

**IN THE INCOME TAX APPELLATE TRIBUNAL
Camp Bench at Jalandhar**

**Before Shri N.K. Saini, Vice President
and Shri Ravish Sood, Judicial Member**

**ITA No. 377/Asr./2018
Assessment Year : 2009-10**

Sh Barat Pal Sood,
Rattan Niwas,
G.T. Road,
Phagwara

Vs.

The ITO, Ward-1,
Phagwara

PAN – ACJPS0851J

(Appellant)

(Respondent)

Appellant by: Shri Sandeep Vijn, CA
Respondent by: Sh Shakil Ahmad, D.R

Date of Hearing: 16.01.2019
Date of Pronouncement: 17.01.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-2, Jalandhar, dated 04.04.2018 which in turn arises from the order passed by the Assessing Officer u/s 271 (1) (c) of the Income Tax Act, 1961 (for short 'I.T. Act'), dated 23.11.2015 for Assessment Year 2009-10. The assessee assailing the order of the CIT(A) has raised before us the following grounds of appeal:

1. *The Ld. CIT(A) has erred in sustaining the order u/s 271 (1) (c) which is bad in law.*
2. *That Ld. CIT(A) has further erred in sustaining an order which was premature and bad in law. The Ld. Assessing Officer had proceeded to levy penalty*

without even intimating the inability to wait till the decision of the ITAT in quantum appeal. The principles of natural justice thus also stood violated.

3. *The Ld. CIT(A) erred in confirming the levy of penalty for concealment at Rs. 2,75,275/- . Even the error in computing the peak balance which was the basis of levy of penalty for concealment has not been appreciated.*

2. Briefly stated, the assessee had filed his return of income for Assessment Year 2009-10 on 25.8.2009, declaring an income of Rs. 1,98,390/-. The return of income filed by the assessee was processed as such u/s 143(1) of the I.T.Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) if the I.T.Act. The Assessing Officer assessed the income of the assessee at Rs. 22,55,590/- after making the following additions / disallowances:-

Sr.No.	Particulars	Amount (in Rs.)
1	Addition on account of unexplained cash credits in the bank account	18,16,500
2	Addition on account of interest disallowed u/s 36(i)(iii)	88,855
3	Addition of bank interest	34,242
4	Addition to the rental income	1,97,400

3. Aggrieved, the assessee carried the matter in appeal before CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee allowed a relief of Rs. 8,97,600/- out of the addition of Rs. 18,16,500/-

made on account of unexplained cash credits. Apart therefrom, the addition of Rs. 1,97,400/- and Rs. 88,855/- that was made by the Assessing Officer on account of rental income and disallowance of interest u/s 36(i)(iii) of the I.T.Act was deleted by him. Insofar, the addition of Rs. 34,242/- made on account of bank interest was concerned, the same was confirmed by the CIT(A). In sum and substance, the CIT(A) sustained the addition of Rs. 9,18,900/- (out of unexplained cash credits of Rs. 18,16,500/-), as well as upheld the addition of Rs. 34,242/- made by the Assessing Officer on account of bank interest.

4. The Assessing Officer after receiving the order of the CIT(A) called upon the assessee to explain as to why penalty u/s 271(1)(c) of the Act may not be imposed on him. The explanation given by the assessee in order to impress upon the Assessing Officer that no penalty u/s 271(1)(c) of the I.T.Act was liable to be imposed, however, did not find favour with him and he imposed a penalty of Rs. 2,75,275/- u/s 271(1)(c) of the I.T. Act for concealing the particulars of income or filing “inaccurate particulars of income” in the hands of the assessee.

5. Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee, dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The Ld. Authorized Representative (for short ‘A.R’) of the assessee, at the outset of the hearing of the appeal, submitted

that the Assessing Officer had failed to put the assessee to notice as regards the default for which penalty u/s 271(1)(c) was sought to be imposed in the hands of the assessee. In order to drive home his aforesaid contention, the Ld. AR took us through the copy of the 'Show Cause notice (for short 'SCN')' dated 7.8.2015, Page 17 of the assessee's Paper Book (in short 'APB'). Apart therefrom, it was averred by the Ld. AR that there was no specific mention of the default for which penalty proceedings were initiated by the Assessing Officer while framing the assessment vide his order passed u/s 143(3) of the Act dated 23.12.2011. The Ld. AR drew our attention to the copy of the assessment order wherein the Assessing Officer while framing the assessment has initiated penalty proceedings u/s 271 (1) (c) for "concealing /filing inaccurate particulars of income". The Ld. AR further drew our attention to the "SCN", dated 23.12.2011 issued u/s 271 read with section 271 of the I.T.Act, which was issued by the Assessing Officer alongwith the assessment order. It was submitted by the Ld. AR that a perusal of the aforesaid "SCN" dated 23.12.2011 did not reveal the default for which the assessee was called upon to explain as to why penalty may not be imposed upon him us 271 (1) (c) of the I.T.Act. It was the claim of the Ld. AR that as the Assessing Officer had ticked both the defaults viz "concealment of particulars of income" **or** "furnishing of inaccurate particulars of such income", thus, it was not discernible as to for what default the penalty was sought to be imposed by the Assessing Officer under the aforesaid statutory provisions. The Ld. AR further submitted that the assessee in the course of the penalty proceedings had vide his reply dated 10.9.2015 submitted

before the Assessing Officer that the penalty proceedings initiated u/s 271 (1) (c) of the Act may be kept pending till the disposal of the appeal before the Income Tax Appellate Tribunal, Amritsar. However, the Assessing Officer despite the aforesaid request on the part of the assessee had proceeded with and vide his order dated 23.11.2015 had imposed penalty u/s 271 (1) (c) of the Act in the hands of the assessee. It was submitted by the Ld. AR that where an appeal of the assessee against the addition made in the assessment was pending before the Tribunal, an order imposing penalty u/s 271 (1) (c) would be pre-mature and, hence, not maintainable. In support of his aforesaid contention, the Ld. AR relied upon the judgement of the Hon'ble Bombay High Court in the case of **R.B. Shree Ram Durga Prasad vs CIT, Nagpur (2016) 65 taxman.com 293 (Bom.)**

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied upon the orders of the lower authorities. It was submitted by the Ld. Departmental Representative (for short 'D.R') that as multiple additions / disallowances were made by Assessing Officer, therefore, the latter had rightly initiated penalty proceedings for both the defaults viz “concealment of income” and “furnishing of inaccurate particulars of income”

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the Assessing Officer in the “SCN” dated 23.12.2011 had earmarked both the defaults viz “concealment of particulars of income” or “furnishing of inaccurate particulars of income”. Interestingly, though the Assessing Officer had ticked both the defaults, however, the usage of the

term “**or**” used between the said defaults clearly reveals that he had failed to point out the default for which the assessee was called upon to explain as to why penalty u/s 271 (1) (c) may not be imposed upon him. In our considered view, on a bare perusal of the “SCN” dated 23/12/2011, it can safely be gathered that the Assessing Officer himself was not aware as to for what default the assessee was being put to notice and therein called upon to explain as to why penalty may not be imposed upon him. Apart therefrom, the subsequent “opportunity notice” issued by the Assessing Officer u/s 129 of the I.T. Act, dated 7.8.2015 also does not make any mention of the default for which the assessee was called upon to explain as to why penalty may not be imposed under the aforesaid statutory provision in his hands. Be that as it may, in our considered view, the Assessing Officer had blatantly failed to put the assessee to notice as regards the default for which the penalty was sought to be imposed upon him

9. We have given a thoughtful consideration to the facts of the case and are persuaded to subscribe to the claim of the ld. A.R that the A.O had in the aforesaid ‘SCN’, dated 23.12.2011 and 07.08.2015 failed to point out the default for which penalty was sought to be imposed by him on the assessee. In our considered view, as both of the two defaults envisaged in Sec. 271(1)(c) i.e ‘concealment of income’ and ‘furnishing of inaccurate particulars of income’ are separate and distinct defaults which operate in their independent and exclusive fields, therefore, it was obligatory on the part of the A.O to have clearly put the assessee to notice as regards the default for which he was called upon to explain as to why penalty under Sec.

271(1)(c) may not be imposed on him. As observed by us hereinabove, a perusal of the 'Show cause' notices issued in the present case by the A.O under Sec. 274 r.w. Sec. 271(1)(c), dated 23.12.2011 and 07.08.2015 clearly reveals that there has been no application of mind on the part of the A.O while issuing the same. We are of a strong conviction that the very purpose of affording a reasonable opportunity of being heard to the assessee as per the mandate of Sec. 274(1) would not only be frustrated, but would be rendered redundant, if the assessee is not conveyed in clear terms the specific default for which penalty under the said statutory provision was sought to be imposed. In our considered view, the indispensable requirement on the part of the A.O to put the assessee to notice as regards the specific charge contemplated under the aforesaid statutory provision viz. 'concealment of income' or 'furnishing of inaccurate particulars of income' is not merely an idle formality, but is a statutory obligation cast upon him, which we find had not been discharged in the present case as per the mandate of law.

10. We would now test the validity of the aforesaid 'Show Cause' notices and the jurisdiction emerging therefrom in the backdrop of the judicial pronouncements on the issue under consideration. Admittedly, the A.O is vested with the powers to levy penalty under Sec. 271(1)(c) of the Act, if in the course of the proceedings he is satisfied that the assessee had either 'concealed his income' or 'furnished inaccurate particulars of his income'. In our considered view, as penalty proceedings are in the nature of *quasi criminal* proceedings, therefore, the assessee as a matter of a statutory right

is supposed to know the exact charge for which he is being called upon to explain that as to why the same may not be imposed. The non specifying of the charge in the 'Show cause' notice not only reflects the non application of mind by the A.O, but the same seriously defeats the very purpose of giving a reasonable opportunity of being heard to the assessee as envisaged under Sec. 274(1) of the I.T Act. We find that the fine distinction between the said two defaults contemplated in Sec. 271(1)(c) viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' had been appreciated at length by the **Hon'ble Supreme Court** in its judgments passed in the case of **Dilip & Shroff Vs. Jt. CIT (2007) 210 CTR (SC) 228** and **T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC)**. The Hon'ble Apex Court in its aforesaid judgments had observed that the two expressions, viz. 'concealment of particulars of income' and 'furnishing of inaccurate particulars of income' have different connotation. The Hon'ble Apex Court being of the view that the non-striking off the irrelevant limb in the notice clearly reveals a non-application of mind by the A.O, had observed as under:-

"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he has furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing reliance on the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice [See Malabar Industrial Co. Ltd. Vs. CIT (2000) 2 SCC 718].

We are of the considered view, that now when as per the settled position of law the two defaults viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults, therefore, in case the A.O sought to have proceeded against the assessee for either of the said defaults, then it was incumbent on his part to have clearly specified his said intention in the 'Show cause' notice, which however we find he had failed to do in the case before us. The aforesaid failure on the part of the assessee cannot be characterised as merely a technical default, as the same has clearly divested the assessee of his statutory right of an opportunity of being heard and defend his case.

11. We find that the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** has held that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings had been initiated, i.e. whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same has to be held as bad in law. The 'Special Leave Petition' (for short 'SLP') filed by the revenue against the aforesaid order of the **Hon'ble High Court of Karnataka** had been dismissed by the **Hon'ble Supreme Court** in **CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)**. Apart therefrom, we find that a similar view had been taken by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017)(Bom)**.

12. We find that as averred by the Ld. A.R., the indispensable obligation on the part of the A.O to clearly put the assessee to notice of the charge under the aforesaid statutory provision viz. Sec. 271(1)(c) had been deliberated upon by a coordinate bench of the Tribunal, i.e. ITAT “C” Bench, Mumbai in the case of M/s Orbit Enterprises Vs. ITO-15(2)(2), Mumbai (ITA No. 1596 & 1597/Mum/2014, dated 01.09.2017). The Tribunal in the aforementioned case had in the backdrop of various judicial pronouncements concluded that the failure to specify the charge in the ‘Show cause’ notice clearly reflects the non application of mind by the A.O, and would resultantly render the order passed under Sec. 271(1)(c) in the backdrop of the said serious infirmity as invalid and *void ab initio*.

13. We have given a thoughtful consideration to the issue before us and after deliberating on the facts, are of the considered view, that the failure on the part of the A.O to clearly put the assessee to notice as regards the default for which penalty under Sec. 271(1)(c) was sought to be imposed on him by failing to strike off the irrelevant default in the ‘SCN’, dated 23.12.2011 and 07.08.2015, had left the assessee guessing of the default for which he was being proceeded against for. We thus in the backdrop of our aforesaid observations, are of a strong conviction that as the A.O had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the default for which he was being proceeded against, therefore, the penalty under Sec. 271(1)(c) of Rs. 2,75,275/- imposed by him in clear violation of the mandate of Sec. 274(1) of the Act, cannot be sustained. We thus for the aforesaid reasons not being able to persuade

ourselves to subscribe to the imposition of penalty by the A.O, therefore, set aside the order of the CIT(A) who had upheld the same. The penalty of Rs.2,75,275/- imposed by the A.O under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

14. As the penalty imposed on the assessee under Sec. 271(1)(c) of the Act had been quashed by us for want of jurisdiction on the part of the A.O, therefore, we refrain from advertng to and adjudicating the merits of the case.

15. The appeal of the assessee is allowed in terms of our aforesaid observations

The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 17.01.2019.

Sd/-

Sd/-

(N.K. Saini)
Vice President

(Ravish Sood)
Judicial Member

Place: Jalandhar;

Date 17.01.2019

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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)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Camp Bench at Jalandhar.
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Camp Bench,
Jalandhar.

Sr.No.	Details	Date	Initials	Designation
1	Draft dictated on	16.1.19		Sr.PS/PS
2	Draft Placed before author	17.1.19		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5	Approved Draft comes to the Sr.PS/PS	17.1.19		Sr.PS/PS
6	Kept for pronouncement on	17.1.19		Sr.PS/PS
7	File sent to the Bench Clerk	17.1.19		Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date on which file goes to the AR			
10	Date of Dispatch of order			