

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 2490/KOL/2013
Assessment Year: 2008-2009**

Shri Suresh Karmakar,.....Appellant
C/o Bidhan Jewellers,
Hill Cart Road, Hakimpara,
Siliguri-734 001
[PAN : ALIPK 6761 D]

-Vs.-

Deputy Commissioner of Income Tax,.....Respondent
Central Circle-XXVIII, Kolkata,
Aayakar Bhawan Poorva,
110, Shanti Pally,
E.M. Bye Pass,
Kolkata-700 107

Appearances by:

Shri S.M. Surana, Advocate, for the assessee
Shri Rajat Subhra Biswas, CIT, D.R., for the Department

Date of concluding the hearing : May 24, 2016
Date of pronouncing the order : June 03, 2016

O R D E R

Per Shri P.M. Jagtap :-

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals), Central-I, Kolkata dated 10.09.2013 for the assessment year 2008-09, whereby he confirmed the penalty of Rs.3,20,444/- imposed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961.

2. The assessee in the present case is an individual, who is carrying on the business of jewellery in the name and style of his proprietary concern M/s. Bidhan Jewellers. The said concern belongs to 'Bidhan Jewellers Group'. A search and seizure action under section 132 was conducted on 08.01.2010 as well as on subsequent dates. Pursuant to the search, a notice under section 153A was issued by the Assessing Officer and in response to which, the return of income was filed by the assessee on 31.10.2011 declaring total income of Rs.40,63,220/- as against the income of Rs.31,37,220/- declared in the return of income originally filed under section 139(1) on 20.03.2009. In the assessment completed under section 143(3) read with section 153A vide an order dated 27.12.2011, the total income of the assessee was determined by the Assessing Officer at Rs.40,79,980/-. Penalty proceedings under section 271(1)(c) were also initiated by the Assessing Officer in respect of the difference between the income as finally assessed at Rs.40,79,980/- and the income as originally offered by the assessee in the return of income filed under section 139(1) at Rs.31,37,220/-. The explanation offered by the assessee in response to the show-cause notice issued by the Assessing Officer during the course of the penalty proceedings was not found acceptable by him and he proceeded to impose penalty of Rs.3,20,444/- under section 271(1)(c) being 100% of the tax sought to be evaded by the assessee on the difference between the income as finally assessed and income as originally returned by the assessee.

3. On appeal, the Id. CIT(Appeals) confirmed the penalty imposed by the Assessing Officer under section 271(1)(c) for the following reasons given in paragraph no. 4 of his appellate order dated 10.09.2013:-

"4. I have perused the relevant orders and considered the submissions made on behalf of the assessee. It is an admitted fact that the assessee filed his original return u/s 139 declaring total income of Rs.31,37,220/-. It is also admitted that in consequence to search, the assessee filed return on 31-10-2011 declaring total income of Rs.40,63,220/- thereby admitting undisclosed investment of Rs.9,26,000/-. The AO made further addition of Rs.16,764/- on account of undisclosed investment which was not contested in appeal. In

this factual background, I am of the considered view that Explanation 5A to section 271(1)(c) is clearly applicable in the case of the assessee who shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of levy of penalty u/s 271(1)(c). The judicial decisions relied upon by the Ld. AR are not applicable to the facts of the present case. In view of the above, the penalty order of the AO is upheld. The grounds raised by the assessee are dismissed”.

Aggrieved by the order of the Id. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. At the time of hearing before us, the Id. counsel for the assessee has raised a preliminary issue challenging the validity of the penalty order passed by the Assessing Officer on the ground that in the absence of any specific mention in the show-cause notice issued under section 274 of the Act for the year under consideration by the Assessing Officer as to whether the assessee is guilty of having “furnished inaccurate particulars of income” or of having “concealed particulars of such income”, the initiation of penalty proceedings itself was bad in law and the penalty order passed in pursuance thereof is liable to be quashed being invalid. He has invited our attention to the show-cause notice issued by the Assessing Officer for the year under consideration under section 274 in the printed form to point out that the irrelevant portion, viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” was not struck off by the Assessing Officer. Although the Id. D.R. has contended in this regard that the relevant portion in the penalty notice having been ticked by the Assessing Officer, it is clear that the other charge was not invoked by him and there was thus no infirmity in the notice issued by the Assessing Officer under section 274 as alleged by the Id. Counsel for the assessee, it is observed that the Coordinate Bench of this Tribunal in the case of Suvaprasanna Bhattacharya -vs.- ACIT (in ITA No.

1303/KOL/2010) cited by the Id. Counsel for the assessee had an occasion to consider a similar issue in the identical fact situation and the order passed by the Assessing Officer imposing penalty under section 271(1)(c) was held to be invalid by the Tribunal relying on the decision of the Hon'ble Karnataka High Court in the case of CIT & Another -vs.- Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 after discussing the proposition laid down therein in great detail in paragraph no. 8 to 8.2 of its order dated 06.11.2015, which read as under:-

"8. The next argument that the show cause notice u/s.274 of the Act which is in a printed form does not strike out as to whether the penalty is sought to be levied on the for "furnishing inaccurate particulars of income" or "concealing particulars of such income". On this aspect we find that in the show cause notice u/s.274 of the Act the AO has not struck out the irrelevant part. It is therefore not spelt out as to whether the penalty proceedings are sought to be levied for "furnishing inaccurate particulars of income" or "concealing particulars of such income".

8.1 The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and find the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will squarely apply and all the orders imposing penalty have to be held as bad in law and liable to be quashed.

8.2 The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory (supra) has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act.

"NOTICE UNDER SECTION 274

59. As the provision stands, the penalty proceedings can be initiated on various ground 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 under Section 274, they 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-1(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 in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear 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 Section 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 all the grounds mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences 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 under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague. **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 of some cases may attract both the offences and in 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 or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet 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 penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.**

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course 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 different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether it is 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 page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the 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 Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard pro forma without striking of the relevant clauses will lead to an inference as to non-application of mind."

The final conclusion of the Hon'ble Court was as follows:-

"63. In the light of what is stated above, what emerges is as under:

- a) Penalty under Section 271(1)(c) is a civil liability.*
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.*
- c) Willful concealment is not an essential ingredient for attracting civil liability.*
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.*
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.*
- f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.*
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).*
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*
- i) The imposition of penalty is not automatic.*
- j) Imposition of penalty even if the tax liability is admitted is not automatic.*
- k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.*
- l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bona fide, an order imposing penalty could be passed.*
- m) If the explanation offered, even though not substantiated by the assessee, but is found to be bona fide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*
- n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*
- o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*
- p) Notice under Section 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 for furnishing of incorrect particulars of income*

q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as *res judicata* in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.

The assessment or reassessment cannot be declared as invalid in the penalty proceedings."

(emphasis supplied)

It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.

For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. We therefore cancel the orders imposing penalty on the Assessee and allow the appeal by the Assessee".

5. In our opinion, the decision of the Coordinate Bench of this Tribunal rendered in the case of Suvaprasanna Bhattacharya -vs.- ACIT rendered vide its order dated 06.11.2015 in ITA No. 1303/KOL/2010 by relying on the decision of the Hon'ble Karnataka High Court in the case of CIT & Another -vs.- Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 is clearly applicable in the present case and respectfully following the same, we hold that the show-cause notice issued by the Assessing Officer under section 274 for the year under consideration not being in accordance with law, the penalty order passed by the Assessing Officer in pursuance thereof is liable to be cancelled being invalid. We accordingly cancel the order passed by the Assessing Officer imposing

penalty under section 271(1)(c) for the year under consideration and allow the appeal of the assessee.

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

Order pronounced in the open Court on June 3, 2016.

Sd/-

Sd/-

(S.S. Viswanethra Ravi)
Judicial Member

(P.M. Jagtap)
Accountant Member

Kolkata, the 3rd day of June, 2016

Copies to : (1) **Shri Suresh Karmakar,**
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(4) *Commissioner of Income Tax, Kolkata*
(5) *The Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.