IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

Before: **Shri P. M. Jagtap, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 53/Kol/2017 A.Y 2011-12

I.T.O, Ward 13(1) Kolkata [Appellant]	**Vs.**	**M/s. Elcon Estate P.Ltd** PAN: AABCE 5473D [Respondent]

For the Appellant : Shri Sallong Yaden, Addl.CIT, ld.DR
For the Respondent : Shri Sunil Surana, FCA, ld.AR

Date of hearing : 20-06-2018
Date of pronouncement : 20-06-2018

ORDER

Shri S.S.Viswanethra Ravi, JM:

This appeal by the Revenue is directed against the order of the Commissioner of Income Tax (Appeals), 5, Kolkata dt. 31-10-2016 for the A.Y 2011-12, wherein he directed the AO to delete the penalty of Rs. 28,92,379/- imposed u/s. 271(1)(c) of the Act by the AO.

2. The ld.DR submits that the arguments and written submissions filed before the Tribunal on 27-11-2017 in the case of Jeetmal Choraria in ITA No. 956/Kol/2016 for the A.Y 2010-11 may be adopted in this case and relied on the order of the AO.

3. In view of above, he prayed to allow the grounds raised in appeal of revenue and confirm the penalty imposed by the AO u/s. 271(1)(c) of the Act.

4. On the other hand, the ld.AR submits that the issue raised in the appeal is covered in favour of assessee by the decision of the Hon'ble Supreme Court in the case of SSA's Emerald Meadows. He also submits that the AO imposed penalty on defective notice dt. 28-02-2014 issued u/s. 274 r.w.s 271(1)(c) of the Act, copy of the same

is on record and the imposition of penalty on defective notice is not maintainable. In support of his contention, he placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs SSA'S Emerald Meadows *supra* in ITA No. 380 of 2015 dated 23.11.2015 which was approved by the Hon'ble Supreme Court by dismissal of Special Leave Petition (SLP) filed by the Revenue in CC No. 11485/2016 dated 5.8.2016. In view of above, he prayed to dismiss the appeal of revenue.

5. We have heard the rival submissions and considered the written submissions and the case laws relied upon by the Ld.DR. We find the same set of written submissions were filed before the Coordinate Bench of this Tribunal in the case of Jeetmal Choraria in ITA 956/KOL/16 for AY 2010-11, wherein the Coordinate Bench elaborately discussed the facts in the decisions as relied upon by the Ld.DR and principle laid down by the respective Hon'ble High Courts at Bombay and Patna and preferred to follow the ratio laid down by the Hon'ble High Court of Karnataka in the case of Manjunatha Cotton and Ginning Factory supra by taking support of the established principle enunciated by the Hon'ble Supreme Court in the case of **Vegetable Products ltd** reported in 88 ITR 192 (SC). We are in agreement with the reasoning in its order dt:01-12-2017 of Coordinate Bench in the case of Jeetmal Choraria and the same is reproduced for ready reference:

> *"7. The learned DR submitted that the Hon'ble Calcutta High Court in the case of Dr.Syamal Baran Mondal Vs. CIT (2011) 244 CTR 631 (Cal) has taken a view that Sec.271 does not mandate that the recording of satisfaction about concealment of income must be in specific terms and words and that satisfaction of AO must reflect from the order either with expressed words recorded by the AO or by his overt act and action. In our view this decision is on the question of recording satisfaction and not in the context of specific charge in the mandatory show cause notice u/s.274 of the Act. Therefore reference to this decision, in our view is not of any help to the plea of the Revenue before us.*
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> *8. The learned DR relied on three decisions of Mumbai ITAT viz., (i) Dhanraj Mills Pvt. Ltd. Vs. ACIT ITA No.3830 & 3833/Mum/2009 dated 21.3.2017; (ii) Earthmoving Equipment Service Corporation Vs. DCIT 22(2), Mumbai, (2017) 84 taxmann.com 51 (iii) Mahesh M.Gandhi Vs. ACIT Vs. ACIT ITA No.2976/Mum/2016 dated 27.2.2017. Reliance was placed on two decisions of the Hon'ble Bombay High Court viz., (i) CIT Vs. Kaushalya 216 ITR 660(Bom) and (ii) M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017. This decision was referred to in the written note given by the learned DR. This is an unreported decision and a copy of the*

same was not furnished. However a gist of the ratio laid down in the decision has been given in the written note filed before us.

9. In the case of CIT Vs. Kaushalya (supra), the Hon'ble Bombay High Court held that 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 ITAT Mumbai Bench in the case of Dhanraj Mills Pvt.Ltd. (supra) followed the decision rendered by the Jurisdictional Hon'ble Bombay High court in the case of Kaushalya (supra) and chose not to follow decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra). Reliance was also placed by the ITAT Mumbai in this decision on the decision of Hon'ble Patna High court in the case of CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna) wherein it was held that 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.

10. In the case of Earthmoving Equipment Service Corporation (supra), the ITAT Mumbai did not follow the decision rendered in the case of Manjunatha Cotton & Ginning Factory (supra) for the reason that penalty in that case was deleted for so many reasons and not solely on the basis of defect in show cause notice u/s.274 of the Act. This is not factually correct. One of the parties before the group of Assessees before the Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) was an Assessee by name M/s.Veerabhadrappa Sangappa & Co., in ITA NO.5020 OF 2009 which was an appeal by the revenue. The Tribunal held that on perusal of the notice issued under Section 271(1)(c) of the Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is 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. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. In the appeal, the said finding was set-aside. But addition was sustained on a new ground, that is under valuation of closing stock. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the Appellate Authority, the initiated penal proceedings, nolonger exists. If the Appellate Authority had initiated penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside by its order dated 9th April, 2009. Aggrieved by the said order, the revenue filed appeal before High Court. The Hon'ble High Court framed the following question of law in the said appeal viz., 1. Whether the notice issued under Section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal? 2. Whether the proceedings initiated by the Assessing Authority was legal and valid? The Hon'ble Karnataka High Court held in the negative and against the revenue on both the questions. Therefore the decision rendered by the ITAT Mumbai in the case of Earthmoving Equipment Service Corporation (supra) is of no assistance to the plea of the revenue before us.

11. In the case of M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017 referred to in the written note given by the learned DR, which is an unreported decision and a copy of the same was not furnished, the same proposition as was laid down by the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra) appears to have been reiterated, as is evident from the extracts furnished in the written note furnished by the learned DR before us.

12. In the case of Trishul Enterprises ITA No.384 & 385/Mum/2014, the Mumbai Bench of ITAT followed the decision of the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra).

13. In the case of Mahesh M.Gandhi (supra) the Mumbai ITAT the ITAT held that the decision of the Hon'ble Karnataka High Court in the case Manjunatha Cotton & Ginning (supra) will not be applicable to the facts of that case because the AO in the assessment order while initiating penalty proceedings has held that the Assessee had concealed particulars of income and merely because in the show cause notice u/s.274 of the Act, there is no mention whether the proceedings are for furnishing inaccurate particulars or concealing particulars of income, that will not vitiate the penalty proceedings. In the present case there is no whispher in the order of assessment on this aspect. We have pointed out this aspect in the earlier part of this order. Hence, this decision will not be of any assistance to the plea of the revenue before us. Even otherwise this decision does not follow the ratio laid down by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) in as much as the ratio laid down in the said case was only with reference to show cause notice u/s.274 of the Act. The Hon'ble Court did not lay down a proposition that the defect in the show cause notice will stand cured if the intention of the charge u/s.271(1) (c) is discernible from a reading of the Assessment order in which the penalty was initiated.

14. From the aforesaid discussion it can be seen that the line of reasoning of the Hon'ble Bombay High Court and the Hon'ble Patna High Court is that 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 Tribunal Benches at Mumbai and Patna being subordinate to the Hon'ble Bombay High Court and Patna High Court are bound to follow the aforesaid view. The Tribunal Benchs at Bangalore have to follow the decision of the Hon'ble Karnataka High Court. As far as benches of Tribunal in other jurisdictions are concerned, there are two views on the issue, one in favour of the Assessee rendered by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) and other of the Hon'ble Bombay High Court in the case of Smt.Kaushalya. It is settled legal position that where two views are available on an issue, the view favourable to the Assessee has to be followed. We therefore prefer to follow the view expressed by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra).

15. 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 ld. 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.

6. We find that the notice dt. 28-02-2014 issued u/s 274 r.w.s 271 of the Act does not specify the charge of offence committed by the assessee viz whether had concealed the particulars of income or had furnished inaccurate particulars of income. Hence the said notice is to be held as defective.

7. We find that the Revenue had preferred a SLP before the Hon'ble Supreme Court against this judgment which was dismissed in CC No. 11485/2016 dated 5.8.2016 by observing as under:-

UPON hearing the counsel, the Court made the following ORDER
Delay condoned.
We do not find any merit in this petition. The special leave petition is , accordingly dismissed.
Pending application, if any, stands disposed of.

8. Respectfully following the aforesaid judicial precedents, we cancel the penalty of Rs. 28,92,379/- imposed by the AO U/Sec.271(1)(c) of the Act. Accordingly, the ground(s) raised by the revenue in the appeal for the A.Y under consideration are dismissed.

9. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 20-06-2018

Sd/-	Sd/-
P. M. Jagtap	**S.S. Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dated : 20-06-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Revenue: The Income Tax Officer, Ward 13(1), 9th Floor, 110 Shanti Pally, Aaykar Bhawan (Poorva), Kolkata-107.
2. Respondent/Assessee :M/s.Elcon Estate Pvt. Ltd. P-3 New CIT Road, Bowbazar, Kolkata-73.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order, Sr.PS/H.O.O
ITAT Kolkata