

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

**IA NO. GA/2/2017
(Old No:GA/1176/2017)
ITAT/131/2017**

**PRINCIPAL COMMISSIONER OF INCOME TAX , CENTRAL-1, KOLKATA
Vs
MONOJ KUMAR JAIN & SONS (HUF)**

*For the Appellant: MR. Smarajit Roy Chowdhury, Adv.
Mr. Sushil Kuamr Mishra, Adv.*

*For the Respondent: Mr. J. P. Khiatan, Sr. Adv.
Ms. Swapna Das, Adv.
Mr. Siddharth Das, Adv.*

Heard on : 15.12.2021

Judgment on : 15.12.2021

T. S. SIVAGANANAM, J. : The Court : This appeal by the Revenue filed under section 260A of the Income Tax Act, 1961 [the Act, in brevity] is directed against the composite orders dated 6.4.2016 passed by the Income Tax Appellate Tribunal "A" Bench, Kolkata in ITA Nos.1238 to 1243/Kol/2011 for the

assessment years 2002-03 to 2007-08 and in ITA No.1183 to 1187/Kol/2011 for the assessment years 2002-03 to 2005-06 and 2007-08 respectively.

The Revenue has raised the following substantial questions of law for consideration.

- a. Whether on the facts and in the circumstances of the case the learned Tribunal was justified in law in invalidating the penalty proceedings on mere mistake in the penalty notice?
- b. Whether on the facts and in the circumstances of the case the Learned Tribunal was justified in law in invalidating the penalty proceedings when under similar circumstances of the disclosure by the assessee during the search proceedings the Hon'ble High Court at Calcutta has held in favour of the revenue in [2015] 64 Taxman.com [Calcutta] in the case of CIT-I vs. Balarampur Chini Mills Ltd. ?

We have heard Mr. Roy Chowdhury, learned senior standing counsel appearing for the appellant/revenue and Mr. Khaitan, learned senior counsel appearing for the respondent/assessee.

The learned counsel appearing for the appellant submitted that this appeal has been filed by the Revenue against the composite orders passed for the respondent/assessee's case for assessment years 2002-03, 2003-04, 2004-05 and 2005-06 are below the threshold limit prescribed by the CBDT and, therefore, the appeal in so far as it relates to the aforementioned four assessment years are rejected on the ground of law tax effect. This leads us with only the

assessment for the year 2007-08. The search and seizure operation under section 132 of the Act was conducted in Jain Group of cases on 18.3.2008 and on subsequent dates the respondent/assessee, one of the assessee of this Group. The residential premises of the karta of the assessee was also subjected to search and seizure operation. The other intricate factual details may not be required to be considered and it will suffice to note that the assessment was completed by the Assessing Officer by order dated 31.12.2009 under section 143[3] read with section 153C of the Act. In the said order the Assessing Officer stated that the penalty proceedings under section 271[1][c] of the Act will be initiated separately. This leads to issuance of show cause notice dated 31.12.2009 calling upon the assessee to show cause as to why penalty should not be imposed on them. The assessee participated in the opportunity of hearing granted by the Assessing Officer and raised various contentions including the contentions that merely because the assessee has offered an additional income after the search and seizure operations, it would not tantamount to concealment of income liable to penalty under section 271[1][c] of the Act. Further, the assessee contended that the penalty notice was bad in law on the ground that the Assessing Officer has not recorded satisfaction. The Assessing Officer conceded the said submission and by an order dated 29.6.2010 rejected the same and confirmed the proposal in the show cause notice and imposed penalty at 300%. Aggrieved by the same, the assessee preferred appeal to the Commissioner of Income Tax [Appeals], Central-I, Kolkata [CIT(A)]. The CIT[A] by an order dated 16.6.2011 dismissed the appeal by confirming the finding of the Assessing Officer in so far as the levy of

penalty is concerned but granted a small reprieve to the assessee by reducing the percentage of penalty to 100% from 300%. Aggrieved by the same, the assessee was in appeal before the Tribunal and the Revenue was also in appeal. These appeals were heard and the assessee's appeal was allowed and the penalty was deleted. Consequently, the Revenue's appeal was dismissed. Questioning the correctness of the order passed by the Tribunal the Revenue is before us by way of this appeal. On going through the order passed by the Tribunal we find that the Tribunal was largely guided by the decision rendered in the case of *Satyananda Achariya Biswas vs. DCIT* in ITA no.05/Kol/2010 dated 2.12.2015. This decision has been noted by the Tribunal in paragraph 15 of the impugned order as relied on by the assessee and in paragraph 16 after briefly discussing the facts of Satyananda Achariya Biswas's case the Tribunal has extracted the decision almost in its entirety and the finding of the Tribunal is in paragraph 17. The Tribunal would state that respectfully following the decision in the said case it holds that the penalty levied under section 271[1][c] of the Act is liable to be cancelled on the ground that there was no proper recording of satisfaction in the order of assessment and that the show cause notice under section 274 of the Act does not satisfy the specific charge against the assessee. We have gone through the order of assessment and the order passed under section 271[1][c] of the Act. The first contention raised by the assessee was by submitting that the assessment under section 153C has been completed on the figures disclosed by it in the return filed under section 153C of the Act and, hence, penalty under section 271[1][c] cannot be imposed. The correctness of such contention was

tested by the Assessing Officer and it was held that the income disclosed by the assessee at the time of search only represents the quantification of income conceded by him and this quantification emanates from the seized documents found during the course of search. Further the Assessing Officer stated that the mere fact that the assessee has correctly quantified its concealed income, which has been accepted by the department, has no co-relation with the fact that the assessee has not concealed its income. Further, during the course of search, incriminating documents were found which revealed that the assessee was having concealed income and when the assessee was confronted with the same he had no other alternative but to admit that he had indeed concealed the particulars of income and he in the due course of time came out with a correct calculation of his undisclosed income. Thus, the assessee having not disclosed the income in the return of income filed under section 139[1] but has shown the same in the return in response to the notice under section 153C cannot be said to be voluntary.

With regard to the alleged defect in the notice issued under section 274 of the Act, either on the ground that the relevant portions have not been clearly indicated or that satisfaction of the Assessing Officer has not been properly made was not canvassed before the CIT[A]. This contention appears to have been canvassed for the first time before the Tribunal. It may be true that the Tribunal being the last fact finding forum in the hierarchy is entitled to examine an issue qua the assumption of jurisdiction of the authority to initiate proceedings as it may be argued by the assessee that the said issue goes to the root of the matter.

Be that as it may, if the Tribunal proposes to undertake such an exercise then it should do so after hearing the assessee and the Revenue also and the reasons of its satisfaction for accepting the case of the assessee should be clearly spelt out. As pointed out earlier, the decision of the Tribunal in the case of *Satyananda Achariya Biswas [supra]* and we have also noted that substantial portions of the order has been extracted by the Tribunal and the finding of the Tribunal is only in paragraph 17 which in our considered view is not adequate as the contention regarding the defective notice was canvassed before the Tribunal by the assessee for the first time. Therefore, if the Tribunal decides to embark upon examining such an issue in its own which was a legal issue, then the Tribunal should consider it afresh. We are of the view that the finding rendered in paragraph 17 of the impugned order for setting aside the penalty is inadequate.

Mr. Roy Chowdhury, learned senior standing counsel for the appellant submitted that the Tribunal ought to have taken note of the decision in the case of *Commissioner of Income Tax-II, Calcutta vs. Balarampur Chini Mills Ltd., [2015] 64 taxmann.com 91 [Calcutta]* wherein it was held that the assessee disclosed additional income only after search of premises of another assessee indicating that certain expenditure claimed by the assessee was disallowed, it would amount to concealment of income liable to penalty under section 271[1][c] of the Act. It is submitted by the learned senior counsel for the respondent/assessee that as against the said decision in *Balarampur Chini Mills Ltd.* leave has been granted by the Hon'ble Supreme Court as reported in *[2017] 18 taxmann.com 36 [SC]*.

In the light of the aforesaid discussion, we are of the view that more thorough exercise is required to be done by the Tribunal on the issue with regard to the levy of penalty which was sustained by the CIT[A] on the ground whether the additional income offered by the assessee in the return filed pursuant to notice under section 153C could be taken to be not voluntary and whether it could be treated imposition of penalty. Similarly, with regard to the validity of the notice also needs to be considered after taking note of the factual position.

For the above reasons, the appeal is allowed and the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration on the grounds noted above for the assessment year 2007-08 alone. Consequently, the substantial questions of law are left open.

The application, IA No.GA/2/2017, (Old No.GA/1176/2017) also stands disposed of.

(T.S. SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

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