

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND  
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

**ITA Nos.7383 & 7384/M/2017  
Assessment Years: 2002-03 & 2003-04**

M/s. Sahakar Developers, Sai Sadan Building, Roshan Nagar, Chandawarkar Road, Borivali (West), Mumbai - 400 092 <b>PAN: AANFS1752N</b>	Vs.	ACIT 25(2), CIT(A)-44, 6 <sup>th</sup> Floor, C-11, Bandra-Kurla Complex, Bandra (East), Mumbai - 400051
(Appellant)		(Respondent)

**Present for:**

Assessee by : Shri Anuj Kishnadwala, A.R.  
Revenue by : Shri Chaudhary Arun Kumar Singh, D.R.

Date of Hearing : 24.04.2019  
Date of Pronouncement : 30.04.2019

**ORDER**

**Per Rajesh Kumar, Accountant Member:**

The above titled two appeals have been preferred by the assessee against the order dated 11.09.2017 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2002-03 & 2003-04.

2. The assessee has raised various grounds of appeal challenging the penalty proceedings both on merits as well as on jurisdictional issue. We are inclined to decide first of all the legal issue raised by the assessee in the ground No.5 which is reproduced as under:

"The penalty notice does not specify whether the appellant has concealed the income or has furnished the inaccurate particulars of income."

3. At the outset, the Ld. Counsel of the assessee pointed out that the issue raised by the assessee in the ground No.5 is

squarely covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in assessee's own case under similar set of facts in the subsequent year i.e. A.Y. 2006-07 in ITA No.379/M/2016 A.Y. 2006-07 vide order dated 13.06.2017. The Ld. A.R. submitted before the Bench that the AO had issued notice under section 274 read with section 271 of the Act dated 22.12.2009 in a mechanical manner without application of mind. In the said notice, the AO did not delete and strike off the inappropriate or redundant limb thereby not mentioning the exact charge on which the AO intends to impose penalty under section 271(1)(c) of the Act. Thus the assessee was deprived of a fair and reasonable opportunity to effectively deal with and respond to the issue of imposition of penalty. The Ld. A.R., therefore, prayed before the Bench that since the issue is squarely covered by the order of co-ordinate bench of the Tribunal in assessee's own case, the appeal filed by the assessee may kindly be dismissed.

4. The Ld. D.R., on the other hand, relied heavily on the order of AO and also the jurisdictional High Court in the case of Earthmoving Equipment Service Corporation vs. DCIT (2017) 84 taxmann.com 51 (Mum.-Trib.) wherein it has been held that the penalty can not be deleted merely on the basis of defect pointed out by the Ld. A.R. in the notice. The Ld. D.R. also relied on the decision of the Jurisdictional High Court in the case of Maharaj Garage & Co. vs. CIT Nagpur 85 taxmann.com 86 (Bombay) and prayed before the Bench that since there is no merit in the submissions of the Ld. A.R. and therefore the appeal of the assessee may be allowed by setting aside the order of the Ld. CIT(A).

5. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the rival parties and also the written submissions of the Ld. Departmental Representative. After perusal of the notice issued under section 274 read with section 271(1)(c) of the Act a copy of which is filed at page No.1 of the paper book, we observe that AO has not deleted the inappropriate/redundant words in the notice thereby not specifying the charge on which the penalty was proposed to be levied. Thus, we find merits in the contentions of the Ld. A.R. that assessee was deprived of a reasonable and fair opportunity to effectively respond and deal with the issue of imposition of penalty. In our opinion, the issue is squarely covered by the decision of the co-ordinate bench of the Tribunal in the assessee's own case in the subsequent. The relevant part of the order is reproduced below:

"4. We have considered the rival submission of the parties and have gone through the order of authorities below. We have also gone through the notice dated 31.12.2008 u/s 274 r.w.s. 271(1)(c) of the Act. The AO issued a notice on standard Performa without striking out the irrelevant clause. Thus, the notice refers to both the limbs of section 271(1)(c) of the Act for concealment of particulars of income as well as furnishing inaccurate particulars of income, none-striking of the irrelevant limbs of the said notice does not convey to the assessee as to which of the two charge it has to respond. The Id. AR of the assessee demonstrated that none-striking of relevant clause shows a none-application of mind by the AO. The Id. AR of the assessee besides the other decision relied on the decision of Co-ordinate Bench in case of Meherjee Cassinath Holdings P. Ltd. (supra), wherein one of us is a co-author of the said decision, the Co-ordinate Bench of this Tribunal after considering the various decisions of similar arguments as argued by Id. AR of the assessee and Id. DR for the Revenue passed the following order:

"8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the

phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec.271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T. Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee- company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-strikingoff of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718)"

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue

has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the Id. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the Id. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of nonapplication of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the Id. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the Id. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the Id. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdar Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated

and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:- "...The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the Id. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself

unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non- application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted."

5. Considering the decision of Co-ordinate Bench, we find that AO failed to satisfy the specific charge on which the penalty was proposed u/s 271(1)(c) of the Act. Thus, considering the various decisions of Hon'ble Apex Court as referred by us, the Hon'ble Bombay High Court in case of CIT vs. Samson Perinchery (supra), we allowed the Ground No.1 raised by assessee in the present appeal holding that the penalty order is bad-in-law. As we have allowed Ground No.1 of the present appeal. Thus, the discussion on other Grounds of appeal is become academic."

6. So far as the arguments of Ld. D.R. that in Earthmoving Equipment Service Corporation vs. DCIT (supra), the decision rendered in the case of Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar. -HC) was not followed , we observe that the coordinate bench in the case of Jeetmal Choraria vs. ACIT in ITA No.956/Kol/2016 A.Y. 2010-11, came to the conclusion that this is factually in correct. The another decision relied upon by the Ld. D.R. in the case of Maharaj Garage & Co. vs. CIT (supra), has been distinguished by the co-ordinate bench of the Tribunal in Mrs. Indrani Sunil Pillai Vs ACIT ITA No.1339/M/2016 A.Y. 2010-11 that the decision was rendered on different context of quantum penalty proposed to be levied and not with reference to doing away with the show cause notice as contemplated under section 274 of the Act and therefore judgment of the Hon'ble Bombay High Court can not be read out of context or any manner to mean that there is no need for mentioning specific limb of section 271(1)(c) of the Act.

7. After considering all the facts and the ratio laid down in the assessee's own case in the subsequent year, we hold that the penalty as levied by the AO is bad in law as AO has failed to strike off the inappropriate/redundant limb in the notice. Accordingly, we allow the appeal of the assessee.

**ITA No.7384/M/2017**

8. The issue involved in the present appeal is identical to the one as stated above in ITA No.7383/M/2017 for assessment year 2002-03. Therefore, our finding in ITA No.7383/M/2017 for A.Y. 2002-03 would, mutatis mutandis, apply to this appeal as well. Accordingly the appeal of the assessee is allowed.

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

**Order pronounced in the open court on 30.04.2019.**

**Sd/-  
(Ram Lal Negi)  
JUDICIAL MEMBER**

**Sd/-  
(Rajesh Kumar)  
ACCOUNTANT MEMBER**

Mumbai, Dated: 30.04.2019.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.