

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 14.06.2023
DELIVERED ON: 03.07.2023

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/88/2022

(IA NO: GA/2/2022)

WITH

OCOT NO. 7 OF 2022

PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-2. KOLKATA

VERSUS

M/S. INDUSTRIAL SAFETY PRODUCTS PRIVATE LIMITED

Appearance:-

Mr. Smarajit Roy Chowdhury, Adv.

Mr. Soumen Bhattacharya, Adv.

.....For the Appellant/Respondent.

Mr. Ranjeet Kumar Muraka, Sr. Adv.

Mr. Vivek Muraka, Adv.

Mr. Dibanath Dey, Adv.

.....For the Respondent/Cross Objector.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, C.J.)

1. The appeal in ITAT No. 88 of 2022 has been filed by the revenue under Section 260A of Income Tax Act, 1961 (the Act) challenging the order dated 31st October, 2019 passed by the Income Tax Appellate Tribunal, B Bench, Kolkata (Tribunal) in ITA No.2128/Kol/2017 for the Assessment Year 2015-16. The revenue has raised the following substantial questions of law for consideration:

(i) Whether the on the facts and circumstances of the case, the Learned Income Tax Appellate Tribunal has erred to hold that undisclosed income under the disclosure petition made during search and seizure proceedings as taken to books subsequently does not attract penalty in terms of Section 271AAB of the Income Tax Act, 1961.

(ii) Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal has erred in confirming the decision of Learned Commissioner of Income Tax (Appeal) which was decided in favour of the assessee, without examining the entire facts of the case.

2. OCOT No. 7 of 2022 is a cross-objection filed by the assessee questioning the very same order passed by the Tribunal in so far as that portion of the order where the Tribunal did not adjudicate the correctness of the penalty notice dated 31st March, 2016 issued under Section 271/ 274 of the Act.

3. We have heard Mr. Samarjit Roy Chowdhury, learned Standing Counsel assisted by Mr. Soumen Bhattacharyya, learned Senior Counsel appearing for the appellant revenue and Mr. Ranjeet Kumar Muraka, learned Senior Advocate assisted by Mr. Vivek Muraka and Mr. Dibanath Dey, learned Advocates for the respondent cross-objector.

4. The revenue had filed the appeal before the Tribunal questioning the correctness of the order passed by the Commission of Income Tax (Appeals), 21 Kolkata (CIT(A)) dated 04.07.2017 deleting the penalty levied on the assessee under Section 271 AAB of the Act. The Assessing Officer while completing the assessment for the Assessment Year under consideration, AY 2015-16 had issued a show-cause notice to the assessee calling upon them to explain as to why the under-valuation of physical stock of Rs. 10.75 crore deducted during the course of search in respect of such main companies in the group namely New Horizon Limited and Industrial Safety Products Private Limited should not be treated as suppression of profit made by the assessee during the year under consideration and added back to the total income of the assessee. The assessee stated that the excess stock found on the physical verification is related to the company amounting to Rs. 6,04,95,912/- and have been properly accounted for in the books for Financial Year 2014-15 and the same has also been disclosed in the disclosure petition dated 06.05.2015, the excess stock found during the course of physical verification has been duly accounted and hence, there is no question of suppression of profit made by the company and the profit reflected in statement of profit and loss includes the same. In this regard, the assessee referred Note number 37 of the financial statement where the auditor had certified that the surplus stock of leather found during the course of physical verification of inventory during the month of January-February, was subsequently disclosed in the statement recorded in course of proceedings under Section 132 of the Act and has been duly accounted for in the books of accounts. The Assessing Officer rejected the explanation

offered by the assessee and held that the value of stock difference clearly represents undisclosed income coming under the purview of Explanation (c) of Section 271 AAB of the Act as it was not recorded in the books of accounts or before the date of search and accordingly, thought fit to impose penalty under Section 271 AAB. Challenging the said order, the assessee preferred an appeal to the CIT(A). the first ground of challenge before the Appellate Authority was that the order of penalty is ab initio void since the conditions precedent for valid invocation of penalty proceedings were not fulfilled. Further, it was contended that no satisfaction has been recorded in the assessment order or in the show-cause notice that the assessee had any undisclosed income and initiation of penalty proceedings in a mechanical manner without application of mind was unjustified. Apart from the said contention, other contentions on the merits of the matter were also raised. The CIT(A) by order dated 4th July, 2017 allowed the assessee's appeal and deleted the penalty. Aggrieved by the same, the revenue had preferred appeal before the Tribunal which has been dismissed by the impugned order. The learned Tribunal first took up for consideration the correctness of the order passed by the CIT(A) by deleting the penalty on the ground that the income of Rs. 6,04,95,912/- with reference to which penalty was levied did not construe "undisclosed income". After elaborately going through the facts and also taking note of the decisions of the learned Tribunal in the case of the assessee's group company, M/s. New Horizon Ltd. in ITA No. 2128/Kol/2017 dated 28.08.2019 rejected the contention raised by the revenue and affirmed the order passed by the CIT(A). As pointed out earlier before the CIT(A), the assessee had specifically raised the contention

objection the validity of the initiation of the penalty proceedings by issuance of notice under Section 274 read with Section 271 of the Act and the Tribunal while considering the order passed by the CIT(A) did not examine the validity of the initiation of the penalty proceedings on the ground that on facts the Tribunal had confirmed the order passed by the CIT(A) and therefore, considering the validity of the initiation of the penalty proceedings is only an academic exercise and therefore, did not adjudicate the same separately. The assessee has filed the cross-objection objecting to that portion of the order by raising the following substantial questions of law:

A. For that the purported penalty proceedings under Section 271, 271AAB and 274 of the Income Tax Act, 1961 for the Assessment Year 2015-16, by penalty notice dated 31st March 2016 under Section 271/274 of the said Act were and are vague, unspecific and invalid as it did not disclose any satisfaction of the Assessing Officer and any of the relevant provision of the said Act.

B. For that the purported penalty notice was issued without application of mind and mechanically and did not fulfill and satisfy the condition precedent necessary to confer jurisdiction to issue the same and the purported penalty proceedings were not issued in accordance with Law.

C. For that the purported show cause notice do not disclosed and specify the charge against the respondent (assessee) and on the contrary relies on different charges and therefore is bad in law and without jurisdiction.

5. The question which came up for consideration before the Tribunal was whether the income offered by the assessee in the return for the Assessment Year 2015-16 being the value of closing stock of Rs. 6,04,95,912/- can be considered to be undisclosed income found in the course of search so as to warrant levy of penalty under Section 271 AAB of

the Act. The Tribunal took note of the statement recorded from the Director before the Investigating Officer and all other documents forming part of the assessment file and held that no material has been brought on record by the Assessing Officer to show that the during the course of search the authorized officer of the department had conducted physical inspection of the stock because of which excess quantities of raw leather was deducted and consequence to which additions were made towards undisclosed stock. Further the Tribunal found that the Assessing Officer himself assessed the said sum of Rs. 6,04,95,912/- on the ground of “under-valuation” of stock and not as value of “undisclosed stock”.

6. The tribunal on facts further found that well before the search on 20.03.2015, the assessee had internally conducted stock taking exercise and deducted the discrepancy in stock and the same was reported to the assessee’s Managing Director on 18.03.2015 well before the commencement of search on 20.03.2015. Further the tribunal found that prior to commencement of search the Managing Director of the assessee had issued instructions to the respective unit heads to reconcile the stocks and records and incorporate difference in the Company’s books for the financial year ending on 31.03.2015. Thus, taking note of all these facts, the tribunal held that the difference in stocks of Rs. 6,04,95,912/- had been identified by internal team of the assessee itself much prior to the commencement of the search.

7. Further the tribunal also noted the decision of its coordinate bench in the assessee’s group company M/s. New Horizon Private Limited wherein

the facts were identical and the tribunal by order dated 28.08.2019 had affirmed the order passed by the CIT(A) in the case of New Horizon Limited which order had attained finality and held that no penalty could be levied under Section 271 AAB of the Act.

8. The tribunal also examined the correctness of the submission of the revenue that the excess stock found was undisclosed income of the assessee on account of the admission made by the assessee's Director in a statement under Section 132 (4) that it was not recorded in the books of accounts at the time of search. The tribunal noted that the assessee is a body corporate who is required to maintain and prepare its accounts in conformity with the provisions of the Companies Act. The accounts are required to be audited and the auditors of the Company is required to furnish his report in the manner prescribed in Section 227 of the Companies Act, 1956 and the rules made thereunder.

9. Referring to the auditor's report, the tribunal held that the auditor has to certify as to whether the physical verification of the inventory conducted by the Company at reasonable intervals and whether the procedures followed are reasonable and adequate. The auditor is also required to report whether any material discrepancies were noticed on physical verification and whether they were properly dealt with in the books of accounts. After taking note of the auditor's report as well as stock inspection report, the tribunal found that such inspection report was prepared at the instance of the management as a matter of internal control and the same was drawn up much prior to the date of search. The tribunal placed reliance on the

decision of the High Court of Karnataka in the case of **Principal Commissioner of Income Tax Versus Deccan Mining Syndicate Private Limited** ¹ which decision was affirmed by the Hon'ble Supreme Court as a Special Leave Petition filed by the revenue was dismissed on 15.04.2019. Thus, we find that the tribunal has made elaborate examination of the factual position and granted relief to the assessee and we find that there is no substantial question of law as suggested by the revenue arising for a decision in this case as both the CIT(A) as well as the tribunal has proceeded on facts which appear to not in a dispute. Therefore, we find no grounds to entertain the appeal filed by the revenue.

10. The assessee has filed the cross objection questioning the initiation of penalty proceedings on the grounds of non-applications of minds and on the ground of the notice being defective which goes to the root of the matter. The notice issued under Section 274 read with Section 271 of the Act dated 31.03.2016 was placed before us. On a perusal of the notice, we find that none of the particulars which are required to be mentioned in the notice have been disclosed. In fact, the relevant columns have been left blank. The question would be whether penalty proceedings could have been initiated pursuant to such a notice and was the notice in accordance with law.

11. In **Food Corporation of India Limited Versus State of Punjab and Others** ², the Hon'ble Supreme Court while considering the validity of the notice issued under the Punjab Municipal Act, 1911 pointed out that notice to the affected person mandated in the section is not an empty

¹ 105 Taxmann.com 138 (SC)

² AIR 2001 SC 250

formality; it is meant for a purpose. A vague and unreasoned notice will not provide reasonable opportunity to the noticee to file objection meeting the reasons/grounds on which action is proposed. Since the notice did not state the reasons of the grounds, the notice was held to be vague.

12. In **Amrit Food Versus Commissioner of Central Excise, Uttar Pradesh** ³, it was held that the assessee should be put on notice as to the exact nature of contravention for which the assessee was liable to be proceeded against.

13. In **Commissioner of Income-tax, Bangalore Versus SSA'S Emerald Meadows** ⁴, the High Court of Karnataka following the decision in **Commissioner of Income Tax Versus Manjunatha Cotton and Ginning Factory** ⁵ held that the imposition of penalty under Section 271(1)(c) of the Act is bad in law and invalid for the reasons where the show cause notice under Section 274 of Act did not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. The said decision of the High Court of Karnataka was affirmed by the Hon'ble Supreme Court in the decision reported in **(2016) 73 Taxmann.com 248 (SC)**. On the same lines it is the decision of this court in **Principal Commissioner of Income Tax Central - 2, Kolkata Versus Brijendra Kumar Poddar** in **ITAT No. 215 of 2018** dated 23.11.2021. As pointed out earlier, the show cause notice issued under Section 274 read with Section 271 of the Act did not furnish any

³ 2005 (190) ELT 433 (SC)

⁴ (2016) 73 Taxmann.com 241 (Kar)

⁵ 35 Taxmann.com 250 (Kar)

particulars and all the relevant columns have been left blank. Thus, by applying the legal position in the aforementioned decision, this court has no hesitation to hold that the show cause notice was bad in law consequently the initiation of the penalty proceedings is vitiated.

14. For the above reason, the cross objection is allowed and the substantial questions of law are answered in favor of the assessee.

15. In the result, the appeal filed by the revenue is dismissed as no substantial question of law arises for consideration. The cross objection filed by the assessee is allowed and substantial question of law are answered in favour of the assessee and it is held that the penalty proceedings are bad in law.

(T.S. SIVAGNANAM, CJ.)

I Agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – PRAMITA/SACHIN)