

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

Before Shri Sandeep Gosain (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

ITA No. 493/Mum/2016
(Assessment year : 2011-12)

Nikhil Mulchand Chheda 257/10, Champa Niwas Station Road, Wadala (W) Mumbai 400 031 PAN : AAMPC6244N	vs	Income-tax Officer-20(2)(4) Mumbai
APPELLANT		RESPONDEDNT

Appellant by	Shri K Gopal
Respondent by	Shri Suman Kumar

Date of hearing	02-01-2019
Date of pronouncement	29-03-2019

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against order of the CIT(A)-32, Mumbai dated 10-11-2015 and it pertains to AY 2011-12. The assessee has raised the following grounds of appeal:-

1. On the facts and circumstances of the case and in law, learned Commissioner of Income Tax (Appeals) has erred in confirming the order passed by the Assessing Officer levying the penalty u/s271(1)(c) of Rs 29,18,690/-.
2. On the facts and circumstances of the case and in Law, learned Commissioner of Income Tax (Appeals) has erred in appreciating that the assessee was under bona fide belief that sale was complete only after grant of possession and transfer of share certified to the buyer.

3. On the facts and circumstances of the case and in Law, learned Commissioner of Income Tax (Appeals) has erred in ignoring the fact about cooperation extended by the assessee to learned Assessing Officer, to reach and connect purchaser.
4. On the facts and circumstances of the case and in Law, learned Commissioner of Income Tax (Appeals) has erred in appreciating the fact that assessee has invested part consideration in REC Bonds on the basis of the receipt of consideration.
5. On the facts and circumstances of the case and in Law, learned Commissioner of Income Tax (Appeals) has erred in appreciating the fact that penalty proceedings have been dropped in case of the co-owner of the said property.”

2. The assessee also filed a petition for admission of additional ground vide letter dated 04-09-2018 raising a legal ground challenging validity of penalty order passed by the AO in light of vague notice issued u/s 274 r.w.s. 271(1)(c) of the I.T. Act, 1961.

3. The Ld.AR for the assessee submitted that additional ground taken by the assessee goes to root of the matter in assuming jurisdiction by the AO in levying penalty u/s 271(1)(c), therefore, the same may be admitted, in the interest of justice.

4. Having considered arguments of both the sides, we find that additional ground taken by the assessee in light of notice issued by the AO u/s 274 r.w.s. 271(1)(c) of the I.T. Act, 1961 is purely a legal ground which goes to question the jurisdiction of the AO in levying penalty u/s 271(1)(c) of the Act; hence, we admit the additional ground raised by the assessee.

5. The brief facts of the case are that in this case, the assessment has been completed u/s 143(3) of the I.T. Act, 1961 making addition of Rs.94,45,060 on account of long term capital gain on sale of property. The AO has made

addition towards capital gain on the ground that although the liability to pay capital tax has arisen, but the assessee has deferred payment of long term capital gain by stating that sale has not been completed in the year under consideration. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income. After considering submissions of the assessee, the AO levied penalty of Rs.29,18,690 which is 100% of tax sought to be evaded u/s 271(1)(c) for furnishing inaccurate particulars of income.

6. Aggrieved by the penalty order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee submitted that the AO was erred in levying penalty u/s 271(1)(c) without appreciating the fact that when two views are possible in respect of date of transfer of property and the AO has adopted one of the possible views for determining the capital gain, for which assessee has not agreed, would not result into furnishing of inaccurate particulars of income which warrants penalty u/s 271(1)(c) of the I.T. Act. The Ld.CIT(A), after considering submissions of the assessee and also by relying upon various judicial precedents, held that the assessee failed to offer any explanation except stating that penalty proceedings initiated in the case of the co-owner, i.e. his father has been dropped. He observed that - "I am not aware about the circumstances of the dropping of penalty in the case of co-owner. Even though

out of place to mention, I am of the opinion that the AO of the co-owner has not passed a speaking order as to why penalty proceedings have been dropped". Therefore, the Ld.CIT(A) held that the AO was right in levying penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. Aggrieved by the order of Ld.CIT(A), assessee is in appeal before us.

7. The Ld.AR for the assessee, referring to additional ground of appeal submitted that penalty proceedings initiated by the AO u/s 271(1)(c) of the Act is bad in law and liable to be quashed because the AO has issued vague notice in a printed form without striking off inapplicable portion, which is a clear case of non application of mind by the AO before initiation of penalty, whether penalty has been initiated for concealment of particulars of income or for furnishing of inaccurate particulars of income. Therefore, the penalty proceedings consequent to vague notice issued u/s 274 r.w.s. 271(1)(c) vitiates whole penalty proceedings. In this regard, he relied upon the decision of ITAT, Mumbai Bench "C" in the case of M/s Cenzar Industries Ltd vs ITO in ITA No.1970/Mum/2015 for AY 2006-07 (order dated 29-12-2017).

8. The Ld.DR, on the other hand, strongly supported the order of Ld.CIT(A). The Ld.DR further submitted that the assessee has taken additional ground challenging validity of notice u/s 274 r.w.s. 271(1)(c) for the first time before the Tribunal without making any averment to the effect that relevant facts

were before the lower authorities, therefore, the additional ground raised by the assessee should not be admitted.

9. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The issue of notice u/s 274 r.w.s. 271(1)(c) is no longer a res integra. The co-ordinate bench of ITAT, Mumbai Bench "C" in the case of M/s Cenzar Industries Ltd vs ITO (supra) has considered an identical issue in the light of vague notice issued u/s 274 r.w.s. 271(1)(c) of the I.T. Act, 1961 and by following the decision of Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) held that when the AO issued a vague notice without striking off inappropriate portion in the notice to frame the assessee as to whether penalty has been initiated for concealment of particulars of income or for furnishing of inaccurate particulars of income, it is a clear case of non application of mind by the AO. In that eventuality, it is difficult for the assessee to make out his case before the authorities; therefore, the whole penalty proceedings is bad in law and liable to be quashed. The relevant observations of the Tribunal are as under:-

"10. We have heard the rival submissions, perused the material available on record and also gone through the orders of authorities below. The AO has levied penalty u/s 271(1)(c) in respect of disallowance of reimbursement of selling and distribution expenses on the ground that the assessee has concealed particulars of income and also furnished inaccurate particulars of income. The AO has initiated

penalty by issuing notice u/s 274 r.w.s. 271(1)(c) in a printed form without striking off of irrelevant portion which were not applicable to the facts of assessee's case. The AO has issued notice which states that penalty has been initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. In the assessment order, the AO has initiated penalty proceedings on both charges, i.e. for concealing the particulars of income and furnishing inaccurate particulars of income. The AO levied the penalty on both the charges, i.e. for concealing the particulars of income and furnishing inaccurate particulars of income. Right from the assessment stages to levy of penalty, the AO has initiated penalty on both charges which is not the case as per the provisions of section 271(1)(c) as the two charges, i.e. concealment of particulars of income or furnishing of inaccurate particulars of income are two different connotations. The issue of notice u/s 274 r.w.s. 271(1)(c) goes to the root of the matter of assuming jurisdiction to levy penalty u/s 271(1)(c), therefore, before issuance of notice, the AO has to arrive at a satisfaction as to whether penalty proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. The AO cannot take both the charges for levying penalty by stating that the assessee has concealed particulars of income and also furnished inaccurate particulars of income.

11. The provisions of section 271(1)(c) are very clear and there is no ambiguity. On a plain reading of section 271(1)(c), it is very clear that clause (c) deals with two specific offences, that is to say, concealment of particulars of income or furnishing of 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 initiating penalty proceedings for one offence and finding the assessee guilty of another offence or holding him guilty for either one or the other cannot be sustained in law. This legal proposition is clearly reiterated by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory Ltd (supra) wherein it was categorically held that satisfaction of the existence of the grounds mentioned in section 271(1)(c) when it is a sine qua non initiation of proceedings, the penalty proceedings should be confined only to those grounds and the said ground should be specifically stated so that the assessee would have the opportunity to meet those grounds. Initiation of penalty on one ground and levying penalty on another ground would cause injustice to the assessee as the assessee was kept in blank to justify his

case whether the AO sought to initiated penalty for concealment of particulars of income or furnishing of inaccurate particulars of income. If the proceedings are initiated on a specific charge, then, the assessee can justify its case by advancing arguments on the charge framed by the AO. Thus, once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. If penalty proceedings are initiated on one ground and levied penalty on different ground or penalty proceedings are initiated on two grounds, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income would definitely vitiate the entire penalty proceedings.

12. In this case, on perusal of the facts available on record it is abundantly clear that the AO has initiated penalty proceedings in the assessment order on both the grounds, i.e. concealment of particulars of income and also furnishing of inaccurate particulars of income. The AO also levied penalty on both the grounds of concealment of particulars of income and also furnishing of inaccurate particulars of income which is quite contrary to the provisions of section 271(1)(c) where it was categorically stated that both the charges are standing in a different footing and the AO has to initiate penalty proceedings for concealment of particulars of income or furnishing of inaccurate particulars of income. Initiation of penalty by injecting and in place of or would definitely go against the basic provisions of the Act. In this case, the AO has initiated penalty on both the grounds, which cannot be the case for initiation of penalty u/s 271(1)(c) of the Act. We further observe that it is not open to the authority, at the time of imposing penalty to impose penalty on the ground 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 violate principles of natural justice and cannot be sustained. The validity of order of penalty must be determined with reference to the information, facts and materials in the possession of the authority imposing 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. The AO 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. As already stated, facts of some cases may attract both the offences. In case, the AO has made multiple additions, one may relates to concealment of particulars of income and another may relate to furnishing of inaccurate particulars of income, but single addition made cannot lead to an inference of

concealment of particulars of income and furnishing of inaccurate particulars. Therefore, we are of the considered view that before initiation of penalty proceedings, the AO has to arrive at a correct satisfaction as to whether penalty is initiated for concealment of particulars of income or furnishing of inaccurate particulars of income. If the AO fails to initiate penalty proceedings by issuance of proper notice, then the whole penalty proceedings becomes vitiated and void ab initio.

13. Coming to the case laws relied upon by the assessee. The assessee has relied upon the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory vs CIT (supra), wherein the Hon'ble High Court has categorically observed that sending printed form of notice where all the grounds mentioned in section 271(1)(c) are mentioned would not satisfy requirement of law. Notice issued u/s 274 of the Act should specifically state the ground mentioned in section 271(1)(c), i.e. whether it is for concealment of income or for furnishing of inaccurate particulars of income. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. Initiating the penalty proceedings on one limb and holding the assessee guilty of another limb is bad in law. The relevant portion of the order is extracted below:-

“ 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 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 as case of furnishing of inaccurate particulars. The apex court in the case of Ashok Pai reported (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 reported in 122 ITR 306 and the Delhi High Court in the case of Virgo Marketing P.Ltd., reported in 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. The assessee has relied upon decision of Hon’ble Bombay High Court in the case of CIT vs Samson Perinchery in Income Tax Appeal No.1154 of 2014 & Ors order dated 5th January, 2017. The Hon’ble Bombay High Court after considering the ratio laid down by the Hon’ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) observed that the satisfaction of the AO with regard to only one of the two breaches mentioned in section 271(1)(c) of the Act for initiation of penalty proceedings will not warrant / permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated / notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated and it cannot be on a fresh ground of which assessee has no notice. The relevant portion of the order is extracted below:-

“The above submission on the part of the Revenue is in the the decision of the Supreme Court in Ashok Pal v/s. CIT 292 ITR [relied upon in Manjunath Cotton & Ginning Factory (supra)]wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated / notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated and it cannot be on a fresh ground of which assessee has no notice.”

15. The assessee has also relied upon the decision of Hon’ble Supreme Court in the case of CIT vs SSA’s Emerald Meadows (supra) wherein the Hon’ble Supreme Court dismissed SLP filed by the revenue by following the decision of the Karnataka High Court in the

case of CIT vs Manjunatha Cotton & Ginning Factory (supra) by observing that notice issued u/s 274 r.w.s. 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.

16. Coming to the case laws relied upon by the Ld.DR. The Ld.DR relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs Smt.Kaushalya (supra). We have gone through the case law relied upon by the Ld.DR in the light of the facts of the present case and find that the ITAT, Mumbai in the case of DCIT vs Dr. Sarita Milind Davare in ITA No.1789/Mum/2014 dated 21-12-2016 has considered the decision rendered by Hon'ble Bombay High Court in the light of Supreme Court judgement in the case of Dilip N Shroff 291 ITR 519 (SC) and observed that there should be application of mind on the part of the AO at the time of issuing notice. Since the co-ordinate bench has already considered the judgement of Hon'ble Bombay High Court, we are of the view that case law relied upon by the Ld.DR is not applicable to the facts of the present case."

10. In this case, the facts being identical, therefore, consistent with the view taken by the co-ordinate bench in the case of M/s Cenzar Industries Ltd (supra), we are of the considered view that the penalty order passed by the AO is bad in law and liable to be quashed as the AO has issued a vague notice without striking off inappropriate portion in the notice. Accordingly, we quash the penalty order passed by the AO.

11. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 29-03-2019.

Sd/-

sd/-

(Sandeep Gosain)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 29th March, 2019

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order

Asstt. Registrar, ITAT, Mumbai