

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "A" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष  
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA. No. 982/JP/2018  
निर्धारण वर्ष / Assessment Year : 2014-15

Shri Prem Prakash Uma Shanker GB-34, Krishi Upaj Mandi, Alwar (Raj.)-301001.	बनाम Vs.	The ITO, Ward-2(3), Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAFFP 4000 N		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri P. C. Parwal (C.A.)  
राजस्व की ओर से / Revenue by : Shri J. C. Kulhari (JCIT)

सुनवाई की तारीख / Date of Hearing : 13/12/2018  
उदघोषणा की तारीख / Date of Pronouncement : 21/12/2018

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Alwar dated 06.06.2018 for Assessment Year 2014-15 wherein the assessee has challenged the confirmation of penalty of Rs. 36,003/- U/s 271(1)(c) of the IT Act.

2. The Id AR submitted that during the course of assessment proceedings, the AO made an addition on account of interest on income

tax refund amounting to Rs. 1485/-, addition on account of difference in commission income as per Form 26AS and as reported in the return of income amounting to Rs. 19,049/-, and different in the interest income as per Form 26AS and as shown in the return of income amounting to Rs. 99,475/-. It was further submitted by the Id. AR that in respect of these three additions, the AO has initiated the penalty and while initiating the penalty, the AO stated that the penalty has been initiated for furnishing of inaccurate particulars of income as regards addition of interest on income tax refund. Regarding the other two additions of commission and interest income, the AO has initiated the penalty for furnishing inaccurate particulars of concealed/escaped income. It was further submitted that towards the end of the assessment order, the AO has stated that the penalty notice U/s 271(1)(c) of the Act is also issued separately for furnishing inaccurate particulars of concealed/escaped commission and interest income. Our reference was drawn to the notice issued U/s 274 r.w.s. 271(1)(c) of the Act dated 30.12.2016 which is issued for concealing the particulars of income or furnishing inaccurate particulars of such income. Further, our reference was drawn the penalty order dated 29.06.2017 wherein the AO has levy the penalty for concealing the income and levying the penalty of Rs. 36,003/-. It was accordingly submitted that in the absence of any specific charge against the assessee in the assessment order and even in the penalty notice and thereafter, in the penalty proceedings, levying the penalty for concealing the particulars of income, the penalty order passed by the AO is illegal and bad in law. In this regard our reference was drawn to the decision of the Third Member of the Tribunal in case

of HPCL Mittal Energy Ltd. Vs. ACIT in ITA No. 554 &555/Asr./2014 dated 07.05.2018.

3. Per contra, the Id. DR vehemently argued the matter and supported the order of the lower authorities. It was further submitted that the decision of the Third Member of the Tribunal in case of HPCL Mittal Energy Ltd. Vs. ACIT (supra) supports the case of the Revenue.

4. Heard the rival contentions and perused the material available on record. Regarding the contention of the Id. AR in context of issue of vague notice with an uncertain charge and subsequent findings giving in the penalty order, we find that a similar issue has been dealt with by this Bench in case of **Smt. Shipra Jain and Ors. vs. ACIT (ITA No. 922/JP/2018 & others dated 31.10.2018)** wherein we have examined the issue at length in context of various authorities (including the decision of the Third Member of the Tribunal relied upon by the Id AR) and our findings are contained at para 4.2 to 4.5 which are reproduced as under:-

*"4.2 Now coming to the first contention so raised by the Id. AR that in the absence of any specific charge against the assessee in the penalty notice and subsequently in the penalty order, consequent penalty imposed by AO is illegal and bad in law. We find that Explanation 5A to section 271(1)(c) is a deeming provision and subject to fulfilling the requisite conditions, it deems the assessee to have concealed the particulars of his income or furnished inaccurate particulars of such income similar to what has been provided in clause (c) to section*

*271(1) of the Act. In search cases as well, the legislature has thus envisaged applicability of one or both of these charges. It is settled position now as held by catena of judicial pronouncements that the notice initiating the penalty proceedings should specify the charge against the assessee and even where the charge is uncertain at the time of initiation of penalty proceedings, subsequently during the penalty proceedings, the AO must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'.*

*4.3 In this regard, useful reference can be drawn to the decision of the **Coordinate Bench in case of HPCL Mittal Energy vs Add. CIT** reported in 96 Taxman.com 3 where the matter was referred to the Third Member to decide on the issue as to "Whether, in case where the satisfaction of the AO while initiating penalty proceedings u/s. 271(l)(c) of the Income-tax Act, 1961 is with regard to alleged concealment of income by the assessee, whereas the imposition of the penalty is for 'concealment/furnishing inaccurate particulars of income', the levy of penalty is not sustainable?".*

*After analyzing catena of judicial pronouncements including the decisions which have been cited by the Id AR, the Coordinate Bench speaking through the Third Member has held as under:*

*"9. On an analysis of the factual matrix narrated above, it is manifested that the AO recorded satisfaction qua the three items of disallowance/additions leading to penalty, as 'concealment of*

*income' in all the assessment orders; initiated penalty in all the four cases by treating them as covered under the expression 'concealment of particulars of income'; and then finally passed penalty orders on the assessee finding them guilty of 'concealment of particulars of income/furnishing inaccurate particulars of such income'. As against that, the actual position is that all the three items of disallowance/additions fall only under the category of 'furnishing of inaccurate particulars of income'. Now the question arises if the penalty is sustainable in such circumstances?*

**10.** *At this juncture, it is pertinent to note that penalty proceedings are distinct from the assessment proceedings. Merely because an addition has been made or confirmed in the assessment, does not, per se, lead to imposition of penalty u/s. 271(1)(c). Penalty proceedings are separately initiated on conclusion of the assessment, in which the assessee is given an opportunity to explain his position qua the imposition of penalty on the additions/disallowances made in the assessment. The AO considers the explanation of the assessee and then decides if the penalty is imposable or not. Further, the opinion of the AO as to concealment of particulars of income or furnishing of inaccurate particulars of such income has to be seen with reference to the day on which he initiates/imposes penalty. Later events, like confirmation or deletion of additions/disallowances in quantum appeals, are irrelevant in this context.*

**11.** *It transpires from the above discussion that, insofar as the issue before me is concerned, there are broadly two different stages having bearing on the imposition of penalty, namely, assessment and penalty. At the assessment stage, the AO has to record a satisfaction in the assessment order as to whether the additions/disallowances, on which penalty is likely to be imposed, represent concealment of particulars of income or furnishing of inaccurate particulars of income. There can be two sub-stages in penalty proceedings requiring the AO to record such satisfaction, viz., at the time of initiating the penalty proceedings and at the time of passing the penalty order. I will deal with such two stages in the present context.*

*(a) Recording of satisfaction at the assessment stage.*

**12.** *It has been noticed hereinabove that the first stage of imposition of penalty is recording of satisfaction by the AO in the assessment order as to whether the assessee concealed the particulars of income or furnished inaccurate particulars of income. There was a lot of litigation on this point. The assessees were contending before the appellate courts that the AO had not recorded proper satisfaction in the assessment order and hence the penalty should be deleted. On the other hand, the Department was contending that the satisfaction was properly recorded. Considering the magnitude of litigation on the point, the Finance Act, 2008, inserted sub-section (1B) to section 271, w.r.e.f. 1.4.1989, which runs as under: —*

*'Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).'*

**13.** *The effect of this insertion is that when an amount is added or disallowed in an assessment and the order contains a direction for initiation of penalty proceedings u/s. 271(l)(c), it shall be deemed to constitute satisfaction of the AO for initiation of the penalty proceedings. Crux of the new provision is that a mere direction in the assessment order to initiate penalty proceedings under clause (c) is sufficient to conclude that the AO recorded proper satisfaction as to whether the additions/disallowances are 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income' or both. It is incorrect to argue that even after the insertion of sub-section (1B), the AO still needs to specifically record as to whether each item of addition/disallowance is a case of concealment of particulars of income or furnishing of inaccurate particulars of income. Deeming 'satisfaction' under clause (c) in terms of sub-section (1B) means deeming 'proper satisfaction' and 'proper satisfaction' means getting satisfied as to whether it is a case of concealment of particulars of income or furnishing of inaccurate particulars of such income. It cannot be conceived that a direction to initiate*

*penalty proceedings in the assessment order is only 'satisfaction' and not 'proper satisfaction'. This contention, if taken to a logical conclusion, would mean that after such a direction in the assessment order constituting his satisfaction, the AO should once again specifically record satisfaction with reference to each addition or disallowance as to whether it is a case of concealment or furnishing of inaccurate particulars. It is obviously an absurd proposition and goes against the unambiguous language of the provision. Thus, it is overt that after insertion of sub-section (1B) to section 271, invariably, the AO should be deemed to have recorded proper satisfaction with reference to each addition/disallowance as to concealment or furnishing of inaccurate particulars, once a direction is contained in the assessment order to initiate penalty u/s. 271(l)(c) of the Act. Requiring the recording of separate satisfaction, once again, by the AO would militate against the deeming provision contained in sub-section (1B). Admittedly, in all the four appeals under consideration, the AO directed to initiate penalty u/s. 271(l)(c) of the Act in the assessment orders. Thus, the Revenue can be safely considered to have successfully passed out the first stage.*

*(b) Recording of satisfaction at the penalty stage*

**14.** *It has been noted above that penalty proceedings are separate from assessment proceedings, which get kicked with the issue of notice u/s. 274 and culminate in the penalty order u/s. 271(l)(c) of the Act. Many a times, penalty initiated in the assessment order on one or more counts by means of notice u/s.*

*274, is not eventually imposed by the AO on getting satisfied with the explanation tendered by the assessee in the penalty proceedings. In any case, confronting the assessee with the charge against him is sine qua non for any valid penalty proceedings. It is only when the assessee is made aware of such a charge against him that he can present his side. Thus prescribing the charge in the penalty notice and penalty order is must. Absence of a charge in the penalty notice or not finding the assessee guilty of a clear offence in the penalty order, vitiates the penalty order.*

**15.** *The moot question is that what should be the nature of specification of a charge by the AO at the stage of initiation of penalty proceedings and at the time of passing the penalty order. Is the AO required to specify in the penalty notice/order as to whether it is a case of 'concealment of particulars of income'; or 'furnishing of inaccurate particulars of income'; or both of them, which can be expressed by using the word 'and' between the two expressions. When the AO is satisfied that it is a clear-cut case of concealment of particulars of income, he must specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. The AO cannot initiate penalty on the charge of 'concealment of particulars of income', but ultimately find the assessee guilty in the penalty order of 'furnishing inaccurate particulars of income'. In the same manner, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two*

*expressions. When the AO is satisfied that it is a clear-cut case of 'furnishing of inaccurate particulars of income', he must again specify it so in the notice at the time of initiation of penalty proceedings and also in the penalty order. After initiating penalty on the charge of 'furnishing of inaccurate particulars of income', he cannot impose penalty by finding the assessee guilty of 'concealment of particulars of income'. Again, he cannot be uncertain in the penalty order as to concealment or furnishing of inaccurate particulars of income by using slash between the two expressions. When the AO is satisfied that it is a clear-cut case of imposition of penalty u/s. 271(l)(c) of the Act on two or more additions/disallowances, one or more falling under the expression 'concealment of particulars of income' and the other under the 'furnishing of inaccurate particulars of income', he must specify it so by using the word 'and' between the two expressions in the notice at the time of initiation of penalty proceedings. If he remains convinced in the penalty proceedings that the penalty was rightly initiated on such counts and imposes penalty accordingly, he must specifically find the assessee guilty of 'concealment of particulars of income' and also 'furnishing of inaccurate particulars of income' in the penalty order. If the charge is not levied in the above manner in all the three clear-cut situations discussed above in the penalty notice and also in the penalty order, the penalty order becomes unsustainable in law.*

**16.** *The Hon'ble Karnataka High Court in CIT v. Manjunatha Cotton and Ginning Factory [\[2013\] 359 ITR 565/218 Taxman](#)*

[423/35 taxmann.com 250](#) has held that a person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as 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) do not exist as such he is not liable to pay penalty. The Hon'ble High Court went on to hold that: 'Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income.... 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..... 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'.

**17.** In *Manu Engg. Works (supra)* penalty was imposed by noting: 'that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Striking down the penalty, the Hon'ble High Court held that: 'it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached

*by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down.'*

**18.** *In Padma Ram Bharali (supra), the Hon'ble High Court did not sustain penalty levied u/s. 271(l)(c) when: 'the initiation of the penalty proceeding was for concealment of the particulars of income. But the Tribunal finally held that the assessee would be deemed to have concealed the particulars of income or to have furnished inaccurate particulars of such income.'*

**19.** *Thus it is evident that when the AO is satisfied at the stage of initiation of penalty proceedings of a clear-cut charge against the assessee in any of the three situations discussed above (say, concealment of particulars of income), but imposes penalty by holding the assessee as guilty of the other charge (say, furnishing of inaccurate particulars of income) or an uncertain charge (concealment of particulars of income/furnishing of inaccurate particulars of income), the penalty cannot be sustained.*

**20.** *Another crucial factor to be kept in mind is that the satisfaction of the AO as to a clear-cut charge leveled by him in the penalty notice or the penalty order must concur with the actual default. If the clear-cut charge in the penalty notice or the penalty order is that of 'concealment of particulars of income', but it turns out to be a case of 'furnishing of inaccurate particulars of such income' or vice-versa, then also the penalty order cannot legally stand.*

*21. Apart from the above three situations in which the AO has clear-cut satisfaction, there can be another fourth situation as well. It may be when it is definitely a case of under-reporting of income by the assessee for which an addition/disallowance has been made, but the AO is not sure at the stage of initiation of penalty proceedings of the precise charge as to 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income'. In such circumstances, he may use slash between the two expressions at the time of initiation of penalty proceedings. However, during the penalty proceedings, he must get decisive, which should be reflected in the penalty order, as to whether the assessee is guilty of 'concealment of particulars of income' or 'furnishing of inaccurate particulars of such income'. Uncertain charge at the time of initiation of penalty, must necessarily be substituted with a conclusive default at the time of passing the penalty order. If the penalty is initiated with doubt and also concluded with a doubt as to the concealment of particulars of income or furnishing of inaccurate particulars of such income etc., the penalty order is vitiated. If on the other hand, if the penalty is initiated with an uncertain charge of 'concealment of particulars of income/furnishing of inaccurate particulars of income' etc., but the assessee is ultimately found to be guilty of a specific charge of either 'concealment of particulars of income' or 'furnishing of inaccurate particulars of income', then no fault can be found in the penalty order.*

**22.** *In Manu Engineering Works (supra), the Hon'ble Gujarat High Court noticed that the charge at the stage of initiation of penalty proceedings as well in the penalty order was uncertain and the expression used at both the stages was concealment of particulars of income and/or furnishing of inaccurate particulars of such income. It struck down the penalty by holding that the assessee must have been found to be guilty of a certain charge in the penalty order. It, however, did not find anything amiss with the initiation of penalty on such uncertain charge, which is vivid from the following observations : —*

*'We find from the order of the IAC, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order: "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income". Now, the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee.'*

**23.** *It is thus evident that uncertain charge at the stage of initiation of penalty proceedings can be made good with a clear-cut charge in the penalty order. In any case, existence of a clear-cut charge in penalty order is a must so as to validate any penalty order."*

4.4 In the instant case, the Assessing officer has recorded his satisfaction in respect of the five items of disallowance/additions including undisclosed investment on construction of house amounting to Rs 938,800 leading to penalty, as 'concealment of income' in the assessment order passed under section 143(3) r/w 153A, thereafter initiated penalty by issuance of notice u/s 274 r/w 271 dated 21.30.2014 in respect of all the five items of disallowance/additions by treating them as covered under the expression "concealment particulars of income or furnished inaccurate particulars of income" and then finally passed the impugned penalty order u/s 271(1)(c) in respect of undisclosed investment on construction of house amounting to Rs 134,025 (to the extent sustained by the Id CIT(A) out of Rs 938,800) and levied penalty u/s 271(1)(c) amounting to Rs 45,555 by stating as under:

"6. In view of above stated facts and legal position, the assessee under consideration is, clearly liable for penalty u/s 271(1)(c) of the Act is imposed upon him as per following computation:-

Total undisclosed/concealed income liable to penalty u/s 271(1)(c)	Rs. 1,34,025
Penalty imposable (100% of tax sought to evaded)	Rs. 45,555/-
Penalty imposable (300% of tax sought to evaded)	Rs. 1,36,665/-
Penalty levied (100% of the tax sought to evaded)	Rs. 45,555/-

In view of the above, a penalty of Rs. 45,555/- is hereby levied u/s 271(1)(c) of the Income-tax Act, 1961. Issued demand notice."

*4.5 It is thus a case where the AO has recorded the satisfaction in the assessment order stating that the assessee has concealed his particulars of income whereby the assessee has not disclosed his investment in construction of the house to the extent of expenditure incurred during the previous year relevant to impugned assessment year. Therefore, the notice initiating the penalty proceedings is uncertain where he uses the expression "concealment particulars of income or furnished inaccurate particulars of income". However, during the penalty proceedings, he has given a decisive finding as reflected in the penalty order that the assessee is guilty of 'concealment of particulars of income' by not disclosing the investment in the construction of his house. As held by the Coordinate Bench (supra), the uncertain charge at the time of initiation of penalty has been made good and substituted with a conclusive default at the time of passing the penalty order and that in such a case, no fault can be found in the penalty order." In such a case, we do not see any infirmity in the penalty order so passed by the Assessing officer and the contentions so raised by the Id AR in this regard are not accepted."*

5. In the instant case, we find that the AO has recorded the satisfaction in the assessment order for initiating the penalty proceedings u/s 271(1)(c) of the Act. Thereafter, the notice initiating the penalty proceedings is uncertain where the AO uses the expression "concealment of particulars of income or furnished inaccurate particulars of such income". However, during the penalty proceedings, he has given a decisive and clear finding as reflected in the penalty

order that the assessee is guilty of concealment of particulars of income where the AO says that *"after considering all the facts that the amount of subject income under consideration were concealed by the assessee either by not disclosing or with the intention to evade the tax. Therefore, I am satisfied that the assessee has intentionally concealed the total income of Rs 1,20,009, hence, a notional penalty u/s 271(1)(c) to the tune of Rs 36,003 is hereby imposed."*

6. Therefore, following the legal proposition as discussed above, we are unable to accede to the aforesaid contention of the Id AR and penalty order cannot be held bad in law merely on account of uncertain charge at the stage of penalty notice. Given that the AO has found the assessee guilty of specific charge of concealment of particulars of income at the time of passing the penalty order which is found to be factually correct, the penalty levied u/s 271(1)(c) is hereby confirmed and the ground of appeal is dismissed.

In the result, the appeal of the assessee is dismissed.

Order pronounced in the open court on 21/12/2018.

Sd/-

(विजय पाल राव)  
(Vijay Pal Rao)

न्यायिक सदस्य / Judicial Member

Sd/-

(विक्रम सिंह यादव)  
(Vikram Singh Yadav)

लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 21/12/2018.

\*Santosh

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

1. अपीलार्थी / The Appellant- Shri Prem Prakash Uma Shanker, Alwar.

2. प्रत्यर्थी / The Respondent- ITO, Ward-2(3), Alwar.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 982/JP/2018 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar.