

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),
'B' BENCH MUMBAI**

BEFORE: HON'BLE JUSTICE P.P. BHATT, PRESIDENT

&

SHRI M.BALAGANESH, AM

**ITA No.7663/Mum/2013
(Assessment Year :2009-10)**

M/s. Balee Plastics Pvt. Ltd. C-101, 1 st Floor Marathon Nextgen Innova G.K. Marg, Lower Parel(W) Mumbai – 400 013	Vs.	The Income Tax Officer Ward 5(1)(2), Room No.570 Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No.AAACB5172D		
(Appellant)	..	(Respondent)

Assessee by	Shri Nitesh Joshi
Revenue by	Shri Tharian Oommen
Date of Hearing	09/02/2021
Date of Pronouncement	23/02/2021

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.7663/Mum/2013 for A.Y.2009-10 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-55, Mumbai in appeal No.CIT(A)-9/ITO-5(1)(2)/247/2013-14 dated 22/11/2013 (Id. CIT(A) in short) in the matter of imposition of penalty u/s.271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as Act).

2. The only effective issue to be decided in this appeal is as to whether the penalty u/s.271(1)(c) of the Act be levied in respect of additional income offered to tax by the assessee pursuant to survey and which was also disclosed by him in the return of income filed.

3. We have heard rival submissions and perused the materials available on record. We find that assessee is a company engaged in the business of manufacturing and marketing of plastic products and had filed its return of income for the A.Y.2009-10 on 24/09/2009 declaring total income of Rs. 2,99,94,911/-. During the year under consideration, the assessee has purchased land along with house at Hyderabad for Rs.10.50 Crores vide sale deed dated 10/06/2008. The survey u/s.133A of the Act was conducted on the assessee's premises on 29/07/2008. During the course of survey proceedings, statement on oath of Shri Sanjay Damji Shah, authorised signatory on behalf of the assessee company for purchase of land at Jubilee Hill Road, Hyderabad was recorded and later on in the post survey proceedings on 08/09/2008, statement of Shri Jadavji Lalji Shah, Director of the assessee company was recorded wherein they had admitted additional income of Rs.4.50 Crores as cash component towards purchase of property at Hyderabad. However, in the return of income, the assessee offered only a sum of Rs.3 Crores as on-money payment made for purchase of property at Hyderabad as its additional income by duly crediting the same in its profit and loss account under the head 'other income' by clearly mentioning that this sum of Rs.3 Crores was the additional income offered during survey. We find that the Id. AO completed the assessment without considering the income of Rs. 3 Crores offered by the assessee in the return of income and made a total addition of Rs.4.50 Crores based on the statement recorded as stated supra as unexplained investment u/s.69B of the Act. The Id. CIT(A) in the

quantum appeal deleted the addition made in the sum of Rs.1.50 Crores and also held that the sum of Rs.3 Crores has already been disclosed by the assessee in the return of income which was accepted by the Id. AO while completing the assessment. Thereafter, the Id. AO levied the penalty u/s.271(1)(c) of the Act on the sum of Rs. 3 Crores ultimately offered by the assessee pursuant to the survey. This action of the Id. AO was upheld by the Id. CIT(A) on the ground that assessee had not recorded the cash of Rs.3 Crores in its regular books of accounts, and that , but for the survey, the assessee would not have come forward to offer the same to the Income Tax department.

3.1. We find that on perusal of page 10 read with page 13 of the factual paper book filed by the assessee comprising of the profit and loss account for the year ended 31/03/2009 and the schedule for the other income thereon, the sum of Rs.3 Crores has been disclosed by the assessee exclusively as income declared under survey under the head 'other income'. This itself goes to prove that the assessee had duly recorded that income offered in the survey in its books of accounts. We find that this sum of Rs 3 crores was also duly offered to tax by the assessee in the return of income filed. Moreover, we find that similar issue had been the subject matter of adjudication by the Hon'ble Delhi High Court in the case of CIT vs. SAS Pharmaceuticals reported in 335 ITR 259 (Del) wherein it was held that for the purpose of imposing penalty u/s.271(1)(c) of the Act, concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in the income tax return filed by the assessee. The facts before the Delhi High Court was that certain income was surrendered by the assessee during survey and the same was shown by it in regular income tax return which was filed within the prescribed time. The Hon'ble Delhi High Court held that no penalty

would be exigible in such scenario. The facts of the case before us are exactly similar and identical to the facts before the Hon'ble Delhi High Court. In the instant case also there is no dispute that assessee had indeed disclosed Rs.3 Crores additional income in the income tax return filed by it. The operative portion of the order of the Hon'ble Delhi High Court are as under:-

“9. The learned counsel for the assessee, on the other hand, contends that Clause (c) of [Section 271\(1\)](#) of the Act makes it crystal clear that the act of „concealment“ or „furnishing inaccurate particulars“ is relatable only in respect of a return being filed. Therefore, in a case where the stage of filing return itself had not been reached, there is no question of invocation of the penal provision of [Section 271](#) of the Act, as is the position in the present case. In the present case, the return was filed well within the prescribed time, i.e., on 02.12.2003 and in the said return the entire amount had been duly shown as income. Therefore, invoking a penal provision merely on the basis of assumption that the assessee „would not have included“ the said amount while filing his return is completely erroneous and unsustainable. It is a settled position of law as enunciated in various judicial pronouncements that „penalty cannot be based on presumptions and surmises“. It was also argued that the legislative intent in connection with [Section 271](#) of the Act is further fortified from the various Explanations provided in the said provision. In this regard, Explanation 4 is relevant wherein it is specifically provided as to what would be included in the expression „the amount of tax sought to the evaded“, which is the basis for imposition of penalty contemplated under [Section 271](#) (1) (c) of the Act. The perusal of the said Explanation also clearly establishes the direct nexus between the concealment/inaccurate particular being furnished with the return filed.

10. To bolster this submission, the learned counsel for the assessee took refuge of Explanation 5 and Explanation 5A of [Section 271](#) of the Act and submitted that these Explanations provide that in cases of search by way of deeming fiction, the liability towards penalty has been prescribed even in cases where the return of income for such year has not been furnished before the said date of search. Therefore, wherever the legislature intended to impose a penal liability covering a case where return was yet to be filed, a deeming fiction has been consciously provided. In the absence of any such deeming fiction imposing penalty in a case of survey where return is yet to be filed, the penal provision of [Section 271](#) of the Act cannot be invoked as the mandatory ingredients thereof are not met at all.

11. He also sought to draw sustenance from the judgment of Supreme Court in the case of *Commissioner of Income Tax, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd.* (2010) 3 SCR 510 wherein inter alia it has been held that unless the conditions under [Section 271 \(1\)\(c\)](#) of the Act exist in a particular case, penalty cannot be imposed and it was further held that 271 of the Act being a penal provision is required to be construed strictly. The following observations made in the said judgment were specifically referred to:

"8. Therefore, it is obvious that it must be shown that the conditions under [Section 271 \(1\)\(c\)](#) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise."

12. After considering the respective submissions of the learned counsel for the parties, we are of the view that the argument of the learned counsel for the assessee has to prevail as it carried substantial weight. It is to be kept in mind that [Section 271\(1\)\(c\)](#) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Sub-section (1) of [Section 271](#) stipulates certain contingencies on the happening whereof the AO or the Commissioner (Appeals) may direct payment of penalty by the assessee. We are concerned herewith the fundamentality provided in Clause

(c) of [Section 271 \(1\)](#) of the Act, which authorizes imposition of penalty when the AO is satisfied that the assessee has either;

- (a) Concealed the particulars of his income; or
- (b) Furnished inaccurate particulars of such income.

13. It is not the case of furnishing inaccurate particular of income, as in the income tax return, particulars of income have been duly furnished and the surrendered amount of income was duly reflected in the income tax return. The question is whether the particulars of income were concealed by the assessee or not. It would depend upon the issue as to whether this concealment has reference to the income tax return filed by the assessee, viz., whether concealment is to be found in the income tax return.

14. We may, first of all, reject the contention of the learned counsel for the Revenue relying upon the expression „in the course of any proceedings under this Act” occurring in Sub-section (1) of [Section 271](#) of the Act and contending that even during survey when it was found that the assessee had concealed the particular of his income, it would amount concealment in the course of „any proceedings”. The words „in the course of any proceedings under this Act” are prefaced by the satisfaction of the AO or the Commissioner of Income Tax (Appeals). When the survey is conducted by a

survey team, the question of satisfaction of AO or the Commissioner (Appeals) or the Commissioner does not arise. We have to keep in mind that it is the AO who initiated the penalty proceedings and directed the payment of penalty. He had not recorded any satisfaction during the course of survey. Decision to initiate penalty proceedings was taken while making assessment order. It is, thus, obvious that the expression „in the course of any proceedings under this Act“ cannot have the reference to survey proceedings, in this case.

15. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income tax return filed by it. There is sufficient indication of this in the judgment of this Court in the case of Commissioner of Income Tax, Delhi-I Vs. Mohan Das Hassa Nand 141 ITR 203 and in Reliance Petroproducts Pvt. Ltd. (supra), the Supreme Court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income tax return filed by the assessee. This view gets supported by Explanation 4 as well as 5 and 5A of [Section 271](#) of the Act as contended by the learned counsel for the Respondent.

16. No doubt, the discrepancies were found during the survey.

This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under the provisions of [Section 271\(1\)\(c\)](#) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. [Section 271 \(1\) \(c\)](#) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the income tax return and offered the surrendered amount for the purposes of tax.

17. We, thus, answer the questions as formulated above, in favour of the assessee and against the Revenue finding no fault with the decisions of the CIT (A) as well as the Tribunal. As a result, this appeal is dismissed.

3.2. We also find similar view was taken by the Hon'ble Gujarat High Court in the case of PCIT vs. Shree Sai Developers reported in 418 ITR 306. In the facts before the Hon'ble Gujarat High Court, a survey took

place on 17/07/2012 wherein unaccounted income of Rs.78,50,000/- was declared during the survey of the assessee firm which was also subsequently included in the return of income filed by the assessee firm for the A.Y.2012-13. The assessment was completed accepting the returned income thereon. The Hon'ble Gujarat High Court held that since there was no concealment in the return of income filed by the assessee which was ultimately accepted by the Revenue, there cannot be any levy of penalty u/s.271(1)(c) of the Act. Respectfully following the aforesaid decisions and applying the same to the facts and circumstances of the instant case, we hold that no penalty u/s.271(1)(c) would be exigible thereof in the hands of the assessee. Accordingly, the grounds raised by the assessee are allowed.

3.3. We find that the assessee had filed additional ground on 14/12/2018 on the non-striking of the specific limb of offence committed by the assessee in the penalty show-cause notice. Since, we have already directed the Id. AO to delete the penalty, we deem it fit not to adjudicate this ground as it would be academic in nature.

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

Order pronounced on 23/02/2021 by way of proper mentioning in the notice board.

Sd/-
(JUSTICE P P BHATT)
PRESIDENT

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 23/02/2021

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai