

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA.No.7386/MUM/2014 (A.Y: 2007-08)**

D.C.I.T -1(2)(2) R.No.535 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K.Road, Mumbai-400 020	v.	M/s. Pennzoil Quaker State India Ltd. Mercury Meeting Room, 407-408, 4 <sup>th</sup> Floor, Powai Plaza, Hiranandani Business Park, Powai, Mumbai – 400 076
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**PAN NO: AAACP 7143 C**

**(Appellant)**

**(Respondent)**

**ITA.No.7503/MUM/2014 (A.Y: 2007-08)**

M/s. Pennzoil Quaker State India Ltd. Mercury Meeting Room, 407-408, 4 <sup>th</sup> Floor, Powai Plaza, Hiranandani Business Park, Powai, Mumbai – 400 076	v.	D.C.I.T -1(2)(2) R.No.535, 5 <sup>th</sup> Floor, Aayakar Bhavan, M.K.Road, Mumbai- 400 020
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**PAN NO: AAACP 7143**

**(Appellant)**

**(Respondent)**

<b>Assessee by</b>	<b>:</b>	<b>Shri F. V. Irani</b>
<b>Revenue by</b>	<b>:</b>	<b>Shri Rajat Mittal</b>
<b>Date of Hearing</b>	<b>:</b>	<b>08.01.2018</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>12.01.2018</b>

**ORDER****PER C.N. PRASAD (JM)**

1. These two appeals are filed by the Revenue and assessee against order of the Learned Commissioner of Income Tax (Appeals)-2, Mumbai dated 28.03.2013 for the Assessment Year 2007-08 in deleting the penalty levied on Transfer pricing adjustment of ₹.77,50,450/- and in sustaining the penalty on the addition of ₹.96,39,000/- made on account of change in method of accounting on valuation of inventories.
2. At the outset the Ld. Counsel for the assessee submits that initiation of penalty proceedings u/s. 271(1)(c) of the Act is improper. Ld. Counsel for the assessee submits that the Assessing Officer is not clear as to the charge for which the penalty is initiated i.e. either concealment of income or furnishing inaccurate particulars. Ld. Counsel for the assessee further referring to notice issued u/s.274 r.w.s. 271(1)(c) of the Act submits that the Assessing Officer did not specify the charge for which the penalty proceedings were initiated, but penalty was levied for furnishing inaccurate particulars of income in the penalty order. Ld. Counsel for the assessee submits that the notice has been issued without specifying the charge for which the penalty is initiated as there is no striking off of the limb in the notice and therefore the initiation itself is improper and not valid.

3. Ld. Counsel for the assessee submitted various propositions as under:

(I) The levy of penalty is illegal, void, bad in law, vitiated by non-application of mind and is without jurisdiction as the penalty notice issued by the AO does not strike off the relevant portion thereof.

(II) No penalty can be levied as there was a full and complete disclosure by the assessee. The respondent had made full and complete disclosure and in this regard reliance is placed on various documents.

- (i) Tax Audit Report – Refer Para 11(b), Page No. 27 of the Paper Book
- (ii) Signed Financials – Refer Schedule 21(c) of Notes to Accounts, Page No. 18 of the Paper Book.
- (iii) Signed Financials- Schedule 17(c) of financials – refer Page No. 13 of the Paper Book.

Case Laws:

- ACIT Circle-6 Jaipur v. M/s. Modern threads (India) Ltd. (ITA.No. 795/JP/2012) (Jaipur Tribunal)
- H.P. State Forest Corporation Ltd v. DCIT [93 ITD 442] Chandigarh
- CIT v. S.M. Construction [60 taxmann.com 135 (BOM)]
- DIT (IT)-1, Mumbai v. Administrator of the Estate of Late Mr. E.F. Dinshaw [35 taxmann.com 95 (Bom).]

For these case laws refer Compilation No.2.

(III) With utmost respect, the decision of the Hon'ble Tribunal in assessee's own case for Assessment Year 2007-08 is erroneous on merits.

(IV) No penalty can be levied as the issue is highly debatable and at the very least two views are possible in the matter.

Case laws:

- American Express Bank Ltd. v. DDIT [2010-TII-134-ITAT-Mum-INTL]
- Impulse India (P) Ltd v. ITO [40 ITD 36 (Delhi ITAT)]

For these case laws refer Compilation No.4

(V) Penalty should not be leviable in cases where the tax rates are the same in different years or the issue involved relates to a timing difference. There is no justification for levy of penalty as the effect of change in stock valuation is tax neutral inter alia.

(i) The reduction in the value of closing stock due to change in the method of valuation this year will lead to an identical change in the next year's opening stock.

(ii) Tax rate for AYs 2007-07 and 2008-09 is same.

Case Law:

CIT v. Excel Industries Ltd. [38 taxmann.com 100 (SC)].

(VI) No penalty can be levied where there is no motive to obtain any tax advantage. The impact of the change in the method of

valuation of closing stock was only ₹.96.39 lakhs, whereas, the assessee declared returned loss of ₹.14.05 crores and the assessed loss was ₹.12.30 Crores. Hence there is no intention or motive on part of the assessee to obtain any tax advantage-refer computation of income in the final Assessment Order - page Nos. 127 & 128 of the Paper Book.

4. Ld. DR strongly supported the penalty order of the Assessing Officer.

5. We have heard the rival submissions, perused the orders of the authorities below, the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act, Assessment Order and the penalty orders. On a perusal of the notice issued u/s. 271(1)(c) of the Act for initiation of proceedings we find that the Assessing Officer did not strike off and specify the charge/limb for which he is proposing to initiate penalty proceedings. However, in the Assessment Order, Assessing Officer records that the penalty proceedings are initiated for furnishing inaccurate particulars of income.

6. An identical situation has been considered by the Coordinate Bench in Meherjee Cassinath Holdings v. ACIT in ITA.No. 2555/Mum/2012 dated 28.04.2017 as to whether the action of the Assessing Officer in initiating penalty proceedings u/s.271(1)(c) of the Act without striking off one of the

limbs and without specifying the specific charge in the notice initiating penalty proceedings for inaccurate particulars of income in the Assessment Order and the Coordinate Bench considering the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery [392 ITR 4] and also various decisions held that action of the Assessing Officer in non-striking off relevant clause in the notice shows that the charge being made against the assessee is not firm therefore proceedings suffer from non-compliance with principles of natural justice in as much as the Assessing Officer himself is not sure of the charge and the assessee is not made aware as to which of the two limbs of section u/s. 271(1)(c) of the Act he has to respond. While holding so the Coordinate Bench observed as under: -

8. *We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer 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)”*

9. *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.

10. 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.

11. 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.”*

12. *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.*

13. *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.*

14. *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 non-application 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.*

7. Following the above decision, similar view has been taken by the Coordinate Bench in the case of Orbit Enterprises v. Income Tax Officer [60 ITR (Trib.) 252]. Respectfully following the said decision, we hold that the notice issued by the Assessing Officer u/s. 274 r.w.s. 271(1)(c) of the Act is on account of non-application of mind and therefore on this account itself the penalty imposed u/s.271(1)(c) is liable to be deleted. Thus, we direct the Assessing Officer to delete the penalty levied u/s.271(1)(c) of the Act. As we have held that the penalty be deleted on the preliminary point the other arguments raised by the Ld. Counsel for the assessee are not being dealt with.

8. In the result, appeal filed by the assessee is allowed as indicated above and the Revenue's appeal is dismissed.

Order pronounced in the open court on the 12<sup>th</sup> January, 2018.

Sd/-  
**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**

Mumbai / Dated 12/01/2018  
Giridhar, SPS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)

**ITAT, Mum**