आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL, RAIPUR BENCH, RAIPUR

(Through Virtual Court)

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI RATHOD KAMLESH JAYANTBHAI, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 164/RPR/2018

निर्धारण वर्ष / Assessment Year : 2014-15

Raipur Securities & Investment Ltd.
MIG 21, Indravati Colony,
Raipur (C.G.)
PAN : AACCR4419F

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer-3(1),
Raipur (C.G.)

……प्रत्यर्थी / Respondent

Assessee by : Ms. Puja Bajaj, AR
Revenue by : Shri G.N Singh, DR

सुनवाई की तारीख / Date of Hearing : 23.05.2022
घोषणा की तारीख / Date of Pronouncement : 25.05.2022

आदेश / ORDER

PER RATHOD KAMLESH JAYANTBHAI, AM:

This appeal is filed by the assessee aggrieved from the order of the Commissioner of Income Tax (Appeal)- I, Raipur [Here in after referred as Ld. CIT(A)] for the assessment year 2014-15 dated 20.06.2018.

2. The hearing of the appeal was concluded through audio-visual medium on account of Government guidelines on account of prevalent situation of Covid-19 Pandemic, both the parties have placed their written as well as oral arguments during this online hearing process.

3. The appellant has taken following grounds in this appeal;

1. In the facts & circumstances of the case, penalty order passed by the AO is illegal and invalid inasmuch as the show cause notice issued by the AO is illegal and not in accordance with provisions of law. Ld. CIT(A) erred in confirming the penalty without appreciating the correct position of law.

2. In the facts and circumstances of the case and in law, Ld. CIT (A) erred in confirming the penalty of Rs. 2,18,910/- imposed by the AO u/s 271(1)(c). The penalty imposed by the AO and confirmed by CIT (A) is not justified and is illegal.

3. The appellant reserves the right to add, amend or alter any ground or ground/s of appeal.

4. The fact as culled out from the records is that the assessment was made under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'Act') on 16.12.2016 at Rs 10,62,670/-. The addition of Rs. 10,62,670/- was made on account of LTCG arising out of sale of land and which was not disclosed by the assessee in its return of income. Consequently, penalty proceeding under section 271(1)(c) of the Act was initiated. In this case, assessee had sold a piece of land for Rs 15,36,834/-, the sale proceeds of which and consequential capital gains were not mentioned in the return of income. During the course of scrutiny proceedings, on being asked about this, the AR of the assessee has simply stated that it was inadvertently missed while filing return of income due to some problem. Therefore, LTCG on this sale was worked out at Rs 10,62,666/ and so it (rounded off to Rs 10,62,670/-) was added to the returned income. Moreover, penalty u/s 271(1)(c) of the Income Tax Act, 1961 was also initiated on this addition as it was held that the assessee had concealed this income by furnishing inaccurate particulars of income.

4.1 During the penalty proceedings the learned Assessing Officer [here in after for short “ld. AO “] observed that

5. On the basis of detailed reasons given in assessment and also considering the facts of the case it is quite clear that there was no bona fide reason due to which the said income derived from LTCG on sale of land has been left to be shown in its return of income and therefore, it is held that the assessee has concealed its income to the tune of Rs 10,62,670/- by furnishing inaccurate particulars of income by not showing this income in its return of income. Moreover, no evidence of filing appeal against the assessment order has been produced which means that assessee has accepted the assessment order.

6. Considering the facts and circumstances of the case as is discussed in detail in assessment order and in above para which is also accepted by the assessee because no appeal is reported to have been filed it is held that assessee had concealed this income of Rs 10,62,670/- without bonafide reason, I hold that the assessee has furnished inaccurate particulars of income and consequently, concealed particulars of income within the meaning of Section 271(1)(c) of the Act to the tune of Rs 10,62,670/-. The minimum penalty leviable in this case, equal to the tax sought to be evaded by reason of the concealment of particulars of Income by furnishing inaccurate particulars of income comes to Rs 2,18,910/- whereas the maximum penalty leviable comes to Rs 6,56,730/-.

Considering the facts and circumstances of the case I impose a penalty of Rs 2,18,910/- (Rupees two lacs eighteen thousand nine hundred ten only) under Section 271(1)(c) of the Act. The assessee is directed to pay the penalty of Rs 2,18,910/ in addition to the tax payable by him.

5. Aggrieved from the order of the ld. AO the assessee filed an appeal before the ld. CIT(A) who has sustained the levy of penalty and the relevant findings of the ld. CIT(A) is as under :

Finding of the CIT(A)

2.3 Capital gain was not worked out by the assessee and was not offered. The sale consideration was however credited in the books. As per Explni to section 147, if any information can be deduced from records by due diligence, the assessee cannot claim that such information was furnished. before the AO. In the present case while the sale transaction was recorded in books but the books are assessee's records. And unless the case is selected. for scrutiny the AO will not have occasion to examine the books and if the appellant has not offered the amount of capital gain for transaction it has escaped the assessment. The assessee's plea that it has not furnished incorrect particulars is not correct and cannot be accepted.

Regarding technical plea that the notice issued by the AO did not specify the exact defect for which the penalty was initiated, on perusal of the notice I find that in the notice dated 26/05/2017 out of the three sub clauses (a) (b) & (c) the sub clause (c) has been printed in bold which tells that the notice has been issued in respect of clause (c). It reads as "(c) for concealment the particulars of income or furnishing inaccurate particular of such income." In view of the facts of the case as discussed above the assessee has furnished inaccurate particulars of income and thereby escaped the income. Therefore, the penalty imposed by the AO is hereby sustained.

6. During the course of hearing, Ld. AR took us through the relevant facts of the case vis-à-vis paper book filed on record and in support of legal ground, it is submitted that, the initiation as well imposition of

penalty suffers from voice of non-application of mind of the Ld. AO and therefore penalty deserves to be deleted. Insofar the merits of the case concern, Ld. AR contended that, during the course of assessment proceeding the assessee on being aware of about the inadvertent mistake filed the revised computation and offered the long term capital gain in the assessment proceedings and looking to the finding of the assessing officer in the order passed u/s. 143(3) there was complete absentia of clear findings so has to attract the penal provisions not only that while issuing the notice he has not stated the charge under which the assessee has to defend the penalty proceedings the ld. AR of the assessee has drawn our attention to the paper book page 4 & 5 where the notice for penalty issued bearing dated 16.12.2016 and 26.05.2017 both have been issued mechanically without specifying the charge under which the default made by the assessee. In addition to the above oral arguments the ld. AR of the assessee has also filed the written submission and the evidence and cases laws relied upon and the same is reproduced for the sake of brevity of the facts:

Submission of the assessee

The AO issued show cause notice dated 16.12.2016 and 26.05.2017. In the penalty order, the AO concluded that the appellant has furnished inaccurate particulars of income and consequently concealed particulars of income. He therefore levied penalty of Rs. 2,18,910/- being the minimum penalty. In this regard, it is humbly submitted that: -

As regards ground no. 1

The present appeal has been filed against the penalty order passed by the AO u/s 271(1)(c), imposing penalty of Rs. 2,18,910/-. In this case, the return of income was filed declaring nil income which has been assessed by the AO u/s 143(3) at Rs. 10,62,666/-, The addition made by the AO is on account of long term capital gain on sale of land. In the assessment order, the AO observed that the appellant has sold a piece of land but capital gain thereon was not disclosed in the return and that during assessment proceedings, the appellant offered capital gain. In the assessment, the AO concluded that the appellant has concealed its income and has furnished inaccurate particulars.

1. At the outset, it is submitted that the appellant neither concealed its income nor furnished inaccurate particulars. The AO has levied penalty on capital gain on sale of land. The land was sold for a consideration of Rs, 15,36,834/- capital gain whereon came to Rs, 10,62,666/-.

2. It is pertinent to note that the transaction of sale of land has been recorded in the books of appellant and is also reflected in the audited balance sheet, a copy whereof is enclosed (page no. 1 to 22). In the schedule of fixed assets (schedule no. 8), the sale proceeds of land of Rs. 15,36,834/- is reflected/disclosed. Therefore, the sale transaction stood disclosed in the books/alance sheet. Please note that in para no. 3 of the assessment order also, it is mentioned that the sale price is reflected in the schedule of fixed assets.

3. The capital gain on the land was left to be offered in the computation due to family disputes/ problems in the family of the directors of the company. There was no intention in the mind of appellant/its directors to not disclose the capital gain and the default was unintentional. It is at case of genuine and bonafide mistake and there is no malafide.

4. Once having declared the transaction of sale in the books and balance sheet, it cannot be said that the appellant intended to conceal the capital gain. It is pertinent to note that even the auditors have not worked out capital gain in the financial statements. Since the gain was left to be accounted through proper accounting entry, it was not reflected in the statement of profit & loss and consequently, it escaped disclosure in the computation.

In the case of Price Waterhouse Coopers Pvt. Ltd. vs CIT (2012) 348 ITR 306 (SC), a disallowance on account of gratuity was reported in the tax audit report which was not disallowed in the return/computation. It was held that the tax audit report was filed with the return and that it unequivocally stated that provision for payment was not allowable which indicates that the assessee made a computation error. Contents of the tax audit report suggested that there is no question of the assessee concealing its income and all that happened is that through a bonafide and inadvertent error, the assessee failed to add back the provision for gratuity. It was described by Hon'ble Supreme Court as a human error which we all are prone to make. It was held that imposition of penalty was not justified.

The case of appellant is squarely covered by the above decision of Hon'ble Supreme Court. In the case of appellant also, the sale transaction is reflected in the balance sheet which was filed with the return and it was a case of bonafide human error.

As regards ground no. 2

1. While initiating penalty proceedings in the assessment order, the AO has mentioned in para no. 3 that the appellant has concealed the income and has furnished inaccurate particulars. Again in the penalty order, the AO concluded vide para no. 6 that the appellant has furnished inaccurate particulars of income and consequently concealed particulars of income.

2. As held in Dilip N. Shroff vs JCIT (2007) 291 ITR 519, 551 (SC) and Sachin Arora vs ITO in ITA no. 118/Agra/2015 order dated 19.12.2017, it is a settled position that the term "concealment" and "furnishing inaccurate particulars" are different and distinct, having different and separate meanings. It is also settled that the two terms are not interchangeable and one cannot be replaced by the other. In other words, both the terms signify different default and therefore, it was incumbent upon the AO to have framed definite charge against the appellant, which the AO has utterly failed, both in the assessment and penalty order as well as in the show cause notice.

   Since both concealment and furnishing of inaccurate particulars have different meanings, it cannot be said that the appellant committed both the defaults. The term "conceal" means to hide an income and the term "furnishing inaccurate particulars" means not accurate or not exact or correct or not according to truth, as held in Dilip N. Shroff vs JCIT (2007) 291 ITR 519, 546 (SC). The AO had to fix the charge on appellant according to the established meaning of the two terms. Mentioning of both the defaults means that the AO was not sure of the default and it is a case of non application of mind. In view of this, mentioning both the defaults in the order and show cause notice shows that the appellant was not made aware of exact charge against it which is necessary so as to render reasonable opportunity of hearing. It is only when a charge is communicated to assessee that he can be said to

have been given reasonable and proper opportunity of hearing."

3. Notice not valid

We are enclosing herewith copy of the show cause notices dt 16.12.2016 & 26.05.2017 issued by the AO. A perusal of the notices issued to appellant shows that in such notice, the AO has not specified as to whether penalty was sought to be imposed for concealment of income or for furnishing inaccurate particulars of income. In the show cause notice, both the charges are mentioned and the irrelevant charge is not struck of.

In the following cases, it was held that the show cause notice should specify whether penalty is proposed to be levied for concealment or for furnishing inaccurate particulars and if the notice does not specify the charge and if the AO does not strike off the irrelevant part in the notice, penalty u/s 271(1)(c) cannot be sustained: -

CIT & Another vs Manjunatha Cotton & Ginning 359 ITR 565 (Kar.), SLP dismissed on 5.8.2016 vide (2016) 386 ITR 13 (St.). Manjunatha followed in CIT vs Samson Perinchery (Bom.)

M.G. Contractor Pvt. Ltd. vs DCIT, ITA no. 7034 to 7038/Del./2014 order dt. 19.09.2016 of "E" Bench.

Pr. CIT vs Smt. Baisetty Revathi (2017) 398 ITR 88 (T & AP)
Indrani Sunil Pillai vs ACIT (2018) 52 CCH 56 (Mum. Trib.)

Jeetmal Choraria vs ACIT in ITA no. 956/Kol.2016 order dt. 01.12.2017 of "D Bench Sachin Arora vs ITO in ITA no. 118/Agra/2015 order dated 19.12.2017, after considering a number of decisions on the subject.

In Sachin Arora vs ITO in ITA no. 118/Agra/2015 order dated 19/12/2017, a similar situation had arisen. The AO initiated

penalty for a specific charge and in the accompanying notice, the assessee was called upon to explain on both the charges. It was held by Hon'ble ITAT that the notice issued by the AO suffers from non-application of mind. The penalty was held to be illegal and not sustainable. The relevant findings are given in para no. 52 the order of Hon'ble ITAT.

In the above case, definition of the term "concealment" and "inaccurate particulars" was considered. "Concealment" was understood to mean to hide or suppress the truth and "inaccurate" was understood to mean suggesting or stating a falsehood. It was further held that both the terms have different meanings. In view of above explanation, it is requested that the penalty imposed by AO may kindly be cancelled/quashed.

7. Per contra the Ld. DR supported the orders of the lower tax authority and the conviction of Ld. CIT(A) and also stated that it is mere technical error and the same may be seen accordingly and has heavily relied upon the findings of the lower authorities and requested to confirm the penalty levied.

8. The ld. AR appearing on the behalf of the assessee also relied upon the decision of this co -ordinate bench given in the case of Shri Swapnil Kumar Jain in ITA No. 106/BIL/2017 dated 01.04.2022 where in the bench has dealt the similar legal issue and the relevant finding is extract for the sake of brevity:

6. After hearing to the rival contentions of both the parties; perused material placed on records and duly considered the facts of the case in the light of settled legal position and the case laws relied upon by the appellant assessee as well the respondent revenue.

7. It is apt to quote relevant text of the provision to arrive at the applicability in the instant case before us;

> *271. Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the [Assessing] Officer or the [Commissioner (Appeals)] [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person —*
> *(a) . . . . .*
> *(b) . . . . .*
> *(c) has concealed the particulars of his income or [* * *] furnished inaccurate particulars of [such income, or]*
> *(d) . . . . .*
>
> *he may direct that such person shall pay by way of penalty,—*
>
> *(i) . . . . .*
> *(ii) . . . . .*
> *(iii) in the cases referred to in clause (c) [or clause (d)], [in addition to tax, if any, payable] by him, a sum which shall not be less than, but which shall not exceed [three times], the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.*

7.1 One can observe, that the provisions of section 271(1)(c) of the Act lex lata, postulates that, penalty prescribed therein can only be levied on the occurrence of either of the situation, namely either for concealment of particulars of income or for furnishing of inaccurate particulars of such income. It has been judicially well settled by now that, the "concealment of particulars of income" and "furnishing of inaccurate particulars of income" referred into section 271(1)(c) of the Act signifies two distinct connotations, and the said proposition can be witnessed from the judgments of the Hon'ble Supreme Court in the case of "Dilip N Shroff Vs JCIT" reported at 291 ITR 519 (SC), and "Ashok Paid Vs CIT" reported at 292 ITR 11. In the light of aforesaid judicial precedents, it is imperative on the part of Ld. AO to make the assessee aware in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act as to which one of the two limbs is alleged against him for the purposes of imposition of penalty and unless it is made aware of any specific charge against him, the proceedings shall be violative of the principles of natural

justice inasmuch as the assessee would not be in a position to put up his necessary defence appropriately.

7.2 One has to appreciate the point being canvassed by the assessee before us, which is based on the tone and drift of the notice issued u/s 274 r.w.s. 271(1)(c) of the Act dt 14/01/2015, a copy of which has been placed on record which de-facto reads as under; During the course of assessment proceedings u/s 143(3) of the Income Tax, 1961 for A.Y 2010-11. Penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 were initiated. Therefore, you are hereby requested to appear before me at my office on 29/01/2015 at 11.30 A.M and show cause why an order imposing a penalty on you should not be made u/s 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made u/s 271(1)(c). (Emphasis Supplied)

7.3 The infirmity in the notice was sought to demonstrate a reflection of nonapplication of mind by the Ld. AO ex facie and in support thereof a reference can be made to the specific discussion laid by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra); "It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income, or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations." (Emphasis Supplied)

7.4 Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case apparently endures from non-application of mind by Ld. AO and a similar proposition was also articulated by the Hon'ble Karnataka High Court in "CIT Vs M/s SSA's Emerald Meadows" (ITA 380/2015), which the Ld. AR heavily relied upon in support of legal ground raised as "fumus boni iuris."

7.5 The Ld. DR did not dispute the factual matrix, but sought to point out that, there was a due application of mind by Ld. AO in the assessment order, wherein after discussing the reasons for the disallowance, has initiated the penalty proceedings u/s 271(1)(c) which can be seen from the relevant text of the order of the assessment;13 ITA No. : 106/BIL/2017 AY : 2010-2011 ITAT-Raipur Page 7 of 10 "In addition to this, through order

sheet dtd.28/12/2012, the counsel himself accepted the above mistake and he offered to surrender the amount of Rs.251275/- for addition in the hand of the assessee. Now decision is to be taken as whether the amount of Rs.251275/- will be considered for unexplained investment u/s 69 or unexplained expenditure u/s-69C. Because the assessee had himself submitted that VAT of Rs.10051/- is refundable means assets or in other word the refundable VAT is VAT Credit (purchase). Therefore, considering the above, I hereby add of Rs.2,51,275/- in the hand of the assessee u/s-69C with initiating penalty proceeding u/s-271(1)(c) of Income Tax Act, 1961." (Emphasis Supplied)

7.6 In our considered opinion, the attempt of the Ld. DR to demonstrate application of mind by the Assessing Officer is of no defence, inasmuch as the Hon'ble Supreme Court has approved the factum of non-specifying relevant clause in the notice is reflective of non-application of mind by the Assessing Officer. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court in plethora of cases inter-alia "CIT Vs Samson Pericherry", "PCIT Vs Goa Dorado" and "PCIT Vs New Era Sova Mine" wherein it is categorically held that, "No notice could be issued under Section 274, read with Section 271(1)(c), of the IT Act without indicating which particular limb of Section 271(1)(c) was invoked for initiating the penalty proceedings"

7.7 To demonstrate the voice of non-application of mind by the Ld. AO, we shall also refer to the one of the pivotal feature of the present litigation that, in the assessment order the Ld. AO at the epilogue of para 5 on page 3 records that, "with initiating penalty proceedings u/s 271(1)(c) of the Act", however, in the notice u/s 274 r.w.s. 271(1)(c) of the Act was issued without any limbs of section 271(1)(c) of the Act which evidently brings out the reticence on the part of Assessing Officer, resultantly there is complete absentia of clear and crystallised charge being conveyed u/s 271(1)(c), which to be defended by the appellant assessee. In this regard we also refer a similar judgment of the Hon'ble Karnataka High Court in the case of "S Chandrashekar Vs ACIT", reported at 396 ITR 538 (Karn) wherein a notice u/s 274 r.w.s. 271(1)(c) of the Act was issued in printed form without specifying the grounds of initiation of penalty proceedings, was held to be invalid and untenable in law.

8. In omnibus, as noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of issuing the notice without any limb or charge being made against the assessee qua section 271(1)(c) of the Act

establishes unfirm stance and therefore the proceedings suffered from noncompliance with principles of "audi alteram partem".

9. Therefore, in view of the aforesaid discussion, the issue herein stands concluded in favour of the assessee and nothing contrary has been shown to us in the present facts which would warrant our taking a view different from Hon'ble Karnataka High Court in the case of "S Chandrashekar Vs ACIT" (Supra)

10. Since the provision of section 271(1)(c) is calamitous, albeit commercial, consequences, the provision is mandatory and brooks no trifling or dilution therewith, as a result we are of the considered view that, having regard to the fact that in the instant case the SCN dt 14/01/2015 issued u/s 274 r.w.s. 271(1)(c) of the Act without specifying any limb or charge, is invalid and untenable in the eyes of law, consequently the penalty imposed u/s 271(1)(c) of the Act is bad in law and hence quashed accordingly.

11. Resultantly, the appeal of the assessee is allowed in terms of afore stated observation.

9. Respectfully, following judicial precedent and the decision of the co-ordinate bench on the very legal issue that the assessing officer is under obligation to specify the appropriate limb of clause c of section 271(1)(c) of the Act at the time of initiation as well as at the time of levy of penalty notice. In this case it has been drawn our attention that while recording the satisfaction in the assessment order as well as while issuing the notice at two occasion failed to specify the charge under which the assessee is liable for penalty and therefore, without going into the merits of the case, we set-a side the order of CIT(A) and direct the Assessing Officer to delete the levy of penalty imposed upon the

assessee, relying on the various decision cited by the co-ordinate bench while rendering the decision in the case of Shri Swapnil Kumar Jain. In the result the appeal of the assessee is allowed on legal issue.

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

Order pronounced in open court on 25th day of May, 2022.

Sd/-	Sd/-
RAVISH SOOD **JUDICIAL MEMBER**	**RATHOD KAMLESH JAYANTBHAI** **ACCOUNTANT MEMBER**

रायपुर/ RAIPUR ; दिनांक / Dated : 25th May, 2022
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)
4. The Pr. CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.

		Date	
1	Draft dictated on	23.05.2022	Sr.PS/PS
2	Draft placed before author	24.05.2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		