

**IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH "A"**

**BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER
AND SHRI LALIET KUMAR, JUDICIAL MEMBER**

ITA No.162/Bang/2014
(Asst. Year 2004-05)

Smt. Bhagyalakshmi,
W/o B Shreeramulu,
Vidyagiri, SB Colony,
Club Road, Near Kumaraswamy
Temple, Bellary. . Appellant

Vs.

The Dy. Commissioner of Income-tax,
Central Circle-1(3),
Bangalore. . Respondent
PAN - AJNPB 7530N.

Appellant by : Shri Lakshmi Narayan, Advocate
Respondent by : Shri C.H Sundar Rao, CIT

Date of Hearing : 23-3-2018
Date of Pronouncement : 28-3-2018

ORDER

PER SHRI JASON P BOAZ, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-VI, Bangalore dated 30/10/2013; upholding the orders of the DCIT, Central Circle-1(3), Bangalore dated 28/6/2010 levying penalty of Rs.18,00,000/- u/s

271(1)(c) of the Income-tax Act, 1961 (in short 'the Act') for asst. year 2004-05.

2.1 Aggrieved by the order of the CIT(A)-6, Bangalore dated 31/10/2013 for asst. year 2004-05 upholding the levy of penalty of Rs. 18 lakhs u/s 271(1)(c) of the Act, the assessee has preferred this appeal raising the following grounds:-

"1. The order of the learned Commissioner of Income Tax (Appeals) (CIT(A)) in upholding the levy of penalty of Rs. 18,00,000/- u/s. 271 (1) (c) of the Act is opposed to law, facts and circumstances of the case.

2. The learned IT(A) ought to have appreciated that there is neither concealment nor furnishing of inaccurate particular income by the appellate assessee and therefore, the penalty u/s 27 1(1) (c) could not have been imposed.

3. The learned CIT(A) ought to have appreciated that the explanation of the appellate assessee was bonafide and therefore, the penalty u/s 271(1) (c) could not have been imposed.

4. The learned CIT(A) ought to have appreciated when there was no seized materials contemplated u/s 132 in the case of the appellate assessee, there could not have been any assessment u/s 153C as per law

and therefore, the penalty u/s 271(1) (c) is not justified.

5. The learned CIT (A) ought to have appreciated when the income itself was not liable to be taxed u/s 153C in the absence of seized material, the penalty could not have been imposed.

6 The learned CIT(A) ought to have understood that there was no jurisdiction u/s 153C to justify the penalty u/s 271(1) (c).

7. The learned CIT(A) ought to have appreciated that explanation 5A u/s 271(1)(c) is not applicable to the assessee as it is applicable only to a person in whose case search was initiated u/s 132A of the act and therefore, there is neither concealment nor furnishing of inaccurate particulars of income.

The appellant craves leave to add modify, or delete any of the grounds before the commencement of the hearing for these and other written submission that may be furnished and also the arguments that may be advanced, the Honorable ITA T may be pleased to allow the appeal in the interest of equity and justice."

2.2 Subsequently, the assessee filed additional grounds No.8 which is extracted hereunder:-

"8. On the facts and circumstances of the case, the penalty levied on the appellant

ought to be quashed as neither in the notice issued nor in the assessment order, the specific change as to under which limb the penalty was to be levied is not specified.

It is prayed that this Hon'ble ITAT may be pleased to delete the penalty levied by the AO and confirmed by the CIT(A) in view of the grounds raised hereunder.”

2.3 In support of the additional ground raised (Supra) the assessee submitted that the said ground is a pure legal ground that goes to the root of the matter and can be decided on the basis of material already on the records. According to the assessee the omission to raise specific grounds to this effect was neither intentional nor deliberate and prayed that the additional ground raised be admitted for adjudication in the interest of equity and justice. In this regard reliance was placed on the decision of the Hon'ble Apex Court in the case of NTPC Ltd., Vs. CIT (229 ITR 383) (SC).

2.4 We have heard the rival contentions and perused and carefully considered the material on record and the legal precedents in this regard. In our view the legal issue in the additional ground raised (Supra) would go to the root of the matter and can be decided on the basis of material already on record. Following the ratio of the decision of the Hon'ble

Apex Court in the case of NTPC Ltd; (Supra), we admit the additional ground (Supra) for adjudication.

3 Ground No: 2

3.1 In this ground (Supra), the sum and substance of the assessee's contentions are that the penalty proceedings initiated by the AO for asst. year 2004-05 vide notice issued u/s 274 r.w.s 271 of the Act dated 31/12/2009 for levy of penalty u/s 271(1)(c) of the Act, is defective. In this regard the Id AR for the assessee has placed reliance on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (359 ITR 565) (Kar) and the rejection of the Revenue's SLP by the Hon'ble Apex Court in the case of SSAS Emerald Meadows in SLP: (CC 11485/2016) dated 5/8/2016. The Id AR also placed reliance on the decision of the co-ordinate bench of this Tribunal in the following cases of -

(1) C Ramaiah Reddy in ITA No.977/Bang/2017 dated 22/9/2017 and (ii) Arun Kumar in ITA No.117/Bang/2016 dated 16/12/2106 in support of the assessee's case. It is contended that in similar circumstances, as in the case on hand, the co-ordinate benches of this Tribunal have held that the penalty proceedings initiated on the basis of defective notice has to be cancelled.

3.2 Per contra, the Id DR for Revenue supported the orders of the authorities below. It was submitted that since the Id CIT(A) had not considered and decided the issue of defective notice u/s 274 r.w.s 271 of the Act for initiation of penalty proceedings u/s 271(1)(c) of the Act, therefore the matter requires to be sent back to the file of the

CIT(A) for adjudication of this ground. Reliance was placed on the decision of the co-ordinate bench in the case of Jaysons Infrastructure India Pvt. Ltd., in ITA No.997/Bang/2015.

3.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. At the outset we may mention that while the aforesaid issue of defective notice was not before the Id CIT(A), however, since the facts of the matter on this issue are apparent from the copy of the said notice issued u/s 274 r.w.s 271 of the Act dated 31/12/2009 (filed by the assessee at page 10 and 11 of paper book pages 1 to 11) and the judicial view of Courts and ITAT co-ordinate benches in the matter (Supra) in our view, no useful purpose would be served in restoring the matter to the file of the Id CIT(A) as prayed for by the Id DR for Revenue. We have perused the copy of the notice issued u/s 274 r.w.s 271 of the Act; dated 31/12/2009 and find that it reveals that the AO has not deleted the inappropriate words and parts in the relevant paragraph of the notice, whereby it is not clear as to which default has been committed by the assessee; i.e whether it is for furnishing of inaccurate particulars of income or concealing particulars of income that penalty u/s 271(1)(c) of the Act is sought to be levied.

3.3.2 The Hon'ble Karnataka High Court in the case of M/s Manjunatha Cotton & Ginning Factory in (359 ITR 565) (Kar) has held that a notice issued u/s 274 r.w.s 271 of the Act without specifying the nature of default; i.e; whether the notice is issued for

concealment of particulars of income or furnishing of inaccurate particulars of income; is invalid and the consequential penalty proceedings/order are also not valid. The relevant portion of the aforesaid judgment of the Hon'ble Karnataka High Court (Supra) at paras 59 to 61 are extracted hereunder:-

“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-I or in Explanation- l(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 oil 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(I)(c)

c/a not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form 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 tax liability. As the said provisions have to be held to be stand by 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 M4NU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO IvLARKETING reported in 171 Taxman 156, has held that penalty has to be clear as to the limb for which it is levied and the action 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."*

3.3.3 The aforesaid view taken by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (Supra) was followed by the Hon'ble Karnataka High Court in the case of SSAS Emerald Meadows in ITA No.380 of 2015 dated 23/11/2015; wherein the Hon'ble Court upheld the order of co-ordinate bench of this Tribunal, cancelling the penalty levied on the basis of the defective notice issued by the AO. Revenue's SLP filed against he said judgment of the Hon'ble High Court in the case of SSAS Emerald Meadows (Supra) has also been dismissed by the Hon'ble Apex Court in CC/1485/2016 dated 5/8/2016. In view of the aforesaid decisions of Hon'ble Karnataka High Court holding the ground (Supra), the decision cited by the ld DR would not come to Revenue's rescue.

3.3.4 Respectfully following the judgments of the Hon'ble Karnataka High Court in the cases of M/s Manjunatha Cotton & Ginning Factory (359 ITR 565(Kar) and SSAS Emerald Meadows in ITA No:380 of 2015 dated 23/11/2015, we hold that the notice issued by the AO u/s 274 r.w.s 271 of the Act dated 2/1/2014 for initiating penalty proceedings for asst. year 2011-12 is invalid and consequently, the penalty proceedings conducted in pursuance thereof, are also invalid and we therefore delete the penalty levied u/s 271(1)(c) of the Act for asst. year 2011-12. Consequently, the additional ground raised by the assessee at S.No. 8 (Supra) is allowed.

4. Since the very basis for levy of penalty u/s 271(1)(c) of the Act has been held by us to be invalid as discussed in paras 3.1 to 3.3.4 of this order (Supra), the other grounds of appeal at S.Nos. 1 to 7 raised on the merits of the levy of penalty u/s 271(1)(c) of the Act require no adjudication by us at this stage.

5. In the result, assessee's appeal for asst. year 2004-05 is allowed as indicated above.

Order pronounced in the open court on **28th March, 2018.**

Sd/-
(LALIET KUMAR)
JUDICIAL MEMBER

Sd/-
(JASON P BOAZ)
ACCOUNTANT MEMBER

Bangalore
Dated : 28/3/2018
Vms

Copy to :1. The Assessee
2. The Revenue
3.The CIT concerned.
4.The CIT(A) concerned.
5.DR
6.GF

By order

Sr. Private Secretary, ITAT, Bangalore.