

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D” KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.380/Kol/2015
Assessment Year:2008-09

M/s Wanderland Real Estate Pvt. Ltd., 19, R.N. Mukherjee Road, Kolkata [PAN No. AAACW 6397 F]	बनाम / V/s.	Income Tax Officer, Ward-6(4), Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Arivand Agarwal, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri A.K. Tiwari, CIT-DR
सुनवाई की तारीख/Date of Hearing	02-01-2018
घोषणा की तारीख/Date of Pronouncement	25-01-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-2, Kolkata dated 09.01.2015. Assessment was framed by ITO Ward-6(4), Kolkata u/s 153 r.w.s. 153A of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 28.03.2013 for assessment year 2008-09. The penalty levied u/s 271(1)(c) of the Act vide order dated 30.09.2013 by the Assessing Officer.

2. In this appeal the assessee has challenged the order of CIT(A) whereby the CIT(A) confirmed the order of AO imposing penalty u/s 271(1)(c) of the.

3. The facts and circumstances under which penalty u/s 271(1)(c) of the Act was imposed on the assessee by the AO are as follows :-

The Assessee is a private limited company and carries on the business of real estate development. A search operation u/s 132 of the Act was carried out at the business premises situated at Indore of Kalani Group on 16-04-2009. The incriminating documents belonging to the assessee were found during search and therefore proceedings u/s 153C of the Act was initiated. Consequently, the assessee disclosed an additional income of Rs. 60 lacs whereas in the original return the income of Rs. 2,56,300/- only was disclosed. Thus, the assessment was framed under section 153C r.w.s. 153A at a total income of Rs. 62,56,300 only vide order dated 28.3.2013. In respect of the aforesaid addition of Rs. 60 lacs made in the course of assessment proceedings, the AO initiated penalty proceedings u/s 271(1)(c) of the Act. The initiation of penalty proceedings was made by the AO by observing as follows:

“Penalty proceedings u/s.271(1)(c) initiated separately”

4. In the penalty proceedings the assessee tried to explain that there was no concealment of income. This explanation was not accepted in the penalty proceedings and penalty u/s 271(1)(c) of the Act was imposed on the assessee by the AO.

The order of AO was subsequently confirmed by Id. CIT(A).

5. Aggrieved by the order of Id. CIT(A) the assessee has filed the present appeal before the Tribunal.

6. The Id. Counsel for the assessee before us submitted that the show cause notice issued u/s 274 of the Act 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. The same is reproduced for the purpose of ready reference:

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

7. 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 *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.

On the other hand, Ld. DR as summarized by his in his written submissions are reproduced hereunder:-

“It is submitted that the Assessing Officer correctly initiated penalty proceedings u/s. 271(1)(c). It is also submitted that ground as to the validity of . notice was not included in the grounds of a:ppeal filed by the assessee before either CIT(A) or the Hon'ble ITAT, Kolkata, nor is the issue that there was lack of opportunity granted to the assessee.

2. The judgement of the Hon'ble Calcutta High Court 111 the case Dr.Syamal Baran Mondal Vs. CIT (2011) 244 CTR631 states that "section 271 nowhere 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 Bangalore bench of Income-tax Appellate Tribunal ("ITAT) in a recent decision in the case of Jaysons Infrastructure India Private Limited vs ITO TS-5873-ITAT-2017(BANGALORE-O] held that since the assessment order clearly mentioned the reason for initiation of penalty proceedings, not mentioning the reason in the penalty notice should not cause any prejudice to the taxpayer. Therefore, it was held that the requirements of section 271(1)(c), as discussed by the KHC, were complied with in this case.

4. The ITAT Mumbai in its order in Trishul Enterprises Vs. DCIT (ITA Nos.384 &, 385jMumj2014 for A.Yrs.2006-07 &, 2007-08), Dt.10-02-2017, 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 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 11101 is required that the assessee be given an opportunity of show cause"

5. The Hon'ble Bombay High Court (Nagpur Bench) In the case of M/s. Maharaj Garage & Company Vs. CIT in its judgement Dt.22-08-20 17, 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 ..."

6. The Hon'ble Mumbai "E" Bench in the case of Earthmoving Equipment Service Corporation vs DCIT 22(2) Mumbai (2017) 84 taxmann.com 51 held "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 Hon'ble 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. "

7. Reliance is placed on the decision of Hon'ble ITAT 'E' Bench in the case of Earthmoving Equipment Service Corporation in ITA No. 6617/Mum/2014,

A.Y. 2010-11, wherein on identical facts, the Tribunal has held that penalty could not be deleted merely on the basis of defect pointed out (as regarding non striking off one . limb). While upholding the validity of penalty, the Hon'ble Tribunal also considered the judgement rendered in the case of CIT Vs. Manjunath Cotton & Ginning Factory [359 ITR 565] and the dismissal of the Revenue's SLP by the Apex Court in CIT Vs. SSA Emerald Meadows. In light of aforesaid decision of the Mumbai Tribunal the issue is squarely covered in favour of the Revenue on this legal issue. Therefore, it is submitted that penalty proceedings for levy of penalty u/s.271(1)(c), were correctly initiated and the case may be heard on merits.

8. We have heard the rival contentions of both the parties and perused the materials available on record and the judgment / orders cited by the representatives of both the parties. The facts of the case have already been elaborated in the preceding paragraphs therefore we are not repeating the same for the sake of brevity. The Ld 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.

With regard to the other judgments referred by the ld. DR we note that there are conflicting judgments of different High Courts. 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 (supra) . 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). 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. AO is directed accordingly.

9. **In the result, assessee's appeal stands allowed.**

Order pronounced in open court on 25/01/2018

Sd/-
(न्यायिक सदस्य)
(S.S.Viswanethra Ravi)
Judicial Member

Sd/-
(लेखा सदस्य)
(Waseem Ahmed)
Accountant Member

*Dkp, Sr.P.S

दिनांक:- 25/01/2018 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Wanderland Real Estate Pvt. Ltd. 19, R.N. Mukherjee Road, Kolkata-700001
2. प्रत्यर्थी/Respondent-ITO Ward 6(4),Aayakar Bhawan, P-7, Chowringhee Sq. Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary
Head of Office/DDO
आयकर अपीलीय अधिकरण,
कोलकाता