the original return of income is not germane to the present issue.

Section 143(2) states that where a return has been furnished u/s 139, the AO, if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not under paid the tax in any manner, shall serve on the assessee a notice requiring him, on a date to be specified therein, either to attend the office of the AO or to produce, or cause to be produced before the AO any evidence on which the assessee may rely in support of the return.

For the purpose of making assessment, the AO may serve on any person a notice u/s 142(1) to produce or cause to be produced, such accounts or documents as the AO may require.

Thus in the instant case, the assessee had no intention to declare its true income in the original return of income filed on 30.09.2011. Had it been the intention of the assessee to make a full and true disclosure of its income, it would have filed a revised return of income before the issuance of the notice 143(2)/ 142(1) by the AO. Therefore, in the instant case, the AO has rightly held that the assessee has deliberately and consciously failed to furnish full and true particulars of income and attempted to conceal income. To hold otherwise would be to exalt artifice over reality and to deprive the statutory provisions in question all serious purpose.

However, the penalty is not levyable on the disallowance of Rs. 49,791/- (disallowance u/s 14A) and Rs. 5,00,000/- (salary).

The AO is directed to restrict the levy of penalty u/s 271(1)(c) to 100% of the difference between revised income (Rs. 23, 92, 594/-) and original income (Rs.9,733/-).

8. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 30/09/2019.

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 30/09/2019

Rahul Sharma Sr. P. S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai