

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'D' BENCH, KOLKATA****Before Shri P.M. Jagtap, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member****I.T.A. No. 1097/KOL./2016
Assessment year: 2010-2011*****M/s. Akshay Kr. Ghosh & Sons,.....Appellant***
15/1, Strand Road,
Kolkata-700 001
[PAN: AAIFA 2121 L]***-Vs.-******Income Tax Officer,.....Respondent***
Ward-34(2), Kolkata,
110, Shantipalli,
Aayakar Bhawan Poorva,
E.M. Bye-Pass,
Kolkata-700 107**Appearances by:*****Shri Soumitra Choudhury, Advocate, for the assessee***
Shri Arindam Bhattacharjee, Addl. CIT, D.R., for the DepartmentDate of concluding the hearing : December 04, 2017
Date of pronouncing the order : December 22, 2017**O R D E R****Per Shri P.M. Jagtap, Accountant Member :**

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-10, Kolkata dated 08.02.2016, whereby he confirmed the penalty of Rs.1,09,325/- imposed by the Assessing Officer under section 271(1)(c) of the Income Tax Act, 1961.

2. The assessee in the present case is a partnership firm, which filed its return of income for the year under consideration declaring total income of Rs.7,29,629/-. In the assessment completed under section 143(3) vide an order dated 21.03.2013, the total income of the assessee was determined by the Assessing Officer at Rs.13,00,340/- after making, inter alia, an addition of Rs.3,53,802/- to the total income of the assessee on account of suppression of gross receipts. Penalty proceedings under

section 271(1)(c) were also initiated by the Assessing Officer and since the explanation offered by the assessee in response to the show-cause notice issued during the course of the said proceedings, was not found acceptable by him, the Assessing Officer proceeded to impose penalty of Rs.1,09,325/- under section 271(1)(c) being 100% of the tax sought to be evaded by the assessee.

3. On appeal, the ld. CIT(Appeals) confirmed the said penalty imposed by the Assessing Officer. Aggrieved by the order of the ld. CIT(Appeals), the assessee has preferred this appeal before the Tribunal.

4. At the time of hearing before us, the ld. counsel for the assessee raised a preliminary issue challenging the very initiation of penalty proceedings by the Assessing Officer on the ground that the show-cause notice issued by him under section 274 without containing the specific charge as to whether the assessee was guilty of having concealed particulars of its income or having furnished inaccurate particulars of such income, was defective. He placed on record a copy of the said notice to show that the Assessing Officer has not struck off the irrelevant portion in the show-cause notice thereby not specifying the exact charge against the assessee. He contended that the initiation of penalty proceedings thus was bad-in-law and the penalty imposed under section 271(1)(c) in pursuance of such invalid initiation is not sustainable. In support of this contention, he relied on the decision of the Hon'ble Karnataka High Court in the case of CIT -vs.- SSA's Emerald Meadows (ITA No. 380 of 2015 dated 23.11.2015), wherein the Hon'ble Karnataka High Court following its earlier decision rendered in the case of CIT -vs.- Manjunatha Cotton & Ginning Factory [(2013) 359 ITR 565] took a view that the penalty imposed under section 271(1)(c) was bad-in-law and invalid on the ground that the Assessing Officer in the show-cause notice issued under section 274 did not specify the exact charge against the assessee as to whether he was guilty of having concealed particulars of his income or furnished inaccurate particulars of such income. He also

brought to our notice that the Hon'ble Supreme Court by its order dated 05.08.2016 has dismissed the SLP preferred by the Department against the decision of the Hon'ble Karnataka High Court in the case of SSA's Emerald Meadows (supra). He also cited the decision of the Hon'ble Bombay High Court in the case of CIT -vs.- Shri Samson Perinchery (ITA No. 1154 of 2014 dated 05.01.2017), wherein it was held by the Hon'ble Bombay High Court by relying on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) that imposition of penalty on defective show-cause notice without specifying the charge against the assessee cannot be sustained.

5. The ld. D.R., on the other hand, relied on the certain decisions of the Tribunal as well as the Hon'ble High Courts in support of the Revenue's case on the issue under consideration and filed a written submission giving the gist of the said decisions as under:-

"2. The judgement of the Hon 'ble Calcutta High Court in the case Dr. Syamal Baran Mondal Vs. CIT (2011) 244 CTR631 states that "section 271 no where mandates that recording of satisfaction about concealment of assessee's income must be in specific terms and words, satisfaction of AO must reflect from the order either with expressed words recorded by the Assessing Officer himself or by his overt act and action."

3. The Ld. ITAT Mumbai in its order the case of Trishul Enterprises Vs. DCIT (ITA Nos.384 & 385/Mum/2014 for A.Yrs.2006-07 & 2007-08), Dt.10-02-20 17 dismissed the contention of the assessee regarding failure of the AO to strike off the relevant part of the notice u/s.274 for initiating proceedings u/s.271(1)(c). The ITAT relied upon the judgement of the Hon'ble Bombay High Court in the case of CIT Vs. Smt. Kaushalya (1992) wherein it was held that "mere not striking off specific limb cannot by itself invalidate notice issued u/s. 274 of the Act. The language of the section does not speak about the issuance of notice. All that is required that the assessee be given an opportunity of show cause.....".

4. The Hon'ble Bombay HighCourt(Nagpur Bench) in the case of M/s. Maharaj Garage & Company Vs. CIT in its judgement Dt.22-08-2017, has also held that" 15. The requirement of Section 274 of the Income Tax Act for

granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. It further observed that: "16. It is not in dispute that a reasonable opportunity of being heard in the matter, as required by Section 274 of the said Act was given to the assessee before imposing the penalty by the Income Tax Officer."

5. Honble Mumbai E Bench in the case of Earthmoving Equipment Service Corporation vs DCIT 22(2), Mumbai (2017) 84 taxmann.com 51 looked into the issue very closely and opined that after perusing the ratio of the judgement rendered in Manjunatha Cotton and Ginning Factory we find that the assessee's appeal was allowed by the Honble High Court after considering the multiple factors and not solely on the basis of defect in notice u/ s 274. Therefore we are of the opinion that the penalty could not be deleted merely on the basis of defect pointed by the Ld AR in the notice and therefore the legal grounds raised are rejected.

6. The Mumbai bench of ITAT in a recent decision in the case of Mahesh M Gandhi vs ACIT [TS-5465-ITAT-2017(MUMBAI)-O] also dealt with this aspect. The taxpayer had not offered Director's fees and income from short term capital gains to tax in the return of income. During the course of assessment proceedings when these incomes were picked up by the tax officer, the taxpayer admitted earning of the incomes and filed a revised computation of income. Based on this finding, the tax officer mentioned in the assessment order that penalty proceedings under section 271(1)(c) of the Act will be initiated for furnishing of inaccurate particulars of income. Subsequently the tax officer issued a notice under section 274 read with section 271(1)(c) of the Act wherein the reason for penalty was not mentioned. The taxpayer filed an appeal before the CIT(A) which ruled in favour of the revenue. The CIT(A) placed reliance on the decision of the KHC in the case of CIT vs Manjunatha Cotton and Ginning Factory (supra), the CIT(A) ruled in favour of the revenue. Aggrieved the taxpayer preferred an appeal before the ITAT. The ITAT after observing the facts of the case held that the tax officer had recorded satisfaction in the assessment order in relation to invoking penalty provisions. The tax officer had applied his mind while detailing the reasons for initiation of penalty proceedings in the assessment order. Accordingly, not mentioning the reasons in the penalty notice cannot invalidate the penalty proceedings.

7. Hon'ble Mumbai ITAT in the case of Dhanraj Mills (P) Ltd vs ACIT(OSD) Central Range-z, Mumbai on 21 March 2017 has stated As there is no declaration of law which may be governed by Article 141 of the Constitution of India in the case of CIT- Versus - SSA'S Emerald Meadows dismissed by Hon'ble Apex Court, vide SLP (CC No. 11485/2016) on 05/08/2016. The judgment of Hon'ble Jurisdictional High Court in CIT Vs Kaushalya (supra) is still having a binding force on us. Thus, with utmost regards to the judgment of Karnataka High Court in CIT Vs Manjunatha Cotton & Ginning Factory (supra) we are bound to follow the judgment of jurisdictional High Court in CIT Vs Kaushalya (supra). Our view also find support from a decision of the Mumbai Bench of the Tribunal in the case of Dhawal K. Jain vs Income Tax Officer (ITA NO.996/Mum/2014) order dated 30/09/2016. With these observations, the argument of Id. counsel of the assessee on the legal/technical ground is rejected. Thus, all these four appeals are, therefore, dismissed and the stand of the Ld. Commissioner of Income Tax (Appeal) is affirmed”.

Relying on the proposition propounded in the various judicial pronouncements as given above, he contended that the initiation of penalty proceedings inspite of the irrelevant portion of a notice not having been struck off by the Assessing Officer was valid and the penalty imposed under section 271(1)(c) by the Assessing Officer cannot be held to be unsustainable on this ground.

6. We have considered the rival submissions and also perused the relevant material available on record. It is observed that a similar issue was involved before the Coordinate Bench of this Tribunal in the case of Jeetmal Choraria -vs.- ACIT in ITA No. 956/KOL/2016 and after considering all the submissions made by both the sides, which are similar to the submissions made by both the sides before us in the present case, the Tribunal cancelled the penalty imposed under section 271(1)(c) by holding the same to be unsustainable vide paragraphs no. 5 to 15 of its order, which read as under:-

“5. The Id. Counsel for the assessee submitted before us that the show cause notice issued u/s 274 of the Act before imposing penalty does not contain the specific charge against the assessee namely as to whether the assessee was guilty

of having concealed particulars of income or having furnished inaccurate particulars of income. A copy of the show cause notice u/s 274 of the Act was filed before us and perusal of the same reveals that AO has not struck out the irrelevant portion in the show cause notice and therefore the show cause notice does not specify the charge against the assessee as to whether the charge is of concealment of particulars of income or furnishing of inaccurate particulars of income. The same is reproduced for the purpose of ready reference:

“Have concealed the particulars of your income or furnished inaccurate particulars of such income.”

6. The Id. Counsel for the assessee drew our attention to the decision of the Hon’ble Karnataka High Court in the case of CIT vs. SSA’s Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon’ble Karnataka High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 took a view that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. The Id. Counsel further brought to our notice that as against the decision of the Hon’ble Karnataka High Court the revenue preferred an appeal in SLP in CC No.11485 of 2016 and the Hon’ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department. The Id. Counsel also brought to our notice the decision of the Hon’ble Bombay High Court in the case of CIT vs Shri Samson Perinchery in ITA No.1154 of 2014 dated 05.01.2017 wherein the Hon’ble Bombay High Court following the decision of the Hon’ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning factory (supra) came to the conclusion that imposition of penalty on defective show cause notice without specifying the charge against the assessee cannot be sustained. Our attention was also drawn to the decision of ITAT in the case of Suvaprasanna Bhattacharya vs ACIT in ITA No.1303/Kol/2010 dated 06.11.2015 wherein identical proposition has been followed by the Tribunal.

7. The learned DR submitted that the Hon’ble Calcutta High Court in the case of Dr.Syamal Baran Mondal Vs. CIT (2011) 244 CTR 631 (Cal) has taken a view that Sec.271 does not mandate that the recording of satisfaction about concealment of income must be in specific terms and words and that satisfaction of AO must reflect from the order either with expressed words recorded by the AO or by his overt act and action. In our view this decision is on the question of recording satisfaction and not in the context of specific charge in the mandatory show cause notice u/s.274 of the Act. Therefore reference to this decision, in our view is not of any help to the plea of the Revenue before us.

8. The learned DR relied on three decisions of Mumbai ITAT viz., (i) Dhanraj Mills Pvt. Ltd. Vs. ACIT ITA No.3830 & 3833/Mum/2009 dated 21.3.2017; (ii) Earthmoving Equipment Service Corporation Vs. DCIT 22(2), Mumbai, (2017) 84 taxmann.com 51 (iii) Mahesh M.Gandhi Vs. ACIT Vs. ACIT ITA No.2976/Mum/2016 dated 27.2.2017. Reliance was placed on two decisions of the Hon’ble Bombay High Court viz., (i) CIT Vs. Kaushalya 216 ITR 660(Bom) and (ii) M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017. This decision was referred to in the written note given by the learned DR. This is an unreported decision and a copy of the same was not furnished. However a gist of the ratio laid down in the decision has been given in the written note filed before us.

9. In the case of *CIT Vs. Kaushalya (supra)*, the Hon'ble Bombay High Court held that [section 274](#) or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. [Section 274](#) contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the Principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The ITAT Mumbai Bench in the case of *Dhanraj Mills Pvt.Ltd. (supra)* followed the decision rendered by the Jurisdictional Hon'ble Bombay High court in the case of *Kaushalya (supra)* and chose not to follow decision of Hon'ble Karnataka High Court in the case of *Manjunatha Cotton & Ginning Factory (supra)*. Reliance was also placed by the ITAT Mumbai in this decision on the decision of Hon'ble Patna High court in the case of *CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna)* wherein it was held that under [section 274](#) of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings.

10. In the case of *Earthmoving Equipment Service Corporation (supra)*, the ITAT Mumbai did not follow the decision rendered in the case of *Manjunatha Cotton & Ginning Factory (supra)* for the reason that penalty in that case was deleted for so many reasons and not solely on the basis of defect in show cause notice u/s.274 of the Act. This is not factually correct. One of the parties before the group of Assessee before the Karnataka High Court in the case of *Manjunatha Cotton & Ginning (supra)* was an Assessee by name *M/s.Veerabhadrappa Sangappa & Co.*, in ITA NO.5020 OF 2009 which was an appeal by the revenue. The Tribunal held that on perusal of the notice issued under Section 271(1)(c) of the Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non application of mind on the part of the Assessing authority. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. In the appeal, the said finding was set-aside. But addition was sustained on a new ground, that is under valuation of closing stock. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the Appellate Authority, the initiated penal proceedings, no longer exists. If the Appellate Authority had initiated penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside by its order dated 9th April, 2009. Aggrieved by the said order, the revenue filed appeal before High Court. The Hon'ble High Court framed the following question of law in the said appeal viz., 1. Whether the notice issued under Section

271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal? 2. Whether the proceedings initiated by the Assessing Authority was legal and valid? The Hon'ble Karnataka High Court held in the negative and against the revenue on both the questions. Therefore the decision rendered by the ITAT Mumbai in the case of Earthmoving Equipment Service Corporation (supra) is of no assistance to the plea of the revenue before us.

11. In the case of M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017 referred to in the written note given by the learned DR, which is an unreported decision and a copy of the same was not furnished, the same proposition as was laid down by the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra) appears to have been reiterated, as is evident from the extracts furnished in the written note furnished by the learned DR before us.

12. In the case of Trishul Enterprises ITA No.384 & 385/Mum/2014, the Mumbai Bench of ITAT followed the decision of the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra).

13. In the case of Mahesh M.Gandhi (supra) the Mumbai ITAT the ITAT held that the decision of the Hon'ble Karnataka High Court in the case Manjunatha Cotton & Ginning (supra) will not be applicable to the facts of that case because the AO in the assessment order while initiating penalty proceedings has held that the Assessee had concealed particulars of income and merely because in the show cause notice u/s.274 of the Act, there is no mention whether the proceedings are for furnishing inaccurate particulars or concealing particulars of income, that will not vitiate the penalty proceedings. In the present case there is no whisper in the order of assessment on this aspect. We have pointed out this aspect in the earlier part of this order. Hence, this decision will not be of any assistance to the plea of the revenue before us. Even otherwise this decision does not follow the ratio laid down by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) in as much as the ratio laid down in the said case was only with reference to show cause notice u/s.274 of the Act. The Hon'ble Court did not lay down a proposition that the defect in the show cause notice will stand cured if the intention of the charge u/s.271(1) (c) is discernible from a reading of the Assessment order in which the penalty was initiated.

14. From the aforesaid discussion it can be seen that the line of reasoning of the Hon'ble Bombay High Court and the Hon'ble Patna High Court is that issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The Tribunal Benches at Mumbai and Patna being subordinate to the Hon'ble Bombay High Court and Patna High Court are bound to follow the aforesaid view. The Tribunal Benches at Bangalore have to follow the decision of the Hon'ble Karnataka High Court. As far as benches of Tribunal in other jurisdictions are concerned, there are two views on the issue, one in favour of the Assessee rendered by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) and other of the Hon'ble Bombay High Court in the case of Smt.Kaushalya. It is settled legal position that where two views are available on an issue, the view favourable to the Assessee has to be followed. We therefore prefer to follow the view expressed

by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra).

15. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the Id. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present case cannot be sustained and the same is directed to be cancelled".

7. As the issue involved in the present case as well as all the material facts including the submissions made by both the sides are similar to the case of Jeetmal Choraria (supra), we respectfully follow the decision rendered by the Coordinate Bench of this Tribunal in the said case and cancel the penalty imposed by the Assessing Officer under section 271(1)(c) and confirmed by the Id. CIT(Appeals).

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

Order pronounced in the open Court on 22nd day of December, 2017.

**Sd/-
(S.S. Viswanethra Ravi)
Judicial Member**

Kolkata, the 22nd day of December, 2017

**Sd/-
(P.M. Jagtap)
Accountant Member**

- Copies to :
- (1) **M/s. Akshay Kr. Ghosh & Sons,
15/1, Strand Road,
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 - 2) **Income Tax Officer,
Ward-34(2), Kolkata,
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Kolkata-700 107**
 - (3) **CIT(Appeals)-10, Kolkata,**
 - (4) **CIT- , Kolkata,**
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*By Order
Senior Private Secretary,
Head of Office/DDO,
Income Tax Appellate Tribunal
Kolkata Benches, Kolkata*