

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 361/VIZ/2015
(Asst. Year : 2003-04)**

B. Adinarayana, vs. ITO, Ward-1,
S/o Ramu Naidu, D.No. 5-9-32, Anakapalle.
Lakshmi Devi Peta, Anakapalle-1.

PAN No. AETPB 5443 B
(Appellant)

(Respondent)

Assessee by : Shri C.V.S. Murthy – FCA.
Department By : Shri R.S. Aravindakshan – Sr.DR

Date of hearing : 10/01/2018.
Date of pronouncement : 12/01/2018.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This is an appeal filed by the assessee against the order of Commissioner of Income Tax (Appeals)-2, Visakhapatnam, dated 24/08/2015 for the Assessment Year 2003-04.

2. Facts of the case, in brief, are that the assessee filed a return of income by declaring total income of Rs. 66,260/-. The main activity of the assessee was money lending business. A survey operation was conducted in the assessee's case and subsequently case was taken up for scrutiny and after following

due procedure, the Assessing Officer has made the following additions:-

1. Unexplained cash credits	Rs. 6,00,000/-
2. Unexplained withdrawals	Rs. 40,000/-
3. Brokerage Income	Rs. 20,000/-
4. Unexplained advances and interest	Rs. 17,21,534/-

Thus, the total income was determined at Rs. 18,47,794/- after giving certain set-off. The assessee preferred an appeal before the Id. CIT(A), who by order dated 29/12/2006 upheld the additions towards unexplained cash credits of Rs. 6 lakhs and undisclosed interest income of Rs. 60,000/-. Subsequent to that, assessee preferred an appeal before the ITAT. However, the ITAT in its common order in ITA No. 42 & 55/Vizag/2007 dated 12/08/2009, dismissed both the appeals filed by the assessee as well as revenue. Thereafter, Assessing Officer has initiated penalty proceedings and issued show-cause notice under section 274 r.w.s. 271 of the Income Tax Act, 1961 (hereinafter referred to as "Act") and penalty was imposed.

3. On appeal, Id. CIT(A) confirmed the penalty order passed by the Assessing Officer.

4. Aggrieved, the assessee has raised the following additional ground before the Tribunal.

"The appellant contends that the notice issued u/s. 271(1)(c) is bad in law as there was no specific mentioning that under which charge the penalty u/s 271(1)(c) of the I.T. Act, is leviable i.e. whether under charge of concealment of income or under furnishing of inaccurate particulars of income. Hence, the order passed on the basis of such an invalid notice issue, is void abinitio. Therefore, I pray the Hon'ble Income Tax Appellate Tribunal, Visakhapatnam Bench, for relief."

- 5.** Learned Authorised Representative for the assessee has submitted that the notice issued by the Assessing Officer dated 28/02/2006, is a vague notice and therefore, the additional ground raised before the tribunal is a legal issue, which goes to the root of the matter and therefore the same may be admitted.
- 6.** On the other hand, learned Departmental Representative has raised an objection for admission of additional legal ground raised by the assessee.
- 7.** We have heard both the sides, perused the material available on record and orders of the authorities below.
- 8.** We find that the issue raised by the assessee is a legal issue and all the facts are available on record. In this context, the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. Vs. CIT* (229 ITR 383) has considered the issue and held that 'where the tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question

in order to correctly assess the tax liability of an assessee'. From the above, it is very clear that there is no fresh investigation on facts is required, the additional ground raised by the assessee has to be adjudicated, hence, the same has to be admitted by following the judgment of the Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd.*, (supra), the additional ground raised by the assessee is admitted.

9. Now coming to the validity of the notice issued by the Assessing Officer dated 28/02/2006. In this context, learned counsel for the assessee has submitted that the notice issued by the Assessing Officer is not clear whether notice issued under section 271(1)(c) is for concealment of income or furnished inaccurate particulars. Therefore, the notice issued by the Assessing Officer is not a valid notice in the light of the latest judgment of the Hon'ble Supreme Court in the case of *CIT Vs. SSA's Emerald Meadows* [(2016) 73 taxman.com 248 (SC)] and also the Hon'ble Jurisdictional High Court of Telangana & A.P. in I.T.T.A. No. 684/2016 in *PCIT Vs. Smt. Baisetty Revathi* dated 30/07/2017.

10. On the other hand, learned Departmental Representative has submitted that at the time of issuance of notice, the Assessing Officer is not sure about the penalty either for concealment of

income or furnishing inaccurate particulars. Therefore, it is a premature notice and submitted that the notice issued by the Assessing Officer is a valid notice.

11. We have heard both the sides, perused the material available on record and orders of the authorities below.

12 The only issue for adjudication before us is whether the notice issued by the Assessing Officer dated 28/11/2011 is valid or not. For the sake of convenience, the notice is extracted as under:-

"Whereas in the course of proceedings before me for the Assessment Year 2003-04, it appears to me that you :-

* xxxxxxx

* xxxxxxx

* *have concealed the particulars of income or furnished inaccurate particulars of such income."*

13 From the above, it is not clear whether Assessing Officer has initiated penalty proceedings for concealment of particulars of income or for furnished inaccurate particulars. Therefore, the notice issued by the Assessing Officer is a vague notice and is liable to be quashed in the light of the decision of the Hon'ble Jurisdictional High Court in the case of *Smt. Baisetty Revathi* (supra) and also the decision of the Hon'ble Supreme Court in the case of *SSA's Emerald Meadows* (supra). The coordinate bench of the Visakhapatnam tribunal in the case of *Konchada Sreeram Vs.*

ITO in ITA No. 388/VIZ/2015, by order dated 06/10/2017 has considered the validity of notice by following the above referred to judgments and held that notice issued by the Assessing Officer is not a valid notice and accordingly quashed. For the sake of convenience, the relevant portion of the order is extracted as under:-

"6. We have heard both the parties and perused the material placed on record. In this case, the assessee has not filed the return of income. The department has conducted the survey u/s 133A and completed the assessment u/s 143(3) on total income of Rs.15,43,041/- and initiated penalty proceedings u/s 271(1)(c). The fact is that long term capital gains for sale of the property have come to the notice of the assessing officer because of the efforts made by the department. Therefore, the AO has initiated the penalty proceedings u/s 271(1)(c) and issued show cause notice in the printed proforma of penalty. The AO has issued the penalty notice which reads as under :

"WHEREAS in the course of the proceeding before me for the Asst. Year 2007-08 it appears to me that you have concealed the particulars of your some or furnished inaccurate particulars of such income."

6.1. From the notice issued by the AO, it is observed that the assessing officer had issued the notice for concealment of income or for furnishing of inaccurate particulars. As per the notice, the assessing officer was not sure of which limb of the offence he sought the explanation from the assessee, whether it was for the concealment of income or for furnishing of inaccurate particulars. As per the decision of the Hon'ble Jurisdictional High Court cited, for starting the penalty proceedings, the condition precedent is that the assessing officer must be satisfied that a person has either concealed the particulars of his income or furnished inaccurate particulars of such income. The person who is accused of the conditions mentioned in Section 271 should be made aware of the grounds on which imposition of penalty is proposed as he has a right to contest such proceedings and should have the full opportunity to meet the case of the revenue so as to show that the conditions stipulated in Section 271(1)(c) do not exist and that he is not liable to pay the penalty. The Hon'ble High Court of Karnataka in the case law cited held that the practice of the revenue in sending the printed form where all the grounds mentioned in 271(1)(c) are mentioned would not satisfy the requirement of law when the consequence of the assessee not rebutting the initial presumption is serious in nature and has to pay the

penalty ranging from 100% to 300% of the tax liability. As the provisions of section 271(1)(c) have to be strictly construed, the Hon'ble High court of Karnataka mandated that the notice issued should be set out the grounds which the assessee has to meet specifically, otherwise the principles of natural justice would be offended as the show cause notice would be vague. On the similar facts, Hon'ble Supreme Court dismissed the SLP in the case of SSA's Emerald Meadows (2016) 73 Taxman.com 248(SC). Ld. DR's argument that the case is distinguishable on facts is not acceptable since the Ld. DR relied on the passing observation of the Hon'ble High Court of AP. In the assessee's case, the issue is the defective notice u/s 271(1)(c) but not the penalty order. Unless the notice issued u/s 271(1)(c) is valid the penalty order cannot be held to be valid. The assessing officer did not strike off the irrelevant column in the notice and made known the assessee whether the penalty was initiated for the concealment of income or for furnishing the inaccurate particulars. In the assessment order also the AO simply recorded that the penalty proceedings u/s 271(1)(c) are initiated separately. Neither in the assessment order nor in the penalty notice, the assessing officer has put the assessee on notice for which offence, the penalty u/s 271 was initiated. Therefore, the case is squarely covered by the decision of the Hon'ble Jurisdictional High Court of cited (supra) wherein the Hon'ble high court held as under:

"On principle, when penalty proceedings are sought to be initiated by the revenue under Section 271(1)(c) of the Act of 1961, the specific ground which forms the foundation therefore has to be spelt out in clear terms. Otherwise, an assessee would not have proper opportunity to put forth his defence. When the proceedings are penal in nature resulting in imposition of penalty ranging from 100% to 300% of the tax liability, the charge must be unequivocal and unambiguous. When the charge is either concealment of particulars of income or furnishing of inaccurate particulars thereof, the revenue must specify as to which one of the two is sought to be pressed into service and cannot be permitted to club both by interjecting an 'or' between the two, as in the present case. This ambiguity in the show-cause notice is further compounded presently by the confused finding of the Assessing Officer that he was satisfied that the assessee was guilty of both.

We are therefore of the opinion that the order under appeal does not brook interference on any ground. We find no question of law, much less a substantial one, arising for consideration warranting admission of this appeal."

6.2. On the similar facts, the Coordinate Bench of ITAT, Visakhapatnam in ITA No.229/Viz/2015 in the case of Narayana Reddy Enterprises, following the order of the Coordinate Bench in the case of Smt. Makina Annapurna Vs. ITO, Visakhapatnam in ITA Nos.604 & 605/Vizag/2014 dated 2.2.2017 held that non-striking of the irrelevant column renders the notice issued u/s 271 as invalid. Respectfully,

following the decision of the Hon'ble AP High Court cited supra and the decision of this Tribunal cited (supra), we hold that the notice issued u/s 271 is invalid and consequent penalty imposed by the AO is cancelled. "

14. We therefore, respectfully following the decision of the Hon'ble Supreme Court in the case of *SSA's Emerald Meadows* (supra) and also the decision of Hon'ble Jurisdictional High Court in the case of *Smt. Baisetty Revathi* (supra) and also the decision of the coordinate bench of the tribunal in the case of *Konchada Sreeram* (supra), we hold that the notice issued under section 274 read with section 271 is invalid and, therefore penalty imposed by the Assessing Officer is cancelled.

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

Order Pronounced in open Court on this 12th day of Jan., 2018.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated : January, 2018.

vr/-

Copy to:

1. The Assessee - B. Adinarayana, S/o Ramu Naidu, D.No. 5-9-32, Lakshmi Devi Peta, Anakapalle-1.
2. The Revenue - ITO, Ward-1, Anakapalle.
3. The CIT-2, Visakhapatnam.
4. The CIT(A), Visakhapatnam.
5. The D.R., Visakhapatnam.
6. Guard file.

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.