

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'C', BANGALORE

BEFORE SHRI. ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

AND

SHRI. GEORGE GEORGE K, JUDICIAL MEMBER

I.T.A No.111/Bang/2015
(Assessment Year : 2010-11)

Dr. Vishnumurthy Kaushik,
No.131, 7th Main, 4th Cross, 5th Block,
Jayanagar, Bengaluru 560 011 .. Appellant
PAN : AHYPK6291L

v.

Deputy Commissioner of Income-tax,
Circle -5(1), Bengaluru .. Respondent

Assessee by : Shri. Ravishankar S. V, Advocate
Revenue by : Shri. Sunil Kumar Agarwala, JCIT

Heard on : 11.04.2016
Pronounced on : 12.04.2016

ORDER

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

Assessee through this appeal assails levy of penalty u/s.271(1)(c) of the Income-tax Act, 1961 ('the Act' in short), for the impugned assessment year, which was confirmed by the CIT(A) –II, Bengaluru.

02. One of the grounds taken by the assessee states that the notice issued initiating the penalty proceedings suffer from incurable defect. In support of this, assessee has filed a copy of the notice dt.09.01.2013, issued u/s.274 r.w.s.271 of the Act.

03. Per contra, Ld. DR submitted that the levy of penalty for the impugned assessment year was for concealment of income. Ld. DR submitted that assessee had failed to disclose the correct income. There was clear concealment of income. According to him, vagueness of notice could not be considered as a reason for annulling the levy of penalty, when the assessment order was clear for what reason the penalty proceedings were being initiated.

04. We have perused the orders and heard the contentions. It is necessary to reproduce the notice dt.09.01.2013 issued to the assessee, under section 274 r.w.s. 271, which read as under :

Whereas in the course of proceedings before me for the A.Y. 2011-12 it appears to me that you

2. Have without reasonable failed to furnish the return of income which you were required to furnish by a notice given u/s 139(1) or by a notice given u/s 139(2)/ 148 of the Income tax Act, 1961, no. _____ dated _____ or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1)/ or by such notice.

3. Have without reasonable cause failed to comply with a notice u/s 142(1)/ 143(2) of the Income tax Act, 1961, no. _____ dated _____.

4. Have concealed the particulars of your income or furnished inaccurate particulars of such income.

5. You are hereby requested to appear before me at room no. 606, VI floor, Unity Building Annexe, Mission Road, Bangalore at 11.30 A.m. 30.01.2013 and show cause why an order imposing a penalty on you should not be made u/s 271 of the Income tax, Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative or you may show cause in writing on or before the said date which will be considered before any such order is made u/s 271 (1)(c).

05. It is seen that assessee had taken a ground regarding the vagueness of notice before the CIT (A), which was however decided against the assessee by the CIT (A). In our opinion, notice has to specify whether there was concealment of particulars of income or furnishing of inaccurate particulars of income. If there are both, it is the duty of the AO to specify so. Hon'ble jurisdictional High Court in the case of CIT v. M/s. Manjunatha Cotton & Ginning Factory (359 ITR 565) held as under at paras 15 to 17 :

“15. The first legal question is whether the notice u/s 274 r.w.s.271 is valid. The learned DR’s objection is that the assessee has not raised any specific ground of appeal on this issue. However, we find in the ground of appeal no.2, the assessee has raised an objection that the order of penalty passed by the ld.AO u/s271(1) of the IT Act, is without jurisdiction as the mandatory condition for invoking provision of sec.271(1)(c) of the Act has not been complied with. Therefore, we have to examine whether mandatory conditions for initiating the proceedings u/s 271(1)(c) were complied with or not. What are the mandatory conditions for invoking the provision of sec.271(1)(c) of the Act? One of the mandatory conditions is that the notice u/s 274 r.w.s. 271 must be valid notice. In view of the same, we proceed to adjudicate this ground of appeal.

16. As seen from the notice issued u/s 271(1)(c) of the IT Act, it is dated 29-03-2002 addressed to the assessee for the assessment year 1998-99. It is in the prescribed form with the blanks to be filled up by the relevant information. At the bottom of the notice on page-2, it is mentioned that inappropriate words and paragraphs are to be deleted. However, we find that the AO except from the assessment year and striking off para 2 of the notice has not filled up any other blanks nor has he struck off any other inappropriate words or paragraphs. Para-4 mention both the concealment of particulars of income as well as furnishing of inaccurate particulars of such income. The AO has not specified as to which of the conditions for initiating penalty is fulfilled. The Hon’ble jurisdictional High Court in the case of CIT v. M/s Manjunatha Cotton & Ginning Factory (2013) page 93 para 59 to 61 has considered this issue at length and has held that clause(c) of the printed form of notice u/s 274 deals with two satisfactions i.e. concealment of particulars of income or furnishing of inaccurate particulars of income. The Hon’ble High Court has held that both the conditions are different and distinct though at times they may overlap with each other. It was held that AO while issuing notice u/s 274 has to come to the conclusion as to whether it is case of concealment of income or it is a case of furnishing of inaccurate particulars of income and if the standard proforma without deleting the relevant clause is issued, it leads to an inference as to

non-application of mind by the AO. The relevant portion of the Honble High Court's order is reproduced hereunder:

“59. As the provision stands, the penalty proceedings can be initiated on various grounds set out therein. If the order passed by the authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued u/s 274, the could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation 1 or in Explanation(b), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned insec.271 should be made known about the grounds on which they intend imposing penalty on him as the sec.274 makes ft c/ear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in sec.271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where as the ground mentioned in sec.271 are mentioned would not satisfy requirement of law when the consequence of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued u/s 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended/f the shown cause notice is vogue. On the basis of such proceedings no penalty could be imposed on the assessee.

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts f the some cases may attract both the offences and is some cases there may be

overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence of finding him guilty for either the one or the other cannot be sustained in law. It is needless to pint satisfaction of the existence of the grounds mentioned in sec.271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confirmed only to those grounds and the said grounds have to be specifically stated to that the assessee would have the opportunity to met those grounds.

After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise, though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained Thus, once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of the penalty must be determined with the reference to information, facts and materials in the hands of the authority imposing penalty at the time the order was passed and further disco very of facts subsequent to the imposition of penalty cannot violate the order of penalty which, when passed, was not sustainable.

61. The AO is empowered under the Act to initiate penalty proceedings once he is satisfied in the cause of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause(c). Concealment, furnishing inaccurate particulars of income are difference. Thus, the A O while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of

inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at pages 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat Court in the case of Manu Engineering reported in 122 ITR 306 and the be Delhi High Court in the case of Virgo Marketing reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the AO proposes to invoke the first limb concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non -application of mind'

17. We find that in the case before us also, the AO has not specified the relevant portion of the clause (c) for initiating penalty proceedings u/s 271(1)(c) of the IT Act and therefore, as held by the Hon'ble High Court, the assessee could not have rebutted the initial presumptions for initiation of penalty which is serious in nature. Respectfully following the decision of the Hon'ble jurisdictional High Court in the case of M/s Manjunatha Cotton & Ginning Factory (cited supra) we hold that the notice u/s 274 r.w.s.271(1)(c) is invalid. The contention of the learned DR that it is only a defect which is curable u/s 292B of the IT Act, is also not acceptable because the AO gets the jurisdiction to levy the penalty only by issuance of a valid notice and, therefore, when the jurisdiction is not validly invoked, then the consequent proceedings are also not valid. Hence, it is not a procedural irregularity as contended by the DR.

Thus as per the above judgment of Hon'ble jurisdictional High Court it is imperative for the AO to show in the notice the default of assessee. Mere mentioning of the default in the assessment order may not be sufficient. Notice issued to the assessee, reproduced by us at para 4 above, does not

specify the default of the assessee. In our opinion, notice u/s.274 r.w.s.271 of the Act, issued for the impugned assessment year was invalid. Ex-consequenti the penalty order is set aside.

06. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 12th April, 2016.

Sd/-

(GEORGE GEORGE K)
JUDICIAL MEMBER

Sd/-

(ABRAHAM P GEORGE)
ACCOUNTANT MEMBER