

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

Before **Shri Waseem Ahmed, Accountant Member** and  
**Shri Partha Sarathi Chowdhury, Judicial Member**

<b>ITA No.1336-1337/Kol/2014</b> Assessment Years:2005-06 to 2006-07
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R.V.Enterprises C/o Jaykishan, 12, Ho- Chi-Minh Sarani, 2 <sup>nd</sup> Floor, Suite No. 2D, E & F, Kolkata-700 071	<u>बनाम/</u> <u>V/s.</u>	Income Tax Officer, Ward-36(1), Aaykar Bhawan, Poorva 110, Shanti Pally, Kolkata-107
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Manish Tiwari, FCA
राजस्व की ओर से/By Revenue	Shri Amitava Bhattacharya, JCIT-SR-DR
सुनवाई की तारीख/Date of Hearing	07-03-2017
घोषणा की तारीख/Date of Pronouncement	26-05-2017

**आदेश /O R D E R**

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

Both appeals by the assessee are directed against the different orders of Commissioner of Income Tax (Appeals)-XX, Kolkata with even dates i.e. 05.03.2014. Assessments were framed by ITO/Tax Recovery Officer Ward-36(1), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 26.12.2007 & 30.12.2008 for assessment years 2005-06 & 2006-08 respectively. The penalty levied by the Assessing Officer vide his orders dated 25.06.2010 and 21.05.2010 u/s 271(1)(c) of the Act

Shri Manish Tiwari, Ld. Authorized Representative appeared on behalf of assessee and Shri Amitava Bhattacharya, Ld. Departmental Representative represented on behalf of Revenue.

**First we take up assessee's appeal in ITA No.1336/Kol/2014 for A.Y. 05-06.**

2. Grounds No. 1 to 6 are inter-related and therefore being taken up together. Sole issue raised by assessee in his appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by imposing penalty of ₹1,04,593/- u/s 271(1)(c) of the Act. For this, the grounds raised by assessee per its appeal as under:-

*“1. That on the facts and in the circumstances of the case, Ld. CIT(A) is unjustified in confirming the order of Assessing Officer to impose penalty of Rs.1,04,593/- u/s 271(1)(c) of IT Act, 1961.*

*2. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in confirming levy of penalty u/s. 271(1)(c) by entertaining irrelevant and extraneous considerations which read “**there was non-compliance during the assessment proceeds**” and/or “**the appellant had been non-cooperative since the very beginning**”.*

*3. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in dismissing assessee's appeal against order u/s. 271(1)(c) without appreciating that profit was estimated because of failure to produce books of account.*

*4. That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong and unjustified in dismissing assessee's appeal against order u/s. 271(1)(c) without dealing with judicial decisions relied by the appellant as under:-*

*(a) CIT –vs- P.K. Narayanan 238 ITR 905(Kar)*

*(b) CIT-vs-Babu Ram Ramkishan 116 ITR 410 (All)*

*(c) Harigopal Singh –vs- CIT 258 ITR 85 (Punj & Har)*

*(d) CIT-vs-Reliance Petro Products (P) Ltd. 3212 ITR 158 (SC)*

*5. That on the facts and in the circumstances of the case, the action of Ld. CIT(A) to dismiss appeal without adjudicating the issue that tax sought to be evaded was excessive, is erroneous, arbitrary and bad.*

*6. That the appellant craves leave to add, alter, adduce or amend any ground on or at the time of hearing of the appeal.”*

3. Before us Ld AR submitted the copy of notice issued u/s. 274 r.w.s 271(1)(c) of the Act is defective as it does not clearly strike out the charge of penalty whether it has been initiated either for concealment of income or furnishing inaccurate particulars of income.

On the other hand, the ld. DR submitted that the recording of initiation of penalty proceedings u/s 271(1)(c) of the Act is sufficient enough to satisfy the requirement of the compliance of law. He vehemently relied on the order of Authorities Below.

4. We have heard rival contentions of both the parties and perused the materials available on record. We find that the notice issued u/s 274 of the Act by the AO for levying of the penalty is defective in so far it does not spell out the specific charge for penalty. The specific charge for the penalty whether it is levied for the concealment or furnishing of inaccurate particulars of income must emanate from the penalty notice. In the absence of specific charge in the notice, the several courts have decided the issue in favour of assessee including the Jurisdictional High Court which is binding on us. In this regard we guidance & support from the judgment of Hon'ble High court of Karnataka in the case of *CIT Vs. Manjunatha Cotton & Ginning Factory* reported in 359 ITR 565. The relevant is of the judgment is reproduced below:-

*“Penalty u/s 271(1)(c) is a civil liability, mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities, wilful concealment is not an essential ingredient for attracting civil liability. Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings u/s 271. The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.*

*Even if there is no specific finding regarding the existence of the corrections 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. Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings u/s 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). The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*

*The imposition of penalty is not automatic. Imposition of penalty even if the tax liability is admitted is not automatic. 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 AO in the assessment order.*

*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. 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.*

*The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity. If the AO 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.*

*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 for furnishing of incorrect particulars of income. Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*

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

*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 what we have stated above, it is clear that merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of this addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it cannot be inferred that the said addition is on account of concealment. Moreover, the assessee has offered the explanation. The said explanation is not found to be false. On the contrary, it is held to be bona fide. In fact in the assessment proceedings there is no whisper about these concealment. The very fact that the assessee agreed to pay tax and did not challenge the assessment order, it is clear the conduct of the assessee cannot be construed as mala fide. Therefore, the Tribunal was justified in setting aside the orders passed by the Appellate Authority as well as the Assessing Authority. In so far as the imposition of penalty is concerned, it is not in accordance with law. No fault could be found with the Tribunal for deleting the penalty.*

*Merely because the assessee agreed for addition and accordingly assessment order was passed on the basis of addition and when the assessee has paid the tax and the interest thereon in the absence of any material on record to show the concealment of*

*income, it cannot be inferred that the said addition is on account of concealment so as to levy penalty u/s 271(1)(c)."*

Similarly we rely in the order of Hon'ble jurisdictional High Court in the case of *Smt. Parama Basak Vs. CIT* in ITA 155 of 2003 dated 19.03.2015 where it was held as under: -

*"The penalty proceedings were started and approved by the impugned judgment and order on the basis that the claim made by the assessee on account of bad debt was not allowed. It is not in dispute that the amount of debt had duly been written off by the assessee; why was the same not allowed is however a mystery to us but be that as it may, the fact remains that the claim for bad debt after the debt had been written off could never be a ground for initiating penal proceedings. Before initiating the penal proceedings the Assessing Officer is required to be satisfied as to whether any income has been concealed or any inadequate particulars have been furnished."*

Similarly we rely in the order of Hon'ble jurisdictional High Court in the case of *CIT Vs. Arti & Sons*, in **GA. No. 2682 of 2014**, ITAT 129 of 2014 dated 10.09.2014 where it was held as under :

*"Heard Md. Dhudhoria, learned advocate for the appellant. Since we find from the orders of the assessing officer or the CIT that there is no allegation against the assessee for concealment of particulars of income or had furnished inaccurate particulars of such income, we are of the view that the learned Tribunal was justified in passing the order under challenge. Therefore, the application and appeal are dismissed."*

We also find that the Revenue has filed the SLP No. 5281/2016 before the Hon'ble Supreme Court against the judgment of the Hon'ble High Court in the case of *CIT Vs. Manjunatha Cotton & Ginning Factory* 359 ITR 565 (SC) which was dismissed as under :

*"We do not find any merit in these petitions. The special leave petitions are, accordingly, dismissed.  
Pending applications, if any, stand disposed of."*

In view of above proposition, we have no hesitation in holding that the penalty proceedings are invalid in view of the aforesaid discussions as the notice issued u/s 274 of the Act found defective. Following the above principle laid down by various court we reverse the order of ld. CIT(A) in this regard and direct the AO to delete the penalty. Hence this ground of appeal of the assessee is allowed.

5. In the result, assessee's appeal is allowed.

**Now coming to assessee's Appeal in ITA No.1336/Kol/2014 for A.Y.06-07.**

6. The only issue raised in the present appeal is against levy of penalty u/s 271(1)(c) of the Act. The grounds raised by the assessee per its appeal are as under:-

*"1. That on the facts and in the circumstances of the case Ld. CIT(A) is wrong and unjustified in confirming the order of Assessing Officer impose penalty of Rs.2,93,627/- u/s. 271(1)(c) of IT Act, 1961.*

*2. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in confirming levy of penalty u/s. 271(1)(c) by entertaining irrelevant and extraneous facts.*

*3. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in dismissing assessee's appeal against order u/s. 271(1)(c) without appreciating that profit was estimated because of failure to produce books of account.*

*4. That on the facts and in the circumstances of the case, Ld. CIT(A) is wrong and unjustified in dismissing assessee's appeal against order u/s. 271(1)(c) without dealing with judicial decisions relied by the ape as under:-*

*a) CIT-vs- .K. Narayanan 238 ITR 905 ((Kar)*

*b) CIT-vs-Babu Ram Ramkishan 116 ITR 410 (All)*

*c) Harigopal Singh-vs- CIT 258 ITR 85 (Punj & Har)*

*d) CIT-Vs-Reliance Petro Products (P) Ltd. 322 ITR 158 (SC)*

*5. That the appellants crave leave to ad, alter, adduce or amend any ground on or at the time of hearing of the appeal."*

7. The brief facts relating to the issue are that assessment in the case of the assessee was completed at a total income of Rs.38,33,370/- as against returned income of Rs.2,45,370/-. The Assessing Officer vide order passed u/s 143(3) of the Act dated 26.12.2007, made the additions on account of low GP ratio. The AO determined the taxable profit by applying @ 2.8% of the total turnover after rejecting the books of accounts which was reduced by the Ld CIT(A).

Penalty proceedings were initiated u/s 271(1)(c) of the Act. After the appeal of the assessee was decided by the Ld. CIT(A) where the Assessing Officer held that the assessee has furnished inaccurate particulars of income and accordingly levied penalty u/s 271(1)(c) of the Act at Rs.1,04,593/- i.e. @ 100% of the amount of tax sought to be evaded. The Ld. CIT(A) confirmed the same as the assessee failed to appear before him.

8. We have heard the rival contentions and perused the record. In the instant case the penalty u/s 271(1)(c) of the Act is leviable in cases where the assessee had either concealed its income or furnished inaccurate particulars of income. In the facts of the present case before us, the penalty u/s 271(1)(c) of the Act has been levied for furnishing of inaccurate particulars of income on account of low GP ratio declared by the assessee which was subsequently reduced by the Id. CIT(A). The issue arising in the present appeal before us is whether in such circumstances the assessee is liable to levy of penalty u/s 271(1)(c) of the Act. The assessee had furnished complete particulars before the authorities below. However, the addition in the hands of the assessee was made by estimating the GP profit on the turnover. In such circumstances, where no concrete evidence was found against the assessee and the addition being based on estimation, there is no merit in the levy of penalty u/s 271(1)(c) of the Act. Accordingly, we direct the Assessing Officer to delete the penalty levied for concealment u/s 271(1)(c) of the Act.

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

10. **In combine result, both the appeals of assessee are allowed.**

Order pronounced in open court on 26/05/2017

Sd/-  
(Partha Sarathi Chowdhury)  
Judicial Member

Sd/-  
(Waseem Ahmed)  
Accountant Member

\*Dkp, Sr.P.S

दिनांक:- 26/05/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-R.V.Enterprises, C/o. S. Jaykishan, 12, Ho-Chi-Minh Sarani, 2<sup>nd</sup> Floor, Suite No. 2D, E & F, Kolkata-71
2. राजस्व/Revenue-ITO, Ward-36(1),Aaykar Bhawan, Poorva110, Shantipally, Kol-107
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

Sr.Private Secretary  
Head of Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता