

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

Before Shri Mahavir Singh (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.1970/Mum/2015)

(Assessment year:2006-07)

M/s Cenzar Industries Ltd Oval House, 2 nd Floor Opp Nagindas Master Road British Hotel Lane, Fort Mumbai-400 001 PAN : AABCC4342F	vs	ITO-5(1)(3), Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri Rajiv Khandelwal
Respondent by	Shri Rajat Mittal

Date of hearing	14-11-2017
Date of pronouncement	29 -12-2017

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-10, Mumbai dated 26-02-2015 and it pertains to AY 2006-07. The assessee has raised the following grounds of appeal:-

1. *On the facts and in the circumstances of the case and in law, the learned CIT (A) erred in coming to the conclusion that there was a concealment and default within the meaning of sec 271 (1) (c) and in confirming penalty of Rs. 1,70,00,000/- levied by the Assessing officer.*

2. *On the facts and in the circumstances of the case and in law,*

the learned CIT (A) erred in coming to the conclusion that there was concealment of income particularly considering the fact that the amount contributed by SAGEM was in the nature of income as against the contention of your appellant that this was a receipt in respect of reimbursement of expenses to be incurred by your appellant towards sales promotion which clearly establishes that there was a receipt towards expenses and hence this receipt was deductible from expenses incurred and the learned CIT (A) differed by coming to the conclusion that this is a receipt to be reflected on income side of the Profit & Loss A/c but the main fact was ignored that any of the treatment to this receipt did not have any impact on the profit for the year as it makes no difference whether there is increase in receipt or deduction from payment made on the profit for the year.

3. *The learned CIT (A) further erred in coming to the conclusion that deduction in respect of Rs.4,77,58,412/- claimed by your appellant has not been fully established and hence there was concealment though your appellant had claimed deduction of net amount spent amounting to Rs.1,80,86,421/- (made up of expenditure Rs.9,53,21,476/- less reimbursement Rs.7,72,35,055/-) only and hence it cannot be said that there was concealment of Rs.4,77,58,412/within the meaning of Section 271 (1) (C) as denial of deduction of expenditure does not amount to concealment.*

4. *On the facts and in the circumstances of the case it cannot be said that there was a concealment within the meaning of sec 271(1) (c) attracting levy of penalty u/s 271 (1) (c) of the I.T. Act, 1961 and learned CIT (A) erred in levying such a huge penalty only on account of short coming in the proof required to be furnished for claiming deduction.*

5. *On the facts and in the circumstances of the case and in law the learned CIT (A) erred in not agreeing with your appellant's submission that order of penalty is barred by limitation and same is passed after the end of time by which it ought to have been passed and hence deserves to be cancelled.*

2. The assessee filed a petition for admission of additional ground o 14-11-2017 challenging the validity of penalty proceedings on the ground that penalty

order passed by the AO u/s 271(1)(c) of the Act is bad in law and void ab initio as the notice issued u/s 274 r.w.s. 271(1)(c) is not in accordance with law. The Ld.AR for the assessee submitted that from the notice it is not discernible as to why penalty is initiated, whether it is for furnishing inaccurate particulars of income or for concealment of income as the AO has issued printed form of notice without striking off irrelevant portion in the notice. The Ld.AR further submitted that right from the assessment proceedings to penalty proceedings, the AO has initiated penalty for concealment of particulars of income and furnishing of inaccurate particulars of income which is evident from the assessment order as well as penalty order. At both the places, he has taken two limbs together, therefore, the penalty order passed by the AO u/s 271(1)(c) is bad in law and liable to be quashed. The Ld.AR further submitted that additional ground raised by the assessee taking a legal plea is emanating from the orders of the assessing officer and no new facts or evidences has been brought on record, therefore, the additional ground may be admitted for adjudication.

3. The Ld.DR, on the other hand, strongly opposed admission of additional ground.

4. Having heard both the sides and considered material on record, we find that the additional ground raised by the assessee challenging validity of penalty proceedings initiated u/s 271(1)(c) is a legal plea which emanates from the

orders of the authorities below. We further notice that no new facts or evidence is brought on record in support of additional ground raised by the assessee. Therefore, we are of the considered view that the additional ground raised by the assessee is required to be admitted and hence, admit the additional ground raised by the assessee and dispose of the same, on merits.

5. The brief facts of the case are that the assessee company engaged in the business of manufacturing of watches and calculators, filed its return of income for the assessment year 2006-07 on 30-11-2006 declaring total income at Nil by claiming deduction u/s 80IC of Rs.1,65,30,520 and book profit u/s 115JB at Rs.1,61,27,608. The assessment was completed u/s 143(3) on 31-12-2008, interalia making addition towards disallowance of reimbursement of selling and distribution expenses of Rs.4,77,58,412. Aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A), vide order dated 17-01-2012 has confirmed disallowance of selling and distribution expenses. The assessee preferred further appeal before the ITAT. The ITAT, vide its order dated 12-06-2013 in ITA No.1811/Mum/2012 has upheld the orders of the AO and confirmed disallowance of selling and distribution expenses.

6. In the meantime, the AO has initiated penalty proceedings u/s 271(1)(c) and asked the assessee to show why penalty should not be levied for concealment of income. In response to notice, the assessee submitted that no penalty could be levied u/s 271(1)(c) for concealment of particulars of income

in respect of disallowance of selling and distribution expenses as rejection of claim is neither concealment nor furnishing of inaccurate particulars of income. The assessee further submitted that the AO has taken only a different view in the absence of supporting evidences like vouchers and bills. Therefore, disallowance of expenditure claimed cannot be considered as concealment of particulars of income so as to levy penalty u/s 271(1)(c) of the Act. The AO, after considering the relevant submissions of the assessee and also relying upon the decision of Hon'ble Bombay High Court in the case of Sanghvi Swiss Refills Pvt Ltd vs ACIT 255 CTR 251 (Bom) observed that the assessee has furnished inaccurate particulars of income in respect of reimbursement of selling and distribution expenses, which warrants levy of penalty u/s 271(1)(c) of the Act. Accordingly, the AO levied penalty of Rs.1.70 crore u/s 271(1)(c) for concealment of particulars of income and also furnishing of inaccurate particulars of income.

7. Aggrieved by the penalty order, assessee preferred an appeal before CIT(A). Before the CIT(A), the assessee has reiterated its submissions made before the AO to argue that disallowance of expenses cannot be treated as concealment of particulars of income or furnishing of inaccurate particulars of income so as to levy penalty. The CIT(A), after considering relevant submissions of the assessee observed that disallowance of reimbursement of selling and distribution expenses resulted in reduction of actual profit which

tantamount to furnishing of inaccurate particulars of expenses leading to concealment of true income in terms of provisions of section 271(1)(c) of the Act. Accordingly, the CIT(A) held that the AO was right in levying penalty u/s 271(1)(c) of the Act. The CIT(A) further observed that as regards the alternative plea of the assessee that net expenses claimed after adjustment of reimbursement amount is to be considered for levy of penalty is again a misleading act, because by debiting only the net amount of Rs.1,80,86,421 after adjusting the bogus claim of expenses on gold coins of Rs.4,77,58,412 the assessee was trying to conceal the amount of Rs.4,77,58,412. Therefore, the AO is justified in levying penalty on this amount. Aggrieved by the order of CIT(A), the assessee is in appeal before us.

8. The Ld.AR for the assessee referring to the additional grounds of appeal submitted that penalty proceedings initiated by the AO u/s 271(1)(c) is bad in law and liable to be quashed as the AO has issued vague notice in a printed form without striking off irrelevant portion, which is a clear case of non application of mind by the AO before initiation of penalty which vitiates penalty proceedings. The Ld.AR further submitted that the AO has not framed any specific charge on which he intended to impose penalty which is clear from notice issued u/s 274 r.w.s. 271(1)(c) where he has mentioned both the charges which cannot be the case because both the charges in penalty proceedings operate in two different fields. The Ld.AR further submitted that in the notice issued u/s 274, the AO has not satisfied himself about the clear charge, under

which the penalty is leviable, whether it is for concealment of particulars of income or for furnishing inaccurate particulars of income. The AO right from the assessment proceedings to the levy of penalty, initiated penalty proceedings on both charges, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income. Even in the penalty order, he has levied the penalty for both the charges. Thus, he submitted that such a levy of penalty is not tenable in view of the law laid down in catena of decisions including that of Hon'ble Karnataka High Court in CIT vs Manjunatha Cotton & Ginning Factory 359 ITR 565 (Karn). The Ld.AR further submitted that the AO has to arrive at a satisfaction as to whether the penalty proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of income which should be specified in the notice as issuance of notice u/s 274 r.w.s 271(1)(c) goes to the root of the matter. Once the AO has not arrived at a correct satisfaction, then the whole proceedings are void ab initio and liable to be quashed. In this regard, he relied upon plethora of judgements including the decision of Hon'ble Supreme Court in the case of T Ashok Pai vs CIT (2007) 292 ITR 11 (SC). The Ld.AR further relied upon the following case laws:-

1. Maherji Kashinath Holdings Pvt Ltd - ITA No.2555/Mum/2012
2. Rekha Bhupendra Dalal - ITA No.3363/Mum/2016
3. Dr Sarita Milind Davare - ITA 2187 and 1789Mum/2014
4. Universal Music India Pvt Ltd – ITA No.6752/Mum/2014
5. Shri Samson Perinchery - IT Nos 4625 to 4630/Mum/2013

6. SSA's Emerald Meadows – 242 Taxmann 180 (SC)

9. On the other hand, the Ld.DR submitted that the entire facts and circumstances leading to the levy of penalty has to be seen and simply because penalty has been initiated on one charge and levied on a different charge or penalty has been initiated on both charges does not mean that whole penalty proceedings get vitiated. The Ld.DR further submitted that section 271(1)(c) provides for levy of penalty under both the charges and if the AO in the penalty order has levied penalty on anyone of the charges, then also it cannot be held that penalty order is bad in law. The Ld.DR referring to the decision of Hon'ble Bombay High Court in the case of CIT vs Smt. Kaushalya (1995) 216 ITR 660 (Bom) stated that the vagueness and ambiguity in the notice are mere mistake in language used or mere non striking off of inappropriate portion cannot by itself invalidate the notice issued u/s 274. The AO has brought out clear facts of concealment of particulars of income in respect of disallowance of reimbursement of selling and distribution expenses which warrants levy of penalty and accordingly levied penalty u/s 271(1)(c). Therefore, the order of the lower authorities should be upheld.

10. We have heard the rival submissions, perused the material available on record and also gone through the orders of authorities below. The AO has levied penalty u/s 271(1)(c) in respect of disallowance of reimbursement of selling and distribution expenses on the ground that the assessee has concealed particulars of income and also furnished inaccurate particulars of income. The

AO has initiated penalty by issuing notice u/s 274 r.w.s. 271(1)(c) in a printed form without striking off of irrelevant portion which were not applicable to the facts of assessee's case. The AO has issued notice which states that penalty has been initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. In the assessment order, the AO has initiated penalty proceedings on both charges, i.e. for concealing the particulars of income and furnishing inaccurate particulars of income. The AO levied the penalty on both the charges, i.e. for concealing the particulars of income and furnishing inaccurate particulars of income. Right from the assessment stages to levy of penalty, the AO has initiated penalty on both charges which is not the case as per the provisions of section 271(1)(c) as the two charges, i.e. concealment of particulars of income or furnishing of inaccurate particulars of income are two different connotations. The issue of notice u/s 274 r.w.s. 271(1)(c) goes to the root of the matter of assuming jurisdiction to levy penalty u/s 271(1)(c), therefore, before issuance of notice, the AO has to arrive at a satisfaction as to whether penalty proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. The AO cannot take both the charges for levying penalty by stating that the assessee has concealed particulars of income and also furnished inaccurate particulars of income.

11. The provisions of section 271(1)(c) are very clear and there is no ambiguity. On a plain reading of section 271(1)(c), it is very clear that clause

(c) deals with two specific offences, that is to say, concealment of particulars of income or furnishing of 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 initiating penalty proceedings for one offence and finding the assessee guilty of another offence or holding him guilty for either one or the other cannot be sustained in law. This legal proposition is clearly reiterated by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory Ltd (supra) wherein it was categorically held that satisfaction of the existence of the grounds mentioned in section 271(1)(c) when it is a sine qua non initiation of proceedings, the penalty proceedings should be confined only to those grounds and the said ground should be specifically stated so that the assessee would have the opportunity to meet those grounds. Initiation of penalty on one ground and levying penalty on another ground would cause injustice to the assessee as the assessee was kept in blank to justify his case whether the AO sought to initiated penalty for concealment of particulars of income or furnishing of inaccurate particulars of income. If the proceedings are initiated on a specific charge, then, the assessee can justify its case by advancing arguments on the charge framed by the AO. Thus, once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. If penalty proceedings are initiated on one ground and levied penalty on different ground or penalty proceedings are

initiated on two grounds, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income would definitely vitiate the entire penalty proceedings.

12. In this case, on perusal of the facts available on record it is abundantly clear that the AO has initiated penalty proceedings in the assessment order on both the grounds, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income. The AO also levied penalty on both the grounds of concealment of particulars of income and also furnishing of inaccurate particulars of income which is quite contrary to the provisions of section 271(1)(c) where it was categorically stated that both the charges are standing in a different footing and the AO has to initiate penalty proceedings for concealment of particulars of income or furnishing of inaccurate particulars of income. Initiation of penalty by injecting and in place of or would definitely go against the basic provisions of the Act. In this case, the AO has initiated penalty on both the grounds, which cannot be the case for initiation of penalty u/s 271(1)(c) of the Act. We further observe that it is not open to the authority, at the time of imposing penalty to impose penalty on the ground other than what assessee was called upon to meet otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would violate principles of natural justice and cannot be sustained. The validity of order of penalty must be determined with reference to the information, facts and materials in the possession of the authority imposing 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. The AO 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. As already stated, facts of some cases may attract both the offences. In case, the AO has made multiple additions, one may relate to concealment of particulars of income and another may relate to furnishing of inaccurate particulars of income, but single addition made cannot lead to an inference of concealment of particulars of income and furnishing of inaccurate particulars. Therefore, we are of the considered view that before initiation of penalty proceedings, the AO has to arrive at a correct satisfaction as to whether penalty is initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. If the AO fails to initiate penalty proceedings by issuance of proper notice, then the whole penalty proceedings becomes vitiated and void ab initio.

13. Coming to the case laws relied upon by the assessee. The assessee has relied upon the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory vs CIT (supra), wherein the Hon'ble High Court has categorically observed that sending printed form of notice where all the grounds mentioned in section 271(1)(c) are mentioned would not satisfy requirement of law. Notice issued u/s 274 of the Act should specifically state the ground mentioned in section 271(1)(c), i.e. whether it is for

concealment of income or for furnishing of inaccurate particulars of income. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. Initiating the penalty proceedings on one limb and holding the assessee guilty of another limb is bad in law. The relevant portion of the order is extracted below:-

“ 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 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 as case of furnishing of inaccurate particulars. The apex court in the case of Ashok Pai reported (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 reported in 122 ITR 306 and the Delhi High Court in the case of Virgo Marketing P.Ltd., reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

14. The assessee has relied upon decision of Hon’ble Bombay High Court in the case of CIT vs Samson Perinchery in Income Tax Appeal No.1154 of 2014 & Ors order dated 5th January, 2017. The Hon’ble Bombay High Court after considering the ratio laid down by the Hon’ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) observed that the

satisfaction of the AO with regard to only one of the two breaches mentioned in section 271(1)(c) of the Act for initiation of penalty proceedings will not warrant / permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated / notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated and it cannot be on a fresh ground of which assessee has no notice. The relevant portion of the order is extracted below:-

“The above submission on the part of the Revenue is in the the decision of the Supreme Court in Ashok Pal v/s. CIT 292 ITR [relied upon in Manjunath Cotton & Ginning Factory (supra)] - wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated / notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated and it cannot be on a fresh ground of which assessee has no notice.”

15. The assessee has also relied upon the decision of Hon’ble Supreme Court in the case of CIT vs SSA’s Emerald Meadows (supra) wherein the Hon’ble Supreme Court dismissed SLP filed by the revenue by following the decision of the Karnataka High Court in the case of CIT vs Manjunatha Cotton & Ginning Factory (supra) by observing that notice issued u/s 274 r.w.s. 271(1)(c) was bad in law as it did not specify under which limb of section 271(1)(c), penalty

proceedings had been initiated.

16. Coming to the case laws relied upon by the Ld.DR. The Ld.DR relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Smt.Kaushalya (supra). We have gone through the case law relied upon by the Ld.DR in the light of the facts of the present case and find that the ITAT, Mumbai in the case of DCIT vs Dr. Sarita Milind Davare in ITA No.1789/Mum/2014 dated 21-12-2016 has considered the decision rendered by Hon'ble Bombay High Court in the light of Supreme Court judgement in the case of Dilip N Shroff 291 ITR 519 (SC) and observed that there should be application of mind on the part of the AO at the time of issuing notice. Since the co-ordinate bench has already considered the judgement of Hon'ble Bombay High Court, we are of the view that case law relied upon by the Ld.DR is not applicable to the facts of the present case.

17. In this view of the matter and considering the ratios of the case laws discussed above, we are of the considered view that penalty proceedings initiated u/s 271(1)(c) is void ab initio and liable to be quashed as the AO has issued vague notice u/s 274 r.w.s. 271(1)(c) without striking off of irrelevant portion of notice which is a clear case of non application of mind by the AO before initiation of penalty proceedings. We further notice that from the assessment stage to levy of penalty, the AO has initiated penalty on both charges, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income which is not so in the case of penalty u/s

271(1)(c) of the Act. Therefore, we are of the considered view that the penalty proceedings initiated by the AO is bad in law and hence, we quash the penalty proceedings and delete the penalty levied u/s 271(1)(c) of the Act.

17. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 29th December, 2017.

Sd/-

sd/-

(Mahavir Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 29th December, 2017

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai