

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE D.T. GARASIA, JUDICIAL MEMBER AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER**

**ITA No.2803/M/2012
Assessment Year: 1997-98**

**ITA No.2804/M/2012
Assessment Year: 1999-2000**

**ITA No.2805/M/2012
Assessment Year: 2004-05**

M/s. Autoriders India Pvt. Ltd., 4-A, Vikas Centre, 104 S.V. Road, Santacruz, Mumbai – 400 054 PAN: AAACA8939R	Vs.	The Asst. Comm. of Income Tax-9(1), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Vijay Mehta, A.R.
Revenue by : Shri R.P. Meena, D.R. &
Shri Rajesh Kumar Yadav, D.R.

Date of Hearing : 10.11.2017
Date of Pronouncement : 17.11.2017

ORDER

Per D.T. GARASIA, Judicial Member:

The above titled appeals have been preferred by the assessee against the order dated 13.02.2012 of the Commissioner of Income Tax (Appeals), [hereinafter referred to as the CIT(A)] relevant to assessment year 1997-98, 1999-2000 & 2004-05 which have been arisen out of the order passed by Assessing Officer (hereinafter referred to as the AO) under section 271(1)(c) of the Act.

2. In these appeals, solitary grievance of the assessee is with regards to imposition of penalty under section 271(1)(c) of the Act. The relevant facts are that assessee company was incorporated under the provisions of

Companies Act, 1956. For the year under consideration assessee has filed the return of income at loss of Rs.1,41,74,329/- in assessment year 1997-98 which was subjected to scrutiny under section 143(3) of the Act and vide order dated 26.03.02 the final income was at Rs2,75,48,670/-. The relevant issue for our purpose is the disallowance on account of foreign travelling expenses of Rs.7,29,580/-, Interest payment of Rs.1,25,155/-, Cash credits of Rs.21 lakhs and interest on investments with Autoriders Finance Rs.1,06,81,976/-. Thus, the total disallowance of Rs.1,36,36,711/- made in original order under section 143(3) dated 29.03.2000 was within the meaning of section 271(1)(c) of the Act read with explanation 1. By virtue of disallowance of Rs.5,53,58,771/- which is disallowed is deemed to represent the income in respect of which the particulars have been concealed. The minimum penalty 100% of the tax evaded on account of concealed income of Rs.5,53,58,771/- was worked out to Rs.2,38,04,246/- and penalty of Rs.2,38,04,246/- was levied. Similarly penalty of Rs.2,20,85,000/- and Rs.4,08,34,150/- was worked out for A.Y. 1999-2000 and for A.Y. 2004-05 respectively.

3. Matter carried to Ld. CIT(A) and Ld. CIT(A) has dismissed the appeal of the assessee.

4. Aggrieved by the Ld. CIT(A)'s order upholding the penalty under section 271(1)(c) of the Act, assessee has raised the following common grounds:

"1. The Ld. CIT(A) erred in affirming/confirming the order of AO levying penalty u/s 271(1)(c) of the Act of Rs.2,38,04,246/- for A.Y. 1997-98, Rs.2,20,85,000/- for A.Y. 1999-2000 and Rs.4,08,34,150/- for A.Y. 2004-05 respectively.

2. The Ld. CIT(A) further erred in holding that the order of AO is not bad in law.

3. The appellant submits that the order of AO dated 29.08.08 is bad in law as the official liquidator was appointed by the Hon'ble Bombay High Court and hence, no proceedings can be initiated against the appellant without the leave of the court.

4. The Ld. CIT(A) has not considered any of the judicial decisions submitted during the course of appellant proceedings.

5. The appellant prays that the penalty levied u/s 271(1)(c) of the Act be deleted.”

5. Further, the assessee has also taken the additional ground which is reproduced as under:

“The penalty order is bad in law as the Ld. AO had not struck-off the irrelevant clause in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act and assessee was not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act was to be responded to.”

Along with this additional ground (supra), the assessee has also pleaded that the Bench consider admission of this ground for adjudication since it is a legal ground of jurisdiction which goes to the root of the proceedings, facts of which are already available on record. Reliance in this regard was placed on the decision of the Hon'ble Apex Court in the case of NTPC Ltd. vs. CIT (229 ITR 383 (SC)). Learned D.R. for Revenue opposed admission of this additional ground.

6. We have heard the rival contentions on the issue of admission of the additional ground (supra). We find that since the issue raised therein is a legal one pertaining to the issue of jurisdiction which goes to the very root of the matter and all the relevant facts in this regard are already available on record, we, therefore following the ratio of the decision of the Hon'ble Apex Court in the case of NTPC Ltd. (supra) admit the additional ground raised by the assessee for consideration/adjudication in this appeal.

7. At the time of hearing, the Ld. Representative of the assessee pointed out that assessee has not gone into the Tribunal against the quantum order passed by the Ld. CIT(A). The Ld. A.R. submitted that during the course of assessment proceeding, the assessee has submitted all the evidences. The another pertinent point raised by the assessee was that penalty notice under section 274 read with section 271(1)(c) of the Act dated 29.03.2000, a copy of

which has been placed on record, reveals non-application of mind by AO inasmuch as the irrelevant portion of the notice has not been struck off. It was, therefore, contended that the levy of penalty is illegal and deserves to be set aside. In support of said proposition, the reliance is placed on following decisions:

1. M/s. SSA's Emerald Meadows, ITA No.380/2015 dated 23.11.2015 (Hon'ble Karnataka High Court)
2. Manjunatha Cotton and Ginning Factory & Ors., 359 ITR 565 (Kar.)
3. Dilip N. Shroff 161 Taxman 218 (SC)
4. Dr. Sarita Milind Davare, ITA No.2187 & 1789/Mum/2014 dated 21.12.2016.
5. Shri Samson Perinchery, ITA No.4625 to 4630/Mum/2013 dated 11.10.2013.
6. CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC)

At the time of hearing, the Ld. Representative of the assessee pointed out that the company was incorporated to carry out the business of dealership in automobile vehicles. The company could not carry on business activity due to sudden demise of promoter director Mr. Mukesh R. Patel. The Hon'ble Bombay High Court has appointed an official liquidator as a provisional liquidator. As the provisional liquidator has appointed, the proceeding against company cannot be taken without the leave of the court as provided under section 446 of the Companies Act. In view of this, the penalty levied under section 271(1)(c) is bad in law. The Ld. A.R. submitted that in respect of disallowance of foreign travel expenditure of Rs.7,29,580/-, it was explained during the assessment proceeding that Mrs. Jayshree Patel I wife of Mr. Amrish Patel, brother of Mr. Mukesh Patel. Mrs. Ketki Patel was wife of Mr. Mukesh Patel who expired suddenly on 15.06.2002. It was explained during the assessment proceedings that foreign trips were undertaken as the assessee company had incurred huge losses and they were exploring for arising finance so that they can continue their business. Mrs. Jayshree Patel and Mrs. Ketki

Patel's visit was for business. In respect of interest payment the Ld. A.R. submitted that assessee company has accounted interest on TDS certificate and reconciliation chart has been submitted. In respect of cash credit it was explained that amount received from Shirpur Education Society which is a charitable trust under Bombay Public Trust Act and is assessed to tax and letter of confirmation was submitted. The accounts of the said society are audited and amount appeared as a loan to the assessee. In respect of interest on advance to Autoriders Finance it was explained that the transaction with the Autoriders Finance which was a group company was a business transaction and does not amount for charging of interest, therefore, no penalty can be levied.

The Ld. A.R. also pointed out that in assessment year 1999-2000 the penalty was initiated under section 143(3) read with section 147 of the Act for furnishing inaccurate particulars of income. While passing the penalty order the AO has levied the penalty for concealment of income. The Ld. A.R. has submitted the chart before us which reads as under:

"A.Y. 1997-98

Sr. No.	Particulars	Amount of penalty	Penalty initiated in assessment order passed		Penalty levied by Assessing Officer
			u/s 143(3)	u/s 143(3) r.w.s. 147	
1.	Interest on amount borrowed for purpose of acquisition of land	1,79,40,460	-	Furnishing of inaccurate particulars of income	Concealment of income
2.	Transactions with Autoriders Finance Ltd.	45,93,250	Furnishing of inaccurate particulars of income	-	Concealment of income
3.	Cash credit	9,03,000	no specific charge	-	Concealment of income
4.	Foreign travelling expenses	3,13,719	no specific charge	-	Concealment of income

5.	Interest payment (Note 2)	53,817	no specific charge	-	Concealment of income
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Note 1: In printed show cause notice issued u/s 271(1)(c) of the Act on 29.03.2000 along with assessment order u/s 143(3) of the Act, no particular limb has been struck off.

Note 2: Penalty has been initiated on Rs.39,959/- out of the total disallowance of interest of Rs.1,25,155/-.

A.Y. 1999-2000

Note: In printed show cause notice issued u/s 271(1)(c) of the Act on 23.03.2002 along with assessment

Sr. No.	Particulars	Amount	Penalty initiated in assessment order passed	Penalty levied by Assessing Officer
1.	Interest on amount borrowed for purpose of acquisition of land	2,20,85,000	Furnishing of inaccurate particulars of income	Concealment of income

Order u/s 143(3) of the Act, no particular limb has been struck off (copy enclosed)

A.Y. 2004-05

Sr. No.	Particulars	Amount	Penalty initiated in assessment order passed u/s 143(3) of the Act	Penalty levied by Assessing Officer
1.	Loss on diminution in value of investments	3,69,09,480	Furnishing inaccurate particulars of income	Concealment of income and furnishing inaccurate particulars of income
2.	Other expenses	39,24,670	Furnishing inaccurate particulars of income	Concealment of income and furnishing inaccurate particulars of income

Note: In printed show cause notice issued u/s 271(1)(c) of the Act on 25.08.2006 along with assessment order u/s 143(3) of the Act, no particular limb has been struck off (copy enclosed)''

The Ld. A.R. submitted that from the above chart it can be seen that for A.Y. 1997-98 the assessment order was passed under section 143(3) read with section 147 of the Act in which the penalty has been initiated for furnishing of inaccurate particulars of income while the AO has levied the penalty for concealment of income. In respect of transaction with Autoriders the penalty has been initiated for furnishing of inaccurate particulars of income while the penalty has been levied for concealment of the income. In respect of cash credit in foreign travelling and interest payment no specific charge has been done in assessment order while the penalty is levied for concealment of the income. In respect of A.Y. 1999-2000 the penalty initiated in the assessment order for furnishing of inaccurate particulars of income while the penalty is levied for concealment of income. Similarly, in A.Y. 2004-05 the penalty has been initiated for furnishing of inaccurate particulars of income while the penalty has been levied for concealment of income.

The Ld. A.R. submitted that when the AO is not sure whether penalty is for concealment of income or for furnishing inaccurate particulars of income, then no penalty can be levied. He relied upon the decision of Hon'ble Gujarat High Court in the case of New Sorathia Engg. Co. Vs. CIT 282 ITR 614 (Guj.) and submitted that AO was not certain as to what was the finding on the stand of which he imposed the penalty. He further submitted that in CIT, Gujarat-III vs. Manu Engineering Works, a Division Bench of the Gujarat High Court observed that the AO must give a positive finding as to whether there is concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. In the event there was no such clear-cut finding, the penalty order was held liable to be struck down. The Ld. A.R. submitted that in this case assessee has furnished all the details of expenditure before AO. The Ld. A.R. submitted that when all the evidences have been submitted relating to the expenditure claimed but assessee could not substantiate his claim does not lead to imposition of penalty.

The learned A.R. of the assessee at the outset raised the issue in the additional ground (supra) challenging the validity of the notice issued under section 274 r.w.s. 271 of the Act dated 11.03.2015. According to the learned A.R., the AO has issued this notice without specifying the default committed by the assessee for which penalty proceedings under section 271(1)(c) of the Act are initiated (copy of notice dated 11.03.2015 is placed on record); i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. It is submitted that a perusal of the said notice would evidence total non-application of mind on the part of the AO, since he has neither deleted the inappropriate words/portions of the notice, whereby it is not clear whether penalty is sought to be levied under section 271(1)(c) of the Act; for concealment of particulars of income or furnishing of inaccurate particulars of income. It is contended that the said penalty proceedings seem to have been initiated and levied on all possible grounds. He submitted that various courts have held that non specification of the specific charge will vitiate the penalty proceedings, i.e. the assessee should be appraised of the specific reason/ charge for which penalty under section 271(1)(c) of the Act is to be levied. In this regard, the learned A.R. of the assessee placed reliance on the decision of the Coordinate Bench of the Tribunal in the case of Dr. Sarita Milind Davare in ITA No. 2187/Mum/2014 dated 21.12.2016 wherein after, inter alia, considering the decisions of the Hon'ble Bombay High Court in the case of Smt. B. Kaushalya and Others (216 ITR 660) and the decisions of the Hon'ble Apex Court in Dilip N. Shroff (291 ITR 519) (SC), Dharmendra Textile Processors (306 ITR 277) (SC) and Reliance Petro Products P. Ltd. ((322 ITR 158) (SC) and of the Hon'ble Karnataka high Court in the case of Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar) the Bench has held that since the AO in that case had not specified in the said notice under section 274 r.w.s. 271 of the Act, the limb under which the penalty is to be levied, the assessee has not been appraised of any charge for which the

penalty proceedings has been initiated and therefore the said notice dated 11.03.2015 issued under section 274 r.w.s. 271 of the Act of initiating penalty proceedings under section 271(1)(c) of the Act is invalid and bad in law.

8. On the other hand, the Ld. D.R. submitted that in the assessee company official liquidator was appointed. He further submitted that in case of penalty on foreign expenses, at the time of assessment proceedings, assessee could not produce any evidence regarding the expenditure incurred on foreign travel was for the business which is well settled principle that whatever expense is debited to P & L account assessee has to corroborate them with supporting evidence that it was incurred for business purpose. The Ld. DR appearing for the Revenue has defended the action of the income-tax authorities and pointed out that the loss was disallowed by the Assessing Officer noticing that the shares were purchased at a premium whereas the redemption price was agreed at a discount. The ld. CIT-DR contended that the basis for arriving at the redemption price has not been justified by the assessee and, therefore, the genuineness of the transaction was rejected by the income-tax authorities. It was, therefore, contended that under these circumstances the levy of penalty u/s 271(1)(c) of the Act is quite justified. With regard to the plea of assessee that notice issued u/s 274 r.w.s 271(1)(c) of the Act was legally untenable, the ld. CIT-DR pointed out that in the assessment order itself the Assessing Officer in para 4 has recorded that the penalty u/s 271(1)(c) of the Act was initiated for furnishing of inaccurate particulars of income. It was, therefore, contended that the assessment order itself shows due application of mind by the Assessing Officer for initiation of proceedings u/s 271(1)(c) of the Act and that the notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 cannot be solely examined to see whether the Assessing Officer has duly applied his mind to the initiation of proceedings u/s 271(1)(c) of the Act. The ld. CIT-DR has also referred to the observations of the CIT(A) in para 2.12 of his order wherein the tenability and the bona fide of the explanation rendered by the assessee have

been rejected. It was, therefore, contended that the penalty has been rightly levied u/s 271(1)(c) of the Act in the present case. The learned D.R. submitted that the provisions of section 274 of the Act stipulate that the assessee should be afforded an opportunity of being heard before penalty is imposed. According to the learned D.R., in the case on hand, the assessee has been provided with an opportunity of being heard and had also participated in the penalty proceedings and therefore the deficiencies, if any, in the penalty proceedings is automatically cured by the provisions of section 292B/292BB of the Act. Reliance was placed on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya and Others (216 ITR 660) submitting that the Hon'ble Court has held that mere mistake in the language used or mere non-striking of the inappropriate portion cannot by itself invalidate the notice.

9. In rejoinder, the learned A.R. contends that in the case on hand, the AO issued the said notice dated 11.03.2015 without indicating the limb of section 271(1)(c) that the penalty proceedings were initiated. Since the matter raised in this ground goes to the very root of the matter of the initiation penalty proceedings under section 271(1)(c) of the Act, the same cannot be cured by the provisions of section 292B/292BB of the Act. In support of this proposition, reliance was placed on the decision rendered by the ITAT Bangalore Bench in the case of K. Prakash Shetty vs. ACIT in ITA Nos. 265 to 267/Bang/2014 dated 05.06.2014.

10. We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements, cited. The issue for consideration before us is to examine whether or not penalty under section 271(1)(c) of the Act is exigible in the facts and circumstances of the case on hand. In our considered view, penalty proceedings under section 271(1)(c) of the Act can be initiated only if the AO in the course of proceedings under the Act is satisfied that any person has

'concealed particulars of income' or has 'furnished inaccurate particulars' of income.

11. In this regard, for the sake of convenience, the said notice dated 11.03.2015 issued under section 274 r.w.s. 271 of the Act is extracted below: -

**"NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE
INCOME-TAX ACT, 1961.**

Penalty u/s. 271(1)(c)

PEN/32/PG.31
2014-05

Office of the
Dy. Commissioner of Income Tax- i 3(1)(2)
Room No.218, 2nd floor, Aayakar Bhavan,
Mumbai - 20.

PAN: AAFCP8573K

Date: **11-03-2015**

To,

The Principal Officer,

M/S PRINCE CONSULTANCY PVT. LTD.,
1203, EMP 48,
EVERSHINE HALLEY,
THAKUR VILLAGE,
KANDIVALI (EAST),
MUMBAI - 400 101.

Whereas in the course of proceeding before me for the assessment year 2012-13 it appears to me that you: -

- have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under [section 22\(1\)/22\(2\) 34](#) of the Indian Income-tax Act, 1922 or which you were required to furnish under [section 139\(1\)](#) or by a notice given under [section 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.
- have without reasonable cause failed to comply with a notice under [section 22\(4\)/23\(2\)](#) of the Indian Income-tax Act, 1922 or under [section 142\(1\)/143\(2\)](#) of the Income Tax Act, 1961.
- have concealed the particulars of your income or _____ furnished inaccurate particulars of such income.

You are hereby requested to appear before me with in **SEVEN DAYS** from the receipt of this order and how cause why an order imposing a penalty on you should not be made under [section 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 you may show cause in writing on or before the said date which will be considered before any such order is made under section **271(1)(c)**.

Seal

Sd/-
(ALOK SINGH)
Dy. Commissioner of Income Tax-13(1)(2)
Mumbai "

12. A careful perusal of the said notice would show that it would have issued either for failure to furnish the inaccurate particulars of income under section 139(1), 139(2)/148 of the Act or failure to comply with the notice issued under section 143(1)/143(2) of the Act or for concealment of income. In our view there should not be any doubt about which of the two limbs of section 271(1) for the penalty is sought to be levied vis-à-vis concealment of particulars of income or furnishing of inaccurate particulars of income. In the said notice for all the three years AO has not specified as to which two limbs of section 271(1)(c) has been initiated.

13. Sec. 271(1)(c) of the Act empowers the AO to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income'

referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718)”

We further find that at para 9 of the order in Reliance Petroproducts P. Ltd. (supra), the Hon’ble Supreme Court has held as under:

“9. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In Dilip N. Shroff v. Joint CIT [2007] 6 SCC 329****, this court explained the terms "concealment of income" and "furnishing inaccurate particulars". The court went on to hold therein that in order to attract the penalty under section 271(1)(c), mens rea was necessary, as according to the court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of section 271(1)(c) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the Assessing Officer must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in Dilip N. Shroff v. Joint CIT* was upset. In Union of India v. Dharamendra Textile Processors**, after quoting from section 271 extensively and also considering section 271(1)(c), the court came to the conclusion that since section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The court went on to hold that the objective behind the enactment of section 271(1)(c) read with Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under section 276C of the Act. The basic reason why decision in Dilip N. Shroff v. Joint CIT was overruled by this court in Union of India v. Dharamendra Textile Processors2, was that according to this court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in the case of Dilip N. Shroff v. Joint CIT1. However, it must be pointed out that in Union of India v. Dharamendra Textile Processors**, no fault was found with the reasoning in the decision in Dilip N. Shroff v. Joint CIT*, where the court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff v. Joint CIT1 to the effect that mens

rea was an essential ingredient for the penalty under section 271(1)(c) that the decision in Dilip N. Shroff v. Joint CIT* was overruled.”

14. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

15. In fact, at the time of hearing, the Id. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the Id. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the Id. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

16. Apart from the aforesaid, the Id. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the Id. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

“12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdar Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

“....The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified.”

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee.”

17. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the Id. CIT-DR.

18. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing

Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

19. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of nonapplication of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with.

20. In the result, all the three appeals filed by the assessee are allowed, as above.

Order pronounced in the open court on 17.11.2017.

Sd/-
(G. Manjunatha)
ACCOUNTANT MEMBER

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 17.11.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.