

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. 858 & 859/JP/2016
निर्धारण वर्ष/Assessment Year : 2011-12

Shri Kailash Chand Bangur, M/s Arun Marble Traders, 51, Bhati Colony, Jaipur Road, Madanganj, Kishangarh.	बनाम Vs.	The ITO, Kishangarh.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ACYPB 0569 M		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Sandeep Jhanwar (C.A.)
राजस्व की ओर से / Revenue by : Shri K.C. Gupta (JCIT)

सुनवाई की तारीख / Date of Hearing : 06/02/2019
उदघोषणा की तारीख / Date of Pronouncement: 12/02/2019

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

These two appeals by the assessee are directed against two separate orders of the Id. CIT(A), Ajmer both dated 18.07.2016 arising from the penalty order passed U/s 271B and 271(1)(c) of the I.T. Act for the assessment year 2011-12. In ITA No. 858/JP/2016 the assessee has raised the following ground of appeal:-

- "1. Under the facts and circumstances of the case, the Ld. CIT(A) has erred confirming the penalty imposed by the Ld. AO u/s 271B of the Income Tax Act, 1961 amounting to Rs. 36,650/-. The penalty so imposed deserves to be deleted.*
- 2. The assessee craves the right to add, amend, alter, or modify any of the ground of the appeal."*

2. The assessee is engaged in the business of Morble trading through his proprietorship concern M/s Arun Morble Traders and filed its return of income on 16.07.2011 declaring total income of Rs. 1,76,720/- at turnover of Rs. 19,92,544/-. There was survey U/s 133A of the Act in the case of Shri P.C. Vijayvargiya and others on 06.01.2011 by the Investigation Wing, Jaipur. During the course of survey proceedings it was found that the assessee was indulged in suppressing their sales by routing through bank account of Shri P.C. Vijayvargiya. Thus, as per the cash deposit in the bank account of Shri P.C. Vijayvargiya the Department proposed to make the addition in respect of the unaccounted sales of Rs. 53,37,500/-. During the assessment proceedings the assessee agreed to the addition @ 15.15% of the alleged unaccounted turnover amounting to Rs. 8,08,631/-. Thus, the assessment was completed by making the addition of unaccounted turnover. Subsequently the AO initiated penalty proceedings U/s 271B

of the Act for non compliance of the provisions of Section 44AB of the Act as the account of the assessee were not audited. The AO then, levied the penalty of Rs. 36,650/- U/s 271B of the Act which is half per cent of the total turnover of the assessee. The assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

3. Before us, the Id. AR of the assessee has submitted that as per books of accounts and return of income filed by the assessee, the turnover of the assessee was Rs. 19,92,544/- and therefore, the books of accounts of the assessee were not required to be audited as per provisions of Section 44AB of the Act. It is only when the AO proposed to make the addition on account of the alleged turnover based on the statement of Shri P.C. Vijayvargiya recorded during the survey U/s 133A of the Act the assessee to avoid unnecessary litigation and to buy peace of mind agreed with the addition to the extent of 15.15% profit on the alleged turnover. Thus, the Id. AR of the assessee has submitted that the addition made by the AO will not automatically be considered as the turnover of the assessee for the purpose of Section 44AB of the Act. He has further submitted that the Department is taking divergent on this issue as there were various of transactions of deposits in the bank

account of Shri P.C. Vijayvargiya found during the survey and the Department in some of the cases has made only protective addition in the hands of the other individual and substantive addition in the hands of Shri P.C. Vijayvargiya. Merely because the assessee agreed to the addition to buy peace of mind would not lead to the conclusion that actual turnover of the assessee is Rs. 73,30,044/- as considered by the AO. Thus, the Id. AR has submitted that the penalty levied by the AO U/s 271B of the Act is not justified and the same may be deleted.

4. On the other hand, Id. DR has relied upon the orders of the authorities below and submitted that the assessee has admitted unaccounted turnover then, the provisions of Section 44AB of the Act are applicable as the total turnover exceeds the limit provided U/s 44AB of the Act.

5. We have considered the rival submissions as well as relevant material on record there was no dispute that the turnover of the assessee as per books of accounts regularly maintained by the assessee is only 19,92,544/- which do not exceed the limit provided U/s 44AB of the Act, however, due to the unaccounted turnover as considered by

the AO based on the survey in case of one Shri P.C. Vijayvargiya the AO has made an addition to the income of the assessee to which the assessee agreed. Thus, even if the assessee has agreed to the addition on unaccounted turnover since, the said turnover was not part of the books of accounts, therefore, the question of audit of the books of account in terms of section 44AB does not arise. The requirement of audit of books of accounts as per the provisions of Section 44AB of the Act is based on the turnover which is recorded in the books of account as the audit report in the prescribed form will verify and certify the correctness of the accounts and therefore, whatever not part of the books of accounts cannot be subjected to audit. Hence, the purpose of getting of books of account accounted to get the accounts verified and examined by the auditor so that prima facie the audited accounts to the extent of the entry recorded in the books of account and book results are considered as correct except any defect is pointed out by the AO. Accordingly, the provisions of Section 271B of the Act cannot be invoked when the turnover of the assessee as recorded in the books of account is not exceeding the limit provided U/s 44AB of the Act. Hence, the penalty levied U/s 271B of the Act is deleted.

6. In ITA No. 859/JP/2016 the assessee has raised the following ground of appeal:-

*"1. Under the facts and circumstances of the case, the Ld. CIT(A) has erred confirming the penalty imposed by the Ld. AO u/s 271(1)(c) of the Income Tax Act, 1961 amounting to Rs. 1,53,000/-. The penalty so imposed deserves to be deleted.
2. The assessee craves the right to add, amend, alter, or modify any of the ground of the appeal."*

7. The assessee has also raised additional ground which reads as under:-

*"Though the ground above challenges the levy of penalty for the reason of legality of the issue as well as on merit of the case, the assessee hereby wishes to take specific ground for challenging the legality of the issue involved. The following ground is accordingly being raised as additional ground:
"Under the facts and circumstances of the case, the penalty order passed u/s 271(1)(c) is bad in law and deserved to be quashed."*

Since, the additional ground raised by the assessee is legally in nature and goes to the root of the matter and therefore, first we take up the additional ground.

8. We have heard the Id. AR as well as Id. DR and considered the relevant material on record for admission of additional ground. There is no dispute that the additional ground raised by the assessee involves a question of law which does not require any verification or investigation of new facts but the additional ground cannot be decided on the basis

of the facts already available on record. Therefore, in view of the decision of the Hon'ble Supreme Court in case of NTPC vs. CIT 229 ITR 383 the additional ground raised by the assessee is admitted for adjudication on merits.

9. **On the merits of the additional ground:-** The Id. AR of the assessee has submitted that the Assessing Officer while issuing the notice U/s 274 of the Act has not specified whether the assessee has concealed the particulars of income or furnished inaccurate particulars of income. Therefore, the AO has not made it clear on what ground he proposed to levy the penalty U/s 271(1)(c) of the Act and consequently it does not satisfy the requirement of law to make the assessee known the basis for levy of penalty as proposed by the AO. He has relied upon the decision of the Hon'ble Karnataka High Court in case of **CIT Manjunathan Cotton & Ginning Factory** 359 ITR 565 and submitted that the said decision of the Hon'ble High Court has been confirmed by the Hon'ble Supreme Court in case of **CIT vs. SSA's Emerald Meadows** 73 taxmann.com 241. The Id. AR has also relied upon the decision of Hon'ble jurisdictional High Court in case of **Sheveta Construction Co. vs. ITO** in ITA No. 534/2008 dated 06.12.2016. Hence, the Id. AR has pleaded that the initiation of the

penalty U/s 271(1)(c) of the Act is bad in law and not sustainable and consequently the order passed by the AO U/s 271(1)(c) of the Act is liable to be quashed.

10. On the other hand, Id. DR has submitted that it is an admitted case of concealment of income as the assessee has not disclosed the correct amount of turnover which was detected during the investigation carried out in case of one Shri P.C. Vijayvargiya. The assessee has admitted the addition made by the AO and therefore, it was known to the assessee that he has concealed the particulars of income. He has relied upon the order of the authorities below.

11. We have considered the rival submissions as well as relevant material on record. There is not dispute that the addition made by the AO is based on the statement of one Shri P.C. Vijayvargiya wherein he has alleged that a sum of Rs. 53,37,500/- deposited in the bank account pertains to the sale of the assessee. Thus, the AO has made an addition to the extent of 15.15% of the said turnover as income of the assessee. The Assessing Officer while initiated the penalty proceeding U/s

271(1)(c) of the Act issued notice dated 20.02.2014 wherein he proposed to levy the penalty but has not specified the ground on which the penalty was to be levied U/s 271(1)(c) of the Act. The AO has neither specified the limb nor delete or strike off the irrelevant part of the notice which reads as under:-

*"have concealed the particulars of your income or
..... furnished inaccurate particulars of such income."*

Therefore, show cause notice issued U/s 274 of the Act does not specify the limb for which the AO has proposed the levy of penalty. Once the AO has failed to specify the default of the assessee against which the penalty was to be levied then, it is a clear case of initiation of the proceedings without making the assessee known about his default and consequently the assessee was not given the opportunity to respond to the show cause notice or to meet the charges on which the penalty was proposed to be levied by the AO. Even while passing the penalty order U/s 271(1)(c) of the Act the AO has again stated that the assessee has concealed income and furnished inaccurate particulars of income. The addition is only one which cannot be regarded as concealment as well as furnishing inaccurate particulars of income. The Hon'ble Karnataka High Court in case of CIT vs. Manjunatha Cottn &

Ginning Factory (supra) while dealing with this issue has held in para 59

& 63 as under:-

"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 1 or in Explanation 1(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 on him 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) do 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 the tax liability. As the said provisions have to be held to be strictly 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(l)(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 T. Ashok Pai v. CIT [\[2007\] 292 ITR 11/161 Taxman 340](#) 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 CIT v. Manu Engg. [\[1980\] 122 ITR 306](#) and the Delhi High Court in the case of CIT v. Virgo Marketing (P.) Ltd. [\[2008\] 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. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.

INDEPENDENT PROCEEDING

62. *The penalty proceedings are distinct from assessment proceedings, and independent therefrom. The assessment proceedings are taxing proceedings. The proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceeding. Separate provision is made for the imposition of penalty and separate notices of demand are made for recovery of tax and amount of penalty. Also separate appeal is provided against order of imposition of penalty. Above all, normally, assessment proceedings must precede penalty proceedings. Assessee is entitled to submit fresh evidence in the course of penalty proceedings. It is because penalty proceedings are independent proceedings. The assessee cannot question the*

assessment jurisdiction in penalty proceedings. Jurisdiction under penalty proceedings can only be limited to the issue of penalty, so that validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter in penalty proceedings. It is not possible to give a finding that the reassessment is invalid in such penalty proceedings. Clearly, there is no identity between the assessment proceedings and the penalty proceedings. The latter are separate proceedings that may, in some cases, follow as a consequence of the assessment proceedings. Though it is usual for the Assessing Officer to record in the assessment order that penalty proceedings are being initiated, this is more a matter of convenience than of legal requirement. All that the law requires, so far as the penalty proceedings are concerned, is that they should be initiated in the course of the proceedings for assessment. It is sufficient, if there is some record somewhere, even apart from the assessment order itself, that the Assessing Officer has recorded his satisfaction that the assessee is guilty of concealment or other default for which penalty action is called for. Indeed, in certain cases, it is possible for the Assessing Officer to issue a penalty notice or initiate penalty proceedings even long before the assessment is completed. There is no statutory requirement that the penalty order should precede or be simultaneous with the assessment order. In point of fact, having regard to the mode of computation of penalty outlined in the statute, the actual penalty order cannot be passed until the assessment is finalised.

CONCLUSION

63. *In the light of what is stated above, what emerges is as under:*

- (a) Penalty under Section 271(l)(c) is a civil liability.*
- (b) Mens rea is not an essential element for imposing penalty for*

breach of civil obligations or liabilities.

- (c) Wilful concealment is not an essential ingredient for attracting civil liability.*
- (d) Existence of conditions stipulated in Section 271(l)(c) is a sine qua non for initiation of penalty proceedings under Section 271.*
- (e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.*
- (f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(l)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.*
- (g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).*
- (h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*
- (i) The imposition of penalty is not automatic.*
- (j) Imposition of penalty even if the tax liability is admitted is not automatic.*
- (k) Even if the assessee has not challenged the order of assessment*

levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.

- (l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.*
- (m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*
- (n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*
- (o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*
- (p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(l)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income*

- (q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*
- (r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.*
- (s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.*
- (t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*
- (u) The findings recorded in the assessment proceedings insofar as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."*

The said issue was also came up before the Hon'ble Supreme Court in case of CIT vs. SSA's Emerald Meadows (supra) in the SLP filed by the Revenue against the decision of Hon'ble Karnataka High Court, however, the Hon'ble Supreme Court has dismissed the SLP filed by the Revenue. Accordingly, in view of the above facts and circumstances of the case as well as the decisions cited (supra) we hold that the initiation

of penalty as well as the levy of penalty U/s 271(1)(c) of the Act is not valid and is liable to be quashed.

In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 12/02/2019

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:-12/02/2019.

*Santosh.

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

1. अपीलार्थी / The Appellant- Shri Kailash Chand Bangur, Kishangarh.
2. प्रत्यर्थी / The Respondent- ITO, Kishangarh.
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. 858 & 859/JP/2016}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar