

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

ITA No.1799/Bang/2016
Assessment year : 2002-03

Shri K. Vijay Arya, Prop. M/s. Prime Land Builders (India), # 14, Abhinaya Apartments, 7 th Cross, Malleswaram, Bengaluru – 560 003. PAN: AAHPN 2500P	Vs.	The Deputy Commissioner of Income Tax, Circle 9(1), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri V. Srinivasan, Advocate
Respondent by	:	Shri Sumer Singh Meena, Addl. CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.10.2017
Date of Pronouncement	:	31.10.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This is an appeal filed by the assessee against the order of
CIT(Appeals) *inter alia* on the following grounds:-

“1. The orders of the authorities below in so far as levying penalty u/s 271 [1][c] of the Act against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.

2. The order levying penalty u/s.271 [1][c] of the Act, is bad in law in as much as, the learned AO has neither reached any satisfaction nor has such satisfaction been recorded in the assessment order and consequently, the very initiation of proceedings u/s.271 [1][c] of the Act, is not in accordance with the requirements of Section 271 [1] of the Act and consequently, the order of penalty founded on the invalid initiation of penalty proceedings is liable to be cancelled.

3. The order of penalty passed u/s 271 [1][c] of the Act is bad in law as the notice issued under section 274 rws 271 of the Act is not discernable whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant's case.

4. Without prejudice to the above, the learned CIT[A] is not justified in upholding the penalty levied by the learned Assessing Officer of Rs.4,89,2321- u/s 271 [1][c] of the Act under the facts and in the circumstances of the appellant's case.

5. The authorities below failed to appreciate that the appellant has neither' concealed any income nor furnished inaccurate particulars of income to warrant levy of penalty and therefore, the penalty levied u/s.271 [1][c] of the Act requires to be cancelled.

6. Without prejudice to the above, the penalty levied is highly excessive and liable to be reduced substantially.

7. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.”

2. During the course of hearing, the Id. counsel for the assessee has challenged the validity of these proceedings on the ground that in the show cause notice for levying the penalty u/s. 271(1)(c), the AO has not specified

as to on what ground the AO intends to levy penalty, whether it is on account of concealment of income or furnishing of inaccurate particulars. To explain these facts, he filed a copy of notice u/s. 274 of the Act. He has also placed reliance upon the orders of Tribunal and the judgment of jurisdictional High Court in the case of *CIT & Anr. V. Manjunatha Cotton & Ginning Factory* reported in 359 ITR 565 (Karn). Copy of the judgment of the High Court is placed on record.

3. *Per contra*, the Id. DR has submitted that mere non-striking a particular column in the notice would not be that much fatal to the validity of penalty proceedings.

4. Having carefully examined the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act, we find that notice was issued on a printed proforma in which the AO did not identify, whether the assessee has concealed income or furnished inaccurate particulars of such income. Now the question arises whether, it is necessary to identify in the notice itself that the proceedings u/s. 271(1)(c) are initiated either for concealment of income or furnishing of inaccurate particulars of income. This aspect has been examined by the Hon'ble jurisdictional High Court in the case of *CIT & Anr. V. Manjunatha Cotton & Ginning Factory (supra)* and Their Lordships have laid down the parameters under which penalty u/s. 271(1)(c) of the Act has to be levied. Under clauses (p) & (q) of para 63 of the judgment, Their Lordships have held that notice u/s. 274 should specifically state the

grounds mentioned in. 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 grounds mentioned in section 271 are mentioned would not satisfy the requirement of law. Before laying down the parameters, Their Lordships have analysed the provisions of section 274 for sending notices and for initiating proceedings u/s. 271(1)(c). The relevant observations of Their Lordships are extracted hereunder for reference:-

“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 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 section 274 makes it clear that the 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 the 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 per cent to 300 per cent 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, the 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 the 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 the 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 the 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 [2007] 292 ITR

11 (SC) 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 Works* reported in [1980] 122 ITR 306 (Guj) and the Delhi High Court in the case of *CIT v. Virgo Marketing P. Ltd.* reported in [2008] 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 proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

5. This aspect was also examined by the Hon'ble High Court of Gujarat in the case of *National Textiles v. CIT 249 ITR 125 (Guj)* and *CIT v. Manu Engineering Works 122 ITR 306 (Guj)*. Following the aforesaid judgments, this Bench of the Tribunal in the case of *E. Krishnappa v. ITO* in *ITA No.313 to 315/Bang/2014 dated 14.08.2015* and in the case of *M/s. SLN Traders* (in *ITA No.1045/Bang/2015 & CO NO.210/Bang/2015 dated 30.6.2016*) has also taken a view that where the Assessing Officer has not specified under which limb, penalty u/s. 271(1)(c) of the Act is to be levied, i.e., whether penalty proceedings are being initiated for concealment of income or furnishing of inaccurate particulars of income; such initiation of penalty proceedings has to be held to be illegal. The relevant observations of the Tribunal in *E. Krishnappa v. ITO (supra)* are extracted hereunder:-

“4.4.3 In the case on hand, we find from a careful perusal of the notices, issued under Section 274 rws 271 of the Act dt.29.12.2011 for Assessment Years 2007-08 and placed before the Bench in the course of hearing that the Assessing Officer has

not specified under which limb of the penalty u/s.271(1)(c) of the Act is to be levied; i.e. whether the penalty proceedings are being initiated for concealment of particulars of income or for furnishing of inaccurate particulars of income. Such initiation of penalty proceedings has been held to be illegal by the Hon'ble High Court of Karnataka in the case of Manjunatha Cotton & Ginning Factory (supra). Following the aforesaid decision of the Hon'ble High Court of Karnataka in the case of Raveendhiraa L & Others (supra), we hold that the notices issued under Section 274 rws 271 of the Act dt.29.12.2011 for Assessment Years 2007-08 to 2009-10 are bad in law for the reasons mentioned in the aforesaid orders and consequently hold the penalty orders passed in consequence of these defective, invalid notices also to be invalid and cancel them.”

6. Turning to the facts of the instant case, we find that undisputedly the AO has not identified in the notices as to whether the penalty proceedings are initiated for concealment of income or furnishing of inaccurate particulars of such income. Therefore, following the aforesaid judgment of Hon'ble jurisdictional High Court, we are of the considered view that on account of defective notice issued for initiation of penalty proceedings, the penalty order passed by the AO is not sustainable in the eyes of law. We accordingly set aside the order of the CIT(Appeals) as well as the Assessing Officer and delete the penalty on account of wrong initiation of penalty proceedings.

7. Since the penalty proceedings are quashed, we find no justification to deal with the appeals on merits, as it becomes academic.

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

Pronounced in the open court on this 31st day of October, 2017.

Sd/-

(A.K. GARODIA)
Accountant Member

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Bangalore,
Dated, the 31st October, 2017.

/ Desai Smurthy /

Copy to:

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

By order

Senior Private Secretary
ITAT, Bangalore.