

आयकर अपील अाधिकरण, अहमदाबाद ढायापीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" B " BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And

Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./IT(SS)A No. 127/AHD/2011

अाधरण वष/Asstt. Year: (Block Period 1996-97 to 2001-02)

Shri Arvindbhai M. Patel, 10/59 Santosh Park, Nr. Vijay Nagar, Naranpura, Ahmedabad PAN: ADGPP8502P	Vs.	D.C.I.T., Circle-9, Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	Shri S.N. Soparkar, Sr.Advocate with Ms Urvashi Shodhan, A.R
Revenue by :	Shri Subhash Beins CIT DR

सुनवाई का तारख/Date of Hearing : 07/01/2021

घोषणा का तारख/Date of Pronouncement: 17/03/2021

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-4, Ahmedabad, dated 16/05/2018 arising in the matter of assessment order passed under s. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the block period 1996 to 2002.

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

1. *The Id.CIT(A) erred on facts and in laws in sustaining the Penalty levied under the provision of section 158 BFA(2)/(3) of the Act, where the appellant had not factually concealed the income and addition sustained of Rs.67.36 lacs had been contrary to several case laws relied upon, in regard to jotting on rough pad written by other person, which also retracted by him.*
2. *The Id.CIT(A) erred on facts and in laws in sustaining the levy of penalty towards bad debts of Rs.62,06 lacs; where the same had been established/ became bad before the end of the relevant year and due date of return u/s.139(1) had not been expired.*

The appellant requests that leave be granted to add, alter or amend any of the grounds of appeal on or before the final hearing of the appeal.

2.1 The assessee has also filed the additional ground of appeal vide letter dated 07-12-2015 which is reproduced as under:

"In law and in fact and in the circumstances of the appellant's case, the Ld.Deputy Commissioner of Income Tax Circle-9, Ahmedabad, has erred in levying penalty of rs.81,53,501/- by invoking the provision of section 271(1)(c) of the I.T Act, 1961, which is equal to the tax sought to be evaded @ 100 % while passing an order u/s.158BFA[2] r.w.s 158BFA[3] of the Act. Accordingly, the order levying penalty is invalid and void ab-initio and hence, deserves to be quashed."

3. The learned AR for the assessee, at the outset, submitted that the additional ground, being legal in nature, raised by the assessee vide letter dated 17-12-2015 goes to the root of the matter and all the facts related to the additional ground are available in the order of the authorities below. Therefore, the same needs to be admitted in view of the judgment of the Hon'ble Supreme Court in the case of NTPC Ltd. reported in 229 ITR 383 where it was held as under:

Under section 254, the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. There is no reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner (Appeals). Both the assessee as well as the department have a right to file an appeal/cross objections before the Tribunal. There is no reason why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

In the instant case, therefore, the Tribunal had jurisdiction to examine a question of law which arose from the facts as found by the lower authorities and having a bearing on the tax liability of the assessee.

4. On the other hand, the learned DR did not raise any objection on the admission of the additional ground of appeal raised by the assessee.

5. Heard the rival contentions of both the parties and perused the materials available on record. The additional ground raised by the assessee is legal in nature and therefore the same can be raised at any stage in pursuance to the judgment of the Hon'ble Supreme Court in the case of NTPC Ltd (*supra*).

5.1 Hence we admit the ground of appeal raised by the assessee and proceed to adjudicate the same.

5.2 First, we take up the additional ground of appeal raised by the assessee. The assessee in additional ground of has challenged the validity of the penalty order framed under section 271(1)(c) of the Act.

5.3 The facts in brief are that the assessee in the present case is an individual and engaged in the business of construction, finance and film distribution. There was a search conducted on the assessee dated 25-07-2002 under section 132 of the Act. As a result of search certain documents of incriminating nature were found and accordingly the assessment was framed under section 158BC of the Act vide order dated 30-07-2004 after making certain addition. The AO also initiated the penalty proceedings under section 158BFA(2) of the Act by issuing notice dated 30-07-2004. The AO finally passed the order under section 271(1)(c) of the Act levying

the penalty for Rs. 81,53,501/- vide order dated 03-03-2010 on account of concealment/furnishing inaccurate particular of income. In appeal, the learned CIT (A) was pleased to confirm the penalty levied by the AO.

6. Being aggrieved by the order of the learned CIT (A) the assessee is in appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 250 and contended that the penalty was initiated by issuing notice under section 158BFA(2) r.w.s. 158BFA(3) of the Act whereas the penalty was finally levied under section 271(1)(c) of the Act. As per the learned AR the assessment was framed under section 158BC on account of the search conducted under section 132 of the Act dated 25-07-2002, therefore the penalty should have been levied under section 158BFA of the Act being search proceedings. Accordingly, the learned AR contended that the penalty order is not sustainable.

8. On the other hand the learned DR submitted that the assessee has not challenged the penalty order before the authorities below. As per the learned DR notice was correctly issued under section 158BFA of the Act. However, the AO while passing the penalty order inadvertently has made reference to the provisions of section 27 (1)(c) of the Act which can be treated as typographical mistake. The Id. DR vehemently supported the order of the authorities below.

9. The learned AR in his rejoinder submitted that the AO in his penalty order has made the reference to the provisions of section 271(1)(c) of the Act at various places. Similarly the AO while concluding the penalty order has specifically referred to the provisions of section 271(1)(c) of the Act . Therefore the mistake committed by the AO in the penalty order cannot be termed as typographical mistake.

10. We have heard the rival contentions of both the parties and perused the materials available on record. In the instant case the issue arises for our

consideration so as to whether the assessee is liable for penalty u/s 271(1)(c) or 158BFA of the Act. At this juncture we find important and pertinent to refer the provision u/s 158BFA (2) of the Act, which reads as under:

(2) The Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Chapter, may direct that a person shall pay by way of penalty a sum which shall not be less than the amount of tax leviable but which shall not exceed three times the amount of tax so leviable in respect of the undisclosed income determined by the Assessing Officer under clause (c) of section 158BC

10.1 A plain reading of the above provision shows that it is applicable for the specified years in the case of search carried out u/s 132 of the Act, on or after first day of June 2007, but before the first day of July 2012. In case of search proceedings it is compulsory to make the assessment in particular manner under the different provision of the sections of the Act. Similarly, the penalty is levied with respect to search proceedings under a different provisions. In this regard we draw support and guidance from the order of ITAT Panji in case of Bhawarlal Jain, Kakinada vs The Dy. CIT, Rajamahendravaram in ITA No. 80 & 81/VIZ/2017. The relevant extract is as under:

“11. From the above, it is very clear that where there is a search has been initiated under section 132 penalty can be imposed under section 271AAA of the Act. In this case, from the paper book filed by the assessee at page No. 62, the Assessing Officer has issued notice to complete assessment of the assessee under section 153C read with 153A(1)(b) and not under section 132 of the Act. Therefore, the initiation of penalty is void ab initio and therefore, the order under section 271AAA has to be quashed. Accordingly, we quash the penalty order passed by the Assessing Officer under section 271AA. Thus, this ground of appeal filed by the assessee is allowed.”

10.2 In the backdrop of the above stated discussion, we refer to the penalty order framed by the AO, we find that the penalty has been levied under section 271(1)(c) of the Act. The relevant order of the penalty is reproduced as under:

I am satisfied that the assessee had concealed and has furnished inaccurate particulars in respect of income of Rs.1,29,42,063/- represented from film exhibition of Rs.67,36,496/- and Rs.35,54,706/- and Rs.26,50,861/- claimed on account of bad debts. The case of the assessee is a fit case for levy a penalty u/s.271(1)(c) of the IT Act. I therefore, levy a penalty of Rs.81,53,501/- which is equal to the tax sought to be evaded and in minimum penalty leviable as against maximum penalty leviable of Rs.2,44,60,503/-.

10.3 It is also pertinent to note that the AO has levied the penalty under section 271(1)© of the Act by observing that the assessee has concealed/furnished inaccurate particular of income whereas there is no concept of concealment/furnishing inaccurate particular of income under the provisions of section 158BFA(2) of the Act as discussed above. In view of the above we hold that the penalty levied under section 271(1)(c) of the Act is not sustainable and accordingly we quash the same. Hence the ground of appeal of the assessee is allowed.

11. As the assessee succeeds before us on the technical count, we don't find any reasons to adjudicate the issue on merits. Furthermore, at the time of hearing, the Ld. Counsel for the assessee did not advance any argument on merit. Accordingly, the grounds raised on merits do not require any separate adjudication. As these grounds become infructuous. Hence, the same are dismissed as infructuous.

12. In the result, the appeal of the assessee **is partly allowed.**

Order pronounced in the Court on 17/03/2021 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated **(True Copy)**
17/03/2021
Manish