

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.4967/Del./2016
(ASSESSMENT YEAR : 2009-10)**

Ochoa Laboratories Ltd. E- 360, Greater Kailash-II New Delhi (PAN : AAACO1370J) Appellant	Vs.	ACIT Circle – 13(1) New Delhi Respondent
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ASSESSEE BY : Sh. Manu Monga, Adv.
REVENUE BY : Ms. Rinku Singh, Sr. DR

Date of Hearing : 01.04.2019
Date of Order : 10 .04.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Ochoa Laboratories Ltd. (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned order dated 08.07.2016 passed by the Commissioner of Income-tax (Appeals)-7, New Delhi , affirming the penalty order dated 26.13.2016 passed u/s 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act'), qua the assessment year 2009-10 on the amended grounds inter alia that :-

“1. That the order of the Ld. CIT(A) confirming the action of the Ld. AO in levying penalty of Rs. 15,50,224/- u/s. 271(1)(c) is against the provisions of law, facts circumstances of the case

and deserves to be quashed.

2. That the Ld. CIT(A) has erred in law in confirming penalty under section 271(1)(c) levied by the AO which is arbitrary and contrary to the provisions of law as show cause notice issued by the Ld. AO is general in nature with mentioning specific charge of imposition of penalty.

3. That the issue in question now squarely covered by the decisions of the co-ordinate Benches of the ITAT, Delhi Benches in case of Sanjay Mitra Vs. DCIT, ITA no. 5206/Del/2016 and Ashwini Mongia Vs. ITO, ITA no. 6044/Del/2015. The penalty of Rs. 15,50,224/- needs to be deleted.

4. That even on merits the Ld. CIT(A) has erred on facts and in law as the material placed on record was not considered in its proper perspective leading to erroneous conclusion.

5. That the order of the Ld. CIT(A) confirming the erroneous order of the AO is bad in law and against the facts of the case.”

2. Briefly stated that facts necessary for adjudication of the controversy at hand are : on the basis of completed assessment u/s. 143(3) of the Income Tax Act, 1961 (for short the ‘Act’) at the income of Rs. 11,35,52,137/- by making addition of Rs. 45,60,824/-, 54,725/- and 88,53,764/- on account of disallowance of Sales Promotion , expenses, disallowance of excess depreciation on disallowance of FBT, PF & ESI respectively, out of which addition of Rs. 88,53,764/- has been deleted by the Ld. CIT(A) in respect of disallowance of FBT, PF, ESI and IT. The

AO initiated the penalty proceedings by way of issuance of notice u/s 274 read with section 271 of the Act for disallowance of Sales Promotion expenses of Rs. 45,60,824/- only. Declining the contention raised by the assessee that the entire expenditures was supported by bills vouchers etc. and most of the payments were made through banking channel and genuineness of the expenditure has not been doubted and that there was no deliberate concealment of any particulars of income, AO levied the penalty of Rs. 15,50,224/- @ 100% and Section 271(1)(c) of the Act.

3. Assessee sought to raise one legal ground challenging the show cause notice issued by the AO for initiation of the penalty u/s 271(1)(c) of the Act as ground no. 2 in the amended grounds of appeal dated 01.04.2019, which is allowed as the legal ground as to the defective show cause notice can be raised, at any stage of the proceedings and is also necessary for complete adjudication of the controversy at hand.

4. Assessee carried the matter before Ld. CIT(A) by way of filing the appeal who has confirmed the penalty by dismissing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. undisputedly, quantum proceedings qua addition of Rs. 45,60,284/- on account of disallowance of Sale Promotion expenses are pending before the Hon'ble High Court. It is also not in dispute that addition on account of disallowance of Sales Promotion expenses have been made for want of furnishing supporting details of such expenses, which the assessee has sought to produce during penalty proceedings and has not been provided with any such opportunity.

7. In the backdrop of the aforesaid undisputed facts & circumstances of the case, order passed by the lower revenue authorities and arguments addressed by the Ld. Authorized Representatives of the parties to the appeal, the sole question arises for determination in this case is:-

“As to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of such income during assessment proceedings?”

8. Ld. AR for the assessee challenging the impugned order contended inter alia that AO in order to initiate the penalty proceedings has prima facie failed to satisfy himself that as to whether the assessee has concealed the particulars of income or have furnished inaccurate particulars of income in the assessment order as well as in the show cause notice issued under section 271(1)(c) / 274 of the Act and relied upon the decision of Hon'ble **Karnataka High Court in case of CIT vs. Manjunatha Cotton and Ginning Factory-359ITR 565 and CIT vs. SSA's Emerala Meadows -73 taxmann.com 241 (kar.) (Revenue's SLP dismissed in 242 taxman 180).**

9. Ld. AR for the assessee further contended that since issue as to the disallowance of 50% of the expenditure claimed by the assessee under the head "Sales Promotion Expenses" is pending before the Hon'ble High Court the penalty cannot be levied.

10. However, on the other hand Ld. DR for the Revenue to repel the arguments addressed by the Id. AR for the assessee contended that assessee has never raised any such question of invalid notice during penalty proceedings nor before the Id. CIT (A) which has caused no prejudice to the assessee as the assessee has understood the purport and import of the notice under section

274 read with section 271 of the Act and relied upon the decision rendered by the Hon'ble Madras High Court in **Sundaram Finance Ltd. vs. CIT (2018) 403 ITR 407 (Madras)**, in which SLP has also been dismissed by Hon'ble Supreme Court in the case cited as **Sundaram Finance Ltd. vs. CIT (2018) 99 taxmann.com 152 (SC)** and also relied upon the judgment of **CIT vs. Smt. Kaushalya – 216 ITR 660 (Bombay) & Trimurti Engineering Works vs. ITO – (2012) 138 ITD 189 (Del.)**. Ld. DR also filed written submission which are made part of the record.

11. In order to proceed further, we would like to peruse the notice issued by AO u/s 274 read with section 271(1)(c) of the Act to initiate the penalty proceedings which is extracted as under for ready perusal:-

“NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF THE INCOME TAX ACT, 1961.

To **Dated : 18.11.2011**
The Principal Officer,
M/s. OCHOA LABORATORIES LTD.,
W-89A, VIKAS APPARTMENT, GREATER KAILASH
PART- II
NEW DELHI – 110048.

Sir,

Whereas in the course of proceedings before me for

the assessment year 2009-10 it appears to me that you :-

- Have without reasonable cause failed to furnish the return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income Tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(@)/148 of the Income tax Act, 1961 No. dated or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.
- Have without reasonable cause failed to comply with a notice under section 22(1)/22(2)/34 of the Indian Income tax Act, 1922 or under section 142(1)/143(2) of the Income tax Act, 1961.
- Have concealed the particulars of your income oror furnished inaccurate particulars of such income.

You are hereby requested to appear before me at 11.00 AM/PM on 20.12.2011 and show cause why an order imposing a penalty on you should not be made under section 271 of the Income tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing or before said date which will be considered before any such order is made under section 271.

Sd/-

Asstt. Commissioner of Income Tax,
Circle 13(1), New Delhi

Delete the appropriate words and paragraph.”

12. Bare perusal of the notice issued u/s 274 read with section 271(1)(c) of the Act in order to initiate penalty proceedings

against the assessee goes to prove that the AO himself was not aware as to whether he is issuing notice to initiate the penalty proceedings either for “concealment of particulars of income” or “furnishing of inaccurate particulars of such income” by the assessee rather issued vague and ambiguous notice by incorporating both the limbs of section 271(1)(c). When the charge is to be framed against any person so as to move the penal provisions against him, he/she should be specifically made aware of the charges to be leveled against him/her.

13. Hon’ble High Court of Karnataka in case of CIT vs. Manjunatha Cotton and Ginning Factory (supra) while deciding the identical issue held that when the AO has failed to issue a specific show-cause notice to the assessee as required u/s 274 read with section 271, penalty levied is not sustainable. The operative part of the judgment is reproduced 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 (1)(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 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(1)(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 Poi 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.”

14. Hon'ble Apex Court in case of CIT vs. SSA's Emerala Meadows - (2016) 73 taxmann.com 248 (SC) while dismissing the SLP filed by the Revenue quashing the penalty by the Tribunal as well as Hon'ble High Court on ground of unspecified notice has held as under:-

“Section 274, read with section 271(1)(c), of the Income-tax Act, 1961 - Penalty - Procedure for imposition of (Conditions precedent) - Assessment

year 2009-10 - Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271 (1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income - High Court held that matter was covered by aforesaid decision of Division Bench and, therefore, there was no substantial question of law arising for determination - Whether since there was no merit in SLP filed by revenue, same was liable to be dismissed - Held, yes [Para 2] [In favour of assessee]”

15. Hon’ble Madras High Court in **Sundaram Finance Ltd.** (**Supra**) relied upon by the Ld. DR for the revenue upheld the order passed by the Tribunal confirming the penalty levied on the basis of notice issued under section 274 read with section 271(1)(c) of the Act in which specific charge was not pointed out by returning the following findings :-

“16. We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue

can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w. Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.

17. Thus, for the above reasons, Substantial Questions of law Nos.1 and 2 are answered against the assessee and in favour of the revenue. The additional substantial question of law, which was framed is rejected on the ground that on facts the said question does not arise for consideration as well as for the reasons set out by us in the preceding paragraphs.”

16. However, we are of the considered view that in the instant

case, not only the notice issued to the assessee under section 274 read with section 271(1)(c) is defective but AO has not even made himself satisfied at the time of making disallowance / addition in assessment order if the assessee has furnished inaccurate particulars of income or has concealed particulars of his income rather to be on the safer side he has invoked both the limbs of section 271(1) of the Act.

17. So, ultimately there was no application of mind on the part of AO even at the time of framing assessment, rather initiated the penalty proceedings in a mechanical manner. Not only this, even at the time of passing the penalty order, AO was not clear enough if he was levying the penalty on account of furnishing of inaccurate particulars of income or for concealment of income. AO has levied the penalty without specifying as to under which limb of the Section 271(1)(c) of the penalties is being levied. Operative part of the penalty order is extracted for ready perusal :-

“As stated above, the addition in respect of sales promotion expenses has been made by the AO for the reasons that the assessee could not conclusively prove with supporting evidence. This finding of Assessing Officer has been confirmed by the Id. CIT(A) in clear terms. Accordingly, I hold

that the case of the assessee clearly falls within the explanation to section 271(1)(c) of the Income Tax Act and therefore, is liable to penalty u/s 271(1)(c) of I.T.Act. I therefore, imposed a penalty of Rs. 15,50,224/-.”

18. So, we are of the considered view that this is not merely a case of serving a defective notice under section 274 read with section 271(1) on the assessee rather it is a case of non-application of mind on the part of the AO to make himself satisfied as to under which limb of section 271(1)(c) of the Act, he is going to initiate/levy the penalty on the assessee.

19. Furthermore assessee by relying upon decision rendered by Hon'ble High Court of Delhi in case cited as **PR. CIT-8 vs. SAMTEL INDIA LTD. ITA No. 43/2017** contended that for mere disallowance of claim raised by the assessee for expenditures, assessee cannot be penalized u/s 271(1)(c). Operative part of the judgment (supra) is extracted for ready perusal as under :

“11. A glance at the [Section 271\(1\)\(c\)](#) presents two essentials - "concealment" and "furnishing inaccurate particulars of income". The current appeal is, however, only concerned with the interpretation of the phrase "furnishing inaccurate particulars of income." The Revenue claims that by furnishing a wrong claim the assessee has "furnished inaccurate particulars of income."The

meaning of the phrase "furnishing inaccurate particulars of income" was explained by the Supreme Court in the case of [Commissioner of Income Tax vs Reliance Petroproducts Pvt Ltd](#) [(2010)322 ITR 158] by bifurcating "particulars" and "inaccurate" where particular was explained to include the details of a claim, or the separate items of an account. The word "inaccurate" was explained as "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." When these words are read in conjunction with each other then it may seem that the details supplied in the Return are not accurate, not exact or correct, not according to truth or erroneous. No doubt, the effect of that judgment has been explained in a later decision; yet its emphasis on the literal interpretation of the word "inaccurate" has not been diluted.

12. From the facts of this case it is clear that the assessee disclosed all the particulars of his income. The AO has disallowed his claim without holding it to be bogus or false. Hence, the genuineness of the loss occurred is not at question here. The Supreme Court while elaborating the scope of [section 271\(1\)\(c\)](#) in [CIT vs Reliance Petroproducts Pvt Ltd](#) [2010] 322 ITR 158 held that-

"A glance of provision of [section 271\(1\)\(c\)](#) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The instant case was not the case of concealment of the income. That was not the case of the revenue either. It was an admitted position in the instant case that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee could not be held guilty of furnishing inaccurate particulars. The revenue argued that

submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. Such cannot be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. [Para 7]"

Similarly, in the present scenario, the assessee cannot be penalized for making a claim which in itself is unsustainable in law. The Supreme Court further held in the Reliance Petrochemicals case that-

"Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under [section 271\(1\)](#) (c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under [section 271\(1\)\(c\)](#)."

13. The intention of the Parliament cannot be taken to have been to penalize everyone who makes a wrong claim for deduction. The legislature does not intend to penalize every person whose claim is disallowed. This is not the aim of the legislature. The Tribunal in the facts of this case, therefore, correctly reached this conclusion. The question of law is answered in favour of the assessee and against the Revenue; therefore, the appeal has no merit and is dismissed."

20. So, in the instant case also assessee claimed sale promotion expenses which have been disallowed by the AO as well as Ld. CIT(A) specifically on the ground that the assessee has failed to

furnish the supporting details to sustain its claim. But at no point of time AO has declared the claim as bogus rather observed that expenses incurred on boarding and lodging and traveling of doctors are neither business expenses nor ethical in nature. So following the decision rendered by Hon'ble High Court in **SAMTEL INDIA LTD. (supra)**. We are of the considered view that mere disallowance of sale promotion expenses claimed by the assessee does not amount to concealment of income or furnishing of inaccurate particulars of income and as such penalty cannot be levied. Further more when it is not in dispute that the question as to disallowance of 50% of expenditure claimed by the assessee under the head "Sale Promotion expenses" is pending adjudication before the Hon'ble High Court in **ITA no. 681/2018, ITA no. 682/2018, ITA no. 683/2018 and 857/2018 OCHOLA LABORATORIES Ltd. vs. PR. COMMISSIONER INCOME TAX-VII NEW DELHI** in which following question of law has been framed that :

“Whether the Income Tax Appellate Tribunal was justified and correct in upholding disallowance of 50% of the expenditure claimed by the assessee under the head of sales promotion expenses as not meeting the parameters specified in Section 37(1) of

the Income Tax Act, 1961.”

So, when, the question of disallowance of sale promotion expenses is “debatable one penalty cannot be imposed.

20. So, in view of what has been discussed above, the case of **Sundaram Finance Ltd. (supra)** and other decision, as relied upon by Id. DR for the Revenue are not applicable to the facts and circumstances of the case. However, decision rendered by Hon’ble Apex Court in **CIT vs. SSA’s Emerala Meadows (supra)** and **Hon’ble Karnataka High Court in CIT vs. Manjunatha Cotton and Ginning Factory (supra)** are applicable to instant case. In view of discussion made in the preceding paras AO/CIT(A) have erred in levying /confirming the penalty in this case which is not sustainable in the eyes of law. Consequently penalty stands deleted and appeal filed by the assessee is allowed.

Order pronounced in open court on this 10th day of April, 2019.

**Sd/-
(R.K.PANDA)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated: 10th day of April, 2019
BR**

Copy forwarded to:
1.Appellant
2.Respondent

- 3.CIT
 4.CIT(A)-XXVI, New Delhi.
 5.CIT(ITAT), New Delhi.

AR, ITAT
 NEW DELHI.

Date of dictation	04/04/2019
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	