IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.4585/DEL/2015
Assessment Year: 2001-02

DCIT, Circle-10(1), New Delhi.	v.	Gellette Diversified Operations Pvt. Ltd., 34 Okhla, Indl. Estate.
TAN/PAN: AAACG 2469C		
(Appellant)		(Respondent)

I.T.A. No.3238/DEL/2015
Assessment Year: 2001-02

Gellette Diversified Operations Pvt. Ltd., 34 Okhla, Indl. Estate.	v.	ACIT, Circle-12(1), New Delhi.
TAN/PAN: AAACG 2469C		
(Appellant)		(Respondent)

Appellant by:	Smt. Parmita Bishwas, CIT-DR		
Respondent by:	Shri Pradeep Dinodiya, Adv.		
Date of hearing:	30	01	2019
Date of pronouncement:	25	04	2019

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid cross appeals have been filed by the Revenue as well as by the assessee against the impugned order dated 06.04.2015, passed by the Commissioner of Income Tax (Appeals)-XV, New Delhi in relation to penalty proceedings u/s.271(1)(c) for the Assessment Year 2001-02. The Revenue is aggrieved by deletion of penalty on account of

addition made under the head 'technical advisory fees' to the extent of Rs.6,57,45,000/- and disallowance of expenditure of Rs.6,57,95,000/-; whereas the assessee is in appeal for confirming the penalty by ld. CIT(A) on account of disallowance of excise duty paid of Rs.70,00,000/- and disallowance out of technical fees paid amounting to Rs.7 crore.

2. The brief facts *qua* the issue of levy of penalty in the quantum proceedings is that, the Assessing Officer has made disallowance of 'technical advisory services' for sum of Rs.13,57,45,000/-; and disallowance of excise duty of Rs.70 lac. In so far as disallowance of technical advisory fees is concerned, the Assessing Officer noted that assessee had paid sum of Rs.13,57,45,000/- as a technical advisory fees to M/s. 'Shervani Industrial Syndicate', whereas no such fee was paid in the last year. In response to the show cause notice, the assessee submitted that the same was paid on account of providing technical support to the assessee company in the field of battery manufacturing and such payment was made in terms of agreement entered by the assessee with the said company. The assessee company had acquired a zinc battery manufacturing facility at Mysore in the previous years and M/s. Shervani Industrial Syndicate Ltd. was in the field of manufacture of batteries and had valuable experience in this field. It was for this reason the said company was hired to provide technical specialized advisory services on a continuous basis to produce the products at the existing

manufacturing facilities of the assessee-company. The Assessing Officer required the assessee to submit what types of services were rendered by the said company to the assessee justifying such a huge payment and also to submit the evidence of the service being rendered. In response, the assessee filed the relevant agreements and stated that the expenditure resulted in improvement of technology of battery production and the results were evident from the audited account. It was further submitted that assessee had no expertise in the field and the said zinc manufacturing facility had been acquired from M/s. Shervani Industrial Syndicate Ltd. However, the Assessing Officer held that no evidence of any services was given by the assessee and the payments made are more than Rs.1 crore per month and no evidence of any travel by M/s. Shervani Industrial Syndicate Ltd. personnel to the factory, advice given, evaluation done, technology provided, etc. was submitted. Accordingly, he made the disallowance.

3. As regards disallowance of payment of excise duty of Rs.70 lacs is concerned, the assessee has claimed deduction of the said amount u/s.43B and stated that this amount was paid as excise duty under protest on the demand of Excise Authorities from M/s. Rialto Enterprises Pvt. Ltd., which company used to manufacture the goods for the assessee company who markets them. This amount was not claimed as expenditure in the books and was shown as deposit, later on claimed as allowable u/s.43B and in support, copy of challan

and letter from M/s. Rialto Enterprises was also enclosed. The ld. Assessing Officer held such a statutory liability can only be allowed if it is a liability of the assessee and incurred by the assessee. The demand of excise duty has been raised in the case of M/s. Rialto Enterprises and as per the agreement, it was to be borne by Rialto Enterprises only. Under these circumstances, assessee could not have treated it as its liability and accordingly disallowance was made.

4. In the quantum proceedings, the Tribunal had given part relief, confirming the disallowance of Rs.7 crore as was done by the ld. CIT (A) and balance amount of Rs.5.65 crore was though treated as capital expenditure but depreciation was allowed. In so far as disallowance of Rs.70 lacs is concerned, the same was confirmed.

5. Now penalty has been levied has been levied on the quantum of disallowance upheld by the first appellate authority and before passing of the Tribunal order. Thus, the Assessing Officer had levied a penalty on entire disallowances made for Rs.5,65,00,000/-. Ld. CIT(A) has confirmed the penalty on amount of addition sustained by the Tribunal for Rs.7 crore and on account of disallowance u/s.43B of Rs.70 lacs.

6. Before us, learned counsel for the assessee, Mr. Pradeep Dinodiya, raising a legal issue submitted that, here in this case, in the show cause notice issued u/s.274 r.w.s. 271 dated 29.03.2004, which has been sent in a printed standard

format, Assessing Officer has not specified exact nature of default for the purposes of initiation and levy of penalty under Section 271(1)(c). In support, he has filed the copy of notices before us. He further submitted that in another show-cause notice dated 08.02.2012, once again notice of the Assessing Officer did not specify the exact default, as to whether it is for the concealment of income or for furnishing of inaccurate particulars of income. There was no clear charge of penalty in the notice. Thus, Assessing Officer himself was not sure of the exact default committed by the assessee. In support of his contention, he strongly relied upon the judgment of Hon'ble Karnataka High Court in the case of **CIT vs. Manjunatha Cotton & Ginning Factory, reported in (2013) 359 ITR 565 (Kar.)** and also referred to the judgment of Hon'ble Supreme Court in the case of **VeerbhadrappaSangappa & Co. (TS-381-SC-216),** wherein Revenue's SLP has been dismissed against the Karanataka High Court judgment. He also referred to judgment of Hon'ble Gujarat High Court in the case of **Manu Engineering reported in 122 ITR 306 (Guj.)** and Hon'ble Delhi High Court in the case of **Virgo Marketing reported in 171 Taxman 156 (Del)**. He also relied upon various Tribunal decisions of the Co-ordinate Benches on similar issue following the aforesaid judgments.

7. On the other hand, learned Department Representative, submitted that here in this case, Assessing Officer in the assessment order itself has specifically mentioned that penalty u/s.271(1)(c) r.w.s. Explanation-I is initiated for

furnishing of inaccurate particulars of income in respect of additions/disallowances made. Even in the penalty order also, the penalty has been levied on account of furnishing of inaccurate particulars of income. Thus, charge was specific right from the stage of assessment proceedings to the passing of the penalty order. Even though Assessing Officer has not strike out the relevant charge in the printed format of the show cause notice issued u/s.274 r.w.s. 271, but that itself will not invalidate the penalty proceedings. Otherwise also, in the quantum proceedings, the additions have been confirmed by the Tribunal on which penalty has been levied.

8. We have heard the rival submissions *qua* the legal issue that impugned penalty proceedings are not valid on the ground that, Assessing Officer while issuing the show cause notice, had not specified the charge as to under which limb, he is proposing to levy the penalty u/s 271(1)(c). From the perusal of the assessment order, it is seen that ld. Assessing Officer has though specified the charge that he is initiating the penalty proceedings u/s. 271(1)(c) on account of furnishing of inaccurate particulars of income, however, at the time of issuance of show cause notice u/s.274, no such charge has been specified. The notices have been sent on a printed format wherein he has not strike down or mentioned as to under which limb he is proposing to levy the penalty. The Section 271(1)(c) stipulates two limbs of charges in which penalty can be levied, one, where any person has concealed the particulars of his income; or second, he has furnished

inaccurate particulars of such income.

9. The Hon'ble Karnataka High Court in the case of **CIT vs. Manjunatha Cotton and Ginning Factory (supra)** has held that a person who is accused of conditions mentioned in Section 271 should be made known about the grounds on which the Department is imposing penalty, as Section 274 makes it clear that the assessee has right to contest such proceedings and should have full opportunity to meet the case of the Department and show that conditions stipulates in Section 271(1)(c) did not exist and is not liable to pay the penalty. Their Lordships have further held that the practice of the Department sending a printed form where all the grounds mentioned in Section 271 would not satisfy the requirement of the law when the consequences of the assessee not rebutting the initial presumption is serious in nature and had to pay penalty from 100% to 300% of the tax liability. Therefore, the said provision has to be strictly construed and notice issued u/s. 274 should satisfy the grounds which the person has to meet specifically. Otherwise, principle of nature justice is offended if a show cause notice is vague. On the basis of such proceedings, no penalty can be imposed on the assessee. The relevant observation and law specified by their Lordships in this regard reads 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-l(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 farm 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 Ashok Pai reported in 292 ITR 11 at page

19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxmn 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"

10. Their Lordships while coming to the aforesaid conclusion have also referred to the judgment of Hon'ble Gujarat High Court in the case of **Manu Engineering (supra);** and Hon'ble Delhi High Court in the case of **Virgo Marketing (supra)**. The aforesaid principle laid down by the Hon'ble High Court has also been followed by this Co-ordinate Bench in various cases. As pointed out by learned counsel, Hon'ble Supreme Court in the case of **VeerbhadrapaSangappa & Co. (supra)** have dismissed the Revenue's SLP against Karnataka High Court judgment laying down the law on penalty, wherein it was held that notice u/s.274 itself specifically state that ground for initiation of penalty proceedings whether for concealment of income or filing of inaccurate particulars of income. Mere sending of printed form with all the grounds mentioned is not sufficient compliance of law. The aforesaid principle and ratio laid down by the Hon'ble Karnataka High Court would also apply in the present case, because here in this case the ld. Assessing Officer while issuing a show cause notice u/s.274 r.w.s. 271 in printed format has not specified the grounds as to under which limb he is proposing to initiate

and levy a penalty u/s. 271(1)(c). Thus, respectfully following the aforesaid judgments, we hold that impugned penalty levied by the Assessing Officer is not valid and same is not sustainable. On this ground the entire penalty is deleted.

11. In the result, in view of the aforesaid finding, the Revenue's appeal is treated as dismissed and assessee's is appeal as allowed.

Order pronounced in the open Court on 25th April, 2019.

Sd/-	Sd/-
[G.D. AGRAWAL]	**[AMIT SHUKLA]**
VICE PRESIDENT	**JUDICIAL MEMBER**

DATED: 25th April, 2019

PKK: