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

% **Date of decision: 06.07.2023**

+ **ITA 345/2023**

PR. COMMISSIONER OF INCOME TAX (CENTRAL)-2

..... Appellant

Through: Mr Sanjay Kumar, Sr. Standing
Counsel with Ms Hemlata Rawat and
Ms EashaKadiyan, Advocates.

versus

GOPAL KUMAR GOYAL

.....Respondent

Through: None.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 33608/2023

1. Allowed, subject to just exceptions.

CM APPL. 33609/2023

2. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in re-filing the appeal.

2.1 According to the appellant/revenue, there is a delay of 220 days.

3. For the reasons given in the application, the delay is condoned.

4. Accordingly, the application is disposed of.



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5. This appeal concerns Assessment Year (AY) 2004-05.

6. The appeal is directed against the order dated 30.03.2022 passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].

7. The short issue which arose for consideration before the Tribunal, and which also arises before this Court is: whether the penalty proceedings are flawed, since the notice issued in that behalf failed to indicate which limb of Section 271(1)(c) of the Income Tax Act, 1961 [in short, “the Act”] was attracted for initiation of proceedings? In other words, whether proceedings were triggered against the respondent/assessee for concealment of income or furnishing inaccurate particulars.

7.1 Given this position, it would be helpful to extract the relevant parts of Section 271(1)(c) of the Act.

*“271. (1) If the Assessing Officer or the [Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—
(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or”*

7.2 A plain reading of Section 271(1)(c) of the Act would show, that it adverts to two circumstances, in which penalty proceedings can be initiated against an assessee. The first circumstance concerns concealment of particulars of income, while the second circumstance relates to furnishing of inaccurate particulars. If one were to read the expression “or” conjunctively, it could lead to a third situation, where inaccurate particulars could lead to concealment of income. In case such circumstance arises in a particular matter, the Assessing Officer’s (AO) notice should reflect this position.



8. The record shows, that the Assessing Officer (AO), in the second round, that is, once the matter was remanded to him pursuant to the order dated 14.03.2012 passed under Section 264 of the Act, had levied penalty at the rate of 300% *via* order dated 31.03.2017. This order was passed on the back of the assessment order dated 21.03.2013.

9. The respondent/assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"]. The CIT(A) *via* order dated 26.12.2018 scaled down the rate of penalty to 150%. It is in this backdrop, that both the appellant/revenue and the respondent/assessee preferred appeals with the Tribunal.

9.1 The Tribunal, *via* the impugned order allowed the appeal of the respondent/assessee, while rejecting the appeal of the appellant/revenue. The Tribunal ruled in favour of the respondent/assessee, having regard to the fact, that the AO had not arrived at a clear satisfaction as to which limb of Section 271(1)(c) was applicable, while passing the penalty order. In other words, according to the Tribunal, there was no clarity, whether the respondent/assessee had concealed the particulars of its income, or furnished inaccurate particulars.

10. We have queried Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the appellant/revenue, whether the penalty notice had been filed with the appeal. Mr Kumar has submitted, that although the penalty notice has not been filed, the relevant part stands extracted in paragraph 9 of the impugned order. For the sake of convenience, the relevant part is extracted hereafter:



“...have concealed the particulars of your income...furnished inaccurate particulars of income...”

11. The Tribunal, after perusing the record and considering the submissions, observed as follows:

“13. In the present appeal, the show-cause-notice dated 15.03.2013 which has been issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Act reveals that Assessing Officer has not recorded any clear cut satisfaction as to whether the penalty under Section 271(1)(c) of the Act has been levied for concealment of income or for furnishing of inaccurate particulars of income.”

12. As is evident upon a perusal of the impugned order, the Tribunal, in concluding that there was a requirement in law for the AO to clearly indicate his satisfaction, as to which limb of Section 271(1)(c) of the Act was triggered qua the respondent/assessee, placed reliance on the following judgments: *PCIT v. Sahara India Life Insurance Co. Ltd.* (2021) 432 ITR 84 and *Mohd. Farhan A Sheikh v. DCIT*, (2021) 434 ITR 1 (Bom)(FB).

13. Thus, having regard to the aforesaid, the Tribunal concluded, that the penalty order could not be sustained, and consequently allowed the appeal of the respondent/assessee.

14. Mr Kumar, in support of his appeal, has vehemently argued that the impugned order is erroneous. In support of his submission, Mr Kumar has relied upon the judgment of another coordinate bench of this Court in *Commissioner of Income Tax v. ECS Ltd.* [2011] 336 ITR 162 (Del).

15. Having heard Mr Kumar and perused the record, in our view, there cannot be any dispute, that the AO failed to clearly reflect his satisfaction in



the penalty notice, as to which limb of the provisions of Section 271(1)(c) of the Act was triggered vis-a-vis the respondent/assessee.

16. As indicated above, in a given case, both limbs may get attracted, but even in such situation the AO would need to set forth his *prima facie*, satisfaction in the penalty notice. The reason, perhaps, why the Legislature has provided for two circumstances in Section 271(1)(c) of the Act, to our minds, emanates from the need to distinguish between the gravity and consequences which may accompany concealment of particulars of income, as against a case which involves furnishing inaccurate particulars. The quantum of penalty, that the AO may levy, would depend on which slot and/or limb of Section 271(1)(c) of the Act, the assessee's infraction falls in.

17. Furthermore, having regard to the doctrine of *stare decisis* which impels courts not to disturb settled propositions or points of law, we are of the view, that the judgment of the coordinate bench of this Court rendered in ***Sahara India*** would have to be followed, as nothing has been brought on record by Mr Kumar, which would persuade us to deviate from the view taken by the coordinate bench, and refer the matter to a larger bench.

18. We may also note, that this very view has been taken by another coordinate bench, of which one of us i.e., Rajiv Shakti, J. was a member. This view has been rendered in ***PCIT v. Ms. Minu Bakshi*** 2022: DHC:2814-DB and also in the judgement in ***Pr. Commissioner of Income Tax, Delhi-7 v. Unitech Reliable Projects Pvt. Ltd.*** 2023: DHC:4258-DB. The relevant observations made in the aforesaid judgement are extracted hereafter:

“21. *Penalty proceedings entail civil consequences for the assessee. The AO is required to apply his mind to the material particulars, and indicate clearly, as to what is being put against the respondent/assessee when triggering the penalty*



proceedings.

22. *In case the AO concludes, that a case is made out under Section 271(1)(c) of the Act, he needs to indicate, clearly, as to which limb of the said provision is attracted. The reason we say so is, that apart from anything else, the pecuniary burden may vary, depending on the infraction(s) committed by the respondent/assessee. In a given case, where concealment has taken place, a heavier burden may be imposed, than in a situation where an assessee is involved in furnishing inaccurate particulars.*

23. *Therefore, it is necessary for the AO to indicate, broadly, as to the provision/limb under which penalty proceedings are triggered against the assessee.*

24. *Clearly, this has not happened in the instant case.”*

19. We may note, that even in the judgment cited by Mr Kumar i.e., *ECS Ltd.*'s case, the coordinate bench has not veered away from this proposition made the following observations:

“The net effect of the aforesaid judgment is that even when the Assessing Officer has not recorded his satisfaction in explicit terms, the assessment orders should indicate that the Assessing Officer had arrived at such a satisfaction. Though the assessment order need not reflect every item, vis., addition or disallowance, yet we have to find out that the order is couched in such a manner and the discussion herein leads towards the opinion of the Assessing Officer that the assessee had concealed the particulars of income or furnishing inaccurate particulars. This has to be discerned from the reading of the assessment order. We have gone through the assessment orders passed in these cases keeping in mind the aforesaid yardstick in mind. In the assessment orders passed by the Assessing Officer in the instant case, after discussing the proposition that expenses incurred in India are to be entered while computing deduction under section 80-O of the Act and disallowing a major part of the expenses claimed by the assessee, the Assessing Officer mentioned at the end in the assessment order as under:

“Penalty proceedings under Section 271(1)(c) are being initiated separately. ”



Admittedly, the Assessing Officer has not stated, in so many words, that he was satisfied that the assessee had concealed the particulars of income or furnished inaccurate particulars. However, it shows that during the assessment proceedings, the Assessing Officer found that the assessee had claimed deduction under Section 80-O of the Act at 50 percent of its gross income earned in foreign exchange and not at 50 percent of the net income earned in foreign exchange. In these circumstances, the Assessing Officer asked the assessee to furnish details of expenditure incurred to earn the income in foreign exchange by giving specific notice. The assessee, however, refused to do the needful even when the case was adjourned repeatedly. Under such circumstances, the Assessing Officer asked the assessee to explain as to why the expenditure relatable to the assessee's earning in convertible foreign exchange should not be estimated. In response to such show-cause notice, the assessee came out with the plea that the expenditure incurred in India to earn foreign exchange was not to be deducted."

20. Thus, for the foregoing reasons, we are of the opinion, that no substantial question of law arises for our consideration.
21. The appeal is accordingly closed.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

JULY 6, 2023 / tr