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

[Before Hon'ble Sri A. T. Varkey, JM & Dr. Arjun Lal Saini, AM]

I.T.A No.1391/Kol/2016
Assessment Year : 2011-12

DCIT, Circle-10(2), Kolkata	-vs.-	M/s. Vivada Chemicals Pvt. Ltd. [PAN : AAACV 8688 C]
(Appellant)		(Respondent)

For the Appellant : Shri A. Bhattacharjee, Addl. CIT
For the Respondent : Shri Ankit Jalan, Ld. AR

Date of Hearing : 03.07.2018
Date of Pronouncement : 11.07.2018.

ORDER

Per Dr. A.L. Saini, AM

This is an appeal by the Revenue against the order dated 02.05.2016 of Commissioner of Income Tax (Appeals)-4, Kolkata relating to Assessment Year 2011-12.

2. In this appeal, the Revenue has challenged the order of CIT(A) whereby the CIT(A) deleted the penalty u/s 271(1)(c) of the Income Tax Act, 1961 ('Act') imposed by the A.O of Rs.12,29,800/-.

3. The facts and circumstances under which penalty u/s 271(1)(c) of the Act was imposed on the assessee by the AO are as follows :-

The assessee is an amalgamated company. The assessee had shown sale consideration of land of Rs.45,00,000/- in its original ITR as well as the revised ITR. As per the copy of deed of conveyance furnished by the assessee wherein the value adopted for the purpose of stamp duty was Rs.1,06,49,000/-. The A.O noted that as per the provisions of section 50C of the Income Tax Act the value adopted by the

stamp valuation authority for the purpose of stamp duty should have been treated the full sale consideration of the land for computing long term capital gain u/s 48 of the Act. The assessee was confronted with this fact and subsequently the assessee filed a revised computation showing the sale consideration of land in question at Rs.1,06,49,000/- instead of Rs.45,00,000/-. Therefore, the A.O initiated penalty proceedings u/s 271(1)(c) of the Act on 30.01.2014 for furnishing inaccurate particulars of income under the head 'long term capital gain'.

4. In the penalty proceedings, the assessee submitted that the value of land adopted for stamp duty valuation was not available at the time of filing of Income Tax Return. The assessee also explained that the addition on account of long term capital gain made by the A.O was illogical and as he filed revised computation of income and offered tax. However, the A.O rejected the plea of the assessee and imposed penalty which was equal to 100% of the tax sought to be evaded amounting to Rs.12,29,800/- [(i.e. Rs.1,06,49,000 - Rs.45,00,000) × 20% (Tax evasion)].

5. Aggrieved with the addition, the assessee filed an appeal before the ld. CIT(A). The ld. CIT(A) held that there was no question of any concealment of income as the assessee filed revised computation disclosing additional income towards capital gains, therefore, it was not tantamount to detection of concealment of income u/s 271(1)(c) of the Act by the A.O. Therefore, the ld. CIT(A) deleted the impugned penalty imposed by the A.O. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us.

6. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to the order dated 1st December, 2017, in ITA No.956/Kol/2016, in the case of Jeetmal Choraria, passed by the Division Bench of this Tribunal for the

Assessment Year 2010-11, whereby the penalty under section 271(1) (c) of the Act was deleted based on the defective notice.

7. Learned Departmental Representative did not have much to say but he nevertheless relied upon the order of the Assessing officer.

8. We see no reasons to take any other view of the matter than the view so taken by the Division Bench of this Tribunal vide order dated 1st December, 2017 (supra), In this order, the Tribunal has inter alia observed as follows:

> *"5. The ld. 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 before us and perusal of the same reveals that AO has not struck out the irrelevant portion in the show cause notice and 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. The same is reproduced for the purpose of ready reference:*
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> *"Have concealed the particulars of your income or …… furnished inaccurate particulars of such income."*
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> *6. The ld. 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 ld. 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 ld. Counsel 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 CIT vs 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 ITAT 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.

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.

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 whisper 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.

16. In the result the appeal of the assessee is allowed."

9. As the issue is squarely covered in favour of the assessee by the decision of the coordinate bench, in the case of Jeetmal Choraria, in ITA No. 956/Kol/2016 (supra) and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings, and the ld CIT(A) has allowed the appeal of the assessee, we find no reason to interfere in the said order of the ld CIT(A) and the same is hereby upheld. Therefore, we uphold the order of CIT(A).

10. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the Court on 11.07.2018.

Sd/-	Sd/-
[A. T. Varkey]	[A. L. Saini]
Judicial Member	Accountant Member

Dated :11.07.2018.
[RS, Sr. PS]

Copy of the order forwarded to:

1. DCIT, Circle-10(2), Kolkata, P-7, Chowringhee Square, 3rd Floor, Kolkata – 700 069.
2. M/s. Vivada Chemicals Pvt. Ltd., 14, Southern Avenue, Kolkata – 700 026.
3. C.I.T. (A)- , Kolkata.
4. C.I.T.- , Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Sr. Private Secretary
Head of Office/DDO, ITAT, Kolkata Benches