

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4055/Mum/2016
Assessment Year: 1997-98**

&

**ITA No. 4056/Mum/2016
Assessment Year: 1998-99**

N. Jamnadas & Co.,
16, Bank Street, Fort,
Mumbai-400001.

Vs.

The Deputy Commissioner of
Income Tax, Central Circle-
6(4), Room No. 1925, 19th floor
Air India Building Nariman
Point, Mumbai-400021.

PAN No. AACCFN8427G

(Appellant)

(Respondent)

Assessee by : Dr. Y.P. Trivedi, AR
Revenue by : Mr. Ram Tiwari, DR

Date of Hearing : 24/04/2018
Date of pronouncement: 27/04/2018

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-54, Mumbai [in short 'CIT(A)'] and arise out of the penalty order passed by the Assessing Officer (AO) u/s 271(1)(c) of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose

them off through a consolidated order for the sake of convenience. Facts being identical, we begin with the assessment year (AY) 1997-98.

2. The grounds of appeal raised by the assessee read as under:

- 1 The Ld. CIT (A) erred in confirming penalty under section 271(1)(c) of the Income tax Act, 1961 amounting to Rs.1,84,615/- levied by the Dy. CIT, Central Circle 39 vide his order dated 27.10.2011.
- 2 The appellant submits that it has filed full, true, correct and complete particulars of its income and has neither concealed any income nor filed any inaccurate particulars thereof and the Ld. CIT(A) erred in confirming penalty under section 271(1)(c) of the Income-tax Act, 1961.
- 3 The Ld. CIT(A) erred in confirming penalty levied on disallowance of sundry expenses amounting to Rs.18,46,151/- under section 37 (1) of the Income tax Act, 1961, even when all the requisite particulars of income and expenses were furnished along with the original return and the annual accounts. This amount of addition was reduced to 25% as decided by the Hon'ble ITAT vide their order dated 11.02,2011. The DCIT levied penalty on addition confirmed by the Hon'ble ITAT.
- 4 As regards expenses u/s 37 (1) the Ld. CIT (A) failed to appreciate that the claim for these expenses was made based on the fact that these expenses were incurred for and on behalf of clients / principals on whose behalf the appellant acted as agent and hence these expenses were not appellant's expenditure but that of the principals and same could not be disallowed.
- 5 The Ld. CIT (A) erred in the facts and circumstances of the case in not accepting appellant's contention that the ratio of judgement as in the case of APL (India) Pvt. Ltd. v/s DCIT (Mum), 96 ITD 227 was applicable in appellant's case and on the basis to consider above expenses of Rs.18,46,151/- as being incurred on behalf of the principals.
- 6 The Ld. CIT (A) erred in not appreciating that in similar cases, like APL (I) Pvt. Ltd. and New Dholera Shipping Co. no penalty proceedings were

either initiated or penalty levied on the same set of facts as this is only an estimation of the possible disallowance without the 100% finding that it is in violation of the law under section 37 (1) of the Income tax Act, 1961.

- 7 The Ld. CIT (A) failed to appreciate that no penalty proceedings were initiated or penalty levied in the Appellant's own case for subsequent years.
- 8 The Ld. CIT (A) ought to have appreciated that penalty proceedings are different and quasi-criminal in nature and hence, any addition / disallowance / surrender of any claim will not automatically follow concealment proceedings.
- 9 The appellant submits that the disallowance was finally confirmed by the Hon'ble ITAT only on an ad-hoc estimated basis by drawing certain assumptions / relying on probabilities and the learned Ld. CIT (A) failed to appreciate that the same cannot be a ground for confirming penalty under section 271(1)(c) of the Income-tax Act, 1961 for concealment of income / filing inaccurate particulars of such income.
- 10 The Ld. CIT(A) ought to have followed the ratio laid down by the Hon'ble Supreme Court in the case of CIT v. Reliance Petro Products P. Ltd. reported in 322 ITR 158 wherein it has been held very clearly that incorrect claim will not amount to concealment of particulars.

3. Also the assessee has filed an additional ground on 18.04.2018 submitting that:

1. The Ld. Assessing Officer as well as CIT(A) failed to appreciate that the notice dated 17.12.2007 issued by Assessing Officer u/s 274 r.w.s. 271 of the Income Tax Act, 1961 failed to strike off the irrelevant charge in the notice and hence the validity of the aforesaid notice and the jurisdiction emerging thereof is totally illegal and invalid in law.
2. The Ld. Assessing Officer as well as CIT(A) failed to appreciate that both the defaults contemplate in section 271(1)(c) of the Income Tax Act, 1961

operate in their exclusive independent fields and are neither interchangeable nor overlapping in nature and therefore, the assessee as a matter of statutory right is supposed to know the exact charge it had to face.

3. The appellant therefore submits that the non-striking off the irrelevant charge in the show cause notice not only reflects the non-application of mind by the Assessing Officer, but rather the same would seriously defeat the very purpose of giving reasonable opportunity of hearing to the appellant, as contemplated u/s 274 of the Income Tax Act, 1961 and hence violated the principles of natural justice.

3.1 As the additional ground raised by the assessee is a question of law and as the related facts are already on records, we, relying on the decision in *NTPC v. CIT* 229 ITR 383 (SC), allow the filing of the same.

4. Briefly stated, the assessee filed its return of income for the AY 1997-98 on 20.10.1997 declaring total income of Rs.8,25,395/-. The assessee is engaged in the business of clearing, forwarding and cargo handling. The AO completed the assessment u/s 143(3) on 27.03.2000 determining the total income at Rs.52,39,370/-. In appeal, the ITAT vide its order dated 11.02.2011 confirmed the disallowance of expenses in the form of 'speed money' to the extent of 25% relying on the decision in *APL (India) P. Ltd. v. DCIT* 96 ITD 227 (Mum).

In the penalty proceedings, in response to the show cause notice issued by the AO, the assessee filed a reply which has been extracted at page 2-5 of the penalty order dated 27.10.2011. However, the AO was not convinced with the explanation furnished and held that (i) the nature of expenses was not disclosed in the bills produced by the assessee, (ii) no vouchers were produced, (iii) the assessee had not

disclosed true nature of expenses to its clients and therefore, the assessee's claim that its clients were aware of such illegal payments made was incorrect.

Thus the AO held that the assessee's claim of such expenses which ultimately resulted in wrong claim amounts to concealment of income and also furnishing of inaccurate particulars of such income within the meaning of the provisions of section 271(1)(c). Accordingly, the AO relying on the decision in *UOI v. Dharmendra Textile Processors & Ors* (2008) 306 ITR 277 (SC), imposed a minimum penalty of Rs.1,84,615/- on the wrong claim of such expenses of Rs.4,61,538/- (25% of Rs.18,46,151/-).

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held that on identical issue, in the case of the assessee's sister concern i.e. M/s J.M. Baxi & Co., the ITAT upheld the levy of penalty as reported in *M/s J.M. Baxi v. DCIT* 44 taxmann.com 140. The Ld. CIT(A) has reproduced the above order of the Tribunal at page 11-16 of his order dated 01.03.2016. Relying on the above order, the Ld. CIT(A) confirmed the penalty of Rs.1,84,615/- levied by the AO.

6. Before us, the Ld. counsel of the assessee files a Paper Book (P/B) containing (i) ITAT order dated 11.02.2011 for AY 1997-98 & 1998-99 in assessee's case, (ii) Statement showing position of penalty initiated u/s 271(1)(c) of the Income Tax Act, 1961 for various assessment years, (iii) ITAT order dated 16.06.2017 in the case of *PBA Infrastructure Ltd. v. ACIT, Central Circle 36, Mumbai* for AY 2004-05, 2006-07 and 2007-08

and (iv) ITAT order dated 22.05.2017 in the case of *Uttam Value Steels Ltd. v. ACIT, Central Circle 41, Mumbai* from AY 2007-08 to 2010-11.

The Ld. counsel submits that in the instant case the notice issued by the AO u/s 271(1)(c) r.w.s. 274 does not specify the limb of section 271(1)(c) for which penalty proceedings were initiated i.e. whether for 'concealment of income' or 'furnishing of inaccurate particulars of such income'. Relying on the decisions contained in the P/B, the Ld. counsel submits that in view of the decision in *CIT v. SSAs Emerald Meadows 73 taxmann.com 241 (Kar)*, *CIT v. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)* and *CIT v. Samson Perinchery (ITA No. 1154/2014) dated 05.01.2017 (Bom)*, the issue of such notice is bad in law.

7. On the other hand, the Ld. DR relies on the decision in *CIT v. Smt. Kaushalya & Ors. (1995) 216 ITR 660 (Bom)*, *M/s Maharaj Garage & Co. v. CIT (Income Tax Reference No. 21 of 2008) order dated 22.08.2017 of the Hon'ble Bombay High Court* and the order of the ITAT in the case of the appellant's sister concern *M/s J.M. Baxi & Co. (supra)*. The Ld. thus supports the order passed by the Ld. CIT(A).

8. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *Smt. Kaushalya & Ors. (supra)*, relied on by the Ld. DR, the Hon'ble Bombay High Court held:

"9. We will first take up the show-cause notice dated March 29, 1972, pertaining to the assessment years 1968-69 and 1969-70. The assessment

orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In this background, it could not be said that either there was non-application of mind by the Income-tax Officer or the so-called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of *CIT v. Mithila Motor's (P.) Ltd.* [1984] 149 ITR 751 (Patna) (head note):

‘Under section 274 of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings.’

In *M/s Maharaj Garage & Co.* (supra) relied on by the Ld. DR, the Hon'ble Bombay High Court at para 15 held:

“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 of asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice u/s 271(1)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice of the action of imposing penalty. We, therefore, do not find either any jurisdiction error or unjust exercise of power by the authority.”

The decision in *M/s J.M. Baxi & Co.* (supra) has been quoted at length by the Ld. CIT(A) at page 11-16 of his order dated 01.03.2016

8.1 In the instant case, in the order u/s 254 passed by the AO on 17.12.2007, the addition of Rs.18,46,151/- is reiterated and penalty notice u/s 274 r.w.s. 271(1)(c) is issued. In the order u/s 271(1)(c) r.w.s. 274 dated 27.10.2011 passed, the AO has held in concluding para that there is concealment of income, and also furnishing of inaccurate particulars of income on the part of the assessee.

Thus in the instant case, the AO has not only forgotten to specify the limb of section 271(1)(c) for which the penalty proceedings had been initiated, but also held at para 8 of his penalty order dated 27.10.2011 that:

“Having regard to the fact of the case and the above discussion, I hold that there is concealment of income, and also furnishing of inaccurate particulars of income on the part of the assessee and the amount of tax sought to be evaded is Rs.1,84,615/-. The assessee has clearly committed default within the meaning of provisions of section 271(1)(c) of the Act. I hold this case a fit case for levy of penalty u/s 271(1)(c) of the Act.”

It would be apposite to refer here to the decision in *Dilip N. Shroff v. JCIT* (2007) 210 CTR (SC) 228, wherein it has been held :

“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 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. Commissioner of Income Tax, Kerala State*, (2000) 2 SCC 718]”

In *CIT vs. Samson Perincherry* (ITA No. 953, 1097, 1154 & 1226 of 2014), the Hon’ble Bombay High Court held:

“Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/permit penalty being imposed for the order breach. This is more so, as an Assessee would respond to the

ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the assessee has no notice.”

As in the instant case, the AO has levied the penalty by holding that there is concealment of income and also furnishing of inaccurate particulars of income on the part of the assessee, following the ratio laid down in *Dilip N. Shroff* (supra) and *Samson Perincherry* (supra), we hold that the penalty proceedings initiated by the AO is bad in law. We thus set aside the order of the Ld. CIT(A) on the penalty of Rs.1,84,615/- imposed by the AO. We may herein observe that since the order of the Ld. CIT(A) has been set aside on the preliminary ground, therefore, the other grounds raised by the assessee on merits before us, having been rendered as academic, are thus not being dealt with.

9. Facts being identical, our decision for the AY 1997-98 applies *mutatis mutandis* to AY 1998-99.

10. In the result, the appeals are allowed.

Order pronounced in the open court on 27/04/2018.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER
Mumbai;
Dated: 27/04/2018
Rahul Sharma, Sr. P.S.

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai