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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 12.07.2022*

\+ **ITA 57/2021 & CM No.7835/2021**

PR. COMMISSIONER OF INCOME TAX-3 ..... Appellant
Through: Mr Ajit Sharma, Sr. Standing Counsel.

versus

MS. MINU BAKSHI ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

ITA 57/2021

1. This appeal is directed against the order dated 11.12.2019 passed by the Income Tax Appellate Tribunal [in short 'Tribunal'] in ITA No. 3118/Del/2017.

2. The record shows that the respondent/assessee in its return for Assessment Year (AY) 2007-2008, disclosed the taxable income as Rs.11,76,296/-.

2.1 The record also shows that on 10.12.2012, search under Section 132 of the Income Tax Act, 1961 [in short 'Act'] was carried out, whereupon notice under Section 153A of the Act was issued.

2.2. Consequent thereto, the respondent's/assessee's case was picked up for scrutiny and notices under sections 143(2) and 142(1) of the Act, along with questionnaire were issued by the Assessing Officer (AO).

2.3. The AO passed an assessment on 27.03.2015, under section 143(3) of the Act. The AO pegged the taxable income at Rs. 9,61,76,296/-. With the addition of Rs 9,50,00,000/-, on account of unaccounted cash receipts.

2.4. Thereafter, penalty proceedings were initiated against the respondent/assessee under section 271(1)(c) *qua* the addition made. In the first instance, *via* order dated 29.09.2015, penalty amounting to Rs 3,19,77,000/- was passed on the ground that there had been concealment. This order was however, rectified on 14.06.2016 in exercise of powers under Section 164 of the Act. Resultantly, penalty amount was scaled down to Rs 2,13,18,000/-.

3. The Tribunal, according to Mr Ajit Sharma, who appears on behalf of the appellant, ruled in favour of the respondent/assessee, based on the rationale that the penalty order did not clearly advert to the ground on which the penalty was being levied, that is, for concealment of income or non-disclosure of material particulars in the original return.

4. That being said, Mr Sharma fairly states that this very issue was, broadly, considered by a Division Bench of this Court in the matter of ***Principal Commissioner of Income Tax-19 v. Neeraj Jindal & Ors.***, (2017) 393 ITR 1 (Delhi) [hereafter referred to as "Neeraj Jindal case".]

4.1. We are also informed by Mr Sharma that a Special Leave Petition [diary No.24342/2017] was preferred against the said judgment which was dismissed on 28.08.2017, keeping the questions of law open.

5. However, we note that the coordinate bench of this Court in the ***Neeraj Jindal*** case has made the following observations:

> *"13. At the outset, it must be noted that pursuant to the search and seizure operation conducted under Section 132(4) of the Act,*

the assessee was given notice under Section 153A to file fresh return of his income. Thereafter, the assessee filed revised returns and the return filed by the assessee under Section 153A was accepted as such by the A.O. However, the A.O. was of the opinion that inasmuch that the income disclosed by the assessee under Section 153A was higher than the income in the original return filed under Section 139(1) and since in his view, such disclosure of income was a consequence of the search conducted on the assessee, there was concealment of income which attracted Section 271(1)(c) of the Act. Therefore, the question that needs to be answered is whether penalty is to be levied automatically whenever the assessee declares a higher income in his return filed under Section 153A in comparison to the original return filed under Section 139(1).

14. The Supreme Court held, in ***Shri T. Ashok Pai v. Commissioner of Income Tax, Bangalore (2007) 7 SCC 162****, that penalty under Section 271(1)(c) is not to be mandatorily imposed. In other words, the levy of penalty under this provision is not automatic. This view has been reiterated in* ***Union of India v. Rajasthan Spinning and Weaving Mills, (2009) 13 SCC 448*** *to say that for there to be a levy of penalty under Section 271(1)(c), the conditions laid out therein have to be specifically fulfilled. Section 271(1)(c) of the Act, being in the nature of a penal provision, requires a strict construction. While considering the interpretation of this provision, this Court in* ***Commissioner of Income Tax v. SAS Pharmaceuticals (2011) 335 ITR 259 (Del)****, stated that:*

> *"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. Subsection (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."*
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> *Thus, what is required to be judged is whether there has been a "concealment" of income in the return filed by the*

assessee.

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17. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. ***However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. On this point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty****.*

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19. The whole matter can be examined from a different perspective as well. Section 153A provides the procedure for completion of assessment where a search is initiated under Section 132 or books of account, or other documents or any assets are requisitioned under Section 132A after 31.05.2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under Section 132 or requisition was made under Section 132A. The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or requisition under Section 132A, as the case may be, shall abate. [Ref to Memorandum accompanying the Finance Bill, 2003] ***Section 153A opens with a non-obstante clause relating to normal assessment procedure covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after May 31, 2003. The sections, so excluded, relate to returns, assessment and reassessment provisions. However, the provisions that are saved are those under Section 153B and 153C, so that these***

three Sections 153A, 153B and 153C are intended to be a complete code for post-search assessments. Considering that the non-obstante clause under Section 153A excludes the application of, inter alia, Section 139, it is clear that the revised return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. *This is further buttressed by Section 153A (1)(a) which reads:*

> *"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-*
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> > *a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall,* ***so far as may be, apply accordingly as if such return were a return required to be furnished under section 139***.[Emphasis is ours.]

6. The Division Bench of this Court, in the ***Neeraj Jindal*** case, concluded the matter in favour of the assessee on three grounds, as would be evident from the paragraphs extracted above.

6.1. First, the revised return filed pursuant to notice issued under Section 153A of the Act, would not, by itself, lead to an inference that there has been concealment; the revenue would have to show that there was incriminating evidence available in that behalf before penalty could be imposed.

6.2. Second, Section 153A of the Act is a complete code, the provisions of section 139 of the Act, which concerns original returns, would not be applicable. In other words, the so-called revised return filed, would be the original return.

6.3. Third, if Explanation 5 to Section 271(1) of the Act were to be relied upon, the revenue would have to establish that the assets, such as money, bullion *etcetera* were seized during the search conducted on the premises of the assessee and that the said assets related to the income of the assessee for the relevant assessment years. Explanation 5, as noted in the said judgement, was inserted in the statute by Taxation Laws (Amendment) Act, 1984, w.e.f. 01.10.1984.

7. In our opinion, the conclusion reached by the Tribunal in the instant case that the notice for imposition of penalty under Section 271(1) (c) of the Act, did not specify which limb of the said provision the penalty was sought to be levied, is covered by the following decisions, which includes a decision rendered by a coordinate bench of this Court.

(i) ***CIT and Anr. v M/s SSA's Emerald Meadows,*** passed in ITA No. 380/2015, dated 23.11.2015.

(ii) ***Commissioner of Income Tax v Manjunatha Cotton and Ginning Factory*** (2013) 359 ITR 565 (Kar.)

(iii) ***PCIT vs M/s Sahara India Life Insurance Company Ltd***., passed in ITA No.475/2019, dated 02.08.2019.

7.1. To be noted, the Special Leave Petition filed against the judgement in ***SSA's Emerald*** (mentioned above) was dismissed *via* order dated 05.08.2016.

7.2. We are in agreement with the view taken by the Karnataka High Court in the above-mentioned judgements (in ***SSA's Emerald*** and ***Manjunatha Cotton***) and, in any event, are bound by the view taken by the coordinate bench of this court in the ***Sahara India*** case.

7.3. Insofar as the view taken in the ***Neeraj Jindal*** case is concerned, that does not arise from the order of the Tribunal in this case, although, there is much weight in the conclusions reached by a coordinate bench in the said case. Like in the ***Neeraj Jindal*** case, in this case as well, search was conducted against the "Bakshi group" which led to the issuance of notice under of the Act.

8. Thus for the foregoing reasons, the appeal is dismissed.

CM No.7835/2021

9. This is an application filed on behalf of the appellant seeking condonation of delay in filing the appeal.

9.1. Even according to the appellant/revenue, the delay involved is 440 days.

10. Since we have dismissed the appeal, the above-captioned application has been rendered infructuous.

11. The application is, accordingly, closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JULY 12, 2022/aj

Click here to check corrigendum, if any