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

ITA No. 3767/Mum/2016
(**निर्धारण वर्ष** / Assessment Year:2011-12)

Sachin Manohar Deshmukh Man Sneh Bungalow, P.K. Road, Deshmukhwadi Complex Mulund, (W), Mumbai-400080	**बनाम**/ Vs.	ACIT-10(2), Aayakar Bhavan, New Marine Lines, Mumbai- 400020
स्थायी लेखा सं./जीआइआर सं./PAN No. AAHPD1129L		
(अपीलार्थी /**Appellant)**	**:**	(प्रत्यर्थी / **Respondent)**

अपीलार्थी की ओर से / **Appellant by**	:	Shri Paresh Saparia, A.R
प्रत्यर्थी की ओर से/**Respondent by**	:	Ms. Pooja Swaroop, D.R

सुनवाई की तारीख / **Date of Hearing**	:	08.01.2018
घोषणा की तारीख / **Date of Pronouncement**	:	23.03.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-22, Mumbai, dated 11.03.2016, which in itself arises from the order passed by the A.O under Sec. 271(1)(c) of the Income tax Act, 1961 (for short 'Act'), dated 26.09.2014. The assessee had raised before us the following grounds of appeal:-

"1. CONFIRMATION OF PENALTY LEVIED U/S 271(1)(c) OF THE I.T. ACT, 1961 OF RS. 12,14,140/-

1. *The Learned CIT(A) erred in confirming penalty u/s 271(l)(c) of the I.T. Act of Rs. 12,14,140/- being @ 100% of tax on disallowance of interest expenses u/s 57 of Rs.39,29,247/-.*
2. *The Learned CIT(A) ought not to have confirmed penalty u/s 271(1)(c) of the I.T. Act of Rs. 12,14,140/-.*
3. *The penalty confirmed u/s 271(1)(c) of Rs. 12,14,140/- requires to be deleted.*

The appellant craves leave to add amend, alter or modify the ground or grounds of appeal before the hearing."

The assessee had further assailed before us the validity of the penalty imposed under Sec. 271(1)(c) by raising the following additional grounds of appeal:

"II. INITIATION OF PENALTY U/S 271(1)(c) IS BAD IN LAW:

1. *The initiation of penalty u/s 271(1)(c) under both the limb for 'furnishing of inaccurate particulars of income' and 'concealment of income' is bad in law.*
2. *The penalty order u/s 271(1)(c) is bad in law in so far as it levied under both the limb i.e. for 'furnishing of inaccurate particulars of income' and 'concealment of income'*
3. *The levy of penalty u/s 271(1)(c) is bad in law and requires to be cancelled."*

The ld. Departmental representative (for short 'D.R') strongly objected to the admission of the aforesaid additional grounds of appeal raised by the assessee. We however find that as the assessee by raising the aforesaid additional grounds of appeal had only sought an adjudication of a legal issue based on the facts already available on record, therefore, keeping in view the judgment of the **Hon'ble Supreme Court** in the case of **National Thermal Power Company ltd. Vs. CIT (1998) 229 ITR 383 (SC)**, reject the objection raised by the revenue and admit the additional grounds of appeal raised by the assessee.

2. Briefly stated, the facts of the case are that the assessee had filed his return of income for A.Y 2011-12 on 22.03.2012, declaring total income of Rs.2,15,02,683/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. The case of the assessee was thereafter taken up for scrutiny assessment under Sec. 143(2).

3. During the course of the assessment proceedings the A.O observed that though the assessee owned two house properties, viz. one at Bhandup and the other at Village: Pawna, Near Lonavala, but however, had not offered the 'Annual Lettable Value' (for short 'ALV') of the said respective properties for tax in his 'return of income' for the year under consideration. The assessee on being called upon to put forth an explanation, submitted that as neither of the said properties were let out, therefore, inadvertently the deemed 'ALV' of the respective properties had remained omitted on his part to be reflected in the 'return of income'. However, the assessee meeting out the aforesaid omission offered the deemed 'ALV' at Rs. 84,000/- (after claiming deduction of Rs. 36,000/- under Sec. 24(a) of the Act), which was accepted by the A.O who made an addition of the aforesaid amount of Rs. 84,000/- to the total income of the assessee under the head 'Income from house property'.

4. The A.O while framing the assessment observed that though the assessee had earned income from other sources, but however, had in his return of income shown loss from 'other sources' of Rs. 37,55,217/-. The A.O after perusing the computation of income of the assessee observed that the assessee had claimed net loss of Rs. 39,29,243/- on account of interest paid to parties, which was adjusted by him against the interest income from bank and NSC of Rs. 1,72,014/. It was further observed by the A.O that the balance loss of

Rs. 37,55,217/- [i.e Rs. 39,29,243/- (-) Rs. 1,72,014/-] was adjusted by the assessee against his income from business. The A.O called upon the assessee to justify the allowability of excess claim of deduction under Sec. 57 on the basis of supporting documentary evidence. The assessee in his reply submitted that he had during the year under consideration raised an interest bearing loan from M/s Laxmi Corporation on which interest of Rs.76,84,062/- was paid. The assessee claimed that the aforesaid interest bearing borrowed funds were utilized by him for giving loans to certain parties from whom interest of Rs. 45,94,819/- was received. It was thus the claim of the assessee that as there was a clear nexus between the loan taken from M/s Laxmi Corporation and the interest bearing loans given to the parties, therefore, the interest paid to M/s Laxmi Corporation was allowable as an expense under Sec. 57(iii) of the Act. However, the assessee neither furnished with the A.O the details as regards the amount of loan taken from M/s Laxmi Corporation nor the aggregate of the amounts which were advanced to the parties. The A.O after deliberating on the aforesaid claim of deduction raised by the assessee observed that as the interest paid by him was found to be more than the interest received on the amounts advanced, therefore, his contention that there was a direct nexus of the borrowed funds and the interest income received on the amounts advanced to the parties was not fully tenable. The A.O in the backdrop of the aforesaid state of affairs held a strong conviction that the entire borrowed funds were not utilized by the assessee for the purpose of advancing of interest bearing loans to group companies and firms. Further, it was observed by the A.O that his aforesaid view was also supported by the fact that the assessee had not furnished details as regards the exact amount of funds which were borrowed by him from Laxmi Corporation on which interest was paid and the funds advanced to the concerns from whom

interest had been received. The A.O on the basis of his aforesaid deliberations concluded that in the absence of any clinching evidence to prove the fact that the interest expenses were incurred wholly and exclusively for the purpose of earning of the income from other sources, the deduction of Rs. 39,29,243/- claimed by the assessee under Sec. 57(iii) could not be allowed.

5. The A.O while framing the assessment vide his order dated 05.03.2014 also initiated penalty proceedings under Sec. 271(1)(c) in respect of both of the aforesaid additions/disallowances for furnishing inaccurate particulars and concealment of income. The assessee accepted the aforesaid addition/disallowance made by the A.O and did not carry the matter in further appeal before the CIT(A).

6. The A.O after the culmination of the assessment order issued a 'Show cause' notice (for short 'SCN') under Sec. 274 r.w. Sec. 271(1)(c) of even date, i.e. 05.03.2014, calling upon the assessee to explain as to why penalty for concealment of the particulars of income or furnishing of inaccurate particulars of income may not be imposed on him. It was submitted by the assessee that as he had furnished complete details as regards the interest received and interest paid on the borrowed funds, therefore, no penalty under Sec.271(1)(c) on rejection of his claim for deduction under Sec. 57(iii) was liable to be imposed. However, the A.O not persuaded to be in agreement with the aforesaid explanation of the assessee imposed penalty of Rs.12,14,140/- under Sec. 271(1)(c) for furnishing of inaccurate particulars of income as regards his claim of deduction of Rs.39,29,247/- under Sec. 57(iii) of the Act.

7. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the facts of the case observed

that the assessee who had borrowed funds of Rs.11 crores from M/s Laxmi Coporation had however utilized only an amount of Rs.2.75 crores for earning of income from other sources. It was observed by the CIT(A) that though only part of the borrowed funds were utilized by the assessee for earning of the interest income, but however, the deduction was wrongly claimed in respect of the interest expenditure on the entire amount of the borrowed funds of Rs.11 crores. The CIT(A) observed that as the assessee could neither establish a nexus between the loan of Rs.11 crores taken from M/s Laxmi Corporation and the amounts advanced to the parties, nor substantiate his entitlement towards claim of deduction of the entire amount of interest expenditure of Rs.76,84,062/- paid to M/s Laxmi Corporation, therefore, his claim of deduction of the entire interest expenditure on the funds borrowed from M/s Laxmi Corporation as an expense under Sec.57(iii) was rightly declined by the A.O. The CIT(A) further observed that as the assessee had utilized only an amount of Rs.2.75 crore out of the borrowed funds of Rs.11 crore, therefore, the raising of claim of deduction under Sec. 57(iii) of the entire amount of interest of Rs.76,84,062/- paid to M/s Laxmi Corporation clearly lacked *bonafide* on his part. The CIT(A) held a conviction that though the fact as regards only part utilization of the interest bearing borrowed funds was in full knowledge of the assessee at the time of filing of the return of income, therefore, the claim of deduction of interest paid of Rs.39,24,243/- in excess of the interest received on the amounts advanced clearly brought the case of the assessee within the sweep of Clause (B) of *Explanation 1* to Sec. 271(1)(c) of the Act. The CIT(A) on the basis of his aforesaid observations after distinguishing the case laws relied upon by the assessee upheld the penalty of Rs.12,14,140/- imposed by the A.O under Sec. 271(1)(c).

8. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. A.R submitted that the A.O while disallowing the deduction claimed by the assessee under Sec. 57(iii) of Rs.39,29,243/- had initiated penalty proceedings under Sec.271(1)(c) for furnishing of inaccurate particulars of income and concealment of income. It was submitted by the Ld. A.R that though the A.O had thereafter vide his notice issued under Sec. 274 r.w. Sec. 271(1)(c) of the Act, dated 05.03.2014 directed the assessee to show cause as to why penalty under Sec. 271(1)(c) may not be imposed on him, but however, as the default for which the penalty was sought to be imposed was not specifically pointed out in the said 'Show cause' notice, therefore, the assessee remained oblivious of the charge for which he was being tried upon for. The ld. A.R vehemently submitted that as the assessee was not put to notice in clear terms of the default/defaults for which he was called upon to show cause as to why penalty under Sec. 271(1)(c) may not be imposed on him, therefore, there was no occasion for him to defend his case and establish that no penalty under the aforesaid statutory provision was called for in his hands. The ld. A.R submitted that the A.O dispensing with the statutory requirement of putting the assessee to notice as regards the default/defaults for which penalty was sought to be imposed on him, had thereafter vide his order dated 26.09.2014 levied a penalty of Rs.12,14,140/- under Sec. 271(1)(c) for furnishing of inaccurate particulars of income. It was thus the contention of the ld. A.R that as the specific default/defaults for which the A.O sought to impose penalty in the hands of the assessee had not been earmarked and pointed out by the A.O in the 'Show cause' notice, therefore, the assessee had remained unaware of the default/defaults for which he was called upon to explain as to why penalty may not be imposed in his hands. The ld. A.R submitted that as the penalty had been

imposed in the hands of the assessee for furnishing of inaccurate particulars of income, without clearly putting him to notice as regards the default/defaults for which he was called upon to put forth an explanation in his defence, therefore, the penalty could not be sustained and was liable to be vacated. The ld. A.R in support of his contention relied on the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. S.S. A. Emerald Meadows (2016) 242 Taxman 180 (SC).** The ld. A.R further took support of the judgments of the **Hon'ble High Court of Bombay** in the case of (i) **CIT Vs. Mrs. Piedade Perincherry (ITA No. 1310 of 2014; dt. 10.01.2017)** and **Commissioner of Income-tax-II Vs**. **Shri Samson Perinchery (ITA No. 1154 of 2014; dt. 05.01.2017).** The ld. A.R further took support of a recent order of the coordinate bench of the Tribunal, viz. **ITAT, Agra** in the case of **Sachin Arora Vs. ITO-3(4), Mathura (ITA No. 118/Agr/2015; dt. 19.12.2017).** Per contra, the ld. A.R relied on the orders of the lower authorities.

9. We have heard the Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall herein first advert to and adjudicate upon the validity of the penalty imposed by the A.O under Sec. 271(1)(c) in the backdrop of the contentions advanced by the ld. A.R in support of his additional grounds of appeal. We have perused the 'Show cause' notice, dated 05.03.2014 issued by the A.O under Sec. 274 r.w.s. 271(1)(c), which reads as under:

> "*Pen P/-*
> *2013-14* -
>
> *Form –I.T.N.S -29*
>
> *Whereas in the course of proceedings before me for the assessment year 2011-12 it appears to me that you:-*

**have without reasonable cause failed to furnish me return of income which you were required to furnish by way of a notice given under section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/148 of the Income-tax Act, 1961. No................................dated ....or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.*

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

**You are hereby requested to appear before me at Aaykar Bhavan, Room No. 433, 11:00 A.M on ...or before Fifteen days of the receipt of this notice and show cause why an order imposing a penalty on you should not be made under section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorised representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271(1)(c).*

Sd//-

Place : Mumbai *(Rupesh Aggarwal)*

Date : 05/03/2014 *DY. Commissioner of Income-tax-10(2)*
Mumbai"

We find substantial force in the contention of the ld. A.R that as the aforesaid 'Show cause' notice was issued by the A.O in the standard proforma, viz. 'Form I.T.N.S-29' without clearly and specifically pointing out the default/defaults, therefore, it can safely be concluded that the assessee was never informed of the default/defaults as regards which he was called upon to put forth an explanation as to why penalty under Sec. 271(1)(c) may not be imposed on him. We are of the considered view that as both of the two defaults contemplated in Sec. 271(1)(c), viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults which operate in their independent and exclusive fields and are neither overlapping in nature nor interchangeable, therefore, if the A.O sought to impose penalty on the assessee as regards either or both of the said defaults, he remained under a statutory obligation to have

intimated to the assessee as regards the specific default/defaults for which he was being called upon to show cause as to why penalty under Sec. 271(1)(c) of the Act may not be imposed in his hands. We however find that the 'Show cause' notice issued in the present case by the A.O under Sec. 274 r.w. Sec. 271(1)(c), dated 05.03.2014, which had purposively been reproduced by us hereinabove in order to fortify our observation that the same does not reveal any application of mind on the part of the A.O, clearly fails to satisfy the aforesaid statutory requirement. We find that the A.O had merely issued the 'Show cause' notice in the standard proforma without pointing out the default/defaults for which the assessee was being proceeded against, which we are of the considered view blatantly fails the statutory obligation cast upon the A.O of fairly putting the assessee to notice as regards the default/defaults for which penalty under Sec.271(1)(c) was sought to be imposed on the assessee. We are of the considered view that the very purpose of affording a reasonable opportunity of being heard to the assessee before imposing a penalty contemplated in Chapter XXI of the Act, as required per the mandate of Sec. 274(1), which reads as under:

> *" 274(1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard."*

, would not only be frustrated, but rather, as a matter of fact would be rendered nugatory or redundant if the assessee who is sought to be subject to the rigors of the quasi criminal proceedings contemplated under Sec. 271(1)(c) is not conveyed in clear terms the specific default/defaults for which he is being called upon to explain as to why penalty under the said statutory provision may not be imposed on him. We may herein observe that the indispensable requirement on the part of the A.O to put the assessee to notice as regards the specific

charge contemplated under the aforesaid statutory provision, i.e 'concealment of income' or 'furnishing of inaccurate particulars of income' or both of them, is not merely an idle formality, but rather, is a statutory obligation cast upon him, which we are afraid had not been discharged in the present case as required under the law. We find that though the A.O while framing the assessment had recorded his satisfaction that the penalty proceedings were separately being initiated for furnishing inaccurate particulars of income and concealment of income, but however, by pointing out in the 'Show cause' notice that the assessee appears to have concealed the particulars of his income <u>or</u> furnished inaccurate particulars of such income, had thus failed to come forth with a clear and a specific charge for which the assessee was being called upon to explain as to why penalty may not be imposed on him under Sec. 271(1)(c). We are of the considered view that the blatant failure on the part of the A.O to specifically and clearly put the assessee to notice as regards the default/defaults for which penalty was sought to be imposed clearly militates against the mandate of affording of a reasonable opportunity of being heard to the assessee as contemplated under Sec. 274(1) of the Act. We may herein observe that as held by the **Hon'ble Supreme Court** in its landmark judgment in the case of **Hindustan Steel Ltd. Vs. State of Orissa (1972) 83 ITR 26 (SC)** that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, therefore, not loosing sight of the said material observation of the Hon'ble Apex Court, it becomes all the more obligatory on the part of the A.O to fairly discharge his statutory duty of clearly putting the assessee to notice as regards the specific default/defaults for which penalty is sought to be imposed, so that he may be able to come forth with an explanation in his defense that no such penalty for the said default/defaults was called for in his case.

10. We would now test the validity of the aforesaid notice and the jurisdiction emerging therefrom in the backdrop of the judicial pronouncements on the issue under consideration. We are not oblivious of the fact that the A.O is vested with the powers to levy penalty under Sec. 271(1)(c) of the Act, if in the course of the proceedings he is satisfied that the assessee had either 'concealed his income' or 'furnished inaccurate particulars of his income'. 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 a statutory right is supposed to know the exact charge for which he is being put to notice for. The non specifying of the charge in the 'Show cause' notice not only reflects the non application of mind by the A.O, but rather, the same seriously defeats the very purpose of giving a reasonable opportunity of being heard to the assessee as contemplated under Sec. 274(1) of the Act. We find that the fine distinction between the said two defaults contemplated in Sec. 271(1)(c), viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' 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, had observed 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].*

We are of the considered view that now when as per the settled position of law as observed by us hereinabove, the two defaults, viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults, therefore, in case the A.O sought to have proceeded against the assessee for both of the said defaults, then it was obligatory on his part to have clearly specified his said intention in the 'Show cause' notice, which we find he had failed to do. The aforesaid failure on the part of the assessee cannot be characterised as merely a technical default as the same clearly divesting the assessee of the statutory right of an opportunity of being heard and defend his case, thus, has a material bearing on the validity of the jurisdiction assumed by the A.O for imposing penalty in the hands of the assessee.

11. We have given a thoughtful consideration to the issue before us, and are of the considered view that the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** has held 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, i.e whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same has to be held as bad in law. The **'Special Leave Petition'** (for short 'SLP') filed by the revenue against the aforesaid order of the **Hon'ble High Court of Karnataka** had 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 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).**

12. We find that as averred by the ld. A.R., the indispensable obligation on the part of the A.O to clearly put the assessee to notice of the charge under the aforesaid statutory provisions, viz. Sec. 271(1)(c) had been deliberated upon by a coordinate bench of the Tribunal, i.e ITAT "B" Bench, Mumbai in the case of **Meherjee Cassinath Holdings Private Limited Vs. ACIT, Circle-4(2), Mumbai [ITA No. 2555/Mum/2012; dated. 28.04.2017**, wherein the Tribunal in the backdrop of various judicial pronouncements had concluded that the failure to specify the charge in the 'Show cause' notice clearly reflects the non application of mind by the A.O and would resultantly render the order passed under Sec. 271(1)(c) in the backdrop of the said serious infirmity 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 of T. Ashok Pal, 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 some 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 0/lip 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/s27)4(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. Santa Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Honble 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 Dharnendra 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. 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 AG at the time of issuing notice. In the case of Lakhdir 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 lyer 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 AG 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 AG, 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 AG 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 AG 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. Santa 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".*

12. We have given a thoughtful consideration to the issue before us, and after deliberating on the facts are of the considered view that now when the A.O after recording his satisfaction had initiated the penalty proceedings in the body of the assessment order for furnishing inaccurate particulars and concealment of income, therefore, putting the assessee to notice and calling upon him to explain as to why penalty may not be imposed on him under Sec. 271(1)(c) for concealment of income or furnishing of inaccurate particulars of income, followed by imposing of penalty under Sec. 271(1)(c) in his hands for 'furnishing of inaccurate particulars of income', can in no way be construed as having fairly put the assessee to notice as regards the default/defaults for which penalty was sought to be imposed in his hands. We are of the considered view that a failure on the part of the A.O to clearly put the assessee to notice as regards the default/defaults for which penalty under Sec. 271(1)(c) is sought to be to be imposed on him, has to be visited with and accorded the same treatment as in a case where the A.O had failed to strike off the

irrelevant default in the 'Show cause' notice, because, in both the situations the assessee is not informed and rather is left guessing of the default/defaults for which he is being proceeded against for. We thus in the backdrop of our aforesaid observations are of a strong conviction that as the A.O had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the default/defaults for which he was being proceeded against, therefore, are of the considered view that the penalty under Sec. 271(1)(c) of Rs.12,14,140/- imposed by the A.O in clear violation of the mandate of Sec. 274(1) of the Act, cannot be sustained. We thus not able to persuade ourselves to subscribe to the imposition of penalty by the A.O, therefore, set aside the order of the CIT(A) who had upheld the same. The penalty of Rs.12,14,140/-imposed by the A.O under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

14. We may herein observe that as we have quashed the penalty in the backdrop of our aforesaid observations, therefore, we refrain from adverting to and adjudicating upon the contentions advanced by the ld. A.R as regards the sustainability of the penalty on merits, which thus is left open.

15. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 23.03.2018

Sd/-	Sd/-
(RAJENDRA) ACCOUNTANT MEMBER	(RAVISH SOOD) JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.03.2018
Ps. Rohit

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**