

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “D” KOLKATA**

Before **Shri S.S.Godara, Judicial Member** and  
**Dr. A.L. Saini, Accountant Member**

**ITA No.2104/Kol/2017**  
Assessment Year :2012-13

Income Tax Officer Ward-13(1), 9 <sup>th</sup> Floor, 110, Shanti Pally, Aayakar Bhawan (Poorva), Kolkata-107	<b>V/s.</b>	M/s Ambey Retailers Pvt. Ltd. 29B, Rabindra Sarani, 3 <sup>rd</sup> Floor, Kolkata-73 [ <b>PAN No.AAHCA 8700 F</b> ]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri R. Chowdhury, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	None
सुनवाई की तारीख/Date of Hearing	13-08-2018
घोषणा की तारीख/Date of Pronouncement	05-09-2018

**आदेश /ORDER**

**PER S.S.Godara, Judicial Member:-**

This Revenue's appeal for assessment year 2012-13 challenges correctness of Commissioner of Income Tax (Appeals)-5, Kolkata's order dated 03.07.2017, passed in case No.472/CIT(A)-5/W-15(1)/15-16, reversing the Assessing Officer's action deleting imposing penalty of ₹50,21,837/- involving proceedings u/s. 271(1)(c) of the Income Tax Act, 1961; in short 'the Act'.

2. We have heard Learned Departmental Representative arguing in favour the above impugned penalty. Case file perused. It emerges first of all that CIT(A)'s detailed discussion on the issue reads as under:-

*"1. By way of additional ground the objection raised is that the AO failed to strike off the irrelevant portion in the notice initiating penalty u/s 271(1)(c)/ section 274. Relying on the decision of Manjunatha Cotton and Ginning Factory & Others [2013] 359 ITR*

565 (Kar), the ground has been raised for cancellation of penalty imposed subsequent to the initiation of the said faulty notice.

- 1.1 I have perused the copy of the notice u/s 271(1)(c)/274 dated 21.03.2015. The notice has been issued in a general proforma which is for initiating penalty under various clauses of section 271. The notice has listed three different classes of defaults for initiating penalty. The first para has been not been either struck off or ticked. The second para which is for failure to comply with a notice u/s. 142(1)/143(2) of the IT Act has been ticked by the AO as is apparent from the copy of the said notice issued to the appellant. The third para earmarked for concealing the particulars of income or furnishing of inaccurate particulars of such income has also been ticked or marked by the AO. The notice thus appears to be faulty in respects. From the order of penalty u/s. 271(1)(c) dated 18.09.2015 it appears that the said notice for initiation of penalty was issued by the AO to see whether penalty for concealment of income or furnishing of inaccurate particulars of income can be levied. It is, therefore, wrong for the AO to have marked the second para of the said notice which applies for defaults or failures u/s.142(1)/143(2). Similarly, the AO is in further error when he has marked or ticked off the third para which contains two specific defaults – one for concealing the particulars of income and the other for furnishing of inaccurate particulars. The AO has thus not struck off the irrelevant part of the said third para. In other words, the AO has not specified clearly whether the penalty proceeding was initiated for concealing the particulars of income or for furnishing of inaccurate particulars of income.
- 1.2 1.2 Vide the submission dated 14.06.2017, the A/R has relied on a number of decisions wherein failure to strike off irrelevant portion of the notice has been held as fatal and for which the penalty levied by the AO has been cancelled. Specifically on the grounds of appeal raised by way of additional grounds on 23.06.2017 the case of Manjunatha Cotton and Ginning Factory & Others has been relied upon. The said decision has been followed up by the jurisdictional Kolkata Bench of I.T.A.T. in its various decisions. The relevant portion of the decision in the case of SSA's Emerald Meadows {[2016] 73 Taxmann.com 248(SC)/[2016] 73 taxman.com 241 Karnataka)}, which has been relied upon repeatedly by the Hon'ble ITAT, is reproduced as under:-

'The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. the Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.)'
- 1.3 Some of the decisions which have been relied upon on the point of not striking off the irrelevant portion in the penalty notice is listed below:-
  1. Order of Bombay High Court in the case of CIT vs. Shri Samson Perinchery.
  2. ITAT Order, Kolkata Bench in the case of Gautam Jhunjunwala vs. ITO.
  3. Order of Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory.
  4. Order of Karnataka High Court in the case of CIT vs. SSA'S Emerald Meadows.
  5. ITAT Order, Kolkata Bench in the case of Abu Mansur Ali vs. DCIT

6. ITAT Order, Kolkata Bench in the case of M/s Atmaram & Co.v. DCIT.
7. ITAT Order, Kolkata Bench in the case of ITO vs. M/s Swastik Refinery Pvt. Ltd.
8. Order of Supreme Court in the case of CIT vs. SSA's Emerald Meadows.
9. Order of Supreme Court in the case of CIT vs. M/s V.S. Lad & Sons.
10. Order of Supreme Court in the case of CIT vs. Veerabhadrapa Sangappa & Co.
11. ITAT order, Kolkata Bench in the case of Suresh Karmakar vs. DCIT.

1.4 *Following the above cases and as the relevant notice initiating the penalty u/s. 271(1)(c) has failed to strike off the irrelevant portions, penalty order dated 18.09.2015 and challenged in the present appeal is cancelled for being vague as above. The grounds raised by way of revision or addition of grounds are thus allowed.”*

3. It thus emerges that CIT(A) has deleted the impugned penalty on account of the fact that Assessing Officer's show cause notice initiating the penal proceedings in motion did not specify as to whether the assessee had concealed or furnished inaccurate particulars of income of its taxable income so far as the quantum issue of share capital / premium issue of ₹1,54,78,000 is concerned. We find the instant issue to be no more *res integra* co-ordinate bench's decision in Jeetmal Choraria dated 01.12.2017 has declined Revenue's similar substantive ground as follows:-

“6. 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 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 of the 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.*

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 Assesseees 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, no longer 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 Benches 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 Id. 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.

7. We find that the notice dt. 27-03-2014 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.

8. Further, 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.*

4. Learned Departmental Representative at this stage refers to hon'ble Kerala high court's decision in *CIT vs. K.P. Madhusudanan* (2000) 246 ITR 218 (Ker) in support of the Assessing Officer's action. We find that much water has flown down the stream since then. The CIT(A) has relied upon a catena case law coming much after hon'ble Kerala high court's decision. Learned Departmental Representative has failed to rebut the fact that the same view stand duly considered in latter judicial precedents (supra). We thus conclude that CIT(A) has rightly deleted the impugned penalty in lower appellate proceedings.

5. This Revenue's appeal is dismissed.

Order pronounced in the open court 05/09/2018

Sd/-  
(लेखा सदस्य)  
(Dr. A.L. Saini)  
(Accountant Member)  
Kolkata,  
\*Dkp, Sr.P.S

Sd/-  
(न्यायिक सदस्य)  
(S.S.Godara)  
(Judicial Member)

दिनांक:- 05/09/2018 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-ITO, Ward-13(1), 9<sup>th</sup> Floor, 110, Shanti Pally, Aayakar Bhawan (Poorva), Kolkat-107
2. प्रत्यर्थी/Respondent-M/s Ambey Retailers Pvt. Ltd., 29B, Rabindra Sarani, 3<sup>rd</sup> Fl. Kol-73
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of  
Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।