

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER
ITA No.4168/MUM/2013 (AY. 2008-09)

Siddhi Home Makers,
B-304, Shiv Chambers, Plot No.21,
Sector -11, CBD Belapur,
Navi Mumbai 400 614
PAN: ABFFS8504H

..... Appellant

Vs.

The ITO, Central ,
Ashar IT Park, 6th Floor,
"B" Wing, Room No.22, Road No.16Z,
Wagle Industrial Estate,
Thane

.... Respondent

Appellant by : Shri Subodh Ratnaparkhi

Respondent by : Dr.A.K.Nayak

Date of hearing : 27/03/2017

Date of pronouncement : 28/04/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2008-09 is directed against an order passed by CIT(A)-1, Mumbai dated 31/01/2013, which in turn, arises out of an order passed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') dated 29/06/2011.

2. The solitary grievance of the assessee in this appeal is with regard to the action of the CIT(A) in sustaining penalty of Rs.69,95,271/- imposed by the Assessing Officer under section under section 271(1)(c) of the Act.

3. Briefly put, the relevant facts are that the appellant is a partnership firm engaged in the business of Builder and Developer and civil construction. A search and seizure action under section 132 of the Act was carried out at various premises of Siddhi Group of cases, to which the assessee also belongs, on 19/02/2009. During the course of search and survey action under section 133A of the Act carried out simultaneously at different premises belonging to the group, various incriminating documents and records were found and seized. In the assessment finalized consequent to the search under section 143(3) r.w.s. 153A of the Act on 30/12/2010 for the assessment year 2008-09, the Assessing Officer made an addition on account of unaccounted receipts, which was based on the incriminating documents found and seized during course of search. Notably, the incriminating documents and material found during the search had revealed that the assessee was receiving incomes outside the books of account. Notably, in the course of its business activity, assessee had constructed a building at Navi Mumbai by the name "Ellora" consisting of various flats and shops. The Assessing Officer, based on the material found and seized during the course of search, namely, diaries, inferred that assessee was receiving on-money in cash on sale of units in "Ellora", which was not accounted for in the Books of Account. Pertinently, the factum of the receipt of unaccounted consideration in cash was also admitted by the assessee and it suo-motu declared additional income on this count. In the return filed in

response to the notice under section 153A of the Act assessee declared a total income of Rs.2,55,12,620/-, which inter-alia, included additional income offered of Rs.1,20,00,000/-, whereas in the return of income originally filed under section 139(1) of the Act on 02/09/2008, the total income was returned at Rs.1,13,93,844/-. The Assessing Officer finalized the assessment under section 143(3) r.w.s. 153A of the Act on 30/12/2010 assessing the total income at Rs.3,05,87,120/-, thereby making an addition Rs.50,74,500/- to the income returned in response to notice under section 153A of the Act. The variation in the returned income was also on account of determining the amount unaccounted cash receipts in respect of the units sold in the building "Ellora". Subsequently, vide order dated 29/06/2011 passed under section 271(1)(c) of the Act the Assessing Officer held the assessee guilty of concealment of income and penalty equivalent to 100% of the tax sought to be evaded on the income of Rs.2,05,74,500/- has been levied, which came to Rs.69,93,271/-. The Assessing Officer also observed that the case of the assessee for levy of penalty was also covered by Explanation-5A to section 271(1)(c) of the Act. The said levy of penalty has since been affirmed by the CIT(A) and accordingly assessee is in further appeal before us.

4. Before us, the Ld. Representative for the assessee has raised various submissions in law and on facts assailing the imposition of penalty under section 271(1)(c) of the Act. However, first and foremost plea raised by the assessee is founded on the argument that the Assessing Officer was unsure about the nature of default committed by the assessee. In this context, he has referred to the two notices issued under section 274 of the Act on 30/12/2010; one under section 274 r.w.s. 271(1)(c) of the Act and second

under section 274 of the Act r.w.s. 271AAA of the Act. Furthermore, it is sought to be pointed out that even in the notice issued under section 274 r.w.s. 271(1)(c) of the Act in the standard proforma, the irrelevant portion in the notice has not been struck-off and, therefore, the notice does not specify the exact ground on which penalty is to be charged i.e. whether for concealment of income or for furnishing of inaccurate particulars of income. In this context, reliance has been placed on the judgment of Hon'ble Bombay High Court in the case of CIT vs. Shri Samson Perinchery, ITA Nos.1154,953,1097 and 1226 of 2014 order dated 5th January, 2017 and also the judgment of Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) to contend such a notice issued under section 274 r.w.s. 271(1)(c) of the Act is invalid. So far as the notice issued under section 274 r.w.s. 271AAA of the Act is concerned, the Ld. Representative for the assessee pointed out that in the instant assessment year section 271AA of the Act is inapplicable since the date of search is 19/02/2009.

5. On the aforesaid preliminary aspect, the Ld. Departmental Representative pointed out that in the present case the Assessing Officer initiated penalty for concealment of the particulars of income in terms of section 271(1)(c) of the Act, and he has referred to the observations of the Assessing Officer in para-9 of the assessment order in this regard. The Ld. Departmental Representative pointed out that the facts in the instant case stand on a different footing than the facts before the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). The Ld. Departmental Representative pointed out that in the instant case, the non-striking off of

one of the limbs means that penalty has been imposed on both the limbs; and; it is not a case where the penalty is initiated on one limb i.e. for furnishing inaccurate particulars of income while it has been imposed on the other limb i.e. for concealment of income. The Ld. Departmental Representative pointed out that in the case before the Hon'ble High Court the position was different, inasmuch as, the penalty was imposed on one limb while it was initiated for the other limb.

6. We have carefully considered the rival submissions with regard to the preliminary plea of the assessee in terms of which the validity of the proceedings initiated under section 271(1)(c) of the Act has been sought to be challenged. The sum-and-substance of the point raised by the assessee is that the notice issued by the Assessing Officer under section 274 r.w.s. 271(1)(c) of the Act dated 30/12/2010 does not reflect an appropriate application of mind, inasmuch as, the notice has been issued in a standard proforma where the irrelevant portion has not been struck off. At the time of hearing, Ld. Representative for the assessee has referred to the notice issued under section 274 r.w.s. 271(1)(c) of the Act dated 30/12/2010 in this regard. Factually speaking, it is clearly emerging that the notice has been issued in a standard proforma and the irrelevant limb of section 271(1)(c) of the Act has not been struck off. Notably, the penalty provisions of section 271(1)(c) of the Act are attracted where the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is also a well accepted proposition that the aforesaid two limbs of section 271(1)(c) of the Act carry different meanings. Therefore, it was imperative for the Assessing Officer to strike- off the irrelevant limb so as to make the

assessee aware as to what is the charge made against him so that he can respond accordingly. The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per Hon'ble High Court, where the Assessing Officer proposed to invoke first limb being concealment, then the notice has to be appropriately marked. The Hon'ble High Court held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clauses would lead to an inference of non-application of mind by the Assessing Officer. The Hon'ble Supreme Court in the case of Dilip N. Shroff vs. JCIT, 291 ITR 519(SC) has also noticed that where the Assessing Officer issues notice under section 274 of the Act in the standard proforma and the inappropriate words are not deleted, the same would postulate that the Assessing Officer was not sure as to whether he was to proceed on the basis that the assessee had concealed the particulars of his income or furnished inaccurate particulars of income. According to the Hon'ble Supreme Court, in such a situation, levy of penalty suffers from non-application of mind. In the background of the aforesaid legal position and, having regard to the manner in which the Assessing Officer has issued notice under section 274 r.w.s. 271(1)(c) of the Act dated 30/12/2010 without striking off the irrelevant words, the penalty proceedings show a non-application of mind by the Assessing Officer and is, thus, unsustainable. We hold so.

7. Before proceeding further, we may also refer to another feature of the present case, which also demonstrates the non-application of mind by the Assessing Officer. As pointed out by the Ld. Representative for the assessee,

in the present case, on 30/12/2010 Assessing Officer issued two notices namely, one under section 274 r.w.s. 271(1)(c) of the Act; and, second under section 274 r.w.s 271AAA of the Act. Section 271AAA of the Act is a specific provision dealing with levy of penalty in cases where search under section 132 of the Act has been initiated after a specified date. One of the qualifying conditions of section 271AAA of the Act is that it applies to 'specified previous year', which has been defined in clause (b) of the Explanation below sub-section(4) of section 271AAA of the Act. Having regard to the definition of 'specified previous year' contained in section 271AAA of the Act, and the date of search being 19/02/2009, the instant assessment year of 2008-09 does not fall for consideration under section 271AAA of the Act. Thus, the action of the Assessing Officer in issuing notice under section 274 r.w.s. 271AAA of the Act is erroneous in law. In any case, what we are trying to emphasize is that at the time of initiation of penalty, the Assessing Officer was quite unsure as to which of the two sections namely, section 271(1)(c) of the Act or section 271AAA of the Act was he intending to proceed. Such an approach is also reflective of non application of mind by the Assessing Officer, and, therefore, following the parity of reasoning laid down by the Hon'ble Supreme Court in the case Dilip N. Shroff (supra), Hon'ble Bombay High Court in the case Shri Samson Perinchery (supra) as well as the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra), the notice issued by the Assessing Officer under section 274 r.w.s. 271(1)(c) of the Act dated 30/12/2010 is untenable and consequently, the penalty imposed by the Assessing Officer under section 271(1)(c) of the Act of the Act is hereby directed to be deleted.

8. Since assessee has succeeded on the aforesaid preliminary Ground, the other pleas raised by the assessee with regard to the merits of allowability of penalty, etc. are not being dealt with, as the same have been rendered academic.

9. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 28/04/2017

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 28/04/2017
Vm, Sr. PS

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,

(Dy./Asstt. Registrar)
ITAT, Mumbai