

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "B" KOLKATA**

Before **Shri Mahavir Singh, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

<b>ITA No.1799/Kol/2013</b> Assessment Year :2006-07
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Reena Mitra 10, Mahendra Road, Kolkata-700 025 <b>[PAN No.AEWPM 1942 H]</b>	<b>V/s.</b>	Income Tax Officer, Ward-29(2), Aayakar Bhawan Dakshin, 2, Gariahat Road (South), Kolkata-700 031
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri A.K. Tibrewal, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri Niraj Kumar, CIT-DR
सुनवाई की तारीख/Date of Hearing	10-12-2015
घोषणा की तारीख/Date of Pronouncement	20-01-2016

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the assessee is arising out of order of Commissioner of Income Tax (Appeals)-XVI, Kolkata in appeal No.13/CIT(A)XVI/Wd-29(2)/Kol/09-10 dated 08.02.2013. Assessment was framed by ITO Ward-29(2), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2008 for assessment year 2006-07. Penalty levied by Assessing Officer u/s 271(1)(c) of the Act vide order dated 23.06.2009. The assessee has raised the following grounds:-

*"1. That on the facts and circumstances of the case and in law, Order of the Ld. CIT(A) confirming the imposition of Penalty of Rs.1,86,568/-, under section 271(10)(c), for the alleged concealment of income being*

*grossly founded on the arbitrary, subjective and superficial views, rather than the facts, evidence and moreover the honest and fair conduct of the Appellant, on record, is liable for complete reversal and invalidation.*

*2. That on the facts and circumstances of the case and in law, Order of the Ld. CIT(A) should not have confirmed the imposition of Penalty, under section 271(1)(c) for the alleged concealment, in regard to the income arising from Long Term Capital Gain originating from the Sale of Delhi Property amounting to Rs.6,33,078/-, given the suo motu and bona fide disclosure of the pertinent particulars, prior to any detection thereof in course of assessment proceeding.*

*3. That on the facts and circumstances of the case and in law, Order of the Ld. CIT(A) should not have confirmed the imposition of Penalty, under section 271(1)(c) for the alleged concealment, in regard to the income arising from Short Term Capital Gain or Redemption of Equity Oriented Mutual Funds, amounting to Rs.1,95,574/-, given the suo motu and bona fide disclosure of the pertinent particulars, prior to any detection thereof in course of assessment proceeding.*

*4. That on the facts and circumstances of the case and in law, Order of the Ld. CIT(A) should not have confirmed the imposition of Penalty, under section 271(1)(c) for the alleged concealment, in regard to the discrepancy as regards Bank Interest of Rs.6,106/-, given the suo motu and bona fide disclosure of the pertinent particulars, prior to may detection thereof in course of assessment proceeding.”*

In this regard assessee also filed additional ground, which is reproduced below:-

*“3) That the Appellant would like to raise the following ground as additional ground which is purely a legal ground.*

*‘That the Ld. Commissioner of Income Tax (Appeals) erred in confirming the penalty of Rs.1,86,568 levied by the Income Tax Officer under section 271(1)(c) of the Act in absence of proper satisfaction in accordance with section 271(1)(c) with section 271(1)(c) of the Act, in the assessment order dated 31<sup>st</sup> December, 2008 and also the show cause notice issued under section 271(1)(c) read with section 274 of the Act.”*

2. The common issue, involved in all the grounds of appeal, raised in this appeal of the assessee is that CIT(A) erred in confirming the order of the AO for levying the penalty on account of undisclosed income.

3. The facts of the case are that assessee is an individual and declared income under the head of "business, house property, long term capital gain (LTCG), short term capital gain (STCG) and other sources". During the year under consideration, assessee failed to disclose certain income in her return of income and for the same the AO has made the addition in the assessment order passed under section 143(3) of the Act. The detail of such income is as under :-

1) Bank interest Income	Rs. 6,106/-
2) STCG on the redemption of mutual funds	Rs.1,99,574/-
3) LTCG on the sale of property	Rs.6,33,078/-

The AO at the time of passing order u/s 143(3) of the Act initiated penalty proceedings u/s 271(1)(C) of the Act and issued notice u/s 274 of the Act for levying the penalty u/s 274 of the Act. But no one appeared on behalf of assessee in response to the notice issued under section 274 of the Act. However, the AO imposed penalty @ 100% of the tax sought to be evaded for furnishing inaccurate particulars of income u/s. 271(1)(c) of the Act.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who confirmed the action of AO by observing as under:-

*"I have duly considered the submission of the A/R of the appellant and penalty order. The AO made the addition of Rs.6,33,078/- as income from LTCG on property. Income from STCG of Rs.1,95,574/-. Interest on SB A/c. of the Rs.17,236/-. The appellant didn't dispute such additions. The AO imposed minimum penalty @ 100% of the tax sought to the evaded after examining the submission of the appellant. The CIT(A)-XXXVI, in her husband case Shri Parimal Sarkar confirmed the penalty on same ground. Hence, following the order of CIT(A)-XXXVI in her husband case, Shri Parmimal Sarkar I am in full agreement with the decision taken by the AO in imposing penalty. Thus, I confirm the penalty of Rs.1,86,568/- imposed u/s 271(1)(c) of the IT Act by the AO. These ground are not allowed."*

Being aggrieved by this order of Ld. CIT(A) assessee preferred second appeal before us.

5. At the outset, the Id. AR drew to our attention to additional ground filed which is reproduced below :

‘That the Ld. Commissioner of Income Tax (Appeals) erred in confirming the penalty of Rs.1,86,568 levied by the Income Tax Officer under section 271(1)(c) of the Act in absence of proper satisfaction in accordance with section 271(1)(c) with section 271(1)(c) of the Act, in the assessment order dated 31<sup>st</sup> December, 2008 and also the show cause notice issued under section 271(1)(c) read with section 274 of the Act.’”

5.1. According to the assessee the show cause notice issued under section 274 of the Act does not specify as to whether penalty is imposed for concealment of income or furnishing inaccurate particulars of income. In support of his claim the assessee relied in the order of The Hon’ble Karnataka High Court in the case of *CIT & Anr. v. Manjunatha Cotton and Ginning Factory*, 359 ITR 565 (Karn), where it was 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 finding 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. Our attention was also drawn to the ITAT Bangalore Bench decision in the case of *E. Krishnappa vs. ITO*, ITA Nos. 313 to 315/Bang/2014, order dated 14.8.2015 wherein this Tribunal on an identical request for admission of additional ground, admitted the same observation as under :-“

*“4.4.1. We have heard the rival contentions and perused the material on record on the issue of the additional grounds raised by the assessee challenging the validity of the impugned penalty order levying penalty u/s 271(1)(c) of the Act for the Assessment Years 2007-08 to 2009-10 on the basis of defective notices issued by the Assessing officer under Section 274 rws 271 of the Act dt.*

*29.12.2011 for initiating penalty proceedings u/s 271(1)(c) of the Act. On a careful appreciation thereof, we find that these grounds are pure question of law and do not involve investigation of any facts otherwise than those on the records of the department. Taking into consideration the matter before us, we are of the considered view that, in the interest of equity and justice, these additional grounds raised by the assessee require to be admitted for consideration in this appeal as they go to the very root of the matter of the validity of the initiation of the proceedings that resulted in the levy of penalty u/s 271(1)(c) of the Act in the case on hand for Assessment Years 2007-08 to 2009-10."*

6. The Id. DR opposed the prayer for adjudication of additional ground raised by the assessee on the ground that the same was not raised either before the AO or the CIT(Appeals).

7. We have considered the rival submissions. We are of the view that the issue raised in the additional ground is purely a legal question and does not involve investigation of any new fact and can be decided on the basis of facts already on record. Keeping in view the decision of the Tribunal referred above, we are of the view that the additional ground deserves to be admitted and the same is accordingly admitted.

7.1. As far as merits of additional ground raised by the assessee is concerned, 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 ground 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 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 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(l)(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

g) 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."

In the light of above decision and in view of the fact that notice under section 274 of the Act in the present case does not make any reference as to whether the assessee has concealed or furnished inaccurate particulars of income, the entire penalty proceedings are held to be in valid. So the penalty imposed is accordingly cancelled.

**8. In the result, the appeal by the assessee is allowed.**

Order pronounced in the open court 20/01/2016

Sd/-  
(Mahavir Singh)  
(Judicial Member)  
Kolkata,

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp

दिनांक:- 20/01/2016      कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-Reena Mitra, 10, Mahendra Road, Kolkata-25
2. प्रत्यर्थी/Respondent-ITO Ward-29(2), Aayakar Bhawan Dakshin 2, Gariahat Road  
(South) Kolkata-700 031
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
**कोलकाता ।**