IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.9.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

Tax Case (Appeal) No.840 of 2017

S & P Foundation Pvt. Ltd.,
Old No.27, New No.38,
Madley Road, T.Nagar,
Chennai 600 017.
PAN: AAICS 0224K ... Appellant

Vs.

Assistant Commissioner of Income Tax,
Central Circle-IV(2),
46, Nungambakkam High Road,
Chennai 600 034. ... Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'C' Bench, Chennai, dated 6.6.2017 made in ITA No.2084/Mds/2013,

as against the order of the Commissioner of Income Tax (Appeals)-II No.46(Old No.108) Mahatma Gandhi Road, Chennai-34 made in ITA No.223/10-11/A.11 dated 05/12/2012 as against the order of the Assistant Commissioner of Income Tax Central Circle IV(2), Chennai-34 in PAN/GIR No.AAICSO224K dated 30/12/2009 for the Assessment Year 2006-2007.

For Appellant : Mr.G.Baskar

For Respondent : Mr.J.Narayanasamy,
Senior Standing Counsel

JUDGMENT

(Delivered by DR.VINEET KOTHARI,J)

The Assessee has preferred this Tax Case under Section 260-A of the Income Tax Act aggrieved by the order dated 6.6.2017 for the Assessment Year 2006-2007, restoring the penalty under Section 271(1)(c) of the Act by reversing the order passed by the learned Commissioner of Income Tax (Appeals) in favour of the Assessee by which the learned Commissioner of Income Tax (Appeal) deleted the said penalty.

2. The substantial questions of law raised in this Appeal are as under:-

"Perverse finding in respect of Return u/s.139(1) of the Act

(i) Whether on facts and in the circumstances, order of the Income Tax Appellate Tribunal was perverse in holding that the Assessee had not originally filed his return of income u/s.139(1) of Income Tax Act, 1961, on 30.11.2006?

Tribunal exceeded its jurisdiction

(ii) Whether on the facts and the circumstances of the case, the Income Tax Appellate Tribunal has exceeded its jurisdiction, when there was no ground raised by the Department and without affording any opportunity to the Assessee, proceeded to hold that the Assessee shall be liable for penalty even on the income declared u/s.139(1) on 30.11.2006, which was prior to the search on 10.01.2008?

(iii) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in upholding the levy of penalty u/s.271(1)(c) of the Act on the entire income including the income declared in the original return of income which was not a subject matter of the Appeal before it?

Penalty on additional income offered in return filed in response to notice u/s.153A

(iv) Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in upholding the levy of penalty u/s.271(1)(c) of the Act in respect of additional income offered in return filed in response to notice u/s.153A of Income Tax Act, 1961?

(v) Whether on facts and in the circumstances, the Income Tax Appellate Tribunal is right in law in holding that the explanation provided by the Assessee in respect of additional income voluntarily disclosed was not satisfactory to delete the penalty u/s.271(1)(c) of Income Tax Act, 1961?

Penalty on disallowance u/s.40(a)(ia)

(vi) Whether on facts and in the circumstances, the Income Tax Appellate Tribunal is right in law in holding that mere disallowance u/s.40(a)(ia) of Income Tax Act, 1961, made in the assessment would not amount to concealment of income or furnishing of inaccurate particulars of income for levying penalty u/s.271(1)(c) of the Act?

Validity of Initiation of penalty

(vii) Whether on facts and in the circumstances, the Income Tax Appellate Tribunal is right in law in not holding that initiation of penalty by issuance of notice under section 274 read with section 271(1)(c) of the Income Tax Act, 1961 to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the Penalty Proceedings had been initiated?"

3. The findings of the learned Commissioner of Income Tax (Appeals) in this regard are quoted below for ready reference:-

"6. l have carefully considered the facts of the case and the submission made by the ld. AR. I have also gone through the decisions relied on by the ld. AR. I have also gone through the returns of income filed on 30.11.2006 and 12.8.2009. It has wrongly been stated in the penalty order that the appellant had not filed any return of income u/s.139 of the Act. The assessee had e-filed his return for AY 2006-07 on 28.11.2006 declaring income of Rs.1,01,46,668/-. Subsequently, in response to the notice u/s.153A dated 29.9.2008, it filed return on 12.8.2009 admitting income of Rs.2,55,13,240/- inclusive of additional income of Rs.1,53,98,570/- by withdrawing claim of land development charges. In the assessment order, the same was accepted with a further addition of Rs.13,000/- only u/s.40(a)(ia). Thus, the total income determined was Rs.2,55,26,240/-. The AO has levied penalty on the entire asseesed income. The main contention of the AO is that but for search operation u/s.132, the assessee would not have disclosed the income filed in response to notice u/s.153A. While doing so, he has ignored the return filed by assessee before the date of search on 28.11.2006 declaring income of Rs.1,01,46,668/-. No penalty could be levied on such voluntary income admitted by the assessee u/s.139(1) prior to the date of search. Hence, the issue for adjudication is the additional income of Rs.1,53,98,570/- towards withdrawal of land development charges and Rs.13,000/-being disallowance u/s.40(a)(ia).

6.1. As regards the penalty on additional amount of Rs.1,53,98,570/-, being withdrawal of land development charges, the AO has stated that but for search, the assessee would not have disclosed any income filed in response to notice u/s.153A. He has, however, not given any definite finding as to how it constitutes concealed income. While considering an appeal against an order made u/s.271(1)(c), what is required to be examined is the record which the AO imposing penalty had before him and if that record can sustain that there has been concealment or furnishing inaccurate particulars of income, that would be sufficient to sustain the penalty. At this juncture, it would be appropriate to note that the Explanation contained section in u/s.271(1)(c) is self contained in that it treats every difference between the reported and assessed income as concealed income, but at the same time, provides the criteria where penalty would be warranted. Penalty is leviable for concealment where an assessee fails to offer any explanation for a difference or offers an explanation, which is found to be false. In the instant case, the amount has been voluntarily offered by the appellant in the return of income u/s.153A by withdrawing the land development expenses debited to the profit and loss account. The appellant has been able to offer an explanation which is satisfactory. Further, as submitted by the ld. AR, taxes have also been paid on the admitted income. The decision of the Hon'ble Supreme Court in the case of CIT v. Suresh Chandra Mittal 259 ITR 9 (SC) is relevant in such a situation. The Hon'ble Supreme Court held that penalty is not leviable if the assessee files revised return offering additional income. In that case, the assessee had originally filed returns showing meagre income. When, after search action u/s.132, a notice u/s.148 was served on him, he filed revised returns showing higher income. Subsequently, assessment order was passed and the return submitted was regularized u/s.148. In penalty proceedings u/s.271(1)(c), the assessee claimed that he offered additional income to buy peace of mind and avoid litigation. A.O. did not accept the contention and levied penalty which was confirmed by CIT(A). But the ITAT held that the department has not discharged its burden of proving concealment and had simply rested its conclusion on the act of voluntary surrender done by assessee on good faith, and that penalty order could not be levied on such income. On a reference, the Hon'ble High Court held that no penalty could be levied for concealment. The Department preferred appeals to the Hon'ble Supreme Court. The Hon'ble Supreme Court dismissed the appeals holding that no interference with the order of the High Court was called for. (251 ITR 9). There is no reason as to why the ratio of the above decision will not be applicable to the facts of the present case. Here also, a search action u/s.132 was carried out at the premises of the assessee. The appellant had filed original return of income on 28.11.2006 declaring income of Rs.1,01,46,668/-. Subsequent to search u/s.132, it filed return of income in response to the notice u/s.153A wherein it has offered additional income of Rs.1,53,98,570/- by withdrawing the claim of land development expenses. The AO has also accepted the above income in the assessment order. There is no definite finding regarding concealment of income of furnishing of inaccurate particulars of such income. The appellant did not file any appeal because addition of Rs.13,000/- only was made u/s.40(a)(ia) to the returned income. Moreover, it is well settled that assessment and penalty proceedings are separate. In view of these facts and respectfully following the above decision, I am of the considered opinion that penalty cannot be levied on the additional income offered by the assessee.

6.2. As rewards disallowance u/s.40(a)(ia), it may be stated that penalty was not initiated on this addition of Rs.13,000/- in the assessment order. However, penalty has been levied because the entire assessed income was subjected to penalty u/s.271(1)(c). The Hon'ble ITAT(SB), Vishakhapatnam in the case of Merilyn Shipping & Transport v. Addl. CIT, (2012) 20 taxmann.com 244 has held that provisions of sec.40(a)(ia) are applicable only to amounts of expenditure payable as on 31st March of the previous year and not to actual amounts paid during the previous year without deduction of TDS. When the addition itself is not sustainable, there is no question of levy of penalty on such addition. The Hon'ble Supreme Court in CIT v. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 has also held that disallowance of expenses per se will not amount to furnishing inaccurate particulars of income. Hence, the penalty is not leviable on this addition. In the result, the ground is allowed."

4. The Revenue, aggrieved by the order of the learned Commissioner of Income Tax (Appeals), preferred Appeal before the learned Tribunal with the following grounds:-

" GROUNDS OF APPEAL BY THE DEPARTMENT

1. On the facts and the circumstances of the case, the ld. CIT(A) erred in deleting the penalty levied u/s.271(1)(c) of I.T.Act, on the additional income of Rs. 1,58,98,570/-.

2. On the facts and the circumstances of the case, the ld. CIT(A) failed to appreciate that the Explanation 5A to the section u/s.271(1)(c) of I.T. Act, clearly attracts in the-case of the Assessee as the additional income of Rs.1,58,98,570/- was offered in the return of income filed post search and no such income was disclosed in the original return of income filed by the assessee."

5. The learned Tribunal allowed the Appeal of the Revenue by a detailed order, apparently going beyond the grounds raised by the Revenue before it in the Memorandum of Appeal, while restoring the penalty on both the grounds viz., alleged non-disclosure of income and by voluntary surrender of income in the return of income filed by it to the extent of Rs.1,53,99,000/- which was claimed to be an expenditure for Land Development Charges debited to Profit and Loss Account, which later on, the Assessee did not claim in the revised return filed after issuance of notice under Section 148 of the Act had been issued on 12.8.2009. The learned Tribunal also restored the penalty under Section 271(1)(c) of the Act for the disallowance of Rs.13,000/- under Section 40(a)(ia) of the Act which was not found in the grounds raised by the Revenue in the Appeal before it.

6. The relevant portion of the impugned order dated 6.6.2017 for Assessment Year 2006-2007 passed by the learned Tribunal is quoted below for ready reference:-

"3. Before us, the admitted position was that no return of income had been filed prior to the date of search and had been only after the issue of notice u/s.153A, on 12/8/2009. While the Revenue relied on the findings in assessment and the penalty orders, the ld. AR would on the decisions in Rawatmal Harakchand v. CIT (1981) 129 ITR 346 and in P.V.Doshi v. CIT (1978) 113 ITR 22, averring that even the initiation of the penalty is bad in law.

4. We have heard the parties, and perused the material on record.

4.1. We may proceed by delineating the respective cases of the parties before us. The Revenue's case is that the filing of the return by the assessee is only subsequent to the search and upon discovering that it had no reasonable explanation for the 'advance from allottees' credited in its books in cash, in the like sum, i.e., Rs.153.99 lakhs, corresponding to the expenditure booked under the account head 'development charges', and which is admittedly on money paid to the persons from whom land or rights therein had been acquired. The basis for the relief by the first appellate authority is that the assessee having already filed its return on 30/11/2006, it is only the additional income (of Rs.153.99) lacs offered per the return u/s.153A, or the disallowance effected in assessment, that could at all be considered for the purpose of levy of penalty under section 271(1)(c). The latter was on the basis that the amount was not payable as at the year-end, even as advocated by the Tribunal in Marilyn Shipping & Transport v. Addl. CIT [2012] 16 ITR (Trib) 1 (Vish)(SB) (refer para 6.2 of the impugned order). With regard to the former, there was no finding as to concealment or furnishing inaccurate particulars of income by the AO, who had merely inferred that the assessee would not have 'returned' its income but for the search thereon. The burden to prove that it was not a case of a voluntary surrender of income, made in good faith, is on the Revenue, which it had not discharged. The assesses has only offered the income to buy peace of mind. He, accordingly, deleted the penalty on the entire sum, relying on the decision in the case of CIT v. Suresh Chandra Mittal (2001) 251 ITR 9 (SC), wherein, similarly, notice u/s.148 had been issued after search action u/s.132, in response to which the assessee had offered a higher income (refer para 6.1).

The penalty, which stands levied on the entire assessed income, would accordingly need to be considered separately for each of the three sums comprising it. While the Revenue maintains that no return of income had been filed prior to 12/8/2009, the ld. CIT(A) has allowed relief to the assessee (on the regular business profit as per it's books of account) on the basis that the same had been duly returned on 30/11/2006. The issue thus turns on a matter of fact, i.e., whether or not the assessee had filed its return of income on 30/11/2006, the only return admittedly furnished by it prior to that u/s.153A on 12/8/2009. It is indeed surprising that there should be any ambiguity and, further, continuing up to the second appellate stage, on such a simple matter of fact. Where the assessee has filed a return on 30/11/2006, the same-would necessarily be receipted, i.e., carry a receipt number and, besides, would have been processed u/s.143(1)(a). Be that as it may, where furnished, there is no question of the assessee being subject to penalty thereon, while, where not, the same is returned for the first time only on 12/8/2009, even as the same is only as per its books of account, found and seized in search. Accordingly, the assessee having not furnished any explanation for not returning the income chargeable to tax, it shall be liable for penalty on the income of Rs.101.15 lakhs. The issue is in fact squarely covered by Explanation 3 to section 271(1)(c), which reads as under; the time period prescribed u/s.153 expiring on 31/3/2009:

> 'Explanation 3. -- Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1989 and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.'

In this regard, however, we observe from the assessment order that the assessee had paid 'advance tax' at Rs.35 lacs. The computation of penalty, which stands levied at 100 per cent of the tax sought to be evaded shall, in the present case, be with reference to Explanation 4(b) to S.271(1)(c), reading as under, which allows credit for the advance tax. Without doubt, interest u/ss.234A, 234B, and 234C shall, in View of S.140A, chargeable up to, the date/s of the payment of advance-tax, have to be appropriated first, and only the balance amount regarded in law as the amount of advance-tax paid by the assessee for the relevant year:

> Explanation 4 -- For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded", --
>
> (a) ....
>
> (b) in any case to which Explanation 3 applies, means the tax, on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected

at source and self-assessment tax paid before the issue of notice under section 148;

(c)..."

We decide accordingly, with the AO computing the penalty, where no return has been filed on 30.11.2006, allowing credit for the advance tax.

4.2. Next, we may discuss the aspect of levy of penalty on the sum of Rs.153.99 lacs offered as additional income per the S.153A return. Explanation 5A to S.271(1)(c) of the Act reads as under:

'Explanation 5A --- Where in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assesses is found to be the owner of,--

(i) any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or.

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of the search and, -

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein;

or

(b) the due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

Where, therefore the assessee is found in the course of search to be the owner of any asset, the source of which is attributable to income, or otherwise as the owner of any income (for any previous year) based on any entry in the books of account, documents or transactions, which has not been disclosed per the return of income for the relevant year ended prior to the date of search (or in respect of which year no return had been filed despite the expiry of the due date for furnishing the return of income as on the date of search), then, notwithstanding it being returned as income per the return filed subsequent to be deemed to have concealed the particulars of his income or furnished inaccurate particulars of income, i.e., per the return of income as furnished.

In the facts of instant case, the assessee having returned the additional income of Rs.153.99 lacs in pursuance to notice u/s.153A, which it admits as having done voluntarily, how, we wonder, is it not a case squarely governed by the said Explanation 5A. The assessee in fact admits to the sum credited to the account 'advance from allottees' as representing it's income. The same, it needs to be appreciated, does not explain, much less satisfactorily the nature and source of the said credit so that section 68, deeming the same as the assessee's income for the current year, shall apply with full force. Who are the allottees? What is their creditworthiness? Have they confirmed paying the same, representing the money paid to the sellers of land? Why, again, if they have, is the amount not reflected as the sale proceeds of the relevant real estate/property, having been recovered from the allottees by the assessee as a part of the cost, or otherwise charged to them? This is all the more so as the assessee has claimed and been allowed deduction (in computing its regular profit) in respect of expenditure of its business by way of on money paid to the sellers of land, as 'development charges'. How does it, in any case, represent a liability of the assessee? In fact, to the extent the assessee has received money, duly entered in its' books of account, the same is also covered under clause (i), i.e., besides clause (ii), of Explanation 5A. The facts and circumstances of the case are squarely covered by the said provision, even as observed by the Bench during hearing, to no satisfactory answer by the ld. AR. The ld. CIT(A) has in our view completely misled himself in the matter by not considering a direct provision of law, clearly applicable in the facts and circumstances of the case. In fact, that the AO has not referred to it is not relevant in-as-much as the provision of law (section), is to be read along with Explanation appended thereto, with there being no estoppel against law (also refer: CIT v. Durga Prasad More (1971) 82 ITR 540 (SC)). The scope for the non-application of the said Explanation is only where the assessee does not admit the same as its' income, which then becomes a subject matter of dispute between the assessee and the Revenue. Again, in view of the foregoing, reference to the admission being voluntary, or to the decisions, as the case of Suresh Chandra Mittal (supra), is completely misplaced. As afore-noted, that the income is admitted, and the disclosure voluntary, is the reason or the basis for the application of Explanation 5A. Even on facts, it is to be appreciated that it is the search and the concomitant discovery of the books of account, duly completed, reflecting the said credit as well as expenditure claimed, that has led to the disclosure, with the assessee having no answer to the various aspects of the credit or the amounts credited to the account head 'advance to allottees' as well as the corresponding debit to the account 'development charges', claimed as deduction. There is no confirmation from the transferor/s of the real estate to having received on money, i.e., qua the amount debited to the said (latter) account, which has in any case been claimed and allowed as deduction.

As explained in Mak Data (P) Ltd. v. CIT (2013) 358 ITR 593 (SC), the plea as to the disclosure being only to buy peace of mind, etc., is only a ruse or a make believe. The assessee's case, on the contrary, is squarely covered against it by the decisions in the case Mak Data (P) Ltd. (supra); K.P.Madhusudhahan v. CIT (2001) 251 ITR 99 (SC); and CIT v Zoom Communications P. Ltd (2010) 327 ITR 510 (Del.) to name some, being clearly applicable in the facts and circumstances of the case, qua additional income. And considered either way, irrespective of whether the assessee has filed, or not filed, the return of income on 30/11/2006. Both Explanation 5A, as well as Explanation 1 to S.271(1)(c) are, accordingly, attracted in the facts and circumstances of the case for the said sum. We decide accordingly (also refer page 4.4).

4.3. Finally, we may discuss the aspect of disallowance under section 40(a)(ia) effected at Rs.13,000. The ld. CIT(A) has directed deletion on the basis of the corresponding amount being not payable as at the year-end following Merilyn Shipping & Transport (supra). The plea is valid. However, we observe no explanation by the assessee to that effect; rather, whatsoever. And, consequently, absence of any finding by any authority. The matter would accordingly have to go back to the file of the AO to determine as a matter of fact whether the amount disallowed outstands, in whole or in part, as at the year-end, so that to the extent it outstands, no penalty would be exigible. Where, and to the extent not, an absence of any explanation would justify the levy of penalty under 271(1)(c) We decide accordingly."

7. We have gone through the order of the learned Tribunal, which was almost fully read out by the learned counsel for the Assessee before us.

8. We are of the opinion that the matter deserves to be remanded back to the learned Tribunal as it seems, prima facie, that the learned Tribunal has not only committed some factual errors in respect of filing of return of income by the Assessee but also invoked Explanation 3 and 5A of Section 271(1)(c) of the Act with respect to the alleged non-filing return of income by the Assessee in pursuance of notice issued after the Search which took place in the business place of the Assessee and such a revised Return was filed by the Assessee voluntarily surrendering such income of Rs.1,53,99,000/- and while apparently surrendering all the income on its own by the Assessee ought not to have attracted penalty for concealment under Section 271(1)(c) of the Act, the learned Tribunal has not only restored the penalty by the impugned order but also restored the penalty on the issue for which no ground was raised in the Grounds of Appeal filed by the Revenue before it. The Explanations which give rise to presumption of concealment are rebuttable presumptions and therefore without discussing those facts about such rebuttal or otherwise, the Penalty could not be reimposed by the Tribunal particularly when it was reversing the order of the learned Commissioner of Income Tax (Appeals) in this regard, who found the explanation of the Assessee satisfactory and had deleted the penalty in question.

9. Therefore, without commenting any further on the order passed by the learned Tribunal, we are of the opinion that the learned Tribunal ought to decide the Appeal again after giving opportunity to both the parties afresh on the grounds of Appeal raised by the Revenue. Therefore, without answering the questions of law raised before us, we set aside the order passed by the learned Tribunal on 6th June 2017 for the Assessment Year

2006-2007 in respect of penalty under Section 271(1)(c) of the Act and we request the learned Tribunal to decide the Appeal again in accordance with law after giving opportunity to both the parties, discussing the relevant facts.

With the above observation, the Appeal is disposed of. No costs.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

ssk.

To

1. The Income Tax Appellate Tribunal,
   'C' Bench, Chennai.

2. The Assistant Commissioner of Income Tax,
   Central Circle-IV(2),
   46, Nungambakkam High Road,
   Chennai 600 034.

3. S & P Foundation Pvt. Ltd.,
   Old No.27, New No.38,
   Madley Road, T.Nagar,
   Chennai 600 017.

4. The Commissioner of Income Tax (Appeals)-II,
   No.46, (Old No.108) Mahatma Gandhi Road,
   Chennai-34.

T.C.(A) No.840 of 2017

spd[co]
srg 05/11/2020