

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. Nos.95 & 96/Coch/2016
Assessment Years : 2008-09 & 2009-10

Shri Babu Mathew, 36/2554, Mattamana House, Mathewsons building, Kaloor, Kochi-682 017. [PAN:ACHPM 3973H]	<b>Vs.</b>	The Assistant Commissioner of Income-tax, Circle-1(2), Kochi.
<b>(Assessee-Appellant)</b>		<b>(Revenue-Respondent)</b>

<b>Assessee by</b>	Shri A.S.Narayanamoorthy, CA
<b>Revenue by</b>	Shri A. Dhanaraj, Sr. DR

<b>Date of hearing</b>	15/01/2018
<b>Date of pronouncement</b>	19/01/2018

### **ORDER**

Per CHANDRA POOJARI, ACCOUNTANT MEMBER:

These two appeals by the assessee are directed against different orders of the CIT(A)-I Kochi for the assessment years 2008-09 and 2009-10.

2. The only issue in this appeal is with regard to confirmation of penalty levied u/s. 271(1)(c) of the I.T. Act.

3. The brief facts for the assessment year 2008-09 are that the original return of income for the assessment year 2008-09 was filed on 28/05/2010 declaring a total income of Rs.6,01,250/-. A survey under section 133A was conducted at the business premises of the assessee on 19/03/2011. As a result of the survey the assessee filed a revised return on 31/08/2010 with a total income of Rs.1,07,37,350/- which includes the additional income admitted by the assessee during the survey amounting to Rs.1,01,36,100/-. Subsequently notice under section 148 was issued and the assessment was completed under section 143(3) r.w.s. 147 on 23/12/2010. In the assessment order the Assessing Officer made further additions of Rs.2 lakhs under section 69 and Rs.16,00,740/- on account of difference in books of accounts. The total income thus assessed was Rs.1,25,38,090/-. The Assessing Officer initiated penalty proceedings and passed an order under section 271(1)(c) levying a penalty of Rs.40,70,658/-. The Assessing Officer has stated that the additional income of Rs.1,01,36,100/- declared by the assessee was only after the survey operations and therefore it is clear that had the survey been not conducted and documents revealing unexplained investments made by the assessee in the landed properties were impounded, the ass would not have declared the additional income. The relevant portion of the order is reproduced herein:

*"It is undisputed that the return including the additional income declared by the assessee was filed only after the survey operations. Therefore, it is crystal clear that had the survey been not conducted in the assessee's case and the documents revealing unexplained investments by the assessee in landed*

*properties were impounded, the additional income could not have been got disclosed by the assessee. The undisclosed in this case has come out as a result of survey and thereafter filing return by the assessee to show the undisclosed income could not be said to be a voluntary act on the part of the assessee. In a number of decisions, including that of the Hon'ble Supreme Court, reported in 186 ITR 571, it has been held that revised return does not mitigate the default under section 271(1)(c). The assessee was under a statutory obligation to file the return of income within the time limit provided under section 139(1) providing therein the correct particulars of its income. It has failed to include in the return so filed the correct particulars of its income. It is relevant in this context to mention that an assessee who made a bona fide discovery about having made a previous incorrect return was entitled to make a revised return invoking the enabling provisions of the law. Such a course, however, is not open when the previous return was dishonestly made. This fact is clear in this case, because even though the assessee had filed a return on 28/05/2010, he had done nothing to revise the return till after the date of survey during the course of which the department detected such undisclosed investments. Thus, the act of the assessee was not with any bona fides, it was the assessee who better knows his affairs and could have very well returned the correct particulars of its income rather than waiting the department to probe into the same. It is relevant to mention here that the unexplained investments were detected at the time of survey, in respect of which the assessee admitted additional income and filing return thereafter cannot be said to be on his own volition. The assessee had also not contested the assessment made u/s. 143(3) r.w.s. 147 before appeals. The Hon'ble High Court of Kerala in the case of CIT vs. K. Mahim reported in 15 Taxman 557 has held that mere filing of return would not exonerate assessee from liability to penalty, nor filing of revised return after the departmental investigation would absolve the assessee from penalty."*

4. The CIT(A) observed that in the original return of income filed on 28/05/2010 the assessee had declared only Rs.6,01,250/- as its total income and the additional income was admitted by the assessee only due to survey under section 133A. Though the assessee has claimed that the additional income was offered voluntarily during the survey and only to purchase peace with the department and avoid litigation. However, on perusal of the sworn statement recorded from the assessee on 19/03/2010 during the survey, it is revealed that

the disclosure was not voluntary, rather the assessee has admitted suppression of profits in the original return filed. The relevant portion of the sworn statement is reproduced herein:

*Q.14 It is seen from the computer printouts taken from the computer in which the amounts of your company are maintained that there is huge profits in M/s. Mathew Sons Agencies (P) Ltd. during the above financial years. Have you paid tax and filed your returns showing this?*

*A.14 It is true that there are omissions in including the actual profit in my I.T. returns for self, wife and my company. Moreover, the Company has not filed the returns for the last two assessment years i.e. 2008-09 and 2009-10. I am ready to file all the due returns and to revise my companies, my wife's name and in my name during the assessment years 2007-08, 2008-09 and 2009-10. To compensate the shortage in payment of tax by understatement and non filing of I.T. returns.*

*Q.15 Based on the various documents found in your business premises have you got anything to disclose before the Income Tax Authority?*

*A.15 As agreed by me I have committed various errors, omissions and technical mistakes in my accounting for the business run in the name of M/s. Mathew Son Agencies (P) Ltd., my wife's name and in my name during the assessment years 2007-08, 2008-09 and 2009-10. To compensate the shortage in payment of tax by understatement and non filing of I.T. returns.*

5. Further it was observed that it is evident from the sworn statement of the assessee dated 19.03.2010 that the actual profits in the business were concealed as the same were not shown in the original return of income. It means it is only after getting confronted with evidences found for concealment of income during the course of survey, the assessee has come out with the disclosure of

Rs.1,01,36,100/-. There is no provision as such under section 153A which provides immunity to the penalty proceedings if the assessee comes out with a concealed income during the course of survey. It is noteworthy that survey operations are carried out in order to find out the actual facts and transactions recorded in the books of account and only after getting confronted with the same the assessee has come to admit such income. To this extent, the provisions of section 271(1)(c) becomes applicable as it clearly states that when a person has concealed the particulars of income or furnished inaccurate particulars of such income, is liable for penalty. Thus The CIT(A) confirmed the penalty imposed u/s. 271(1)(c) of the Act.

6. Against this, the assessee is in appeal before us.

7. Before us, the assessee made a primary objection that notice issued u/s. 274 of the Act does not specify the specific charge against the assessee as to whether the assessee is guilty of having concealed particulars of income or having furnished inaccurate particulars of income and to that effect the assessee has also filed additional ground along with petition for admission of the same. This is the legal ground and admit the same for adjudication. He submitted that unless the Assessing Officer specified the charge against the assessee by striking out the relevant portion of the show cause notice issued u/s. 274 of the Act, would render the proceeding for imposition of penalty as null and void. He drew

our attention to the copy of the notice issued u/s. 274 dated 23/12/2011 for the assessment year 2008-09 which is placed at pg. 37 of the paper book and also notice dated 23/12/2011 for the assessment year 2009-10 which is placed at pg. 42 of the paper book.

8. The Ld. AR also relied on the following judgments to this effect:

1. H. Lakshminarayana vs. ITO (41 ITR (Trib) 465) (Bangalore)
2. Deepak Kumar Patwari vs. ACIT, Central Circle X-Kolkata (ITA Nos. 616 to 618/Kol/2013 dt. 3.2.2016) (ITAT, Kolkata)
3. Dr. Sarita Milind Davare vs. ACIT CC-40 (ITA No. 2187/Mum/2014 dt. 21/12/2016 )(ITAT Mumbai E Bench)
4. Jahangir Vs. ACIT (ITA No. 1261/Mum/2011-ITAT, Mumbai)
5. Orbit Enterprises vs. ITO, Mumbai (ITA Nos. 1596 & 1597/Mum/2014 dt. 01/09/2017) (ITAT, Mumbai Bench "C")
6. CIT, Bangalore vs. SSA's Emerald Meadows (ITA 380/2015 dt. 23/11/2015(Kar.))
7. CIT & Another vs. SSA's Emerald Meadows (SLP©/2016)
8. Gangadhara Palo vs. Revenue Office & Another (2011) 4 SCC 690(SC)
9. Mathewsons Agencies Pvt. Ltd. vs. ACIT, Kochi (ITA Nos. 93&94/Coch/2016 dt. 05/10/2017) (Cochin Bench).
10. CIT vs. Manjunatha Cotton and Ginning Factory & Others (2013) 359 ITR 565 (Kar.)

9. The Ld. DR on the other hand submitted that the assessee was given an opportunity before the authorities and the assessee has participated in the

penalty proceedings. Hence, the assessee cannot raise this issue before the Tribunal. He further submitted that the error in the issuance of notice u/s. 274 could be cured in view of the provisions of sec. 292B and sec. 292BB of the Act. He submitted that the penalty order which was decided by the CIT(A) on merit ought to be confirmed.

10. We have heard the rival submissions and perused the material on record. We have given a careful consideration to the rival submissions. The argument of the learned counsel for the Assessee was that the show cause notice u/s.274 of the Act which is in a printed form and the AO has indicated in the said notice as to whether the penalty is sought to be levied on the assessee for "furnishing inaccurate particulars of income" or "concealing particulars of such income" by striking off the irrelevant portion of the printed show cause notice. On this aspect we find that in the show cause notice u/s.274 of the Act the AO has not struck out the irrelevant part. It is not spelt out as to whether the penalty proceedings are sought to be levied for "furnishing inaccurate particulars of income" or "concealing particulars of such income".

11. The Hon'ble Karnataka High Court in the case of [CIT & Anr. v. Manjunatha Cotton and Ginning Factory](#), 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain

printed form where all the grounds given in [section 271](#) are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and finding the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will squarely apply and the orders imposing penalty have to be held as bad in law and liable to be quashed.

12. The Hon'ble Karnataka High Court in the case of [CIT & Anr. v. Manjunatha Cotton and Ginning Factory](#) (supra) has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act.

*"NOTICE UNDER SECTION 274*

*59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed farm where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show*

*cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.*

*60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing 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 drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds 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 offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the 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 which, when passed, was not sustainable.*

*61. 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 under clause (c). Concealment, furnishing inaccurate particulars of 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 a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 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 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."*

The final conclusion of the Hon'ble Court was as follows:-

"63. In the light of what is stated above, what emerges is as under:

- a) Penalty under Section 271(1)(c) is a civil liability.
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- c) Willful concealment is not an essential ingredient for attracting civil liability.
- d) Existence of conditions stipulated in [Section 271\(1\)\(c\)](#) is a sine qua non for initiation of penalty proceedings under [Section 271](#).
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.
- f) Even if there is no specific finding regarding the existence of the conditions mentioned in [Section 271\(1\)\(c\)](#), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under [Section 271\(1\)\(c\)](#) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in [Section 1\(B\)](#).
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.
- i) The imposition of penalty is not automatic.
- j) Imposition of penalty even if the tax liability is admitted is not automatic.

k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

n) The direction referred to in Explanation IB to [Section 271](#) of the Act should be clear and without any ambiguity.

o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

p) Notice under [Section 274](#) of the Act should specifically state the grounds mentioned in [Section 271\(1\)\(c\)](#), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

q) Sending printed form where all the ground mentioned in [Section 271](#) are mentioned would not satisfy requirement of law.

r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

*The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."*

13. It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.

14. We may also add that the provision of [section 292B](#) of the Act cannot cure the basic defect in assumption of jurisdiction and only cure the mistake, defect or omission in return of income, assessment, notice or the proceeding is in substance and effect in conformity with or according to intent and purpose of the Act. As we have already seen that the Hon'ble Karnataka High Court in the decision referred to earlier view the show cause notice and the reasons mentioned in the show cause notice are part of the process of the natural justice and the defect in such notice cannot be overlooked. In view of the aforesaid

decision we do not find any infirmity in the arguments advanced by the learned AR before us.

15. The contention of the Ld. DR is that the assessee has participated in the penalty proceedings and hence the error, if any that has occurred would be cured in view of the provisions of sec. 292B/292BB of the Act. Opposing the said contention, reliance was placed on the decision rendered by the Bangalore Bench of the Tribunal in the case of Shri K. Prakash Shetty vs. ACIT (ITA Nos. 265 to 267/Bang/2014 dt. 05/06/2014) wherein it was held that the provisions of sec.292BB would not come to the rescue of the revenue, when the notice was not in substance and effect in conformity with or according to the intent and purpose of the Act. In our view, the notice issued by the Assessing Officer was not in substance, and effect in conformity with or according to the intent and purpose of the Act, since the Assessing Officer did not specify the charge for which penalty proceedings were initiated and further there was non-application of mind on the part of the Assessing Officer.

15. For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. We therefore cancel the orders imposing penalty on the Assessee and allow the appeals by the Assessee.

16. Since the facts in I.T.A. No. 95/Coch/2016 are identical to the facts in I.T.A. No. 96/Coch/2016, we apply the same ratio for the appeal in I.T.A.

No.96/Coch.2016 also. Therefore, we are inclined to delete the penalty levied u/s. 274 of the Act and cancel the penalty proceedings against the assessee.

17. In the result, both the appeals of the assessee are allowed.

Pronounced in the open court on 19<sup>th</sup> January, 2018.

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 19<sup>th</sup> January, 2018

GJ

Copy to:

1. Shri Babu Mathew, 36/2554, Mattamana House, Mathewsons building, Kaloor, Kochi-682 017.
2. The Assistant Commissioner of Income-tax, Circle-1(2), Kochi.
3. The Commissioner of Income-tax(Appeals)-I, Kochi
4. The Pr. Commissioner of Income-tax, Kochi.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin