



§~35

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% **Date of decision: 19.05.2023**+ **ITA 291/2023**

PR. COMMISSIONER OF INCOME TAX, DELHI -7 Appellant
Through: Mr Puneet Rai, Sr. Standing Counsel.

versus

UNITECH RELIABLE PROJECTS PVT. LTD. 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 No. 26497/2023

1. Allowed, subject to all just exceptions.

CM Nos. 26498-99/2023

2. The above-captioned applications have been moved on behalf of the appellant/revenue, seeking condonation of delay in filing and re-filing the appeal.

2.1 According to the appellant/revenue, there is a delay of 24 days in filing and delay of 28 days in re-filing the appeal.

3. Mr Puneet Rai, learned senior standing counsel who appears on behalf of the appellant/revenue says, that the period of delay, both in filing and re-filing is short.

4. Accordingly, the delay in the above-captioned applications is condoned.

5. The above-captioned applications are disposed of in the aforesaid terms.

ITA 291/2023

6. This appeal concerns Assessment Year (AY) 2012-13.

7. The appeal seeks to lay challenge to the order dated 29.09.2022 passed by the Income Tax Appellate Tribunal [in short, "the Tribunal"].

8. The facts emerging from the record, which are necessary for adjudicating the appeal are the following.



9. On 28.09.2012, the respondent/assessee filed its return of income, wherein it had declared a loss amounting to Rs. 12,83,96,466/-.

9.1 The Assessing Officer (AO), having regard to the fact that there was a substantial increase in the expenses claimed by the respondent/assessee towards Real Estate Project Expenses, as compared to the previous years' claim issued a show-cause notice to the respondent/assessee.

9.2 It appears, that in response, the respondent/assessee filed a reply, wherein it, *inter alia*, stated that it was following the percentage completion method in the earlier years, whereby expenditure for ascertaining the revenue was based on expected estimates, and since the project was completed in the given AY, there was an enhancement in the expenses.

10. It appears, that the AO also flagged the fact, that the expenditure in the completion of project, which was claimed by the respondent/assessee as amounting to Rs. 78,40,58,041/- included a component, which according to the AO had yet not been incurred. This component was an amount equal to Rs. 35,34,96,000/-. It also appears, that although an explanation was sought, the respondent/assessee ultimately surrendered the loss claimed *via* its return, which resulted in the AO disallowing the loss in the initial return.

11. As noticed above, the loss claimed by filing the initial return was Rs. 12,83,96,466/-. Besides this, the AO also made an addition of Rs. 3,02,436/- out of a total amount of Rs. 3,89,61,695/- shown towards trade payables.

11.1 The reason given by the AO for this was, that even though trade payables *qua* two entities were shown as outstanding for more than three years, no legal proceedings had been initiated. The AO, thus, took recourse to the provisions of Section 41(1) of the Income Tax Act, 1961 [in short, "the Act"] and added Rs. 3,02,436/- which was payable by the said entities, on the ground that there was cessation/remission of liability.

12. It is on account of the aforementioned additions i.e., the surrender of loss by the respondent/assessee and the addition made towards trade payables which were



outstanding for more than three years, that the AO was propelled to trigger penalty proceedings under Section 271(1)(c) of the Act. The net result was that the AO, *via* order dated 23.09.2015 levied the penalty of Rs. 4,36,41,961/-.

13. The respondent/assessee, being dissatisfied, preferred an appeal to the Commissioner of Income Tax (Appeals) [in short, CIT(A)]. The CIT(A), however, rejected the appeal, and sustained the penalty order passed by the AO. It is in this backdrop, that the respondent/assessee preferred a second appeal with the Tribunal.

14. The Tribunal, after noticing the backdrop which is set forth hereinabove, disposed of the appeal and set aside the penalty order, based on the defect which was noticed by it, insofar as the penalty proceedings were concerned.

15. According to the Tribunal, the notice dated 14.03.2015 issued under Section 274 read with Section 271(1)(c) of the Act did not specify, as to the limb under which penalty was sought to be imposed. In other words, the notice which was served on the respondent/assessee did not indicate, as to whether penalty was being levied on account of concealment of income, or for the reason that it had furnished inaccurate particulars. The Tribunal, based on the order of the Supreme Court in *CIT vs. SSA's Emerald Meadows* (2016) 73 taxmann.com 248 (SC) observed that the penalty proceedings would have to be quashed.

16. For the sake of convenience, the relevant part of the impugned order passed by the Tribunal is extracted as under:

"7.2 The Hon'ble Apex Court in case of M/s. SSA's Emerald Meadows, (2016) 73 taxmann.com 248(SC) dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by Hon'ble High Court of Karnataka whereby identical issue was decided in favour of the Assessee. Operative part of the judgment in case of M/s. SSA's Emerald Meadows (supra) decided by Hon'ble High Court of Karnataka is reproduced below:-

"2. This appeal has been filed raising the following substantial questions of law:

(1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that



the assessee had concealed income in the facts and circumstances of the case?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid inspite the amendment of Section 271(1 B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued, under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?

3. *The Tribunal has allowed the appeal filed by the Assessee holding **the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income**. The Tribunal, while allowing the appeal of the Assessee, has relied upon the decision of the Division Bench of this Court rendered In the case of COMMISSIONER or INCOME TAX -vs- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.*

4. *In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises, in this appeal for determination by this Court, the appeal is accordingly dismissed."*

[Emphasis is ours]

17. The Supreme Court in the aforesaid case, in fact, confirmed the view of the Karnataka High Court in said matter, which in turn had relied upon the judgment of its own Court in ***Manjunatha Cotton & Ginning Factory***, (2013) 359 ITR 565.

18. Furthermore, the Tribunal also noted the coordinate bench judgement of this Court in ***PCIT vs Sahara India Life Insurance Company Ltd.*** (2021) 432 ITR 84 (Del.).



19. We may note, that even the assessment order dated 14.03.2015, whereby penalty proceedings were triggered, did not indicate as to which limb of Section 271(1)(c) was being triggered *qua* the petitioner. This is evident from the following observation made by the AO:

“Penalty proceeding u/s 271(1)(c) is being initiated separately for concealment of income & for furnishing inaccurate particulars of income.”

20. We may note, that another coordinate bench of this Court, of which one of us [i.e., Rajiv Shakhder, J.] was a party has reached the same conclusion in ***PCIT vs. Minu Bakshi*** 222 (7) TMI 1370-Delhi.

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.

25. As a matter of fact, even in the assessment order, whereby proceedings were triggered, there is no indication whatsoever, as to which limb of Section 271(1)(c) of the Act was triggered.

26. Thus, in the given circumstances, we are not inclined to interfere with the impugned order. According to us, the issue is well-traversed, and therefore, this appeal need not be entertained. No substantial question of law arises for our consideration.

27. The appeal is, accordingly, closed.



28. The Registry will dispatch a copy of the judgement rendered today to the respondent/assesee at the address given in the memo of parties, and also, if possible, *via* e-mail.

29. Parties will act based on the digitally signed copy of the order.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

MAY 19, 2023

v

[Click here to check corrigendum, if any](#)

भारत्यमेव जयते