

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' A '**

**BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER**

I.T. A. No.2111/Bang/2018
(Assessment Year : 2014-15)

M/s. S.R. Construction Company,
Ch. Nagarathamma, No.41,
1st Floor, 30th Cross, Kanakapura Road,
Jayanagar, 7th Block, Bangalore-560 070.

.... Appellant.

Vs.

Dy. Commissioner of Income Tax,
Circle 7(2)(1), Bangalore.

..... Respondent.

Appellant By : Shri V. Srinivasan, Advocate.
Respondent By : Smt. Srinidhi Das, Addl. CIT (D.R)

Date of Hearing : 19.11.2018.
Date of Pronouncement : 27.11.2018.

O R D E R

Per Shri Jason P Boaz, A.M. :

This appeal by the assessee is directed against the order of
Commissioner of Income Tax (Appeals)-7, Bangalore dt.12.06.2018
upholding the orders of the ACIT, Circle 7(2)(1), Bangalore dt.30.05.2017

levying penalty of Rs.26,37,567 under Section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') for the Assessment Year 2014-15.

2.1 Aggrieved by the order of the CIT (Appeals) – 7, Bangalore dt.12.6.2018 for Assessment Year 2014-15 upholding the levy of penalty of Rs.26,37,567 under Section 271(1)(c) of the Act, the a. has preferred this appeal raising the following grounds :-

1. The orders of the authorities below in so far as levying penalty u/s 271[1][c] of the Act against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.
2. The learned CIT[A] is not justified in upholding the penalty of Rs. 26,37,567/- levied u/s. 271[1][c] of the Act in respect of the estimated the income of the appellant from contract business at 8% under the facts and in circumstances of the appellant's case.
3. The learned CIT[A] failed to appreciate that the appellant has neither concealed any income nor furnished inaccurate particulars of income in respect of the above addition made to warrant levy of penalty and therefore, the penalty levied u/s.271[1][c] of the Act requires to be cancelled.
4. Without prejudice to the above, the penalty levied is highly excessive and liable to be reduced substantially.
5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.

2.2 Subsequently, the assessee filed additional ground Nos.1 & 2 which is extracted hereunder :-

1. The order of penalty passed u/s 271[1][c] of the Act is bad in law as the notice issued under section 274 rws 271 of the Act [copy enclosed] is not discernable as to whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant's case and therefore, the impugned order passed deserves to be cancelled.

2. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and Justice rendered.

2.3 In support of the additional ground raised (Supra) the assessee submitted that the said ground is a pure legal ground that goes to the root of the matter and can be decided on the basis of material already on the records. According to the assessee the omission to raise specific grounds to this effect was neither intentional nor deliberate and prayed that the additional ground raised be admitted for adjudication in the interest of equity and justice. In this regard reliance was placed on the decision of the Hon'ble Apex Court in the case of NTPC Ltd., Vs. CIT (229 ITR 383) (SC).

2.4 We have heard the rival contentions and perused and carefully considered the material on record and the legal precedents in this regard. In our view the legal issue in the additional ground raised

(Supra) would go to the root of the matter and can be decided on the basis of material already on record. Following the ratio of the decision of the Hon'ble Apex Court in the case of NTPC Ltd; (Supra), we admit the additional ground (Supra) for adjudication.

3 Addl. Ground Nos. 1 & 2

3.1 In these grounds (Supra), the sum and substance of the assessee's contentions are that the penalty proceedings initiated by the AO for asst. year 2014-15 vide notice issued u/s 274 r.w.s 271 of the Act dated 24/11/2016 for levy of penalty u/s 271(1)(c) of the Act, is defective. (A copy of the said notice is placed on record). A perusal thereof reveals that the Assessing Officer has not struck off the relevant 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. In this regard the Id AR for the assessee has placed reliance on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (359 ITR 565) (Kar) and the rejection of the Revenue's SLP by the Hon'ble Apex Court in the case of SSAS Emerald Meadows in SLP: (CC 11485/2016) dated 5/8/2016. The Id AR also placed reliance on the decision of the co-ordinate bench of this Tribunal in the following cases of -

- (i) C Ramaiah Reddy in ITA No.977/Bang/2017 dated 22/9/2017.

- (ii) Arun Kumar in ITA No.117/Bang/2016 dated 16/12/2106
and
(iii) A. Nagaraju in ITA No.2196/Bang/2016 dt.6.4.2018 in
support of the assessee's case.

It is contended that in similar circumstances, as in the case on hand, the co-ordinate benches of this Tribunal have held that the penalty proceedings initiated on the basis of defective notice has to be cancelled.

3.2 Per contra, the Id DR for Revenue supported the orders of the authorities below. The learned Departmental Representative relied on the decision of the co-ordinate bench of this Tribunal in the case of P.M. Abdullah Vs. ITO in ITA No.1223 & 1224/Bang/2012 dt.17.10.2016, wherein the Bench held that the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) was rendered without considering the provisions of Sec.292B of the Act and preferred to hold that the defect in the show cause notice under Section 274 r.w.s. 271 of the Act is not fatal to the sustainability of the order imposing penalty.

3.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. At the outset we may mention that while the aforesaid issue of defective notice was not before the Id CIT(A), however, since the facts of the matter on this issue are apparent from the copy of the said notice issued u/s 274 r.w.s 271 of the Act dated 24/11/2016 and the judicial view of Courts and ITAT co-ordinate benches in the matter (Supra) in our view, no useful purpose would be served in restoring the matter to the file of the Id CIT(A) as prayed for by the Id DR for Revenue. We have perused the copy of the notice issued u/s 274 r.w.s 271 of the Act; dated 24/11/2016 and find that it reveals that the AO has not deleted the inappropriate words and parts in the relevant paragraph of the notice, whereby it is not clear as to which default has been committed by the assessee; i.e whether it is for furnishing of inaccurate particulars of income or concealing particulars of income that penalty u/s 271(1)(c) of the Act is sought to be levied.

3.3.2 The Hon'ble Karnataka High Court in the case of M/s Manjunatha Cotton & Ginning Factory in (359 ITR 565) (Kar) has held that a notice issued u/s 274 r.w.s 271 of the Act without specifying the nature of default; i.e. whether the notice is issued for concealment of particulars of income or furnishing of inaccurate particulars of income; is invalid and the consequential penalty proceedings/order are also not valid. The relevant portion of the aforesaid judgment of the Hon'ble Karnataka High Court (Supra) at paras 59 to 61 are extracted hereunder:-

"59 As the provision stands, the penalty proceedings can be initiated on various ground set out therein, if the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-I or in Explanation- I(B), then though penalty proceedings are in the nature of civil liability, in fact, it is' penal in nature. in either event, the person who is accused Of the

conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty oil as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(l)(c) c/a not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100% to 300% of tax liability. As the said provisions have to be held to be standby construed notice issued under Section 274 should satisfy the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.

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 Gujarat High Court in the case of M4NU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO IvL4RKETING reported in 171 Taxman 156, has held that penalty has to be clear as to the limb for which it is levied and the action 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 relevant¹ clauses will lead to an inference as to non-application of mind."

3.3.3 The aforesaid view taken by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (Supra) was followed by the Hon'ble Karnataka High Court in the case of SSAS Emerald Meadows in ITA No.380 of 2015 dated 23/11/2015; wherein the Hon'ble Court upheld the order of co-ordinate bench of

this Tribunal, cancelling the penalty levied on the basis of the defective notice issued by the AO. Revenue's SLP filed against he said judgment of the Hon'ble High Court in the case of SSAS Emerald Meadows (Supra) has also been dismissed by the Hon'ble Apex Court in CC/1485/2016 dated 5/8/2016. In view of the aforesaid decisions of Hon'ble Karnataka High Court holding the ground (Supra), the decision cited by the Id DR in the case of P.M. Abdullah (supra) would not come to Revenue's rescue as in our considered opinion the same is contrary to the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra).

3.3.4 Respectfully following the judgments of the Hon'ble Karnataka High Court in the cases of M/s Manjunatha Cotton & Ginning Factory (359 ITR 565) (Kar) and SSAS Emerald Meadows in ITA No:380 of 2015 dated 23/11/2015, we hold that the notice issued by the AO u/s 274 r.w.s 271 of the Act dated 24/11/2016 for initiating penalty proceedings for asst. year 2014-15 is invalid and consequently, the penalty proceedings conducted in

pursuance thereof, are also invalid and we therefore delete the penalty levied u/s. 271(1)(c) of the Act for asst. year 2014-15. Consequently, the additional ground raised by the assessee at S.No. 1 & 2 (Supra) are allowed.

4. Since the very basis for levy of penalty u/s 271(1)(c) of the Act has been held by us to be invalid as discussed in paras 3.1 to 3.3.4 of this order (Supra), the other grounds of appeal at S. Nos. 1 to 5 raised on the merits of the levy of penalty u/s 271(1)(c) of the Act require no adjudication by us at this stage.

5. In the result, assessee's appeal for Asst. Year 2014-15 is allowed as indicated above.

Order pronounced in the open court on the 27th day of Nov., 2018.

Sd/-
(N.V. VASUDEVAN)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

Bangalore,
Dt.27.11.2018.

*Reddy gp

Copy to :

1	Appellant	4	CIT(A)
2	Respondent	5	DR. ITAT, Bangalore
3	CIT	6	Guard File

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Asst. Registrar
Income Tax Appellate Tribunal
Bangalore.