

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C" MUMBAI**

**BEFORE SHRI JOGINDER SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5197/MUM/2014
Assessment Year 2004-05**

M/s. Oleander Farms P. Ltd. D-73/1, TTC Industrial Area, MIDC Road, Turbhe, Navi Mumbai- 400 705.	Vs.	The DCIT,CC-47, Mumbai.
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PAN No. AAACO 6556 G		
Appellant)	..	Respondent)

Appellant by:	Shri. J.P. Bairagra, AR
Respondent by:	Ms. Beena Santosh, DR

Date of Hearing: 23.11.2016
Date of Pronouncement: 28.11.2016

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2004-05. It is directed against the order of Commissioner of Income Tax (Appeals)-38, Mumbai and arises out of the order u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act').

2. The 1st and 2nd grounds raised by the assessee in this appeal are that the Id. CIT(A) has erred in law and on facts in confirming the penalty of Rs. 25,09,949/- levied by the Assessing Officer (AO) u/s 271(1)(c) of the Act . Also the Id. CIT(A) has erred in law and on facts in confirming penalty on disallowance of loss on account of diminution in value of shares of Rs.

25,60,558/-. The 3rd ground is that the Id. CIT(A) has erred in law and on facts in confirming penalty on disallowance of loss Rs. 44,35,817/-, which according to the AO was assessable under the head "Income from Other Sources". While doing so, the Id CIT(A) failed to appreciate that the said loss was declared by the appellant as loss from agricultural activities and the same was excluded while computing its income. The 4th ground is that the Id. CIT(A) has erred in law and on facts in not holding that the penalty order passed by the Assessing Officer u/s. 271(1)(c) of the Act was bad in law as the assessment order, on the basis of which the penalty notice was issued, was not passed in accordance with the provisions of the Act.

3. In a nutshell, the facts are that search and seizure action u/s 132(1) of the Act was carried out by the Department in the case of Felmingo/Bermaco Group on 31/10/2009. The assessee's case was covered u/s 153C of the Act. The assessee filed its return of income on 11/08/2010 in response to notice u/s 153C of the Act, declaring Nil income. However, in the computation of capital income, the assessee claimed agricultural loss of Rs. 44,35,817/-. The AO completed the assessment u/s 153C r.w.s 143(3) on 27/12/2011 by making addition on account of diminution in value of investment of Rs. 25,60,558/- and treating the agricultural income/receipts as income from other sources. Then the AO imposed a penalty of Rs. 25,09,949/- u/s 271(1)(c) vide order dated 28/06/2012. The assessee preferred appeal before Id. CIT(A) against the above order of the AO. The Id. CIT(A) agreed with the reasons stated by the AO and confirmed the said penalty.

4. Before us, the Id. counsel of the assessee submits that in the penalty notice issued by the AO along with the assessment order dated 27/12/2012, it can be seen that the penalty is initiated in a printed form wherein neither the words 'concealed the particulars income' or 'furnished inaccurate particular of income' is deleted. He further submits that notice

u/s 274 of the Act should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or furnishing of incorrect particulars of income and sending printed form where all the grounds in section 271 are mentioned would not satisfy requirement of law. He states that the assessee should know the grounds which he has to meet specifically, otherwise, principles of natural justice is offended and on the basis of such proceedings, no penalty could be imposed on the assessee. Reliance was placed by him on the decision of the Hon'ble Karnataka High Court in the case of *CIT vs. Manjunatha Cotton and Ginning Factory & others* 359 ITR 565 and the order of the Tribunal in the case of *Sanghavi Savla Commodity Brokers P. Ltd.* (ITA No. 1746/Mum/2011) dated 22nd December, 2015 and *Ramesh Prasad Sao vs. DCIT* (ITA No. 997/Kol/2011) dated 3rd February, 2012. Thus it is submitted by the ld. counsel of the assessee that the order passed by the AO u/s 271(1)(c) is bad in law as the notice issued u/s 274 r.w.s 271 of the Act did not specify whether the penalty was initiated for concealment of income or furnishing inaccurate particulars thereof.

5. The ld. DR supports the order passed by the ld. CIT(A) upholding the penalty of Rs. 25,09,949/- imposed by the AO u/s 271(1)(c) of the Act.

6. We have considered the rival submissions and perused the relevant material on record. We find in the notice u/s 274 r.w.s.271 dated 27/12/2011, the AO has mentioned 'have concealed the particulars of your income or-----furnished inaccurate particulars of such Income.' The said notice has been filed by the ld. counsel of the assessee in the paper book which is at page 30. In the said notice issued by the AO, it has been mentioned at bottom that inappropriate words and paragraphs be deleted. Still the AO has not deleted the inappropriate words and paragraphs. It is not spelt out as to whether penalty proceedings are sought to be levied for

'furnishing inaccurate particulars of income' or 'concealing particulars of such income'. Thus there is merit in the contentions of the ld. counsel of assessee on the above fact.

6.1 In *CIT vs. Manjunatha Cotton and Ginning Factory (supra)*, the Hon'ble Karnataka High Court held that 'Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(l)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income.' The ITAT "H" Bench Mumbai in the case of *Sanghavi Savla Commodity Brokers (P) Ltd. (supra)* followed the above judgement and held the penalty notice u/s 274 r.w.s. 271 and the penalty proceedings as invalid.

6.2 In the case of *CIT v. Manu Engg. Works [1980] 122 ITR 306*, the Hon'ble Gujarat High has held :

"...We find from the order of the Inspecting Assistant Commissioner, in the penalty proceedings, that is, the final conclusion as expressed in para 4 of the order : 'I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Now, the language of 'and/or' may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the Inspecting Assistant Commissioner to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the Inspecting Assistant Commissioner and, on that ground alone, the order of penalty passed by the Inspecting Assistant Commissioner was liable to be struck down." (p. 310)

6.3 In *New Sorathia Engg. Co vs. CIT [2006] 155 TAXMAN 513 (Guj.)*, it has been held by the Hon'ble Gujarat High Court that 'where penalty order and order of Commissioner (Appeals) showed that no clear-cut finding had been reached as to whether penalty under section 271(1)(c) was being levied for concealment of particulars of income by assessee or whether any inaccurate

particulars of income had been furnished, order of penalty could not be sustained.'

6.4 In *CIT vs. Smt. Kaushalya* [1994] 75 Taxman 549 (Bom.), the Hon'ble Bombay High Court has held that 'The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charges he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified.'

7. Respectfully following the above decisions, we hold that the notice dated 27.12.2011 issued by the AO u/s 274 r.w.s. 271 of the Act for the AY 2004-05 for initiating penalty proceeding u/s 271(1)(c) of the Act in the present case is invalid. In view of the above, the other grounds of appeal raised by the assessee against the levy of penalty u/s 271(1)(c) of the Act require no adjudication at this stage. The order of the ld CIT(A) sustaining the penalty of Rs. 25,09,949/- imposed by the AO u/s 271(1)(c) of the Act is thus set aside.

8. In the result the appeal filed by the assessee is allowed.

Order pronounced in the open court on 28/11/2016

Sd/-

(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai; Dated:28/11/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

Pramila