

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A .No. 2174/DEL/2016 (A.Y 2009-10)

YKM Holdings Pvt. Ltd. Signature Tower-A, 14 th Floor, South City Gurgaon AAACY0460B (APPELLANT)	Vs	ITO Ward-18(4) New Delhi (RESPONDENT)
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Appellant by	Sh. A. T. Panda, Adv
Respondent by	Smt. Naina Soin Kapil, SR. DR

Date of Hearing	10.10.2018
Date of Pronouncement	12.10.2018

ORDER

PER SUCHITRA KAMBLE, JM

The present appeal has been filed by the assessee against the order dated 25/02/2016 passed by CIT(A)-9, New Delhi for Assessment Year 2009-10.

2. The grounds of appeal are as under:-

“1. That on the facts and circumstances of the case and in law, the Commissioner of Income tax (Appeals)-9 [briefly “the CIT(A)] has erred in upholding levy of penalty of Rs.4,29,361/- under section 271(l)(c) of the Income tax Act, 1961.

2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that during the relevant year, the Appellant

was NBFC duly recognized by RBI and was engaged in the business of money lending and that the ICD to Modi Connect Pvt. Ltd. was in the ordinary course of business.

3. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not appreciating that the bad debts having been taken as income of the previous year is not applicable to debt advance in the course of money lending business.

4. That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that neither any income was concealed nor particulars of income were incorrectly furnished. It was also not appreciated that no satisfaction was recorded by the Assessing Officer.”

3. Assessment in this case was completed u/s 143(3) on 28/11/2011 by making an addition of Rs.12,63,200/- on account of bad debts as conditions laid down in section 36(2) and section 36(i)(vii) were not fulfilled in this case. The Assessing Officer imposed penalty of Rs.4,29,361/- u/s 271(1)(c) for concealment of particulars of income and filing inaccurate particulars of income.

4. Being aggrieved by the penalty order, the assessee filed appeal before the CIT (A). The CIT (A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that notice u/s 274 r.w.s. 271 was issued on 28.11.2011 and the inappropriate words in the said notice have not been struck off. Therefore it is not understood as to under which limb of provisions of Section 271(1)(c) of the Act, the Assessing Officer has levied penalty. Since the said show cause notice issued u/s 274 did not specify the charge against the assessee as to whether it was for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, the penalty order passed under Section 271(1)(c) of the Act in pursuance to the said notice deserves to be set aside. The Ld. AR further submitted that the assessee has

rightly written off the dues from one Modi Connect and the same was reflected in Schedule 13 of Balance Sheet. Thus, the assessee has properly claimed bad debt in the assessment record. But the view of the Assessing Officer was different and the same does not amount to filing of inaccurate particulars or concealment of income. The Ld. AR relied upon the decision of the Hon'ble Apex Court in case of CIT Vs. SSA's Emerald Meadows (2016) 73 Taxman.com 248 as well as various decisions of the Tribunal.

6. The Ld. DR on the other hand strongly supported the order of the CIT(A). Referring to the decision of the Hon'ble Madras High Court in case of Sundaram Finance Ltd. vs. CIT 403 ITR 407 wherein it is held that where notice did not show nature of default, it was a question of fact. The assessee had understood the purport and import of notice and hence no prejudice was caused to the assessee. The Hon'ble High Court in the above decision has considered the decision of the Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory reported in 359 ITR 565. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Smt. Kaushalya reported in 216 ITR 660 the Ld. DR submitted that the Hon'ble High Court in the said decision has held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate the notice u/s 274 of the Act. It was accordingly held that the penalty orders passed by the ITO for assessment years 1968-69 to 1969-70 were perfectly valid and there was no justification for quashing the same on ground of absence of jurisdiction. The Ld. DR also relied on various other decisions to the proposition that mere non-striking off of inappropriate words does not invalidate the penalty proceedings.

7. The Ld. AR in rejoinder submitted that if two views are possible on an issue, the view which is favourable to the assessee has to be followed. For the above proposition, he relied on the decision of the Hon'ble Supreme Court in

the case of Vegetable Products Limited reported in 88 ITR 192. Referring to following decisions, he submitted 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 I.T. Act :-

- i. Shri Sachin Arora, ITA No.118/Agra/2015 dated 19.12.2017.
- ii. Dr. Sarita Milind Davare, 184 TTJ 9.
- iii. Shri K. Prakash Shetty, ITA No.265 to 267/2014 dated 05.06.2014.

The Ld. AR accordingly submitted that the order of the CIT(A) be set-aside and the penalty levied u/s 271(1)(c) be deleted.

8. We have heard both the parties and perused the material available on record. We have also considered the various decisions cited before us. We find the only issue to be decided in the grounds of appeal is regarding the sustainable of penalty levied u/s 271(1)(c) when the inappropriate words in the notice issued u/s 274 r.w.s. 271 of the Act have not been struck off. A perusal of the notice issued u/s 274 r.w.s. 271 dated 28.11.2011 shows that the inappropriate words in the said notice have not been struck off and it is a printed notice. Even the last line of the said notice only speaks of Section 271 and does not even mention of section 271(1)(c) of the I.T. Act. We find an identical issue had come up before the Co-ordinate Bench of the Tribunal in the case of Sahiwal Investment & Trading Co. vs. ITO vide ITA No.4913/Del/2015 for assessment year 2006-07 order dated 18.07.2018 to which both of us parties. We find the Tribunal in the said decision while allowing the additional ground filed by the assessee has decided the issue in favour of the assessee by observing as under :-

“12. Additional Ground No. (ii) is relating to absence of specific charge pointing out in the notice. It is pertinent to note here that the penalty order is based on furnishing of inaccurate particulars but the notice is not specifying

exactly on which limb the penalty u/s 271(1)(c) has been initiated. From the notice dated 30.06.2013 produced by the Ld. AR during the hearing, it can be seen that the Assessing Officer was not sure under which limb of provisions of Section 271 of the Income Tax Act, 1961, the assessee is liable for penalty. The issue is squarely covered by the decision of the Hon'ble Supreme Court in case of M/s SSA' Emerald Meadows. The extract of the decision of the Hon'ble Karnataka High Court in M/s. SSA' Emerald Meadows are as under which was confirmed by the Hon'ble Apex Court:

"3. 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 ITA No. 4913/Del/2015 decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."

Thus, Additional Ground No. (ii) of the assessee's appeal is allowed. Since the inception of the notice issued u/s 271(1)(c) has become null and void, there is no need to comment on merit of the case. The Penalty u/s 271(1)(c) of the Act is quashed."

Since in the instant case also the inappropriate words in the penalty notice has not been struck off and the notice does not specify as to under which limb of the provisions, the penalty u/s 271(1)(c) has been initiated, therefore, we are of the considered opinion that the penalty levied u/s 271(1)(c) is not sustainable and has to be deleted. Although the Ld. DR has relied on various decisions to the proposition that mere non-striking off of the inappropriate words will not invalidate the penalty proceedings, however, all these decisions are of non-jurisdictional High Court decisions. The decision of the Delhi Bench of the Tribunal relied on by the Ld. DR is prior to the decision

of the Hon'ble Karnataka High Court in the case of SSA'S Emerald Meadows (supra) where the SLP filed by the Revenue has been dismissed. Since there is no decision of the Jurisdictional High Court on this issue, therefore, we find merit in the argument of the Ld. AR that if two views are available on a particular issue, the view which is favourable to the assessee has to be followed in the light of the decision of the Hon'ble Supreme Court in the case of Vegetable Products Limited (supra). We, therefore, set-aside the order of the CIT(A) and direct the Assessing Officer to cancel the penalty so levied.

9. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 12th OCTOBER, 2018.

Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 12/10/2018
*R. Naheed **

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	10 .10.2018
Date on which the typed draft is placed before the dictating Member	11 .10.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	12.10.2018
Date on which the final order is uploaded on the website of ITAT	12 .10.2018
Date on which the file goes to the Bench Clerk	12 .10.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	