



IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI AMARJIT SINGH, JM

ITA No.1034/Mum/2017

(Assessment Year :2006-07)

M/s. Valentine Maritime (Gulf) LLC 2004-2005, Montreal, B-31 Shastri Nagar, Andheri (W), Mumbai - 400053	Vs.	DCIT(IT) 4 (3) (1) 16 th Floor, Air India Building Mumbai - 400021
PAN/GIR No.AABCV1070B		
(Appellant)	..	(Respondent)

Assessee by	Shri Hiro Rai
Revenue by	Shri Rajeev Gubgoira
Date of Hearing	13/11/2018
Date of Pronouncement	01/02/2019

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by assessee against the order of CIT(A)-55, Mumbai dated 28/10/2016 for A.Y.2006-07 in the matter of imposition of penalty u/s.271(1)(C) of the IT Act.

2. Following grounds have been taken by the assessee:-

1. *The learned CIT (A) has erred in confirming the levy of penalty of Rs.24,53,292/- U/s 271(l)(c) of Income-tax Act.*
2. *On the facts and circumstances of the case learned CIT (A) failed to consider the submission of the appellant that it was mere rejection of the claim of the Appellant on account of difference of opinion between the A.O and the appellant.*
3. *On the facts and circumstances of the learned CIT(A) failed to appreciate that the appellant has furnished full particulars of claim in the return of Income.*

4. The appellant craves leave to add, alter or amend any of the grounds of appeal at any time before or at the time of the hearing.”

3. Rival contentions have been heard and record perused. Facts in brief are that assessee is engaged in technical / engineering services. During the course of assessment, AO made addition on account of demobilization expense, gross receipt from EIL. After making addition, AO has also levied penalty u/s.271(1)(c) which was confirmed by the CIT(A), against which assessee is in further appeal before us.

4. At the outset, Ld. AR pointed out that there is defect in notice issued u/s.274 r.w.s. 271(1)(c) of the IT Act in so far as AO has not indicated as to whether penalty is initiated and imposed for concealment of particulars of income or furnishing of inaccurate particulars of income. Various judicial pronouncements of co-ordinate Bench as well as Hon'ble Bombay High Court and Hon'ble Supreme Court was placed on record to indicate that on the plea of defect of notice, the penalty so imposed is not legally tenable.

5. Our attention was invited to notice dated 30/12/2008 issued u/s.274 r.w.s. 271(1)(c) wherein inappropriate portion was not deleted.

6. We have considered rival contentions and carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by Ld. AR and Ld. DR during the course of hearing before us in the context of factual matrix of the case. From the record we found

that notice issued by the AO dated 30/12/2008 as placed on record did not indicate as to whether the penalty was to be levied for concealment of particulars of income or furnishing of inaccurate particulars of such income.

7. As per our considered view, two charges for initiating the penalty operate on two different footing and under the penal provision the charge has to be very specific and not vague. These charges are not to be reckoned as any casual remark, which can be interchanged by the AO at any stage on his whims and fancies. It is not an error which is rectifiable or to be ignored, albeit it is a fatal error which vitiates the entire initiation itself. If charge itself is vague and not clear, then the onus cast upon the assessee under Explanation itself gets vitiated as assessee is precluded from a chance to give a specific rebuttal on that charge. It is a trite law that circumstances and facts for levy of penalty under both the grounds operate in a different fields. The courts have held that in the notice under section 274 r.w.s. 271, the AO has to specify the charge on which he intends to levy penalty. This aspect of the matter has been consistently reiterated by the Hon'ble High Courts from time to time.

8. We found that Notice dated 30/12/2018 issued by AO u/s.274 r.w.s. 271(1)(c) was on standard performa in which inappropriate words and paragraphs were neither struck off nor deleted. We also found that no satisfaction was recorded in the quantum order as to whether AO

intends to initiate penalty proceedings for furnishing of inaccurate particulars of income or concealment of income. Thus, the assessing authority was not sure as to whether he had proceeded on the basis that the assessee had either concealed its income or had furnished inaccurate particulars. Thus, the notices so issued are not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non-application of mind on the part of the assessing authority.

9. There can be no doubt that penalty u/s. 271(1)(c) of the Act is levied for concealing particulars of income or for furnishing inaccurate particulars of such Income, which are the two limbs of this provision. In other words, it is only when the authority invested with the requisite power is satisfied that either of the two events existed in a particular case that proceedings u/s. 271(1)(c) of the Act are initiated. This pre-requisite should invariably be evident from the notice issued u/s. 274 r.w.s. 271 of the Act, which is the jurisdictional notice, for visiting an assessee with the penal provision. The intent and purpose of this notice is to inform the assessee as to the specific charge for which he has been show-caused so that he could furnish his reply without any confusion and to the point. In the present case, neither the assessee nor anyone else could make out as to whether the notice u/s. 274 r.w.S. 271 of the Act was issued for concealing the particulars of income or for furnishing inaccurate particulars of such income disabling it to meet with the case of the Assessing Officer. There are a catena of judgments highlighting the necessity for identifying the

charge for which the assessee is being visited and in all those decisions, Hon'ble Courts have repeatedly held that where the jurisdictional notice is vague, similar to the one in the present case, the consequent levy cannot be sustained.

10. In this connection, reliance is first placed upon the judgment of the Hon'ble Karnataka High Court In the case of CIT v. Manjunatha Cotton and Ginning Factory & Ors. and Veerabhadrapa Sangappa and Co. (359 ITR 565, 577, 601, 603-604) in which the facts are similar. In those bunch of tax appeals, several assessee and several issues were involved. In so far as I.T.A. No. 5020 of 2009 was concerned, one of the substantial questions on which the appeal was filed by the revenue was:

"Whether the notice issued under section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal?"

11. While answering the above in favour of the assessee, the following findings were recorded by the Hon'ble Court:

"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 [2007] 292 ITR 11 (SC) 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 Manu Engineering Works reported in [1980] 122 ITR 306 (GUJ) and the Delhi High Court in the case of CIT v. Virgo Marketing P Ltd reported in [2008] 171 Taxman 156 has held that levy of penalty has to be clear as to the limb for which it is levied and the position 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. "(p) Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c) i.e. whether it is for concealment of income or for furnishing of incorrect particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.

12. Thereafter, in so far as the manner in which the statutory notice was required to be issued, the Hon'ble Court concluded thus:

(p) Notice u/s 274 of the Act should be specifically state the grounds mentioned in section 271(1)(c), i.e. whether it is for concealment of income or for furnishing of incorrect particulars of income.

13. Finally, in concurring with the findings recorded in the order of the Tribunal, it was held thus:

66. In view of the aforesaid law, we are of the view that the Tribunal was justified in holding that the entire proceedings are vitiated as the notice issued is not in accordance with law and accordingly justified in interfering with the order passed by the appellate authority as well as the assessing authority and in setting aside the same. Hence, we answer the substantial questions of law framed in this case in favour of the assessee and against the Revenue. "

14. The aforesaid judgment was unsuccessfully challenged by the revenue before the Supreme Court, as it was rejected vide Petition for Special Leave to Appeal (C) No. 13898/2014 dated 11.07.2016. Reliance was next placed upon another judgment of the Hon'ble Karnataka High Court in the case CIT v. SSA'S Emerald Meadows (Income Tax Appeal No. 380 of 2015 decided on 23.11.2016). In this case also a similar situation arose in as much as the Hon'ble Court was required to adjudicate on the following substantial question:

(1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?"

15. The aforesaid question was dealt with by the Hon'ble Court in favour of the assessee in the following words:

"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 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.”

16. The SLP filed by the department in the aforesaid case also was dismissed by the Hon'ble Supreme Court vide Petition for Special Leave to Appeal (C) No /2016 (CC No. 11485/2016) dated 05.08.2016.

17. The Hon'ble Bombay High Court in the case of CIT v. Shri Samson Perinchery [Income Tax Appeal No. 1154 of 2014 and others dated 05.01.2017] had also occasion to consider a similar issue. In this case, though proceedings u/s. 271(1)(c) of the Act were initiated for furnishing of inaccurate particulars of income, in the notice issued u/s. 274 r.w.s. 271 of the Act in the standard form, the charge for which it was issued was also not identified, as in the present case. In deleting the levy, so far as non-specification of the default in the jurisdictional notice, the following findings were recorded by the Hon'ble Bombay High Court:

"7 Therefore, the issue herein stands concluded in favour of the Respondent-Assessee by the decision of the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra). Nothing has been shown to us in the present facts which would warrant our taking a view different from the Karnataka High Court in the case of Menjuneth Cotton and Ginning Factory (supra).

8. In view of the above, the question as framed do not give rise to any substantial question of law Thus, not entertained"

18. The Hon'ble Supreme Court in Dilip N. Shroff v/s JCIT, [2007] 291 ITR 519 (SC), has observed that while issuing the notice under section 274 r/w section 271, in the standard format, the Assessing Officer should

delete the inappropriate words or paragraphs, otherwise, it may indicate that the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income. This, according to the Hon'ble Supreme Court, deprives the assessee of a fair opportunity to explain its stand, thereby, violates the principles of natural justice. As held by the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC), the aforesaid principle laid in Dilip N. Shroff (supra) still holds good in spite of the decision of the Hon'ble Supreme Court in UOI v/s Dharmendra Textile Processors (2008) 306 ITR 277 (SC). The Hon'ble Bombay High Court in CIT v/s Smt. Kaushalya & Ors., [1995] 216 ITR 660 (Bom), observed that notice issued under section 274 must reveal application of mind by the Assessing Officer and the assessee must be made aware of the exact charge on which he had to file his explanation. The Court observed, vagueness and ambiguity in the notice deprives the assessee of reasonable opportunity as he is unaware of the exact charge he has to face. The Hon'ble Bombay High Court in Samson Perinchery (supra), following the decision of Hon'ble Karnataka High Court in CIT v/s Manjunatha Cotton & Ginning Factory, [2013] 359 ITR 565 (Kar.), held, order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated.

19. In view of the above discussions, we do not find any merit for the penalty so imposed., accordingly, AO is directed to delete the penalty so imposed u/s. 271(1)(c) of the IT Act.

20. In the result appeal of the assessee is allowed.

Order pronounced in the open court on this 01/02/2019

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 01/02/2019

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai