

IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH
BENCH 'SMC' CHANDIGARH

BEFORE: SMT. DIVA SINGH, JM

ITA No. 302/CHD/2022

Assessment Year : 2013-14

Shri Lakhwinder Singh Panag, # 1238, Sector 91, Mohali.	d. VS	The ITO, Circle 6(1), Mohali.
PAN No: AMWPP5825A		
J ○ ○ /Appellant		/Respondent

Assessee by : Shri T.N.Singla, CA

Revenue by : Smt. Priyanka Dhar, JCIT

Date of Hearing : 28.06.2022

Date of Pronouncement : 09.09.2022

ORDER

The present appeal has been filed by the assessee wherein the correctness of the order dated 11.03.2022 passed by NFAC, Delhi acting as First Appellate Authority pertaining to 2013 - 14 assessment year is assailed on the following grounds :

1. That the order of Learned C.I.T. (Appeals) is bad and against the facts and Law.
2. That the Learned C.I.T (Appeals) has wrongly upheld the addition made u/s 271(l)(c) of the Act.
3. That the Learned C.I.T (Appeals) has wrongly upheld penalty amounting to Rs. 2,75,688/- u/s 271(l)(c) on addition of Rs. 8,92,193/- on account of disallowance under section 40A(3).

- 4 . *That the learned Commissioner of Income Tax (Appeals) has wrongly ignored the fact that the notice u/s 271(l)(c) issued by the learned assessing officer was defective / invalid.*
- 5 . *That the appellant craves leave to add, alter, amend or withdraw any grounds of appeal before the final hearing."*

2 . The ld. AR inviting attention to the record submitted that the order passed is unsustainable in law.

2 . 1 The notice issued by the AO was stated to be vague and non-specific. On a reading of the Show Cause Notice issued in the penalty proceedings, it was submitted that in the notice the AO has not struck off any of the two limbs.

2 . 2 Reading the notice along with the Penalty Order dated 22.03.2019, it was submitted that the AO has carelessly issued the notice on both counts without specifying the specific charge which the assessee was required to meet. Accordingly, it was submitted that effectively there was no valid opportunity provided and the hearing was a meaningless exercise.

2 . 3 For ready reference, copy of the notice issued in the penalty proceedings at page 14 of the Paper Book was relied upon. It is extracted hereunder for completeness:

**NOTICE U/s 271(1) (c) READ WITH SECTION 274 OF THE
INCOME TAX ACT, 1961**

No. DCIT/Circle - 6(1)/2015-16/-----

PAN: AMWPP5825A

Office of the
Dy. Commissioner of Income Tax,
Circle - 6(1), Mohali at C-81, I.A.
Phase - VI, Mohali

Dated: 29.01.2016

To

Sh. Lakhwinder Singh Panag,
Flat No. 824, HIG Phase-2,
Mohali

Whereas in the course of proceedings before me for the Assessment Year 2013-14, it appears to me that you:-

- i) Have concealed the particulars of your income and,
- ii) Furnished inaccurate particulars of such income.

You are hereby requested to appear before me on **25.02.2016 at 11.00 A.M.** and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) 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 be considered before any such order is made under section 271(1)(c).




(Pragya Singh)
Dy. Commissioner of Income Tax,
Circle 6(1), Mohali

2.4. Copy of the quantum order passed by the Id. Commissioner, it was submitted, was at Paper Book page 1 to 4. He agreed that the assessee has accepted the addition made by the AO as no further appeal was filed. The order of the CIT(A) confirming the penalty, it was submitted, may be quashed as the notice was defective. In view thereof, the AO lacked the jurisdiction to levy penalty. Reliance was placed on *Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Kar)* and *SSA' s Emerald Meadows reported in 386 ITR 13*. The SLP filed by the Revenue against the decision, it was submitted had been dismissed by the Apex Court. Accordingly, it was his prayer that the jurisdiction of the AO to levy the penalty was not available. Specific attention was also invited to the latest decision dated

02.06.2022 in ITA Nos. 161&162/RPR/2018 Vikash Nashine Vs DCIT rendered by the Raipur Bench of the ITAT. Accordingly, in the light of the position of law as considered by the decisions of the Courts it was his prayer that setting aside the impugned order, Penalty order may be quashed.

3. Proceeding to address the issues on merits, it was his submission that even on merits, the penalty has been wrongly invoked. It was his submission that all along the assessee has given an explanation that the assessee was engaged in the business of sand mine and is running crushers etc. It was his submission that the crushers are invariably functioning outside the city limits. In the facts of the present case, it was submitted that there were two types of payments made by the assessee for which the present action has been invoked. These facts, it was submitted, have been captured by the AO at page 3 of his order. Referring to the same, it was submitted, that it would show that most of these payments have been made for repair and maintenance of the machinery on account of break-downs etc. and the remaining payments have been made as bonus payments to the employees in September,2012. Referring to the same, it was submitted that the assessee has consistently argued that these payments were made either on holidays or on Saturday or Sunday.

3.1 Accordingly, it was submitted that an explanation has been given and the explanation cannot be ousted without addressing the specific reasons.

3.2 Inviting attention to the impugned order it was submitted, that Id. Commissioner has upheld the penalty holding that the assessee has concealed the fact of payments in cash. It was his submission that there is no concealment. These facts are very well available on record and were noticed from the records of the assessee itself by the AO. Hence, it was argued that by no stretch of imagination it could be said to be an act of concealment. It was also his submission that the assessee has given an explanation and the tax authorities have discarded the explanation basing entire conclusion against the assessee on the fact that possibly one specific date was not a Sunday. It was submitted that this order may not be upheld because the primary argument remains on facts that the payments were made at the remote area where for urgent repair of machinery, the assessee cannot afford to wait.

4. On query, Id. AR submitted that this is the only year where such a penalty has been levied upon the assessee. The assessee, it was stated, is not a habitual offender. The payments made, it was submitted, were genuine payments for business and now the assessee has made arrangements to ensure that the payments

made for breakdown etc. of machinery are also accepted through the Banking channel.

5. The Id. Sr.DR relies upon the impugned order. It was her submission that admittedly the present case is a case where the assessee has made payments in cash. The argument that the payments are genuine, it was her argument, is not a relevant factor. The assessee's explanation, it was submitted, has not been accepted. Accordingly, it was her prayer that the penalty may be confirmed.

6. I have heard the submissions and perused the material on record. A perusal of the record shows that in the quantum proceedings the explanation of the assessee that addition u/s 40A(3) on facts was not warranted, was rejected. The addition stood made. The issue was carried in appeal before the CIT(A) who also confirmed the addition by his order dated 16.10.2017 (in Appeal No.249/2/15-16). The assessee did not further agitate against the addition made in the quantum proceedings. The record shows that the assessee has claimed that some payments were made on a Sunday i.e. 31st March, 2013. It has also been observed that it being the last day of the Financial Year i.e. 31st March, 2013 the Banks were functioning on the said date as per RBI directions. Hence, the claim that the payment made on a Sunday hence banks were not functioning was rejected considering the peculiar facts. It has also been noticed that there

were payments made in cash to the assessee's employees who admittedly otherwise were paid their salaries by cheques. These payments in cash were held to be in violation of the provisions. I find on going through the consistent explanations on record that the explanation may not be sufficient for the purposes of quantum proceedings, however, in the penalty proceedings the explanation is allowable. The argument discarded that cash payments for addressing machinery breakdown etc. on a Sunday when the Banks were open as per the directions of the RBI, I find considering the background of the specific case where the assessee was functioning outside the city limits, the explanation offered cannot be outrightly discarded in the penalty proceedings. The urgent need to clear payments by an assessee functioning outside residential/commercial areas in the peculiar facts by itself, no doubt, may not have been a valid explanation as far as the quantum proceedings are concerned, however, considering the requirements of the penalty provisions u/s 271(1)(c) of the Act, I find the explanation deserves to be allowed. The explanation on facts is satisfactory.

6.1 Similarly considering the fact of cash payments to its employees during the festive occasion in the peculiar facts by an assessee who is not a habitual offender and who has thereafter operated within the legal provisions, to my mind deserves to be allowed.

7. Considering the peculiar facts and circumstances of the present case, I set aside the order quashing the penalty imposed. While so directing, it is made clear that the argument that payments are genuinely for the purpose of Section 40(A)(3) have no relevance. The evidence and explanation may be good enough to sustain the addition, however, in the penalty proceedings, the explanation considering the peculiar facts as set out herein has been accepted.

8. The other issues, accordingly, become redundant.

9. Ground Nos. 1, 2 & 3 are allowed and Ground Nos. 4 & 5 require no adjudication. Said order was pronounced in the Open Court at the time of hearing itself.

9. In result appeal of the assessee is allowed.

Order pronounced in the Open Court on 9th September, 2022.

Sd/-

(DIVA SPINGH)
Judicial Member