

आयकर अपीलिय अधिकरण
मुंबई पीठ " सी " , मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एस रिफौर रहमान, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
आ. अ. सं. 1425/मुं/2021 नि. व. 2009-10)
ITA No. 1425/Mum/2021 (A.Y. 2009-10)

Orient Fabritech Pvt. Ltd.
C/so D.C.Bothra & Co. LLP (CA),
(formerly known as D.C. Bothra & Co.),
297, Tardeo Road, Willie Mansion,
1st Floor, Opp. Bank of India,
Nana Chowk, Mumbai-400007.

PAN: AAACO8702A

..... अपीलार्थी / Appellant

बनाम Vs.

ITO, Range- 1(2)(4),
Room No. 537, 5th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020.

..... प्रतिवादी / Respondent

अपीलार्थी द्वारा/ Appellant by : Sh. Rajkumar Singh.
प्रतिवादी द्वारा/ Respondent by : Sh. R. A. Dhyani, Sr. DR
सुनवाई की तिथि/ Date of hearing : 07/03/2022
घोषणा की तिथि/ Date of pronouncement : 07/03/2022

आदेश/ ORDER

PER VIKAS AWASTHY, J.M:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre, Delhi (NFAC) (in short

'the CIT(A)' dated 30.07.2021 for the Assessment Year (AY) 2009-10, confirming levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Sh. Rajkumar Singh appearing on behalf of the assessee submitted that the assessment for AY 2009-10 in the case of assessee was re-opened on the ground that the assessee had obtained bogus purchase bills from M/s Ankit Enterprises – Rs. 5,11,810/-, Raj Hans Steel – Rs. 77,444/- and Mukta Steel – Rs. 10,00,350/-. The Assessing Officer (AO) made addition of Rs. 15,89,604/- in respect of the entire alleged bogus purchases made by the assessee from the aforesaid three parties. The assessee carried the issue in appeal before the Tribunal in ITA No. 5113/Mum/2017. The Tribunal vide order dated 30.11.2018 estimated the addition in respect of bogus purchases to 12.5% of alleged purchases. The AO vide order dated 28.03.2019 levied penalty of 300% of the tax i.e. Rs. 1,84,200/- in respect of the addition confirmed by the Tribunal. The Id. Authorized Representative (AR) submitted that in first appeal, the CIT(A) upheld the levy of penalty, however, partial relief was granted to the assessee by restricting penalty @ 100%. The Id. AR submitted that the CIT(A) has erred in upholding penalty to the extent of 100% instead of deleting the penalty as the penalty has been levied on addition merely on estimations. The Id. AR further pointed that the notice issued under section 274 r.w.s. 271(1)(c) of the Act dated 18.03.2015 is ambiguous, in as much as the irrelevant clause have not been struck off by the AO before issuing the notice. Even in subsequent notice issued on 15.03.2019, the AO has mentioned both the limbs of section 271(1)(c) of the Act. The Id. AR pointed that the Hon'ble Bombay High Court in full bench decision in the case of Mohd. Farhan A. Shaikh Vs. DCIT 434 ITR 1 has held that defect in notice i.e. non-striking

off irrelevant matter would vitiate penalty proceedings under section 271(1)(c) of the Act.

3. Per contra, Sh. R. A. Dhyani representing the Department vehemently defended the impugned order and submitted that penalty under section 271(1)(c) of the Act has rightly been levied by the AO and upheld by the CIT(A). The Id. Departmental Representative (DR) submitted that the Tribunal in quantum appeal has concurred with the findings of the AO that the assessee has indulged in obtaining bogus purchase bills. It is only the quantum of addition that has been reduced by the Tribunal.

4. Both sides heard, orders of the authorities below examined. The assessee is in appeal against levy of penalty in respect of assessee's involvement in obtaining bogus purchase bills. In quantum proceedings, the AO made addition of the entire alleged bogus purchases. The matter travelled to the Tribunal, the Tribunal restricted the addition to 12.5% of the alleged bogus purchases. The addition has been made in the hands of assessee on account of bogus purchase merely on estimations. It is an accepted legal position that no penalty under section 271(1)(c) of the Act can be levied where additions are made on estimate. [*Re: CIT Vs. Krishi Tyre Re-trading & Rubber Industries 360 ITR 580(Raj.)*, *CIT Vs. Subhash Trading Company 221 ITR 110 (Guj.)*, *CIT Vs. Sangrur Vanaspati Mills Ltd. 303 ITR 53 (P&H)*].

5. We further find that the notice issued under section 274 r.w.s. 271(1)(c) of the Act dated 18.03.2015 and the subsequent notice issued under section 271(1)(c) of the Act dated 15.03.2019 falls short of the legal requirement to be a valid notice for levy of penalty. The first notice issued under section 274 r.w.s. 271(1)(c) is in Performa, without any application of mind by the AO. The irrelevant

limb of section 271(1)(c) of the Act has not been struck off. The Hon'ble jurisdictional High Court in the case of Mohd. Farhan A. Shaikh (supra) has dealt with the issue where the notice was issued without striking off the irrelevant matter. The Hon'ble High Court held that non-striking off irrelevant matter would vitiate the penalty proceedings. The relevant extract of the judgment is reproduced here-in-below:

“180. One course of action before us is curing a defect in the notice by referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice—and that 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 Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitate 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 section 271(1)(c), read with section 274 of IT 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 different 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.

6. In the second notice dated 15.03.2019, the AO has mentioned both the charges of section 271(1)(c) of the Act. This shows ambiguity in the mind of AO

with regard to charge under section 271(1)(c) of the Act, that is to be invoked. The Hon'ble Apex Court in the case of T. Ashok Pai Vs. CIT 292 ITR 11 has held the concealment of income and furnishing inaccurate particulars of income carry different connotations. Thus, the AO is duty bound to clearly convey to the assessee the limb for which penalty is to be levied. Where the position is unclear, penalty is unsustainable.

7. Thus, the penalty levied under section 271(1)(c) of the Act is unsustainable on account of defect in statutory notice issued under section 274 of the Act, as well for the reason that penalty is levied on addition made on mere estimations. The impugned order is set-aside and the appeal of assessee is allowed.

Order pronounced in the open court on **Monday**, the **7th** day of March, 2022.

Sd/-

(S. RIFAUR RAHMAN)

लेखा सदस्य/ACCOUNTANT MEMBER
मुंबई/Mumbai, दिनांक/Dated: 07/03/2022

SK, Sr.PS

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय. अपी. अधि. , मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

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(Dy./Asstt. Registrar)

ITAT, Mumbai