

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI

BEFORE SHRI B.P. JAIN, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 5006/DEL/2013
[Assessment Year: 1997-98]

Aditya Chemicals Ltd
C/o RRA Tax India
D -28, South Extn. Part - 1
New Delhi

Vs.

The I.T.O
Company Ward-1(2)
New Delhi.

PAN : AAACA 2835 J

[Appellant]

[Respondent]

Date of Hearing : 06.11.2017

Date of Pronouncement : 21.11.2017

Assessee by : Shri Ashwani Tanena, Adv
Shri Acrhit Rehan, Adv

Revenue by : Shri S.K. Jain, Sr. DR

ORDER

PER B.P. JAIN, ACCOUNTANT MEMBER,

This appeal filed by the assessee is directed against the order dated 08.07.2013 passed by the CIT(A)-IV, New Delhi in appeal No.03/12-13 for the AY 1997-98 passed u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short].

2. The assessee has raised the following grounds of appeal:

“1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty of Rs.15,20,000/- and that too without assuming jurisdiction as per law and without considering the facts and circumstances of the case and the impugned penalty order being illegal and void ab-initio.

2. That in any case and in any view of the matter, action of Ld. CIT(A) in not quashing the penalty order framed by Ld. AO is beyond jurisdiction and without considering the facts and circumstances of the case and the impugned penalty order being illegal and void ab-initio and the impugned penalty order has been framed without considering the submissions/evidences of the assessee and without providing any adverse material on record.

3. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in passing the impugned penalty order being contrary to law as the assessment order framed under section 143(3) dated 26-03-2002 and additions made therein were also illegal, beyond jurisdiction and void ab-initio.

4. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(1)(c) on the additions

made in the assessment order u/s 143(3) dated 26-03-2002 as these additions are also contrary to law and facts.

5. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in levying penalty u/s 271(1)(c) is bad in law being beyond jurisdiction and barred by limitation and contrary to the principles of natural justice and has been passed by recording incorrect facts and findings and without giving adequate opportunity to the assessee and without considering the submissions/evidences of the assessee and without providing any adverse material on record and the same is not sustainable on various legal and factual grounds.

6. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not quashing the impugned penalty order framed by Ld. AO that too without recording mandatory “satisfaction” as per law.

7. That the assessee craves the leave to add, alter or amend the grounds of appeal at any stage and all the grounds are without prejudice to each other.”

2. The solitary issue raised in this appeal is with regard to levy of penalty of Rs. 15,20,000/-.

3. During the course of hearing, Ld. Counsel of assessee vehemently challenged the validity of jurisdiction of the AO to levy the penalty on

the ground that in the jurisdictional notice issued u/s 274 by the AO there was no clarity with respect to specific charge as to whether there was concealment of income or furnishing of inaccurate particulars of income by the assessee. It was also shown by the Ld. Counsel that even in the assessment order, no proper satisfaction has been recorded by the AO for initiation of the penalty proceedings. Similarly, in the penalty order also AO was not clear at all as to the fact whether penalty was being levied on the concealment of income or furnishing of inaccurate particulars of income by the assessee.

4. In view of these preliminary submissions of the Ld. Counsel on the jurisdiction, we confronted him with copy of recent judgment of Nagpur Bench of Hon'ble Bombay High Court in the case of Maharaj Garage & Co. (Income Tax Reference No. 21/2008 dated 22.08.2017) wherein issue of jurisdiction has been claimed to be decided against the said assessee. Ld. Counsel was directed to show as to why this judgment was not applicable. Accordingly next date of hearing was given to both the parties to prepare their respective submissions on the aspect of levy of clear charge in the penalty notice/penalty order and all other related issues arising in examining the validity of assumption of jurisdiction for levy of penalty u/s 271(1)(c) of the Act

by the AO. Accordingly, on the next date of hearing Ld. Counsel submitted his brief synopsis containing his submissions on various facets of jurisdictional aspects. Per contra Ld. Senior DR supported the order of lower authorities and vehemently submitted that the penalty should be confirmed in this case.

5. We have heard both the parties at length and also considered the material and copies of judgment placed before us by both the sides. For the sake of ready reference and convenience, the brief synopsis on jurisdictional ground submitted by Ld. Counsel for the assessee, are reproduced below:

“1) Assumption of jurisdiction is bad since no charge has been clearly levied in notice, assessment order and penalty order as to the fact whether there was any concealment of income or furnishing of inaccurate particulars of income. Reference may be made to the following:

PB 28-29 is the copy of jurisdictional notice issued u/s 274 showing that notice is invalid in the eyes of law on following grounds:

a) Some inappropriate clause has been ticked which is not concerned with levy of penalty u/s 271(l)(c). It appears that Ld.

AO has wrongly given show cause for levy of penalty u/s 271(1)(b).

b) No charge has been clearly specified whether there was concealment of income or furnishing of inaccurate particulars of income by the assessee.

c) Please refer to assessment order last para wherein neither there is any satisfaction nor there is any initiation of penalty on any specific charge as would be evident from the last para of assessment order.

d) Please also refer penalty order at **Para 9** again showing that there is no clarity on levy of charge.

e) **PB 15** is detailed reply dated 27.02.2012 filed with the Ld. AO wherein this very objection is raised.

f) Thus, from the above it is clear that there is no valid assumption of jurisdiction to levy the penalty as held by Hon'ble Supreme Court and Hon'ble High Courts and various benches of Tribunals. Some of these judgments are mentioned below:

CIT vs. M/s SSA's Emerald Meadows in SLP No. 11485/2016, date of order 05.08.2016, Supreme Court of India (CLC Page no. 1)

CIT vs. M/s SSA's Emerald Meadows in ITA No. 380/2015, High Court of Karnataka, dated 23.11.2015 (CLC Page no. 2-5)

Pr. CIT vs. Smt. Baisetty Revathi in I.T.T.A. No. 684 of 2016 dated 13.07.2017 (Andhra High Court) (CLC Page no. 6-11)

CIT vs. Manjunatha Cotton & Ginning Factory in 359 ITR 565 (Kar) (CLC Page no. 12-38)

Safina Hotels Pvt. Ltd. vs. CIT, (2016) 237 Taxman 702 (Kar)(HC) (CLC Page no. 39-68)

Shri Samson Perinchery vs. ACIT in ITA No. 4625/Mum/2013 dated 11.10.2013 (CLC Page no. 69-76)

CIT vs. Shri Samson Perinchery in ITA No. 1154 of 2014 (Bombay) dated 05.01.2017 (CLC Page no. 77-80)

Meherjee Cassinath Holdings (P) Ltd. vs. ACIT in ITA No. 2555/Mum/2012 dated 28.04.2017

II) In this case, no satisfaction has been recorded by the Ld. AO before initiation of penalty as evident from the assessment order. Therefore, the assumption of jurisdiction is bad in law for this reason also in view of following judgments of jurisdictional Court:

CIT v. Madhu Shree Gupta 317 ITR 107 (Del) (CLC Pg no. 81-99)

D.M. Manasvi v. CIT 86 ITR 557 (SC)

CIT v. S.V. Angidi Chettiar 44 ITR 739 (SC)

CIT v. Ram Commercial Enterprises Ltd. 246 ITR 568 (Del) (CLC Page no. 100-103)

Diwan Enterprises v. CIT 246 ITR 571(Del) (CLC Pg no. 104-111)

CIT vs Munish Iron Store 63 ITR 484 (P&H)

*Global Green Company Limited vs. DCIT in ITA No.1390/Del/2011
AY 2001-02, ITAT Delhi*

*M/s Victor Electrodes Ltd. vs. ITO in ITA No. 334/D/2009 A.Y.
2006-07 dated 9.8.2012*

III) Without prejudice to the above, it is submitted that Ld. AO has imposed the penalty for 2 mutually exclusive situations i.e. concealing the particulars of its income and furnishing inaccurate particulars of its income which is not permissible in law in view of the nature of penalty proceedings being of quasi criminal in character where definiteness as to the charge is must and in view of the following judicial decisions:

New Sorathia Engg Co. vs. CIT in 282 ITR 642 (Guj) (CLC Page no. 112-114)

CIT vs. Manu Engg. Works in 122 ITR 306 (Guj) (CLC Page no. 115-119)

CIT vs. Lakhdhir Lalji in 85 ITR 77 (Gujarat)

Commissioner of Wealth Tax and Income Tax vs. T. Girija Ammal in 282 ITR 614 (Chennai)

Navinbhai M. Patel vs. ITO in 27 1TD 411(Ahmedabad)

IV) Our Submission with respect to M/s. Maharaj Garage & Company vs. CIT in Income Tax Reference No.21 of 2008:

The above said judgment is not applicable on the facts of our case in view of following reasons:

- a) *In this judgment, there is no reference to judgment of Hon'ble Supreme Court namely CIT & Anr. vs. M/s SSA's Emerald Meadows in SLP No. 11485/ 2016, date or order 05.08.2016. Thus, this judgment is per incuriam to the judgment of Hon'ble Supreme Court and therefore does not have binding precedence over the judgment of Hon'ble Supreme Court.*
- b) *In the case of CIT vs. Shri Samson Perinchery, the Hon'ble Bombay High Court has itself taken a view in line with the judgment of Hon'ble Supreme Court, therefore this judgment of Hon'ble Bombay High Court shall have the precedence over the instant judgment.*
- c) *The Hon'ble Karnataka High Court has already taken a view in favour of assessee by way of specific discussion in the case of M/s SSA's Emerald Meadows. Therefore, this judgment of Hon'ble Karnataka High Court wherein this issue has been dealt with and decided shall have precedence over the judgment where the issue involved is not specifically discussed on this point.*
- d) *In this case, the question of law as mentioned in Para 5 of the order of Hon'ble High Court do not involve the issue involved in the case before us. Therefore, this judgment cannot be applied on the facts of the case before us.*
- e) *Issue involved in the facts of the case before us has not been determined in this judgment.*

f) Without prejudice to the above, in any case if two views are available then the view in favour of assessee should be taken as has been held in the following judgments:

CIT vs. Vegetable Products Ltd. in 88 ITR 192 (SC)
(CLC Page no. 120-124)

DCIT vs. Ananda Marakala in 150 ITD 323 (Bang)

"30. Thus there are two views on the issue, one in favour of the assessee expressed by the Hon'ble Allahabad High Court and the other against the assessee expressed by the Hon'ble Gujarat & Calcutta High Courts. Admittedly, there is no decision rendered by the jurisdictional High Court on this issue. In the given circumstances, following the decision of the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra), we hold that where two views are possible on an issue, the view in favour of the assessee has to be preferred. Following the decision of the Hon'ble Allahabad High Court, we uphold the order of the CIT(A)."

Welgrow Line (India) (P.) Ltd. vs. ACIT in 54 taxmann.com 117
(Chennai)

ACIT vs. M/s. Eskay Designs in ITA No. 1951/Mds/2012 A.Y.
2009-10

Jitendra Mansukhlal Shah vs. DOT in ITA No. 2293/Mum/2013
dated 4.3.2015

6. We have carefully considered all the submissions. With the assistance of both the parties we examined jurisdictional notice issued by the AO u/s 274 dated 26.03.2002. It is noticed from the perusal of said notice that the applicable clause pre-printed on the notice for levy of penalty was **not** ticked and it reads as under:

*“ have concealed the particulars of your income or.....
furnished inaccurate particulars of such income.”*

7. On the contrary, some other clause has been ticked which seems to be some other default and which has nothing to do with levy of penalty u/s 271(1)(c), which reads as under:

“have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under section 142(1)/143(2) of the Income-tax Act, 1961.”

Thus from the above, it is clear that as far as jurisdictional notice is considered, no clear charge has been levied at all that whether a default committed by assessee was on account of concealment of income or it was on account of furnishing of inaccurate particulars of income by the assessee. Our attention was also drawn upon the assessment order dated 26.03.2002 wherein AO has simply mentioned that:

“..... Penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 has already been initiated...”

Similarly in the penalty order also AO has concluded penalty order by stating as under:

It is established beyond doubt that the assessee has concealed the particulars of its income/furnished inaccurate particulars of income to the extent of Rs. 35,12,272/- (Rs. 21,12,272 + Rs. 14,00,000/-). It is therefore liable to be penalized.

8. Thus from the above, it is clear that no proper charge has been levied by AO at any of the aforesaid three stages i.e. assessment order, jurisdictional penalty notice or the penalty order. Under the facts and circumstances of the case, the judgment of Hon'ble Supreme Court in the case of CIT & Anr. vs. SSA's Emerald Meadows in SLP No. 11485/2016 dated 05.08.2016, is squarely applicable wherein Hon'ble Supreme Court has affirmed the view taken by Hon'ble High Court of Karnataka in its order dated 23.11.2015 which in turn relied upon the another judgment of Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory in 359 ITR 565 wherein it was held that jurisdictional notice issued by AO u/s 274 read with section 271(1)(c) of the Act was bad in law as it did not specify that in which limb of section 271(1)(c) of the Act, the penalty proceedings have been initiated i.e. whether for concealment of income or

furnishing of inaccurate particulars of income. Thus, the mandate of the law as declared by Hon'ble Supreme Court is very clear and we are bound by it.

9. It is further brought to our notice that Hon'ble Bombay High Court in the case of CIT vs. Shri Samson Perinchery in ITA No. 1154 dated 05.01.2017 has followed the view taken by Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (supra) and dismissed the argument of the revenue that there is no difference between furnishing of inaccurate particulars or concealment of income. It is further noted by us that above judgment of Hon'ble Bombay High Court also took support of the judgment of Hon'ble Supreme Court in the case of **Ashok Pai vs. CIT 292 ITR 11(SC)** wherein it was observed that concealment of income and furnishing of inaccurate particulars of income in section 271(1)(c) of the Act, carry different meanings/connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/permit penalty being imposed for the other breach. This is more so, as an assessee would respond to the ground on which the penalty has been initiated/notice issued. It must,

therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the assessee has no notice.

10. During the course of hearing, our attention was drawn by the Ld. Counsel of assessee upon the reply filed by the assessee dated 27.02.2012 to the penalty notice of the Ld. AO wherein objection was raised to the AO that assumption of jurisdiction was bad as there was no belief of the AO in the assessment order or in the penalty notice as to whether the penalty proceedings were initiated by the AO for concealment of income or furnishing of inaccurate particulars of income by assessee. Relevant portion of the reply is reproduced below for ready reference:

“Our above named client is in receipt of your letter dated F. No. ITO/W-1(2)/Aditya/2011-12/780 dated 7.2.2012 for the above assessment year to submit evidence / documents in connection with the above proceedings. As has been informed to us by our above named client, no notice u/s 271(1)(C) was issued to the assessee company for the above assessment year. The only notice issued was for penalty u/s 271(1)(b) dated 26.3.2002 (Refer PB 1-2), with reference to assessment order passed dated 26.3.2002 (Refer PB 3-8), which refers to penalty proceedings initiated u/s 271(1)(c), but there is no mention for issuance of notice u/s 271(1)(b). Further, there is no mention or belief of the Ld. AO in the Assessment order passed, as to whether the

penalty proceedings were initiated by him for concealment of income by the assessee or for furnishing inaccurate particulars of income by the assessee. In view of the above facts, the proceedings initiated by the Ld. AO u/s 271(1)(c) are void ab initio, contrary to facts of the case, bad in law, and as such proceedings initiated may kindly be dropped on these facts itself.”

10. Thus, from the perusal of above, it is clear that in the case before us the AO made a serious lapse in not fixing the charge clearly while assuming jurisdiction to levy penalty and whether at the stage of leaving the penalty.

11. On the other hand, it is brought to our notice by the opposite party that judgment of Hon’ble Bombay High Court (Nagpur Bench) in the case of Maharaj Garage & Co. (supra) has not considered the judgment of Hon’ble Supreme Court in the case of CIT vs. SSA’s Emerald Meadows (supra). Further as discussed above, Hon’ble Bombay High Court has itself in the case of CIT vs. Shri Samson Perinchery (supra) has followed the view taken by Hon’ble Supreme Court in the case of CIT vs. M/s SSA’s Emerald Meadows and CIT vs. Ashok Pai (supra). It is further brought to our notice that perusal of judgment shows that in the four questions of law determined by the Hon’ble High

Court, the issue before us in this case was not involved in any of these questions. Further, Hon'ble High Court has made observations in para 15 of the judgment on the basis of specific facts of the said case to hold that the said assessee had sufficient notice of action of imposing penalty. Thus, the said judgment is not applicable on the facts and issue involved before us and more so when the judgment of Hon'ble Apex Court in the case of SSA's Emerald Meadows, (supra) and Ashok Pai, (supra) is directly applicable on the issue involved before us.

12. It is further noted by us that the similar view has been followed recently by Hon'ble Andhra Pradesh High Court in the case of Pr. CIT vs. Smt. Baisetty Revathi dated 13.07.2017 in ITA No. 684 of 2016, wherein Hon'ble High Court observed inter alia as under:

“On principle, when penalty proceedings are sought to be initiated by the revenue under section 271(1)(c) of the Act of 1961, the specific ground which forms the foundation therefore has to be spelt out in clear term. Otherwise, an assessee would not have proper opportunity to put forth his defence. When the proceedings are penal in nature, resulting in imposition of penalty ranging from 100% to 300% of the tax liability, the charge must be unequivocal and unambiguous. When the charge is either concealment of particulars of income or furnishing of inaccurate particulars thereof, the revenue must specify as to

which one of the two is sought to be pressed into service and cannot be permitted to club both by interjecting an or between the two, as in the present case. This ambiguity in the show-cause notice is further compounded presently by the confused finding of the Assessing Officer that he was satisfied that the assessee was guilty or both.

13. Lastly, we shall also deal with the other argument of Ld. Senior DR that penalty should be upheld for the reason that penalty was levied on both the grounds i.e. as per the AO the assessee had made concealment of income and also furnished inaccurate particulars of income. We find that this argument of revenue is also not sustainable. It is settled law that penalty cannot be levied for twin charges. Penalty cannot be levied for two mutually exclusive situations. The default for concealment of particulars of income or furnishing of inaccurate particulars are two mutually exclusive situations. The position of law in this is well settled and reference in this regard may be made to judgments of Hon'ble Gujarat High Court in the case of New Sorathia Engg Co. vs. CIT in 282 ITR 642, CIT vs. Manu Engg. Works in 122 ITR 306 and CIT vs. Lakhdhir Lalji in 85 ITR 77.

14. This view has been again reiterated also by Hon'ble Andhra Pradesh High Court in the case of Pr. CIT vs. Smt. Baisetty Revathi

(supra). Thus viewed from any angle we find that levy of penalty in this case is not justified and the impugned penalty order is illegal. Therefore, we have no other option but to delete the same. Thus, the penalty of Rs. 15,20,000/- is hereby directed to be deleted. Since, penalty is deleted on jurisdictional ground, we are not deciding other issues raised by assessee. As a result, the grounds of appeal raised by the assessee are allowed.

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

The order is pronounced in the open court on 21.11.2017.

Sd/-

**[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER**

Sd/-

**[B.P. JAIN]
ACCOUNTANT MEMBER**

Dated: 21st November, 2017

VL/

Copy forwarded to:

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

Asst. Registrar
New Delhi