

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “G”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER**

**ITA No.7426/M/2013
Assessment Year: 2002-03**

M/s. Goldstar Finvest Pvt. Ltd., Block H, Shri Sadashiv CHS Ltd, 6 th Road, Santacruz (E), Mumbai – 400 055 PAN: AAACG3432H	Vs.	The Assitt. Commissioner of Income Tax, Central Circle-46, Room No.659, 6 th Floor, Aayakar Bhawan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Mukesh Chokshi, A.R.
Revenue by : Shri Dharmvir Yadav, D.R.

Date of Hearing : 12 . 04 . 2023
Date of Pronouncement : 28 . 04 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Goldstar Finvest Pvt. Ltd. (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 27.11.2013 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2002-03 on the grounds inter-alia that :-

“1. The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in confirming the order passed by the Assessing Officer u/s 271(1)(C) of the Act.

2. *The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in confirming the order of Assessing Officer without complying with the principles of natural justice.*

3. *The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in confirming penalty u/s 271(1)(C) of the Act at Rs.2,50,000/-*

4. *The appellant craves leave to add to, alter, amend and / or delete in all the foregoing grounds of appeal.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of completed assessment framed under section 143(3) read with 153C of the Income Tax Act, 1961 (for short ‘the Act’) determining the total income at Rs.4,63,769/- by making addition of the commission income @ 0.15% in case of assessee being an entry provider, penalty proceedings were initiated by way of issuance of notice under section 274 read with section 271 of the Act.

3. Declining the contentions raised by the assessee that very initiation of penalty proceedings were bad in law as valid notice has not been issued to the assessee, the Assessing Officer (AO) reached the conclusion that the assessee has concealed correct nature/particulars of its income and thereby levied the penalty of Rs.6,49,788/- @ 100% of the tax on the income sought to be evaded under section 271(1)(c) of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has confirmed the penalty levied by the AO by dismissing the appeal. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly the addition in this case was made on account of commission income earned by the assessee for providing bogus entries to the different persons @ 0.15%. It is also not in dispute that commission income estimated by the AO as well as the Ld. CIT(A) at 2% was further reduced by the Tribunal to 0.15%.

7. In the backdrop of the aforesaid facts and circumstances of the case the order passed by the lower revenue authorities and arguments addressed by the Ld. Authorized Representatives of the parties to the appeal, the sole question arises for determination in this case is:-

“As to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of such income during assessment proceedings?”

8. Ld. AR for the assessee challenging the impugned order contended that the AO in order to initiate the penalty proceedings has prima-facie failed to issue a valid show cause notice under section 271(1)(c) read with section 274 of the Act by invoking specific limb of section 271(1)(c) of the Act as to if the assessee has concealed the particulars of income or has furnished inaccurate particulars of such income during the assessment proceedings. The Ld. A.R. for the assessee further contended that addition in this case has merely been made on the basis of estimation and as such penalty under section 271(1)(c) of the Act is not leviable and relied

upon the decision rendered by Hon'ble Bombay High Court Full Bench in case of Md. Farhan A Sheikh vs. ACIT (2021) 434 ITR 1(FB-Bombay).

9. Before proceeding further we would extract the notice issued by the AO under section 271 of the Act for ready perusal as under:

आई.टी.एन.एस.-29
I.T.N.S.- 29

आयकर अधिनियम, 1961 की धारा 271 के साथ पढ़ी गयी धारा 274 के अधिन सूचना
NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE
INCOME TAX ACT, 1961

Office of the
Asstt. Commr. of Income Tax,
(OSD) - 1, Cent. Office
आयकर कार्यालय/Income Tax Office
No. 464, 4th floor,
आयकर भवन, M. K. Road,
Mumbai-400 019.

सेवा में
To M/s Gold Star Finvest Pvt Ltd
Block H Shree Sadashu CHS
Ground Floor Santacruz (E)
Mumbai-55

तारीख
Dated 12/11/2008

Pen 50/P.15/2008-09

क्योंकि कर निर्धारण वर्ष _____ के सम्बन्ध में मेरे यहां होने वाली कारवाई के दौरान मुझे प्रतीत होता है कि आपने :-

Whereas in the course of proceedings before me for the assessment year 2002-03 it appears to me that you :-

*बिना उचित कारण के वह आय विवरणी नहीं दी है जो आपको भारतीय आयकर अधिनियम, 1922 की 22(1)22(2)/34 के अधीन दी गई सूचना के अनुसार देनी थी या जो आपको धारा 139(1) के अधीन या आयकर अधिनियम, 1961 को धारा 139(2)/148 के अधीन दी गई सूचना सं. _____ ता. _____ अनुसार दाखिल करनी थी अथवा उचित कारण के बिना आपने दिए गए समय के अन्दर और उक्त धारा 139(1) या इस प्रकार की सूचना द्वारा अपेक्षित नीति से विवरणी नहीं दी है।

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under Section 22(1)22(2)/34 of the Indian Income Tax Act, 1922 or which you were required to furnish under Section 139(1) or by a notice given under Section 139(2)/148 of the Income-Tax Act, 1961 No. _____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139(1) or by such notice.

*बिना उचित कारण के आपने भारतीय आयकर अधिनियम, 1922 की धारा 22(4)/23(2) या आयकर अधिनियम, 1961 की धारा 142(1)/143(2) के अधीन दी गई सूचना सं. _____ ता. _____ का अनुपालन नहीं किया है।

*have without reasonable cause failed to comply with a notice under Section 22(4)/23(2) of the Indian Income-Tax Act, 1922 or under Section 142(1)/143(2) of the Income-tax Act, 1961, No. _____ dated _____

*अपनी आय के ब्योरे छिपा लिए है या _____ इस प्रकार की आय के ब्योरे गलत दिए है।

*have concealed the particulars of your income or _____
Furnished inaccurate particulars of such Income.

आपको एतद्वारा सूचित किया जाता है कि ता. _____ 200 _____ को बजे _____ अ.म./पू.म. में आप भरे कार्यालय में उपस्थित हों और कारण बताएं कि आयकर अधिनियम, 1961 की धारा 271 के अधीन आप पर दण्ड लगाने का आदेश क्यों न दिया जाए। यदि आप स्वयं उपस्थित होकर या प्राधिकृत प्रतिनिधि द्वारा सुनवाई के लिए दिए गए अवसर का लाभ नहीं उठाना चाहते तो उक्त तारीख को या उससे पूर्व लिखकर इसका कारण बताएं, जिस पर धारा 271 के अधीन कोई ऐसा आदेश देने के पूर्व विचार किया जाएगा।

Your are hereby requested to appear before me at 11:30
A.M./P.M. on 15/12/2008 And show cause why an order imposing a penalty on you should not be made under Section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative, you may show cause in writing on or before the said date which will be considered before any such order is made under Section 271.

(मोहर)
(Seal)



रमेश चन्द्र/RAMESH CHANDRA

सहायक आयकर आयुक्त (वि. का. अ.)-I

केंद्र (निर्धारण अधिकारी)

Assit. Commissioner of Income Tax,
(OSD)-I, Cent. Ofc.-7, Mumbai

- * जो शब्द या पैरे अनावश्यक हों, उन्हें काट दीजिए।
- * Delete in inappropriate words and paragraphs.

10. Bare perusal of the notice (supra) issued in this case by the AO goes to prove that the AO at the time of issuing the notice was not satisfied if he was initiating the penalty against the assessee for concealing particulars of his income or for furnishing inaccurate particulars of such income.

11. This issue has been decided by the Hon'ble Bombay High Court in Full Bench Judgment rendered in case of Md. Farhan A Sheikh vs. ACIT (2021) 434 ITR 1(FB-Bombay) and held that penalty under section 271(1)(c) of the Act is not leviable when invalid notice as in the instant case has been issued to the assessee. The operative part of the order passed by the Hon'ble Bombay High Court is as under:

“180. One course of before us is curing a defect in the notice by referring to the assessment order, which may or not contain reason for the penalty proceedings. The other course of action is the prevention of defect in the notice - and that

7. Sailesh Mehta v. CIT(A) ITA No.2445, 2439, 2444 &2443/Mum/2021 prevention takes just a tick mark. Prudence demands prevention is better than cure.

Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Sec. 271(1)(c), docs a mere defect in the notice - not striking off the irrelevant matter vitiate the penalty proceedings?

181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under Sec. 271(1)(c), r.w.s. 274 of the Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a deferent statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More Particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour."

12. So following the order passed by the Hon'ble Bombay High Court in case of Md. Farhan A Sheikh (supra) we are of the considered view that since the AO has failed to initiate the penalty proceedings under section 271(1)(c) of the Act by issuing the valid notice, penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law as the assessee has never been informed about the charges framed to initiate the penalty proceedings through statutory notice.

13. Furthermore, undisputedly entire addition in this case was made/confirmed by the AO as well as the Ld. CIT(A) on the basis of estimation and guess work on the alleged bogus entry provided by the assessee during the year under consideration initially @ 100% by the AO, which was reduced by the Ld. CIT(A) to 2% of the turnover, which was further reduced by the Tribunal to 0.15% of total bogus entries provided.

14. In the backdrop of the aforesaid facts and circumstances of the case, we are of the considered view that when the entire addition has been made on the basis of estimation, penalty levied by the AO and sustained by the Ld. CIT(A) is not sustainable. So when the basis for initiation of penalty proceedings have been altered or modified by the appellate authority the AO cannot proceed with the penalty proceedings as has been held by the Hon'ble Delhi High Court in case of Pr. CIT vs. Fortune Technocomps (P) Ltd. (ITA No.313/2016) (Delhi HC) by following

the decision rendered by the Hon'ble Kolkata High Court in case of CIT vs. Ananda Bazar Patrika Pvt. Ltd. (1979) 116 ITR 416 (Cal HC) by returning the following findings:

“Wherein the Hon'ble Calcutta HC affirmed the view of the ITAT that "once the basis for initiation of penalty proceedings was altered or modified by the first appellate authority, the then Learned Assessing Officer has no jurisdiction thereafter to proceed on the basis of the findings of the first appellate authority.”

15. So we are of the considered view that when entire addition in this case is on estimation basis and at no point of time Revenue Authorities have reached the specific conclusion that the assessee has concealed the particulars of income or has furnished inaccurate particulars of income rather made the addition on the basis of information received from Sales Tax Department without conducting any independent enquiry as to the alleged bogus purchases, the penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law.

16. So in view of what has been discussed above, we are of the considered view that penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law, hence ordered to be deleted.

17. Resultantly, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 28.04.2023.

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 28.04.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.