

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI RAJENDRA, AM AND SHRI RAVISH SOOD, JM**

ITA No. 7525/Mum/2016
(निर्धारण वर्ष / Assessment Year:2009-10)

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| ITO-13(2)(3) Room No. 1468, Aayakar Bhavan, M.K. Road, Mumbai-20 | बनाम/ Vs. | M/s Shangrila Sales Pvt. Ltd. 50, Link Side Road, Carter Road, Bandra (West), Mumbai 400 050 |
| स्थायी लेखा सं./जीआइआर सं./PAN No. AAFCS3227B | | |
| (अपीलार्थी /Revenue) | : | (प्रत्यर्थी / Assessee) |

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| अपीलार्थी की ओर से / Revenue by | : | Shri V. Vidyadhar, D.R |
| प्रत्यर्थी की ओर से / Assessee by | : | Shri Rakesh Kumar Agarwal, A.R |

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| सुनवाई की तारीख / Date of Hearing | : | 09.11.2017 |
| घोषणा की तारीख / Date of Pronouncement | : | 07.02.2018 |

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-21, Mumbai, dated 03.10.2016, which in itself arises from the order passed by the A.O under Sec. 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 19.03.2015. The revenue assailing the order of the CIT(A) had raised before us the following grounds of appeal:

- “1. Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s 271(1)(c) without appreciating the fact that neither the assessee nor its legal representative had brought it to the notice of the A.O at the time of re-assessment proceedings that it had already filed both an original return and a revised return on 31.03.2011.
2. Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s 271(1)(c), despite the fact that the assessee had based its entire argument on the data submitted by it in its second revised return e-filed on 15.11.2013, wherein project expenses of Rs.1,07,94,855/- was debited to the P&L account without corresponding increase in the closing stock.
3. Whether, on facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s 271(1)(c) without appreciating the fact that the assessee has itself rendered the original return and the first revised return irrelevant by basing its contention, before the AO, on the accounting data submitted in its second revised return that was filed on 15.11.2013.
4. Whether, on facts and in the circumstances of the case and in law, the Ld. CIT (A) was right in holding that the issue was not of Revenue expenditure vs. Capital expenditure. In fact, there is a deliberate attempt by the assessee to manipulate the accounts by booking the project expenses and by not correspondingly increasing the closing stock.
5. Whether on facts and in the circumstances of the case and in law, the Ld. CIT(A) failed to appreciate the fact that if there had not been re-assessment proceedings, the assessee could have very well managed to get away with the claim of Rs. 1,07,94,855/- as Revenue Expenditure, without correspondingly increasing the stock in trade.
6. The appellant prays that the order of the CIT(A), on the grounds, be set aside and that of the Assessing Officer be restored.
7. The appellant craves leave to add, amend or alter all or any of the grounds of appeal which may be necessary.”

2. Briefly stated, the facts of the case are that the A.O observing that the assessee company had not filed its return of income for the year under consideration, viz. A.Y 2009-10, therefore, initiated assessment proceedings under Sec. 147 of the Act. The assessee in compliance to the notice issued under Sec. 148 e-filed its return of income, disclosing a depreciation loss of Rs.17,422/-. The A.O during

the course of the assessment proceedings *inter alia* observed that the assessee had wrongly debited expenses of Rs.107,94,853/- in its profit and loss account in respect of the expenses incurred on Linkside building, which were shown under the head Linkside Project (work-in-progress) in its books of accounts. The A.O being of the view that the aforesaid expenses which were in the nature of a capital expenditure and were required to be added to the cost of the fixed assets had wrongly been claimed by the assessee as a revenue expenditure, therefore, disallowed the said amount and added back the same to the block of fixed assets of the assessee. The A.O while framing the assessment initiated penalty proceedings under Sec. 271(1)(c) in the hands of the assessee for furnishing of inaccurate particulars of income by claiming the aforesaid amount of Rs.107,94,855/- as a revenue expenditure. The assessee did not carry the assessment framed by the A.O in further appeal before the CIT(A). The A.O after the culmination of the assessment proceeded with the penalty proceedings and imposed a penalty of Rs. 33,35,618/- for deemed concealment of the particulars of income as per *Explanation 3* of Section 271(1)(c) in respect of the wrong claim of revenue expenditure of Rs.107,94,855/- raised by the assessee in its return of income.

3. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) in appeal before the CIT(A). During the course of the appellate proceedings it was for the very first time submitted by the assessee that an original return of income for the year under consideration, viz. A.Y 2009-10 was filed as on 31.03.2011, disclosing an income of Rs. 37,80,790/-. It was further submitted that as the assessee which was being assessed with the ITO Ward-9(3)(1) had wrongly mentioned "New Case" in its return of income, therefore, corrected the said mistake by filing a revised return of income on the

same date at the same income of Rs.37,80,790/-. However, as the assessee had in its revised return of income continued with the mistake of making an incorrect computation of TDS, therefore, to undo the same it filed a second revised return of income on 15.11.2013, disclosing a depreciation loss of Rs.17,422/-. The assessee in the backdrop of the aforesaid facts submitted before the CIT(A) that as it had filed the original return of income under Sec. 139(4) on 31.03.2011, therefore, the provisions of *Explanation 3* of Sec. 271(1)(c) were wrongly invoked by the A.O. The assessee fortifying its aforesaid contention, submitted before the CIT(A) that the penalty contemplated in *Explanation 3* of Sec. 271(1)(c) was applicable only where the assessee was found to have not filed its return of income under Sec. 139 within the period specified in Sec. 153(1). The assessee further challenging the validity of the penalty imposed by the A.O under Sec. 271(1)(c), submitted that while for the penalty proceedings were initiated on the ground of furnishing of inaccurate particulars of income, however, the same was imposed for concealment of income. It was further submitted by the assessee that as it had in the earlier returns of income already added back the expense of Rs. 107,94,855/- to its loss and arrived at the returned income of Rs.37,80,790/-, therefore, no penalty under Sec. 271(1)(c) could have been levied in its hands. The assessee further assailing the validity of the penalty imposed under Sec. 271(1)(c) on merits, submitted that as the issue of capital or revenue expenditure was in itself a vexed issue, therefore, a mere rejection of the claim of the same by the assessee as a revenue expenditure would not justify levy of penalty under Sec. 271(1)(c). The assessee fairly submitted before the CIT(A) that as the chartered accountant who had appeared before the A.O was oblivious of the return of income filed by the staff on 31.03.2011, therefore, for the said *bonafide* reason he had failed to bring the said fact to the notice

of the A.O. The CIT(A) in the backdrop of the aforesaid submissions of the assessee, directed the A.O to verify the veracity of the claim of the assessee with respect to filing of the original return of income on 31.03.2011. The A.O in his report filed with the CIT(A) submitted that the claim of the assessee that it had filed its return of income on 31.03.2011 prior to issuance of any notice under Sec. 142(1) or under Sec. 148, was found to be in order. However, the A.O rebutting the contention of the assessee that while for the penalty proceedings were initiated by the A.O for furnishing of inaccurate particulars of income, but however, the same was imposed for concealment of income, submitted that the penalty proceedings in the hands of the assessee were initiated for both the grounds, viz. 'concealment of income' and 'furnishing of inaccurate particulars of income'.

4. The CIT(A) taking cognizance of the aforesaid facts observed that though the A.O had referred to the issue of notice under Sec. 148 on 22.03.2014, however, he had failed to elaborate the reasons recorded for reopening of the assessment. It was observed by the CIT(A) that though the A.O had taken cognizance of the return of income filed by the assessee on 15.11.2013 wherein a depreciation loss of Rs.17,422/- was disclosed, but however, there was no mention of the return of income which was filed by the assessee as on 31.03.2011. The CIT(A) observed that the return of income filed by the assessee on 15.11.2013 was an invalid return which had no existence in the eyes of law. That in the backdrop of the aforesaid facts, the CIT(A) observed that now when the only valid return of income was filed by the assessee as on 31.03.2011, therefore, the A.O could have imposed penalty only on the basis of the income assessed vide order dated 19.03.2015, as in comparison to the income returned by the assessee in its return of income filed on 31.03.2011. The CIT(A) further

observed that as the assessee had claimed the expenditure incurred on Linkside building as a capital expenditure in its original return of income, therefore, there was no basis for characterising the same as the concealed income of the assessee. The CIT(A) was further persuaded to be in agreement with the claim of the assessee that as the moot issue involved in the case was as regards characterisation of the expenditure incurred by the assessee as revenue or capital in nature, therefore, on the said count no penalty could justifiably have been imposed in the hands of the assessee. It was observed by the CIT(A) that as the assessee had clearly reflected the details of expenses in its records, therefore, it could safely be concluded that the assessee had not concealed the particulars of its income. The CIT(A) taking cognizance of the fact that the assessee should have brought the fact as regards filing of the original return of income to the notice of the A.O during the course of the assessment proceedings, however observed that the same was a *bonafide* mistake on the part of the assessee. The CIT(A) on the basis of his aforesaid observations concluded that in the backdrop of the facts of the case the assessee was not liable to be visited with penalty under Sec. 271(1)(c).

5. The revenue being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The Id. Departmental Representative (for short 'D.R') taking us through the facts of the case, submitted that as the assessee by claiming the capital expenditure incurred in respect of Linkside building as a revenue expenditure, had suppressed its income, therefore, the A.O had rightly imposed penalty under Sec. 271(1)(c). It was submitted by the Id. D.R that the assessee in the present case had not voluntarily filed its return of income under Sec. 139 of the Act. Per Contra, the Id. Authorized Representative (for short 'A.R') for the assessee relied on the order of the CIT(A). The Id.

A.R further assailing the validity of the penalty imposed by the A.O, submitted that as the penalty proceedings were initiated by the A.O for furnishing of inaccurate particulars of income, but the penalty under Sec. 271(1)(c) was imposed for concealment of the particulars of income, therefore, the same even otherwise on the said count was not sustainable in the eyes of law. The ld. A.R further submitted that as the A.O had failed to strike off the irrelevant default in the 'Show cause' notice (for short 'SCN') issued to the assessee, therefore, the assessee remained unaware of the default for which it was called upon to show cause as to why penalty under Sec. 271(1)(c) may not be imposed in its hands. The ld. A.R in order to drive home his aforesaid contention took us through the notice issued by the A.O under Sec. 274 r.w.s 271(1)(c) of the Act, dated 19.03.2015, which revealed that the A.O had failed to strike off the irrelevant default in the show cause notice. The ld. A.R taking support of the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)** submitted that as the assumption of jurisdiction by the A.O suffered from a material defect, therefore, the penalty imposed by the A.O under Sec. 271(1)(c) on the said count itself could not be sustained.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present case had been sought to adjudicate the validity of the penalty imposed in the hands of the assessee under Sec. 271(1)(c). We have given a thoughtful consideration to the issue before us and find that it remains as a matter of fact that in the notice issued under Sec. 274 r.w.s. 271, dated 19.03.2015, the A.O had failed to strike off the irrelevant default. We would now test the validity of the aforesaid

notice and the jurisdiction emerging there from in the backdrop of the aforesaid facts. We are not oblivious of the fact that the A.O. is vested with the powers to levy penalty in the hands of the assessee under Sec. 271(1)(c) of the Act, if in the course of the proceedings, he is satisfied that any person has either 'concealed his income' or 'furnished inaccurate particulars of his income'. We are of the considered view that both of the aforesaid two defaults contemplated in Sec. 271(1)(c) operate in their exclusive independent fields and are neither interchangeable nor overlapping in nature. We are of a strong conviction that as penalty proceedings are in the nature of *quasi criminal* proceedings, therefore, the assessee as a matter of statutory right is supposed to know the exact charge he had to face. The non striking off the irrelevant charge in the show cause notice not only reflects the non application of mind by the A.O, but rather, the same would seriously defeat the very purpose of giving an opportunity of hearing to the assessee as contemplated under Sec. 274. We find that the distinction between the said two defaults had been appreciated at length by the **Hon'ble Supreme Court** in its judgments passed in the case of **Dilip & Shroff Vs. Jt. CIT (2007) 210 CTR (SC) 228** and **T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC)**, wherein the **Hon'ble Apex Court** had concluded that the two expressions namely 'concealment of particulars of income' and 'furnishing of inaccurate of particulars of income' have different connotation. The Hon'ble Apex Court being of the view that the non-striking off the irrelevant limb in the notice clearly reveals a non-application of mind by the A.O, held as under:-

"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 has furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing reliance on 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. Vs. CIT (2000) 2 SCC 718].

7. We have given a thoughtful consideration to the contentions of the authorized representatives before us and find that a similar issue had come up before the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)**, wherein the **Hon'ble High Court** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** had concluded that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings had been initiated, viz. 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same had to held as bad in law. The 'Special Leave Petition' (SLP) filed by the revenue against the aforesaid order of the Hon'ble Karnataka High Court had thereafter been dismissed by the **Hon'ble Supreme Court** in **CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)**. We further find that a similar view had also been taken by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017)(Bom)**.

8. We find that the issue involved in the present case is squarely covered by the order of a coordinate bench of **ITAT, Mumbai Bench 'B', Mumbai** in the case of **Meherjee Cassinath Holdings Vs. ACIT, Circle-4(2), Mumbai (ITA No. 2555/Mum/2012)**, dated **28.04.2017**, wherein the Tribunal after deliberating on the aforesaid judicial pronouncements had concluded that as the non striking off

the irrelevant charge in the notice clearly reflects the non application of mind by the A.O, therefore, the order passed under Sec. 271(1)(c) in the backdrop of the said jurisdictional defect would be rendered as invalid and *void ab initio*. The Tribunal in its aforesaid order in the case of **Meherjee Cassinath Holdings Pvt. Ltd. (supra)** had 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 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 some 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 circumstance 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 (Born.) 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 Laiji (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”.

We being of the considered view that as the issue involved in the present case is squarely covered by the aforesaid order of the coordinate bench of the Tribunal in the case of *Meherjee Cassinath Pvt. Ltd.(supra)* and is no more *res integra* in light of the aforesaid judicial pronouncements, therefore, respectfully follow the same. We thus in the backdrop of our aforesaid observations conclude that the A.O had wrongly assumed jurisdiction and imposed penalty under Sec. 271(1)(c) in the hands of the assessee.

9. We have further deliberated on the observations recorded by the CIT(A) on merits of the case and are persuaded to be in agreement with the same. We find ourselves to be in agreement with the view taken by the CIT(A) that now when the only valid return of income was filed by the assessee as on 31.03.2011, therefore, the A.O could have

imposed penalty only by pitting the income assessed vide order dated 19.03.2015, as in comparison to the income returned by the assessee in its return of income filed on 31.03.2011. We find that as observed by the CIT(A), that as the assessee had claimed the expenditure incurred on Linkside building as a capital expenditure in its original return of income, therefore, there was no basis for characterising the same as the concealed income of the assessee. We are further of the considered view that as the assessee had duly disclosed the expenditure incurred on Linkside building in its return of income, therefore, merely for the reason that the said expenditure was claimed as a revenue expenditure would not justify imposition of penalty under Sec. 271(1)(c), for the reason that the same was held by the A.O to be in the nature as that of a capital expenditure. We find ourselves to be in agreement with the view taken by the CIT(A) that the issue as to whether an expenditure incurred by the assessee on the Linkside building was a revenue expenditure or in the nature as that of a capital expenditure was in itself a debatable issue, therefore, merely for the reason that the view taken by the assessee did not find favour with the A.O would not justify imposition of penalty under Sec. 271(1)(c) in the hands of the assessee. We find that the aforesaid issue is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)**, wherein it was held as under:

“It was, therefore, reiterated before us that the AO had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished

all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under s. 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by AO for any reason, the assessee will invite penalty under s. 271(1)(c). That is clearly not the intendment of the legislature.”

We thus finding ourselves to be in agreement with the view taken by the CIT(A), thus are of the considered view that in the backdrop of the facts of the case no penalty under Sec. 271(1)(c) could also be sustained on merits in the case of the assessee.

10. We thus in terms of our aforesaid observations uphold the order of the CIT(A) and sustain the quashing of penalty imposed by the A.O under Sec. 271(1)(c) in terms of our aforesaid observations.

11. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 07.02.2018

Sd/-

Sd/-

(Rajendra)

(Ravish Sood)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 07.02.2018

Ps. Rohit Kumar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai