

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.416/PUN/2015

निर्धारण वर्ष / Assessment Year : 2009-10

Aquatech Systems (Asia) Pvt. Ltd.,
MZSK & Associates,
Chartered Accountants,
Level 3, Riverside Business Bay,
Plot No. : 84, Wellesley Road,
Near RTO, Pune – 411001

PAN : AABCA1850C

.....अपीलार्थी / Appellant

बनाम / V/s.

The Dy. Commissioner of Income Tax,
Circle – 1(1), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Neelesh Khandelwal
Revenue by : Dr. Vivek Aggarwal

सुनवाई की तारीख / Date of Hearing : 22-03-2018

घोषणा की तारीख / Date of Pronouncement : 18-06-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-1, Pune dated 31-12-2014 confirming levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2009-10.

2. The brief facts of the case as emanating from records are: The assessee company is engaged in the business of providing engineering software and technical design services with the use of Computer Aided Design (CAD), Computer Aided Manufacturing (CAM), advanced pressure vessel design and product data system design techniques to its Associated Enterprises (AEs). The assessment order was passed u/s. 143(3) r.w.s. 144C(3) of the Act on 19-03-2013 making addition on account of transfer pricing adjustment Rs.5,92,560/- and disallowance of warranty provision Rs.41,22,637/-. The Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act for concealing particulars of income or furnishing inaccurate particulars of income in respect of above mentioned additions / disallowances. Thereafter, the Assessing Officer levied penalty vide order dated 30-09-2013 in respect of both the additions for furnishing inaccurate particulars of income.

Aggrieved by the order levying penalty, the assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) rejected the contentions of assessee and upheld the order levying penalty u/s. 271(1)(c) of the Act. Now, the assessee is in second appeal before the Tribunal against the findings of Commissioner of Income Tax (Appeals) in confirming levy of penalty.

3. Shri Neelesh Khandelwal appearing on behalf of the assessee submitted at the outset that the manner in which penalty has been levied suffers from ambiguity. In assessment order the Assessing Officer has recorded satisfaction for levy of penalty u/s. 271(1)(c) in respect of both the additions separately. The Assessing Officer while recording satisfaction has mentioned both the limbs of section 271(1)(c) i.e. concealment of income or furnishing inaccurate particulars of income. However, the penalty has been levied for furnishing inaccurate particulars of income

only. The manner in which satisfaction has been recorded by the Assessing Officer for initiating penalty proceedings u/s. 271(1)(c) clearly reflects ambiguity in the mind of Assessing Officer with respect to charge for levy of penalty. This ambiguity is further perpetuated at the time of issuance of notice u/s. 274 of the Act. In the notice, the Assessing Officer has again mentioned both the limbs of section 271(1)(c) with conjunction **'or'**. The ld. AR submitted that the Hon'ble High Courts and Pune Bench of the Tribunal in several cases have held that where there is ambiguity in recording of satisfaction, the penalty proceedings are liable to be quashed. In support of his submissions the ld. AR placed reliance on the following decisions :

- i. Commissioner of Income Tax Vs. Samson Perinchery, 392 ITR 4 (Bom);
- ii. CIT Vs. SSA'S Emerald Meadows, 73 taxmann.com 248 (SC);
- iii. CIT Vs. SSA'S Emerald Meadows, 73 taxmann.com 241 (Karnataka);
- iv. CIT Vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Karnataka);
- v. Kanhaiyalal D. Jain Vs. ACIT in ITA Nos. 1201 to 1205/PN/2014 for assessment years 2003-04 to 2007-08 decided on 30-11-2016;
- vi. M/s. Sai Venkata Construction Vs. Addl. CIT in ITA No. 994/PN/2013 for assessment year 2008-09 decided on 11-03-2016;
- vii. Girdhari Ishwarlal Chhablani Vs. ITO in ITA No. 2089/PUN/2012 for assessment year 2007-08 decided on 18-01-2017;
- viii. Jitendra Ramesh Deshmukh Vs. ITO in ITA No. 2150/PUN/2014 for assessment year 2008-09 decided on 13-09-2017.

4. On the other hand Dr. Vivek Aggarwal representing the Department vehemently supported the impugned order in confirming levy of penalty. The ld. DR submitted that there is no requirement for recording of

satisfaction for levy of penalty u/s. 271(1)(c) in any particular manner. Mere reference by the Assessing Officer in the assessment order viz : 'a separate penalty proceedings u/s. 271(1)(c) are being initiated', is sufficient for initiating penalty. The ld. DR referring to the Explanatory Notes to the provisions of the Finance Act, 2008 submitted that the CBDT has clarified that no separate satisfaction is required to be recorded before initiating penalty proceedings. The ld. DR further referred to the order of Pune Bench of the Tribunal in the case of Ghodawat Foods International Pvt. Ltd. Vs. ACIT in ITA Nos. 817 & 818/PN/2010 decided on 11-01-2013 to contend that the manner of recording satisfaction is nowhere explained in the provisions of the Act or Income Tax Rules. To further buttress his submissions the ld. DR placed reliance on the following decisions :

- i. Shyam Biri Works Pvt. Ltd. Vs. Commissioner of Income Tax, 259 ITR 625 (All);
- ii. Becker Gray And Co. Ltd. Vs. ITO And Ors., 112 ITR 503 (Cal);
- iii. Dr. Syamal Baran Mondal Vs. Commissioner of Income Tax in Income Tax Appeal No. 698 of 2007 decided on 18-02-2011 (Cal);
- iv. M. Sajjanraj Nahar Vs. Commissioner of Income Tax, 283 ITR 230 (Mad);
- v. M.S. Mohammed Marzook (Late) And Another Vs. ITO, 283 ITR 254 (Mad);
- vi. M/s. Maharaj Garage & Company Vs. Commissioner of Income Tax in Income Tax Reference No. 21 of 2008 decided on 22-08-2017;
- vii. MAK Data Pvt. Ltd. Vs. Commissioner of Income Tax in Civil Appeal No. 9772 of 2013 decided on 30-10-2013.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also taken into consideration various decisions on which the rival sides have

placed reliance in support of their contentions. We observe that while recording satisfaction for initiating penalty proceedings u/s. 271(1)(c), the Assessing Officer mentioned both the limbs of section 271(1)(c) with conjunction 'or'. The Assessing Officer has recorded separate satisfaction for initiating penalty u/s. 271(1)(c) for both the additions. The relevant extract of the assessment order where the Assessing Officer has recorded satisfaction for initiating penalty proceedings is reproduced here-in-below :

“4.2As a consequence of this adjustment the income of the assessee will be increased by Rs.5,92,560/-. Further, penalty proceedings under section 271(1)(c) read with explanation 7 of the Act, are initiated separately for concealing the particulars of its income or furnishing inaccurate particulars of such income.

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5.6 Thus, the expenditure claimed on account of warranty claim at Rs.41,22,637/- is hereby disallowed and added to the total income of the assessee under section 37(1) of the Act. Further, penalty proceedings under section 271(1)(c) is initiated separately for concealing the particulars of its income or furnishing inaccurate particulars of such income.”

6. Thereafter, at the time of levy of penalty vide order dated 30-09-2013, the Assessing Officer levied penalty on the charge of furnishing inaccurate particulars of income. The Assessing Officer in penalty order while levying penalty in respect of Transfer Pricing adjustment held :

“5.2Thus, it is held that assessee has furnished inaccurate particulars of income within the meaning of section 271(1)(c) r.w. explanation 7 of the Act on the issue of Transfer Pricing adjustment.”

In respect of levy of penalty on disallowance of warranty provision, the Assessing Officer observed :

“5.8It is held that assessee has furnished inaccurate particulars of income within the meaning of section 271(1)(c) r.w. explanation-1 of the Act only with a view to avoid tax and has committed default in view of provisions of Section 271(1)(c) and explanation there off, hence he is liable for penalty.”

7. The Assessing Officer finally levied penalty on only one of the limbs of section 271(1)(c) i.e. inaccurate particulars of income, but the ambiguity in the mind of Assessing Officer while recording satisfaction is apparent writ large.

8. The Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Samson Perinchery (supra) has held :

“6. The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in Ashok Pai v/s. CIT 292 ITR 11 [relied upon in Manjunath Cotton & Ginning Factory (supra)] – wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. 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 other 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.”

9. The ld. DR has placed reliance on various decisions to contend that there is no specific manner for recording of satisfaction. Mere mentioning of the words by the Assessing Officer that penalty proceedings are initiated separately are sufficient to prove the satisfaction of Assessing Officer for initiating penalty proceedings. We have considered the judgments referred by ld. DR and are of the view that the ratio laid down by the judgments are not applicable to the facts of the case. The ld. DR has placed heavy reliance on the decision of Hon'ble Supreme Court of India in the case of MAK Data Pvt. Ltd. Vs. Commissioner of Income Tax (supra). The Hon'ble Apex Court has referred to the decisions of Union of India Vs. Dharmendra Textile Processors reported as 13 SCC 369 and CIT Vs. Atul Mohan Bindal reported as 9 SCC 589 and held that during the course of assessment proceedings, the Assessing Officer is not required to record his satisfaction in a particular manner or reduced it in writing. There is no dispute about

the manner of recording satisfaction. In whatever manner satisfaction is recorded by the Assessing Officer, the principles of natural justice demands that the satisfaction should convey in an unambiguous manner the charge for which the assessee is being penalized. Under the provisions of section 271(1)(c) the penalty can be levied on two charges :

- (a) concealing the particulars of income;
- or,
- (b) furnishing inaccurate particulars of income.

From the bare reading of satisfaction the charge should be decipherable to the assessee, so that he can defend himself accordingly.

The Hon'ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (supra) after considered the law laid down by the Hon'ble Apex Court in the in the case of Union of India Vs. Dharmendra Taxtile Processors (supra) and various other judgments has held as under :

“60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty

cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

The ld. DR has further placed reliance on the decision of Jurisdictional High Court in the case of M/s. Maharaj Garage & Company Vs. Commissioner of Income Tax (supra). We find that in the aforesaid case neither the assessee/appellant nor the respondent/Department has brought to the notice of Hon’ble Court, the earlier decision rendered by Hon’ble Bombay High Court in the case of Commissioner of Income Tax Vs. Samson Perinchery (supra). Be that as it may, when two reasonable construction of the statute is possible, that favourable to the assessee has to be preferred as has been held by the Hon’ble Apex Court in the case of Commissioner of Income Tax Vs. Vegetable Products Ltd. reported as 88 ITR 192.

10. Here we would also like to point that the Hon’ble Karnataka High Court in the case of CIT Vs. SSA’S Emerald Meadows (supra) deleted levy of penalty u/s. 271(1)(c) of the Act by following the decision in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (supra). The Department

carried the matter in appeal before the Hon'ble Supreme Court of India. The Hon'ble Apex Court dismissed the SLP filed by the Department.

11. Thus, in view of the decision of Hon'ble Jurisdictional High Court, the manner in which penalty has been initiated in the instant case suffers from technical defect. Hence, the order levying penalty is liable to be quashed. We hold and direct accordingly.

12. In the result, the impugned order is set aside and the appeal of the assessee is allowed.

Order pronounced on Monday, the 18th day of June, 2018.

Sd/-	Sd/-
(अनिल चतुर्वेदी / Anil Chaturvedi)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 18th June, 2018
RK/SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-1, Pune
4. आयकर आयुक्त / The CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune