



IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.3549/Mum./2015
(Assessment Year : 2008-09)

Shri Surendra A. Kotadia
7, Karim Manor, 8, Krishna Sanghi Path
Gamdevi, Mumbai 400 007
PAN - AABPK3637L

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle-35, Mumbai

..... Respondent

ITA no.3548/Mum./2015
(Assessment Year : 2007-08)

Shri Surendra A. Kotadia
7, Karim Manor, 8, Krishna Sanghi Path
Gamdevi, Mumbai 400 007
PAN - AABPK3637L

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle-35, Mumbai

..... Respondent

ITA no.3550/Mum./2015
(Assessment Year : 2008-09)

Shri Surendra A. Kotadia
7, Karim Manor, 8, Krishna Sanghi Path
Gamdevi, Mumbai 400 007
PAN - AABPK3637L

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle-35, Mumbai

..... Respondent

Assessee by : Shri Beharilal
Revenue by : Ms. Arju Garodia

Date of Hearing - 07.09.2017

Date of Order - 09.10.2017

ORDER**PER SAKTIJIT DEY, J.M.**

Aforesaid appeals by the same assessee are against separate orders of the learned Commissioner (Appeals) confirming imposition of penalty under section 271(1)(c) of the Income-tax Act, 1961 (for short "*the Act*") for the assessment year 2007-08 and 2008-09 and under section 271AAA of the Act for the assessment year 2008-09.

ITA no.3548/Mum./2015

2. In this appeal, the assessee has challenged the imposition of penalty under section 271(1)(c) of the Act for the assessment year 2007-08.

3. Brief facts are a search and seizure operation was conducted in case of Dimple Drums and Barrels Pvt. Ltd. and the assessee was also covered under the said search operation carried out on 15th May 2008. The assessee had filed its original return of income for the impugned assessment year on 8th November 2007, declaring income of ₹ 3,30,758. Subsequently, in response to the notice issued under section 153A of the Act, the assessee filed its return of income on 12th January 2009, declaring the same income of ₹ 3,30,758. In the course of assessment proceedings, the Assessing Officer found that during search and seizure operation in the residence of the assessee total

cash of ₹ 20,47,904, was found, out of which ₹ 17.50 lakh was seized. The Assessing Officer observed, out of total cash found of ₹ 20,47,904, cash amounting to ₹ 15,68,750 was found from different lockers maintained in the name of assessee and his family members. So, out of the cash found in lockers, the Assessing Officer treated an amount of ₹ 8,91,750 to be undisclosed income pertaining to the impugned assessment year since the last date of operation of locker was 11th November 2006. Accordingly, he made the addition. Further, the Assessing Officer added an amount of ₹ 76,176, on account of payment of electricity bills by the company on behalf of the assessee. On the basis of such additions, the Assessing Officer initiated proceedings for imposition of penalty and ultimately passed an order imposing penalty of ₹ 3,52,804 under section 271(1)(c) of the Act.

4. Though, the assessee preferred appeal before the first appellate authority, the learned Commissioner (Appeals) also sustained the penalty imposed.

5. Learned Authorised Representative submitted, the entire cash found during the search and seizure operation was declared by the assessee in the assessment year 2008-09. He further submitted, while directing for initiation of penalty proceedings in the assessment order, the Assessing Officer has not recorded any satisfaction. Further, in the

show cause notice issued under section 274 of the Act, the Assessing Officer has not specified which limb of section 271(1)(c) of the Act is attracted. Therefore, imposition of penalty is not justified. In this context, he relied upon the following decisions CIT v/s Manjunatha Cotton and Ginning Factory, [2013] 359 ITR 565 (Kar.), CIT v/s Samson Perinchery, [2017] 392 ITR 004, Meherji Cassinath Holdings Pvt. Ltd. v/s ACIT, ITA no.2555/Mum./2012, dated 28th April 2017.

6. Learned Departmental Representative supported the order of the Departmental Authorities.

7. We have heard rival contentions and perused the material available on record. On a perusal of the assessment order, we have noticed that the Assessing Officer has simply mentioned "**penalty proceedings under section 271(1)(c) of the I.T. Act are initiated separately**". There is no satisfaction recorded by the Assessing Officer whether the assessee has concealed the particulars of income or has furnished inaccurate particulars of income. Even, in the show cause notice issued under section 274 of the Act on 22nd December 2010, a copy of which is at Page-57 of the paper book, which is in printed format the Assessing Officer has not specified which limb of section 271(1)(c) of the Act he intends to apply for imposing penalty by striking off inappropriate words or paragraph. In that view of the

matter and applying the ratio laid down in the decisions relied upon by the learned Authorised Representative, we hold that imposition of penalty under section 271(1)(c) of the Act in the instant case is not justified. Accordingly, we delete the penalty.

8. In the result, **assessee's** appeal is allowed.

ITA no.3549/Mum./2015

9. In this appeal, the assessee has challenged the imposition of penalty under section 271(1)(c) of the Act for the assessment year 2008-09.

10. Brief facts are, pursuant to a search and seizure operation under section 132 of the Act, proceedings under section 153A was initiated against the assessee. In response to the notice issued under section 153A of the Act, the assessee filed its return of income on 12th January 2009, declaring income of ₹ 84,13,884, including undisclosed income of ₹ 81 lakh. It is pertinent to mention here, as observed by the Assessing Officer, the assessee had not filed original return of income under section 139(1) of the Act for the impugned assessment year since the due date for filing of return of income for the assessment year 2008-09, had not expired till the date of search. During the assessment proceedings, the Assessing Officer made addition on

account of unaccounted cash amounting to ₹ 1.50 lakh on-money received from Bhupendra Jhaveri amounting to ₹ 7 lakh unexplained household expenses of ₹ 1,65,965 and perquisite value towards payment of electricity bill by the company amounted to ₹ 95,758. On the basis of additions made, the Assessing Officer initiated proceedings for imposition of penalty under section 271(1)(c) of the Act by issuing show cause notice under section 274 of the Act. Though, the assessee objected to the initiation of penalty proceedings, however, the Assessing Officer proceeded to impose penalty under section 271(1)(c) of the Act for an amount of ₹ 3,88,344.

11. The learned Commissioner (Appeals) taking note of the fact that the addition of ₹ 7 lakh and ₹ 1,65,965 towards on-money receipt and unexplained household expenses were deleted by the Tribunal restricted the penalty imposed under section 271(1)(c) of the Act to the rest of the additions i.e., perquisite value of ₹ 76,000 and unexplained cash of ₹ 1.50 lakh.

12. Learned Authorised Representative submitted, the Assessing Officer while directing for initiation of penalty proceedings under section 271(1)(c) of the Act, has not recorded any satisfaction whether such penalty has to be imposed for concealment of income or

furnishing inaccurate particulars of income. Therefore, imposition of penalty is invalid.

13. Learned Departmental Representative relied upon the observations of the learned Commissioner (Appeals).

14. We have heard rival contentions and perused the material available on record. A careful reading of the assessment order and more particularly Para-6.4 of the assessment order, it is evident, the Assessing Officer while making addition of ₹ 1.50 lakh has directed for initiation of penalty proceedings under section 271(1)(c) of the Act. However, he has not recorded any satisfaction whether initiation of penalty proceedings is for furnishing of inaccurate particulars of income or concealing the particulars of income or both. Similarly, insofar as the addition of perquisite value of ₹ 76,558 is concerned, from the discussion of the Assessing Officer in Para-9.3 and 9.1, it is evident that the Assessing Officer has not even directed for initiation of penalty proceedings under section 271(1)(c). Of-course, in the concluding part of the assessment order, the Assessing Officer has mentioned that penalty proceedings under section 271(1)(c) r/w section 274 / 271AAA are initiated separately. However, the Assessing Officer has not recorded any satisfaction for which offence the Assessing Officer intends to initiate such penalty proceedings. It is also

evident, in the show cause notice issued under section 274 of the Act, the Assessing Officer has not specifically mentioned which limb of the section 271(1)(c) he intends to bring in force for imposition of penalty. Though, the show cause notice issued under section 274 of the Act is in a printed format, however, the Assessing Officer has not struck off the inappropriate words. This is evident from the show cause notice issued under section 274 of the Act for the impugned assessment year a copy of which is at Page-58 of the paper book. Therefore, following the ratio laid down in the judicial precedents referred to herein before, we delete the penalty imposed under section 271(1)(c) of the Act.

15. In the result, appeal is allowed.

ITA no.3550/Mum./2015

16. In this appeal, the assessee has challenged imposition of penalty under section 271AAA of the Act for assessment year 2008-09.

17. As discussed earlier while dealing with ITA no.3549/Mum./2015, in pursuance to notice issued under section 153A of the Act, the assessee filed his return of income declaring total income of ₹ 84,13,884, which included undisclosed income of ₹ 81 lakh. On the basis of undisclosed income declared by the assessee, the Assessing Officer initiated penalty proceedings under section 271AAA and

ultimately imposed penalty under the said provision for an amount of ₹ 8.10 lakh being 10% of the undisclosed income offered by the assessee.

18. Though, the assessee challenged the imposition of penalty before the learned Commissioner (Appeals), however, learned Commissioner (Appeals) sustained imposition of penalty under section 271AAA.

19. We have heard rival contentions and perused the material available on record. The learned Authorised Representative submitted before us that the Assessing Officer has not initiated proceedings for imposition of penalty under section 271AAA as no show cause notice under section 274 of the Act was issued to the assessee. On the basis of aforesaid submissions made by the learned Authorised Representative the Bench directed the learned Departmental Representative to obtain necessary instruction from the Assessing Officer whether show cause notice under section 274 r/w 271AAA was issued to the assessee before imposition of penalty. On the direction of the Bench, the learned Departmental Representative has obtained necessary instructions from the Assessing Officer and has submitted it before the Bench vide letter dated 11th September 2017, copy of which is placed on record. As could be seen, the Assessing Officer vide letter

dated 6th September 2017, has communicated to the learned Departmental Representative as under: –

*"To
The Sr. AR,
ITAT 'J' Bench,
Mumbai.*

Madam,

*Sub: Factual Report in the case of Sh. Surendra Kotadia
(PAN : AABPK3637L) – reg.*

Ref: no.CIT(DR)/ITAT/J Bench/2016–17 dt. 07.09.2017

Kindly refer to the above.

2. It is to state that on perusal of the assessment records it has been verified that penalty show cause notice u/s 271AAA r.w.s. 274 has not been served to the assessee. The factual report in this regard is being forwarded to you for necessary action at your end.

*Yours faithfully,
Sd/-*

*(Rajeshwari Menon)
Dy. Commissioner of Income Tax
Central Circle–6(2), Mumbai"*

20. Thus, from the letter of the Assessing Officer, it is evident that before imposition of penalty under section 271AAA no show cause notice under section 274 as mandated under sub-section (4) of section 271AAA was issued to the assessee. Though, the assessee has taken aforesaid contention before the learned Commissioner (Appeals), he has totally misconceived the facts while holding that the Assessing Officer has initiated penalty proceedings under section 271AAA in the

assessment order and any defect in such penalty proceedings is curable under section 192B of the Act. We are unable to accept the aforesaid reasoning of the first appellate authority. When the provision contained under section 271AAA mandates issuance of notice under section 274 of the Act before imposition of penalty, the statutory authority being bound by such statutory provision has to act accordingly and cannot deviate therefrom. In our considered view, non-issuance of notice under section 274 is a serious lapse and jurisdictional error as in the absence of such notice, the Assessing Officer could not have proceeded to impose penalty under section 271AAA of the Act. Therefore, the defect arising from non-issuance of notice under section 274 r/w section 271AAA is not a curable defect as provided under section 292B. In view of the aforesaid, we delete the penalty imposed under section 271AAA of the Act.

21. **In the result, assessee's appeal is allowed.**

22. To sum up, all the appeals are allowed.

Order pronounced in the open Court on 09.10.2017

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 09.10.2017

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai

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