IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA (SMC) BENCH: AGRA

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER

I.T.A No. 70/Agra/2017
(ASSESSMENT YEAR-2007-08)

Smt. Sarla Devi Agarwal, MS-9, ADA Colony, Ramghat Road, Aligarh. PAN No.AAOPA7748M **(Assessee)**	**Vs.**	ITO, Ward-1(1), Aligarh. **(Revenue)**

Assessee by	**Shri Pankaj Gargh, AR.**
Revenue by	**Shri Waseem Arshad, Sr.DR.**

Date of Hearing	**11.05.2018**
Date of Pronouncement	**18.05.2018**

ORDER

This is assessee's appeal for assessment year 2007-08 against the confirmation of penalty levied u/s 271(1)(c) of the IT Act. There is a delay in filing of the appeal. As per the application for condonation of delay, which is accompanied by an affidavit of the assessee, The CIT(A)'s order was not served on the assessee and the assessee filed application dated 16.12.2016 before the ld. CIT(A), for providing a certified copy of the CIT(A)'s order. The ld. CIT(A), vide letter dated 20.12.2016, informed the assessee that the order had been sent by registered post on 30.04.2015 along with this letter of the CIT(A). A copy of the

CIT(A)'s order was, however, sent. This was received by the assessee on 24.12.2016. The appeal was filed thereafter.

2. The contents of the application of delay show that the assessee was prevented by sufficient cause from filing the appeal in time. The appeal was filed on 20.02.2017, i.e., within two months of the date of receipt of the CIT(A)'s order by the assessee on 24.12.2016. Accordingly, the delay in filing the appeal is condoned.

3. The following grounds have been raised:

> *"1. Because the Ld. CIT(A) has wrongly and illegally confirmed the penalty imposed by the Assessing Officer u/s 271(l)(c) of the I. T. Act.*
>
> *2. Because the assessee duly discharged her onus of proving the cash credits to be genuine. The addition on account of negative cash balance was duly explained. In the quantum proceedings the Ld. CIT(A) has erred both on facts and in law in confirming the same.*
>
> *3. Because considering the facts of the case and the legal position, the Ld. CIT(A) should have deleted the penalty imposed u/s 271(l)(c) instead of confirming the same.*
>
> *4. Because Ld. CIT(A) while confirming the penalty has erred on facts in treating the quantum appeal to have been confirmed by Hon'ble ITAT Delhi whereas the quantum appeal is pending as on date before Hon'ble*

ITAT, Agra Bench. On this ground also the penalty confirmed by Ld. CIT(A) is wrong and bad in law.

5. *Because the penalty imposed by the Assessing Officer is after applying Explanation 1 to section 271(l)(c). Ld. CIT(A) has legally erred in confirming the penalty ignoring the fact that the Assessing Officer has not specifically mentioned whether Explanation 1 (A) is applicable or Explanation 1(B). Penalty u/s 271(1)(c) cannot be imposed by simply referring to Explanation 1.*

6. *Because even otherwise neither Explanation 1(A) is applicable nor Explanation 1(B) is applicable to the facts of the present case. Ld. CIT(A) should have deleted the penalty."*

4. The following additional grounds have also been raised:

"1. Because the penalty imposed u/s 271(l)(c) of the Income Tax Act and confirmed by Ld. CIT(A) is also wrong and bad in law as while initiating the penalty in the Assessment Order there is no specific satisfaction of the Assessing Officer that for which default the penalty has been initiated either for concealment of income or for furnishing inaccurate particulars of income.

2. *Because there is no specific satisfaction of the Assessing Officer while initiating the penalty is itself clear from the notices issued u/s 271(l)(c). In the first notice dated 21.12.2009 the initiation is for concealment of income. In*

the second notice dated 25.03.2011 it is mentioned "concealed the particulars of your income/furnished inaccurate particulars of such income.

In the third notice dated 30.05.2011 it is mentioned concealed the particulars of your income/ furnished inaccurate particulars of such income. The penalty has been imposed for furnishing inaccurate particulars of income and for concealment of income.

3. Because in the absence of specific satisfaction of the Assessing Officer the penalty imposed being bad in law and without jurisdiction deserves to be deleted."

5. The additional grounds raised concern a legal issue going to the root of the matter. They do not require any fresh material to be gone into. Accordingly, admitted.

6. The facts are that the AO had imposed penalty u/s 271(1)(c) of the Act at Rs.9,44,043/-on the ground that the additions made on 10.12.2009, of Rs.22,50,000/-being unexplained cash credits u/s 68 of the Act, Rs.2,35,096/- u/s 69 of the Act and Rs.2,42,933/- u/s 69C of the Act, were confirmed by the ld. CIT(Appeals), Ghaziabad vide order in Appeal No.48/2009-10/GZB-ALG, dated 21-02-2011.

7. The ld. Counsel for the assessee has contended that the penalty order dated 30.03.2012, as sustained by the ld. CIT(A), is void-ab-initio, as the notices issued

u/s 247 r.w.s. 271(1)(c) of the Act, dated 21.12.2009 (APB-7), 25.03.2011 (APB-8) and 30.05.2011 (APB-9), are not in conformity with the law.

8. As per the ld. DR, however, the notices are entirely in accordance with law.

9. The notice dated 21.12.2009 (APB-7) reads as follows:

> "When translated in English; In the hearing for A.Y. 2007-08, it appears to me that you have:
>
> x-1 concealed your income to quite an extent and you have furnished inaccurate particulars of your income.
>
> ✓ -2. You have not complied with the notices issued under sections 142(1)/143(2) of the Act,
>
> Therefore, kindly state the reason as to why penalty under sections 271(1)(B) and 271(1)(c) of the Act be not imposed on you……"

10. The notice dated 25.03.2011 (APB-8) is as under:

> *"Whereas in the course of the assessment proceedings before me for the Asstt. Year 2007-08, it was found that you have concealed the particulars of your income/furnished inaccurate particulars of such income.*
>
> *Therefore, you are hereby required to show cause as to why an order imposing a penalty on you should not be passed under section 271(1) (C) of the income-tax Act, 1961 in your case.*

The date is fixed for compliance in my office at Qadri Manzil, Marris Road, Aligarh on 11.04.2011 at 12.30 P.M."

11. The notice dated 30.05.2011 (APB-9) states:

"Whereas in the course of assessment proceedings u/s 143(3) of the I.T. Act 1961 for the A.Y. 2007-08, it has been found that you have concealed the particulars of your income furnished inaccurate particulars of such income. Therefore, you are hereby requested to appear before me personally or through an authorized representative at my office at Marris Road, Aiigarh on 09.062011 at 11:30 AM sharp and show cause as lo why an order imposing penalty on you should not be passed under section 271(1)(c) of the Income-tax, Act, 1961 in your case."

12. So, as per the first notice, the notice/ (s) under section/(s) 142(1)/143(2) of the Act was/were not complied with. According to the second and third notices, the assessee had concealed the particulars of his income/furnished inaccurate particulars of such income.

13. In the assessment order dated 10.12.2009, penalty proceedings u/s 271(1)(c) of the Act for concealment of income and for furnishing inaccurate particulars of income were initiated. By way of the penalty order dated 30.03.2012, the AO stated that 'I am satisfied that the assessee has furnished inaccurate particulars of income –sic her – income and has concealed the particulars of his –sic her –income within the Explanation-1 to the section 271(1)(c) of the Act, 1961 and I therefore,

hold him – sic her – liable for penalty u/s 271(1) (c) of the Act accordingly'. In the impugned order, the levy of penalty has been confirmed by holding (impugned order, page 18) as follows:

> *"On the basis of all the above case laws, which include the decision of the jurisdictional High Court also, I hold that in a case of unexplained unsecured loans/investment, burden is on the assessee to prove that there was no concealment of income or of true particulars. But, in the present case, the appellant has failed to adduce any satisfactory explanation in rebuttal of the fact that the impugned loans represented her unexplained money. In my firm view, the angle of concealment is more than established, and, therefore, I uphold the penalty of Rs.9,44,043/- Grounds of appeal Nos.1 to10 are dismissed."*

14. Heard. The matter, it is seen, is squarely covered by order dated 19.12.2017, passed by the Division Bench, in 'Sachin Arora vs. ITO', and other connected cases, in ITA No.118/Agra/2015, for A.Y. 2008-09, and other connected cases.

15. In 'Sachin Arora' (supra), the Bench has observed as follows:

> *"8. According to the ld. Counsel for the assessee, the notice, not being specific about the charge against the assessee, is void. The Counsel have, in their respective cases, relied on the following decisions:*

(i) "CIT vs. Manjunath Cotton and Ginning Factory", 359 ITR 565 (Kar).

(ii) "CIT vs. M/s Veerabhadrappa Sangappa & Co", ITA No. 5020/2009 (Kar).

(iii) "CIT vs. SSA Emerald Meadows", ITA No. 380/2015 (Kar).

(iv) "Dilip N. Shroff Vs. JCIT", 291 ITR 519 (SC).

(v) "Ashok Pai vs. CIT", 292 ITR 11 (SC).

(vi) "CIT vs. Reliance Petroproducts (P) Ltd.", 322 ITR 158 (SC).

(vii) "Uma Shankar Agarwal vs. DCIT", ITA No. 1831 to 1835/Kol/2015.

(viii) "Suvaprasanan Bhatacharya vs. ACIT", ITA No. 1303/Kol/2010. (Kol).

(ix) "SLK Properties vs. ITO", ITA No. 140/PN/2014. (x) "ACIT vs. Deepesh M. Panjwani", ITA No.6330/Mum/2012 & 5878/Mum/2012. (ITAT, Mum).

(xi) "CIT vs. Shri Chandrashekhran", ITA No.61/2009 (Kar).

(xii)"Sarita Milind Davare vs. ACIT", ITA No. 2187/Mum/2014.

(xiii)"Meherjee Cassinath Holdings P. Ltd. vs. ACIT", ITA No.2555/Mum/2012.

(xiv) "Rajeev Kumar Gupta vs. CIT", 123 ITR 907, (Allahabad).

(xv) "Ajay Kumar vs. ITO", ITA No. 53/Agra/2015. (xvi) "N.N. Subramania Iyer vs. UOI", 97 ITR 228 (Ker).

(xvii) "Uttam Value Steels Ltd. vs. ACIT", ITA No.3622 to 3625/Mum/2016.

(xviii) "Muninaga Reddy Vs. ACIT", 396 ITR 398 (Karn).

(xix) "Orbit Enterprises Vs. ITO", ITA Nos. 1596 & 1597/Mum/2014, Order dated 01.09.2017.

9. Per contra, the ld. DR has relied on:

(a) "CIT vs. S.V. Angidi Chettiar", 44 ITR 739 (SC).

(b) "Sanjay Kumar & Ajay Kumar vs. ITO, Agra", ITA Nos.53 & 54/Agra/2015, dated 19.05.2017.

(c) "Mak Data (P) Ltd. vs. CIT", Civil Appeal No.9772/2013 (SC).

(d) "Gujarat State Financial Services Ltd. vs. ACIT", in ITA Nos.2078/Ahd/2006 & 2526/Ahd/206.

(e) "M/s K.P. Madhusudananan vs. CIT", Civil Appeal No. 6465/2000 (SC).

(f) "CIT vs. Zoom Communications Pvt. Ltd.", ITA No.07/2010(Del) (H.C.).

(g) "CIT vs. HCIL Kalindee Arsspl", ITA No.480/2012, Delhi High Court.

(h) "Shyam Biri Works", 259 ITR 625 (All).

(i) "Sangam Enterprises vs. CIT", 288 ITR 396 (All).

(j) "Harish Hosiery Mart", ITAT, Ahmedabad.

(k) "CIT vs. Arcotech Ltd." (Formerly SKS Ltd. ITA No.71/2013, dated 12.09.2013. Delhi (H.C.).

(l) "B.A. Balasubramanian & Bros.", 20 Taxman 215 (Mad).

(m) "Earthmoving Equipment Service Corporation vs. DCIT" ITA No.6617/Mum/2014.

(n) "ACIT vs. Dr. Prakash Kanhaiyalal Kankariya", ITA No.1645/Pune/2013.

(o) "Madanlal Kishorilal vs. CIT", 197CTR (All) 144.

(p) "Muninaga Reddy" (supra).

(q) "Jaysons Infrastructure India P. Ltd. vs. ITO", ITA No. 997/Bang/2015.

(r) "CIT vs. Smt. Kaushalya Devi", 216 ITR 660 (Bom).

10. We have heard the parties and have perused the material on record. The issue is as to whether, as contended by the assessee, issuance of a notice under section 274 of the Act is a prerequisite sine qua non for the levy of concealment penalty u/s 271(1)(c), or whether it is not so, the initiation of penalty proceedings, as contained in or evincible from the assessment order amounting to sufficient notice to the assessee, as maintained by the Department. It is also up for adjudication as to whether, in case issuance of notice u/s 274 is to be taken as a mandatory statutory requirement before levy of penalty, if such a notice does not spell out the precise charge against the assessee, the very initiation of the penalty proceedings would not be liable to be struck down as null and void ab initio.

11. Let us consider the numerous case laws relied on respectively by the parties.

12. The case of "S.V. Angidi Chettiar" (supra) is not applicable. In the referred case, the issue under consideration pertained to a firm which had got dissolved. The contention of the assessee was that the ITO could not, in exercise of the power under section 28(1) of the IT Act, 1922, impose penalty. The Hon'ble High Court accepted the plea of the assessee. However, the Hon'ble Supreme Court reversed the judgment of the Hon'ble High Court by holding that assessment proceedings are liable to be continued against the firm as if it has not been dissolved. The Hon'ble Supreme Court concluded by holding that "in our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1) (c) upon the firm M/s S.V. Veerappan Chettiar & Co. after its dissolution". In the present case, however, the assessee is an individual and has raised no such plea as was raised therein.

13. Regarding 'Sanjay Kumar' & 'Ajay Kumar' (supra), as per the assessee, in both the referred cases, the ITAT, Agra Bench had quashed the penalty orders in ITA Nos. 53 &

54/Agra/2015 vide consolidated order dated 19.05.2017, following the judgment of 'Manjunatha Cotton' (supra) and after distinguishing the cases relied on by the Revenue, namely, 'Mak Data (P) Ltd.' (supra), 'K.P. Madhusudhanan' (supra), 'Zoom Communication Pvt. Ltd.' (supra) & 'S.V. Angidi Chettiar' (supra). This is not disputed.

14. In "Mak Data (P) Ltd." (supra), the Hon'ble Supreme Court has held that the AO has to satisfy himself as to whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner, or to reduce it into writing. In the case before us, the assessee has not raised the issue of satisfaction and, therefore, reliance on "Mak Data" (supra) by the Department is misplaced.

15. In "Gujarat State Finance Services Ltd. Vs ACIT- Circle-IV, Ahmedabad", in ITA No. 2078/Ahd/2006, the ground raised by the assessee for adjudication was as under:

"The learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that there was no satisfaction as regards concealment of income or furnishing of any inaccurate particulars while passing the assessment order. It is submitted

that in absence of such satisfaction penalty u/s 271(l)(c) cannot be levied. It is submitted that it be so held now."

16. This, again, is not the issue before us.

17. In "K.P. Madhusudanan" (supra), the Assessing Officer noted that the demand draft and telegraphic transfer were not entered by the assessee in its cash book on the dates on which the same were purchased and made. These are nowhere the facts of the present case.

18. In "Zoom Communication Pvt. Ltd." (supra), the facts of the case are that during assessment, it was noticed by the AO that in Schedule 9, relating to Administrative and other Expenses, forming part of the Profit & Loss Account, a sum of Rs. 1,21,49,861/- had been debited under the head "Equipment Written Off ". It was stated by the assessee that due to oversight, this amount was not added back in the Computation of Income and the same ought to have been adjusted in the Block of Assets. The aforesaid amount was added back to the income of the assessee, with its consent. It was further noticed that another sum of Rs. 1 Lakh had been paid under the head "Income Tax Paid", in the aforesaid Schedule relating to

Administrative and other Expenses. The assessee claimed that due to oversight, this amount was not added back in the Computation of Income. Hence, the Assessing Officer added this amount also to the income of the assessee. Penalty Proceedings were also initiated against the assessee. In appeal, it was held by the Hon'ble High Court that the assessee did not explain, either to the Income Tax Authorities, or to the Tribunal, as to in what circumstances and on account of whose mistake, the amounts claimed as deductions were not added while computing the income of the assessee company. The Hon'ble High Court further held that it could not lose sight of the fact that the assessee was a Company, which must be having professional assistance for computation of its income, and its accounts were compulsorily subjected to audit. It was observed that in the absence of any details from the assessee, such deductions could not have been left out while computing the income of the assessee Company and it could also not have escaped the attention of the auditors of the Company. Thus, peculiar to the attending facts therein, this case pertains to the explanation tendered by the assessee and the bonafides of such

explanation. As such, again, this matter does not further the cause of the Department.

19. In "HCIL Kalindee Arsspl" (supra), penalty under section 271(l)(c) imposed on disallowance made under section 80IA, which was deleted by the ITAT on the ground that the claim raised under section 80IA, as was disallowed in quantum proceedings, was certified to be correct by the Chartered Accountant, who furnished the prescribed certificate in Form No.10CCB. The Hon'ble High Court held that mere filing of Form issued by the Chartered Accountant in order to comply with a statutory procedural requirement will not absolve the assessee of its liability, if the act of claiming deduction is not bonafide. On the other hand, in the case under consideration, the assessee has not filed any such certificate, claimed no such deduction under section 80IA and seeks no such advantage. Therefore, the case is distinguishable on facts.

20. In the case of "Shyam Biri Works" (supra), the Hon'ble High Court has observed that though the AO must have satisfaction as required under section 273, it is not necessary for him to record that satisfaction in writing before initiating

penalty proceedings under section 273 of the Act. The case of the assessee before us, however, is not on the ground of non recording of satisfaction, but is on the ground of absence of clear charge/default mentioned in the penalty notice. The assessee's case is that on account of absence of a clear charge having been spelt out in the penalty notice, the notice is rendered void ab initio in view of section 274 of the Act.

21. "Sangam Enterprises" (supra) pertains to the applicability of Explanation 1 to section 271(1)(c). The Hon'ble High Court has held that the judgment of "CIT vs. Anwar Ali", 76 ITR 696 (S.C.) is no longer applicable. It has further been observed that after the insertion of Explanation 1 to section 271(1)(c) by the Taxation Laws Amendment Act 1975, if the explanation offered by the assessee regarding the additions is either found to be false, or remained unsubstantiated, the additions so made are deemed to be concealed income, and therefore, the penalty provisions are attracted. The case has no application to the points and controversy under question herein.

22. In the case of "Harish Hosiery Mart Vs ITO", in ITA No. 3009 (Ahd) 2007, the Bench concluded the appeal by holding that the assessee did not place any material before the authorities to show that the explanation of low G.P. during post survey period was bonafide.

23. The ITAT found that assessee did not discharge its onus and failed to prove its bonafideness and therefore, penalty was justified . No issue of Notice U/s 274 was subject matter of consideration before the ITAT and therefore, reliance placed is misplaced.

24. In the case of "Arco tech Ltd." (supra), the Hon'ble Delhi High Court has held that imposition of penalty was not justified and proper on the wrong claim of depreciation of Plant & Machinery, as the claim was debatable. No issue of notice u/s 274 was before the Hon'ble High Court for its consideration. The case of 'Manjunatha' (supra) was not even referred before the Hon'ble High Court.

25. In the case of "B.A. Balasubramaniam" (supra), no issue of validity of penalty notice was under consideration.

26. In the case of "Earthmoving Equipment Service Corporation" (supra), the penalty order was sustained by the ITAT on the ground that the AO therein had levied penalty after due application of mind, in as much as in the assessment order it was mentioned that penalty proceedings were being initiated for furnishing of inaccurate particulars of income and the penalty was finally levied on the same ground. Further the ITAT found, that mere non marking of the relevant clause in the notice is a curable defect, and the action of the revenue is rescued by the provisions of section 292BB of the Act, which cures minor defects in the various notices issued, provided that such notice, in substance and effect, was in conformity with the intent and purpose of the Act. Thus, the Bench concluded that penalty cannot be deleted on this ground. Before us, on the other hand, the question is that where in the assessment order, it is mentioned that penalty is initiated for a specific charge, but the notice accompanying the Assessment Order, issued under section 274, read with section 271(1)(c), by which initiation is formally and legally conveyed, mentions both of the charges, can the penalty be sustained and whether such a penalty notice

can be said to be not defective, the defect being minor in nature and so, curable under section 292BB of the Act.

27. Reliance on "Madan Lal Kishori Lal vs. CIT" (supra), wherein, the Hon'ble Allahabad High Court, following 'K.P. Madhusudanan' (supra), has held that Explanation-1 applies whether or not the Assessing Officer has invoked it in the order or in the notice. This judgment is not an authority for the issue under consideration before the Bench. The judgment explains the scope of Explanation-1 appended to section 271(1)(c) of the Act. It has been held that the onus of the assessee will not get discharged by furnishing an explanation without any further proof; that in Explanation-1 to section 271(1)(c), the onus is the assessee; that where the AO issues a notice to the assessee, he makes the assessee aware that the provisions thereof are to be used against him and these provisions include Explanation-1 to section 271(1)(c); that where the returned income is less than 80% of the assessed income, the Explanation is automatically attracted. In the case under consideration, however, the issue is not about the applicability or non-applicability of Explanation-1 to section 271(1)(c), the issue is regarding the validity and

legality of the notice. It is only when a valid notice is issued, that the question of considering the assessee's explanation/reply in the light of Explanation -1 would arise. The role of Explanation-1 is to put the initial burden on the assessee, which is rebuttable and once rebutted, the burden shifts to the Revenue to establish that the assessee has concealed his income.

28. In 'ACIT vs. Dr. Prakash Kanhaiyalal Kankariya' (supra), has been relied on for the proposition that if there is satisfaction of the AO in the assessment order, notice u/s 274 is immaterial. Here, it is seen that this decision has been rendered by the Pune Bench of the Tribunal, by following 'CIT vs. Smt. Kaushalya Devi', 216 ITR 660 (Bom) (supra), as against 'Manjunatha' (supra), which is a judgment of the Karnataka High Court. This is entirely in keeping with the judicial discipline which requires a Bench of the Tribunal to follow a decision handed down by its jurisdictional High Court. And so far as regards the Pune Bench of the ITAT, it is the Hon'ble Bombay High Court which is the jurisdictional High Court. It is trite that where coordinate Benches of two High Courts, neither

being a jurisdictional High Court, qua the assessee, hold different views on an issue, the view in favour of the assessee needs be followed.

29. 'Kaushalya Devi' (supra) stands considered in 'Meherjee Cassinath Holding (P) Limited' (supra), wherein, the revenue, in the face of the Judgement in the case of 'Manjunatha Cotton' (supra), after placing reliance on the Judgment of the Hon'ble Bombay High Court in the case of 'CIT vs. Smt. Kaushlaya & Ors' (supra), countered the assessee's submission of non application of mind by the AO, submitting that in the assessment order, the Assessing Officer had recorded that penalty was initiated for furnishing of inaccurate particulars of income; that therefore, the penalty notice could not be examined solely to see whether the AO had applied his mind or not. The Mumbai Tribunal, addressing this argument of the revenue, held that the Hon'ble Supreme Court, in the case of 'Dilip N. Shroff', had approved that the factum of non striking off of the irrelevant clause in the notice is reflective of non-application of mind by the Assessing Officer; and that such a proposition has been considered by the Hon'ble Bombay High

Court in the case of 'Shri Samson Perinchery' (supra). The Bench has further held that the observation of the AO in the assessment order and non-striking off the irrelevant clause in the notice clearly brings out the diffidence on part of the AO and there is no clear and crystallized charge being conveyed to the assessee u/s 271(1)(c) which has to be met by him, the observation of the AO in the assessment order alongside his action of non striking off the irrelevant clause in the notice was held be rendering the notice not complying with the principles of natural justice. The Bench thus deleted the penalty.

30. Again, a similar issue came up for consideration before the Mumbai ITAT in the case of 'Dr. Sarita Milind Davare Vs ACIT', in ITA No. 2187/Mum/2014 wherein, the DR that in the assessment order, the AO had clearly specified that penalty was initiated for concealment of income and placing reliance on the Hon'ble Bombay High Court's decision in the case of 'CIT Vs Kaushlaya Devi' 216 ITR 660, submitted that a mere mistake in the language used, or mere non-striking off of the inaccurate portion cannot by itself invalidate the notice.

31. The above argument of the Revenue was not accepted by the ITAT and after discussion of the Judgment delivered in the case of 'CIT Vs Kaushlaya Devi' (supra), the Bench held that a combined reading of 'Smt B. Kaushlaya & Ors' (supra) and the decision rendered by the 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 the notice.

32. That the illegality in the Notice cannot be saved by recourse to section 292BB of the Act, was held by the ITAT, Mumbai Bench in the case of 'Dr. Sarita Milind Davare Vs ACIT' (supra) wherein this plea was taken by the revenue before the ITAT to counter the ratio of 'Manjunatha' (supra), referring to the order passed by the Bangalore Bench in the case of 'Shri K. Prakash Shetty', wherein it was held that section 292BB would not come to the rescue of the revenue when the notice was not in substance and in conformity with, or according to the intent of the Act.

33. In the case of 'Rajeev Kumar Gupta Vs CIT', (supra), it has been held by the Hon'ble jurisdictional High Court that a

notice which does not intimate the assessee of the particular facts, on the basis of which notice the order is proposed to be passed, would not comply with the requirements of s. 274.

34. In "CIT vs. Manjunath Cotton and Ginning Factory", 359 ITR 565 (Kar). "Notice under section 274 should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law. 35. It has further been held that the assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

36. In "CIT vs. SSA Emerald Meadows", in ITA No. 380/2015 (Kar) it has been held as under:

"It is to be kept in mind that section 271(1)(c) is a penal provision and such a provision has to be strictly constructed.

Unless the case falls within the four corners of the said provision, penalty cannot be imposed." (Para-12).

37. In "Dilip N. Shroff Vs. JCIT", 291 ITR 519 (SC), it has been held that section 271(1)(c) of the Act is in two parts. Whereas the first part refers to concealment of income, the second part refers to furnishing of inaccurate particulars thereof. 'Concealment of income' and 'furnishing of inaccurate particulars' are different.

38. In "Ashok Pai vs. CIT", 292 ITR 11 (SC), the Hon'ble Supreme Court has held that:

"Concealment of income' and 'furnishing of inaccurate particulars' carry different connotations. Concealment refers to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi."(Para 22).

39. In "CIT vs. Reliance Petroproducts (P) Ltd.", 322 ITR 158 (SC), the Hon'ble Supreme Court has clarified as follows:

".....It was only on the point of mens rea that the judgment in 'Dilip N. Shroff v. Joint CIT' was upset. In Union of India v. 'Dharmendra Textile Processors' after quoting from section 271 extensively and also considering section 271(1) (c), the Court came to the conclusion that since section 271(1) (c) indicated the element of strict liability on the assessee for the

concealment or for giving inaccurate particulars while filing return, there was not necessity of mens rea. ……. The basic reason why decision in 'Dilip N Shroff v. Joint CIT' was overruled by this Court in 'Union of India v. Dharmendra Textile Processors' was that according to this Court the effect and difference between section 271(1) (c) and section 276C of the Act was lost sight of in the case of 'Dilip N Shroff v. Joint CIT'. However, it must be pointed out that in 'Union of India v. Dharmendra Textile processors', no fault was found with the reasoning in the decision in 'Dilip N. Shroff v. Joint CIT', where the court explained the meaning of the terms conceal and inaccurate. It was only the ultimate inference in 'Dilip N. Shroff v. Joint CIT' to the effect that mens rea was an essential ingredient for the penalty under section 271(1) (c) that the decision in 'Dilip N. Shroff v. Joint CIT' was overruled."

40. In "Uma Shankar Agarwal vs. DCIT" (supra), where the assessee therein challenged the legality of the penalty order on the ground of "No satisfaction" and "Show cause Notice without specific charge", the Tribunal, vide Order dated 20.01.2016, after due consideration of 'MAK Data (P) Ltd', which was relied on by the Department, held the penalty unsustainable in law.

41. In "Suvaprasanan Bhatacharya vs. ACIT" (supra), vide Order dated 06-11-2015, the Tribunal after considering 'Mak Data', (supra) deleted penalty levied under section 271(1)(c) on the ground of "No Satisfaction" recorded in the assessment order and the notice having been issued on both the charges without specifying the exact charge.

42. In "SLK Properties vs. ITO", (supra), vide Order dated 18.03.2016, after considering 'MAK Data (P) Ltd.', held the penalty order to be unsustainable in law, placing reliance on 'Manjunath Cotton' (supra).

43. In "ACIT vs. Deepesh M. Panjwani", (supra), while examining the validity of the penalty order in the light of the objection raised by the assessee regarding the validity of the penalty notice issued on the basis of both the charges, vide Order dated 18.03.2016, placing reliance on 'Manjunath Cotton & Ginning Factory' (supra) held penalty to be unsustainable in law.

44. In "CIT vs. Shri Chandrashekhran" (supra), the Tribunal held that:

"……..In fact, the order imposing penalty is contrary to law, declared by this court in the case of Commissioner of Income-

Tax and Another v. Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (Karn), in as much as, it is clear from the order that there is no direction to initiate penalty proceedings. In the aforesaid judgment, it was held that it is imperative that the assessment order contains a direction. The use of phrases like (a) penalty proceedings are being initiated separately, and (b) penalty proceedings under section 271(1)(c) are initiated separately, do not comply with the meaning of the word "direction" as contemplated even in the amended provisions of law. The direction should be clear and without any ambiguity. A direction by a statutory authority is in the nature of an order requiring positive compliance. When it is left to the option and discretion of the Income tax Officer whether or not take action, it cannot be described as a direction. It is settled law that in the absence of the existence of these conditions in the assessment order penalty proceedings could not be proceeded with. The proceedings which are initiated contrary to the said legal position are liable to be set aside. Therefore, the appellate Authority was justified in setting aside the order imposing penalty. Accordingly, the substantial question of law is answered in favour of the assessee and against the revenue. We do not find any merit in this appeal. Accordingly, the appeal is dismissed."

45. In "Ajay Kumar vs. ITO" (supra), vide order dated 19.05.2017, this Bench deleted penalty under similar circumstances.

46. In "N.N. Subramania Iyer vs. UOI" (supra), it was held as under:

"The penalty notice, Exhibit P-2, is illegal on the face of it. It is in a printed form, which comprehends all possible grounds on which a penalty can be imposed under section 18(1) of the Wealth-tax Act. The notice has not struck off any one of those grounds, and there is no indication for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. Even in the counter-affidavit filed by the second respondent, he has not stated for what specific violation he issued it. It is not that it would have saved his action. Apparently, Exhibit P-2 is a whimsical notice issued to an assessee without intending anything."

47. In 'Uttam Value Steels Ltd. vs. ACIT' (supra), vide order dated 22.05.2017, as relied on by the assessee, the Mumbai Tribunal has held, inter alia, as under:

" In the penalty notices so issued in respect of AYs-2007-08 to 2010- 11 274 r.w.s 271 of the Income Tax Act, 1961 dated January 6, 2014 the ITO did not specify as to whether the penalty was leviable for concealment of income or for furnishing inaccurate particulars thereof.";

that:

"The two charges for initiating the penalty operate on two different footing and under the penal provision the charge has

to be very specific and not vague. These charges are not to be reckoned as any casual remark, which can be interchanged by the AO at am- stage on his whims and fancies. It is not an error which is rectifiable or to be ignored, albeit it is a fatal error which vitiates the entire initiation itself. If charge itself is vague and not clear, then the onus cast upon the assessee under Explanation itself gets vitiated as assessee is precluded from a chance to give a specific rebuttal on that charge. It is a trite law that circumstances and facts for levy of penalty under both the grounds operate in a different fields. The courts have held that in the notice under section 274 r.w.s. 271, the AO has to specify the charge on which he intends to levy penalty. This aspect of the matter has been consistently reiterated by the Hon'ble High Courts from time to time.";

that:

"We found that Notice under section 271(l)(c) is issued on standard performa in which inappropriate words and paragraphs were neither struck off nor deleted. Reference is made to the copy of notice issued under section 274 r.w.s 271 of the Income Tax Act, 1961 on January 2, 2014 in respect of all the assessment years the copies of which are placed in the paper book. We found that the said notices have been issued on standard performa and in the notices the inappropriate words and paragraphs were neither struck off nor deleted. Thus, the assessing authority was not sure as to whether he had proceeded on the basis that the assessee had either concealed

its income or had furnished inaccurate particulars. Thus, the notices so issued are not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non-application of mind on the part of the assessing authority.";

and that:

"There can be no doubt that penalty u/s. 271(l)(c) of the Act is levied for concealing particulars of income or for furnishing inaccurate particulars of such Income, which are the two limbs of this provision. In other words, it is only when the authority invested with the requisite power is satisfied that either of the two events existed in a particular case that proceedings u/s. 271(l)(c) of the Act are initiated. This pre-requisite should invariably be evident from the notice issued u/s. 274 r.w.s. 271 of the Act, which is the jurisdictional notice, for visiting an assessee with the penal provision. The intent and purpose of this notice is to inform the assessee as to the specific charge for which he has been show caused so that he could furnish his reply without any confusion and to the point. In the present case, neither the assessee nor anyone else could make out as to whether the notice u/s. 274 r.w.s. 271 of the Act was issued for concealing the particulars of income or for furnishing inaccurate particulars of such income disabling it to meet with the case of the Assessing Officer. There are a atena of judgments highlighting the necessity for identifying the charge for which the assessee is being visited and in all those

decisions, Hon'ble Courts have repeatedly held that where the jurisdictional notice is vague, similar to the one in the present case, the consequent levy cannot be sustained."

48. 'Muninaga Reddy vs. ACIT'(supra) holds that:

"As per the above referred decision of this court, the notice would have to specifically state the ground mentioned in section 271(1) (c) of the Act namely as to whether it is for the concealment of income or furnishing incorrect particulars of the income the said penalty proceedings is being initiated. The second aspect is that, as held by this court, sending of printed form wherein the grounds mentioned in section 271 of the Act would not satisfy the requirement of law. The third aspect for which the observations are made by this court is that, the assessee should know the ground which he has to meet specifically otherwise the principles of natural justice would be violated and consequently, no penalty could be imposed on the assessee , if there is no specific ground mentioned in the notice. No specific ground is mentioned in the subject notice and resultantly the principles of natural justice could be said as being violated.

In our view, if the observations made by this court in the above referred decision and more particularly clauses (p), (q) and (r) are considered, it was a case wherein the decision of this court would apply and it cannot be said that the decision of this court in the case of CIT v. Manjunatha Cotton and Ginning Factory reported in [2013] 359 ITR 565 (Karn) would not apply.

In view of the aforesaid discussion, if the decision of this court in the case of CIT v. Manjunatha Cotton and Ginning Factory reported in [2013] 359 ITR 565 (Karn) is considered, the resultant effect would be that the notice in question issued under section 271(l)(c) for levy of penalty and consequently the penalty imposed, both would be unsustainable and cannot stand in the eye of law."

49. Thus, 'Muninaga Reddy' (supra), following 'Manjunatha'(supra), unambiguously lays down that the notice u/s 274 must specifically state the ground for which penalty is being levied, i.e., whether for concealment of income, or for furnishing inaccurate particulars.

50. Reliance has been placed by the ld. DR on 'Muninaga Reddy' (supra), for the proposition that the Hon'ble High Court has stated that it is a question of fact and not a question of law and therefore, according to the ld. DR, it will not constitute a binding precedent.

51. In this connection, it is seen that in 'Muninaga Reddy' (supra), the Hon'ble High Court first framed a question of law for its consideration and passed judgment holding the appeal of the Revenue to be meritless and refused to the answer the question of law, holding that the issue is already covered by the

decision of the same Court in the case of 'Manjunatha', (supra). Further, in Para-5 of the judgment, it is also mentioned as to what was considered to be a fact, which included notice. As such, there is no force in this argument of the Department.

52. Therefore, where in the assessment order, penalty proceedings have been initiated mentioning a specific charge and in the accompanying notice, the assessee is called upon to furnish his explanation in respect of both the charges, the notice obviously suffers from either non-application of mind or diffidence on the part of the AO.

53. From all the above, it is quite clear, that 'suppressio vari', or 'suppression of truth', which has, in section 271(1)(c) of the IT Act, as its equivalent, 'concealment of income', and 'suggestio falsi', literally, 'suggesting or stating a falsehood', which manifests itself as 'furnishing of inaccurate particulars thereof', are two distinctly separate charges; that leveling of either of these charges has to be explicitly brought to the notice/knowledge of the assessee, sans which, the assessee, under a nebulous notice containing both these charges, is rendered incapable of defending the charge per se. This would

be in utter violation of the principles of natural justice, such notice being null and void ab initio. It is also pertinent to note at this juncture that the notice u/s 274 is a mandatory statutory notice without which, the initiation of penalty proceedings would be nugatory, nay, non est in the eye of the law. Therefore, the argument of the Department that where initiation of penalty in the Assessment Order, the levy in the penalty order and the confirmation of such penalty in the first appellate order are on one and the same charge, the contents of the notice u/s 274 are of no effect, the assessee having been duly apprised of the specific charge against them, is not acceptable in law. This argument has specifically been met by the Mumbai ITAT in 'Orbit Enterprises vs. ITO', (supra) in ITA Nos. 1596 & 1597/Mum/2014, vide order dated 01.09.2017. Accordingly, this argument is rejected.

54. Therefore, in view of the foregoing discussion, particularly following 'Manjunatha' (supra), we hold that the notices under challenge are not in conformity with the law and they are void ab initio. Accordingly, the said notices and all

proceedings based thereon, culminating in the impugned orders, are quashed."

16. In the present case, as in the cases in 'Sachin Arora' (supra), the notices are nebulous and, therefore, they are not valid in law. The other decisions cited are also not applicable on facts. Accordingly, these notices are quashed. Nothing further survives for adjudication, nor was anything else argued.

17. In the result, the appeal is allowed.

Order pronounced in the open court on 18/05/2018.

Sd/-

(A.D. JAIN)
JUDICIAL MEMBER

Dated 18/05/2018
AKV
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR