

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

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.61/Kol/2017
Assessment Year :2008-09

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| M/s Expert Jewellers Pvt. Ltd., 9/12 Lal Bazar Street, Block-A, Kolkata-001 [PAN No.AABCE 9275 H] | V/s. | Income Tax Officer, Ward-5(2), Aayakar Bhawan, -7, Chowringhee Square, Kolkata-69 |
| अपीलार्थी /Appellant | .. | प्रत्यर्थी/Respondent |

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| अपीलार्थी की ओर से/By Appellant | Parnashree Banerjee, Advocate |
| प्रत्यर्थी की ओर से/By Respondent | Shri G. Hangshing CIT-DR |
| सुनवाई की तारीख/Date of Hearing | 28-02-2018 |
| घोषणा की तारीख/Date of Pronouncement | 04-04-2018 |

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-6, Kolkata dated 18.10.2016. Assessment was framed by ITO Ward-5(3), Kolkata u/s 143(3)/263/143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 26.09.2014 for assessment year 2008-09. The assessee has raised following grounds:-

- “1. That, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred and acted against the principal of natural justice in having passed the ex parte appellate order without affording adequate opportunity of being heard to the appellant and hence the same is liable to be quashed.*
- 2. That, the Ld. CIT(A) further erred in having presumed for alleged non-compliance of notices that the appellant did not appear to be interested in pursuing the appeal, leading to dismissal of all the grounds on the sole foundation that in his appellate order he has upheld the addition of Rs.9,69,00,702/- as unexplained cash credit, which has resulted in concealment of particulars of income.*

3. That, therefore, the Ld. CIT(A) has failed to consider that assessment and penalty proceedings are two independent and distinct proceedings and addition made in the assessment and sustained in appellate proceeding will not automatically attract penal provision u/s. 271(1)(c) of the Act and hence the penalty of Rs.3,29,36,579/- confirmed by him was arbitrary, uncalled for and not sustainable in law.
4. That, the Ld. CIT(A) illogically endorsed the A.O's wrong presumption that there was concealment of particulars of income and filing of inaccurate particulars thereof without appreciating that particulars about a thing which is concealed cannot be furnished, meaning thereby that either there can be concealment or there can be furnishing of inaccurate particulars and both the instances cannot occur simultaneously.
5. That, the Ld. CIT(A) erred in having upheld the penalty on the addition of Rs.9,69,00,702/- made by the A.O. under the deeming provisions of sec.68 and confirmed by the CIT(A) without appreciating that authentic evidences of share application money received by the assessee and identity & creditworthiness of the share applicants and genuineness of the transactions are already on record and hence there cannot be any concealment of particulars of income so as to attract penalty u/s.271(1)(c).
6. That, without any prejudice to the above, the Ld. CIT(A) fell in error in having alleged while upholding the penalty of Rs.3,29,36,579/- u/s.271(1)(c) of the Act that there was concealment of particulars of income in spite of the facts that the share transactions were through banking channel and the particulars of income & transactions are part of the audited accounts, which were duly furnished.
7. That, as the order of Ld. CIT(A) on the above issues suffers from illegality and is devoid of any merit, the same should be quashed and your appellant be given such relief as prayed for.
8. That, the appellant craves leave to amend, alter, modify, substitute, add to, abridge and or rescind any or all of the above grounds."

Parnashree Banerjee, Ld. Advocate appeared on behalf of assessee and Shri GD. Hangshing Ld. Departmental Representative appeared on behalf of Revenue.

2. In this appeal the assessee has challenged the order of CIT(A) whereby the CIT(A) confirmed the order of AO imposing penalty on the assessee u/s 271(1)(c) of the Income Tax Act, 1961 (Act).
3. The facts and circumstances under which penalty u/s 271(1)(c) of the Act was levied on the assessee by the AO are that the assessee is private limited company and engaged in the business of shares dealing & Investment. The Assessee filed return of income for A.Y. 2008-09 declaring total income of Rs.1,020/- only. In the course of assessment proceedings u/s 143(3) of the

Act, the AO added a sum of Rs.9,69,00,702/- only u/s 68 of the Act as unexplained cash credit. In respect of the aforesaid addition, made in the course of assessment proceedings the AO initiated penalty proceedings u/s 271(1)(c) of the Act. The AO imposed penalty holding that the assessee has violated the provision of law enumerated in Section 271(1)(c) of the Act by concealing particulars of income & furnishing inaccurate particulars of income and imposed penalty u/s 271(1)(c) of the Act.

Subsequently the Id. CIT(A) confirmed the order of AO.

Hence this appeal by the assessee is filed before the Tribunal.

4. The Id. Counsel for the assessee submitted before us that the show cause notice issued u/s 274 of the Act before 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 which is placed on record and perusal of the same reveals that AO has not struck out the irrelevant portion in the show cause notice. Therefore the show cause notice does not specify the charge against the assessee as to whether the charge is of concealment of particulars of income or furnishing of inaccurate particulars of income.

5. 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 for the assessee 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 Co-ordinate Bench of this Tribunal 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 for the Revenue before us placed reliance on several case laws as presented on the issue of whether “**tick mark**” not placed on the relevant space as provided in the Notice u/s. 274 of the Act , outlining the type of default, would constitute ground for rejection of satisfaction and levy of penalty u/s. 271(1)(c) of the Act. First, the judgment of Hon'ble jurisdictional High Court in the case of *Dr. Syamal Baran Mondal vs. CIT* (2011) CTR 631 (Cal) stated that “*section 271 nowhere mandates that recording of satisfaction about concealment of assessee's income must be in specific terms and word, satisfaction of AO must reflect from the order either with expressed words recorded by the AO himself or by his overt act and action.*”. The ITAT Mumbai Bench in the case of *Trishul Enterprises Vs. DCIT* (ITA No.384-385/Mum/2014 for AYs 2006-007 & 2007-08) dated 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) of the Act. the ITAT relied upon the judgment of

the Hon'ble Bombay High Court (Nagpur Bench) in the case of *M/s Maharaj Garge & Company vs. CIT* in its judgment dated 22.08.2017 has also 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.....*” It further observed that “16. *It is not in dispute that a reasonable opportunity of being heard in the matter as required by Section 274 of the said Act was given to the assessee before imposing the penalty by the I.T. Officer.*” Further, the ITAT Mumbai Bench in the case of *Earthmoving Equipment Services Corporation v.s DCIT 22(2) Mumbai (2017) 84 taxmann.com 51* opined that after perusing the ratio of the judgment 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. He further submitted that service of notice u/s. 274 for initiating penalty proceeding u/s. 271(1)(c) of the Act would constitute valid initiation of penalty proceedings and the case may be decided on merits. He vehemently relied on the order of Authorities Below.

6. 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.

7. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 04/04/2018

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 04/04/2018 कोलकाता ।

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

(Accountant Member)

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

1. अपीलार्थी/Appellant-M/s Expert Jewellers Pvt. Ltd., 9/12 Lal Bazar St. Block-A Kol-001
2. प्रत्यर्थी/Respondent-ITO Ward-5(3), Aayakar Bhawan, P-7, Chowringhee Sq. Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
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 ।