

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.878/M/2017
Assessment Year: 2011-12**

Shri Anand Vora, Ground Floor, Laxmi Bhavan, 9 th Road, Khar Road (W), Mumbai – 400 049 PAN: ADEPV 8168K	Vs.	DCIT-26(2), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Dharmesh Shah, A.R. &
Shri Dhaval Shah, A.R.

Revenue by : Shri Anoop Hiwase, D.R.

Date of Hearing : 21.08.2018

Date of Pronouncement : 12.09.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 07.11.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2011-12.

2. The only issue raised by the assessee in the grounds of appeal is against the confirmation of penalty of Rs.2,85,051/- as levied by the AO under section 271(1)(c) of the Act.

3. The assessee has also raised the additional ground vide application dated 14.08.2018 which is reproduced as under:

“1. The Ld. CIT(A) has erred in law and in facts in partly confirming the penalty order without appreciating that the penalty notice issued by the assessing officer was in a mechanical manner without specifying or striking out relevant limb of s. 271(1)(c) of the Act.

2. The Ld. CIT(A) has erred in law and in facts in confirming the action of the assessing officer in for levying penalty for filing inaccurate particulars of income by invoking Explanation 1 to s. 271(1)(c) of the Act.”

4. After hearing both the parties and perusing the material on record, we find that the additional ground raised by the assessee is a purely legal ground arising out of the records before the authorities below and therefore we are inclined to admit the same for adjudication. The case of the assessee is also supported by the decision of the Apex Court namely;

1. National Thermal Power Company Ltd. vs. CIT 229 ITR 383 (SC)
2. CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom.) and
3. Jute Corporation India vs. CIT (1991) 187 (ITR) 688.

5. We would like to adjudicate the additional ground first in which the assessee has challenged the jurisdiction of the AO to levy penalty on the basis of notice issued under section 274 read with section 271 of the Act wherein the AO has not specified one of the two limbs i.e. concealment of particulars of income or furnishing of inaccurate particulars of income on which the penalty was proposed to be levied and thus issued the notice imposing penalty in a mechanical manner and without application of mind.

6. The Ld. A.R. vehemently argued before us that the Ld. CIT(A) has grossly erred in affirming the order of AO confirming the penalty without appreciating the fact that AO has not struck off one of the two limbs mentioned in the notice or stated the right limb on which the penalty was proposed to be levied and thus the said notice was issue and penalty was imposed without application of mind. The Ld. A.R. submitted that the issue has been settled by the Apex Court and also by the Hon'ble Bombay High Court in a series of decisions namely;

CIT vs. SSA'S Emerald Meadows 73 taxman.com 248 (SC)

CIT vs. Samson Perincherry 392 ITR 4 (Bom.)

DCIT vs. Pennzoil Quaker State India Ltd. [ITA No.7386/M/2014 dated 12.01.2018 for A.Y. 2007-08]

ACIT vs. Idea Cellular Ltd. [ITA No.1592 & 1593/M/2016 dated 31.05.2018 for A.Y. 2002-03 & 2003-04]

The Ld. A.R., therefore, submitted that the order of AO should be quashed as being invalid and without any jurisdiction as no proper notice was issued under section 274 read with section 271.

7. The Ld. D.R., on the other hand, relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. Smt. Kaushalya & others 216 ITR 66 and the decision of Mumbai Tribunal in the case of Dhaval K. Jain in ITA No.996/M/2014 dated 30.09.2016 to support his contentions that the penalty

has rightly been levied even if the AO has not marked the relevant limb.

8. In the rebuttal, the Ld. A.R. submitted that the decisions relied upon by the Ld. D.R. are not of any help to the Revenue as the co-ordinate Mumbai Bench of the Tribunal in a series of cases has held that non striking off the relevant limb in the notice would amount to non application of mind by the AO and penalty levied in such cases is not valid. The Ld. A.R. also stated that in the case of Global Proserv Ltd. vs. ACIT in ITA No.733 to 7335/M/2014 dated 14.03.2017 and Shri Viren Vini Ahuja vs. ACIT in ITA No.422/M/2017 dated 29.09.2017 the Hon'ble Bench has deleted the penalty after considering the decision relied upon by the Ld. D.R. in the case of CIT vs. Smt. Kaushalya & others (supra) and prayed before the Bench that the AO should be directed to delete the penalty as the penalty notice as well as the consequent order passed under section 271(1)(c) of the Act is invalid and void ab-initio.

9. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the rival parties. The undisputed facts are that notice under section 274 read with section 271(1)(c) of the Act was issued by the AO without striking off the redundant limb of the two limbs and thus issued in a mechanical manner without application of mind. In other words, the AO has not specifically stated in the notice issued that on which one of the two limbs the penalty was proposed to be levied and therefore the penalty proceedings suffer from an incurable defect and

has to be held as invalid and so is the consequent order passed under section 271(1)(c). The case of the assessee is covered by a series of decisions of the Apex Court and Jurisdictional High Court wherein it has been held that it is mandatory to specify one of the two limbs on which penalty is proposed to be levied failing which the penalty as well as the order imposing penalty would be invalid and void ab-initio. The decision relied upon by the Revenue is of no help as the same has been considered by the co-ordinate Benches in the case of Global Proserv Ltd. vs. ACIT (supra) and Shri Viren Vini Ahuja vs. ACIT (supra) and deleted the penalty for non specification of specific charge in the notice issued under section 274 read with section 271(1)(c) of the Act. We, therefore, after carefully perusing the facts in the light of ratio laid down by the Apex Court and the Hon'ble Bombay High Court, are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the penalty.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 12.09.2018.

**Sd/-
(C.N. Prasad)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 12.09.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.