IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 131/Asr/2018
Assessment Year: 2012-13

Malwa Motors, G. T. Road, Rampuraphul, Distt. Bathinda	vs.	The Income Tax Officer, Ward-1(3), Bathinda
[PAN: AARFM 8286D]		
(Appellant)		**(Respondent)**

Appellant by : Sh. P. N. Arora (Adv.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 02.04.2019
Date of Pronouncement: 28.06.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), Bathinda ('CIT(A)' for short) dated 06.12.2017, dismissing the assessee's appeal contesting the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) for Assessment Year (AY) 2012-13 vide order dated 17.7.2015.

2. The facts of the case in brief are that the assessee, a firm in the business of sale and service of vehicles, returned its' income for the year on 30/9/2012 at Rs.2625, setting off brought forward unabsorbed business loss and depreciation at Rs.5,52,861. The assessment was completed u/s.143(3) on 29/1/2015 at an income of Rs.3,25,343, making three separate adjustments/additions aggregating to Rs.3,22,718, as under:

Particular	Amount (Rs.)	Remark
(a) Credits in respected of commission & labor reflected in Form 26AS (TDS statement), but not accounted for.	1,59,747	Tax deducted at source (Rs. 13,615)
(b) stamp duty and registration fee on land purchased for Rs. 7.13 lacs during the year, not accounted for.	64,170	
(c) unexplained credit in the form of increased credit balance on 01.04.2011 in account of M/s. J.K. Tyre, a trade creditor, vis-à-vis as on 30.03.2011.	98,801	

Penalty proceedings were also initiated by issuing notice u/s. 274, with the Assessing Officer (AO) recording his satisfaction in its respect, which was for both, i.e., concealment of particulars of income and furnishing inaccurate particulars of income *qua* the first addition (for Rs. 1.60 lacs, at (a) above), and *qua* the latter only for the other two (at (b) & (c) above). No appeal against the quantum assessment, as also confirmed from the ld. counsel for the assesse, Sh. Arora, during hearing, was though preferred by the assessee.

The assessee, accordingly, furnished its' explanation in respect of all the three additions made to its' returned income in the penalty proceedings. The said explanation was the same as advanced in the assessment proceedings. The non-returning of the commission income (Rs. 1,30,247) was on account of non-receipt thereof, having been credited to the assessee's account (by the payer) on 30/3/2012. No credit for tax deducted at source (TDS) had been, accordingly, claimed per the return of income. The difference in the balance in account of M/s. J.K. Tyres was stated to be on account of a mistake (by the Accountant), clubbing the balance in the account of the said creditor with that in the account (Miscellaneous Creditors). As regards the payment of stamp duty and registration fee on land, the same was tendered in cash by Sh. Surjit Singh, partner, in whose

name the land was purchased. No explanation was furnished in respect of the labour income of Rs. 29,500.

The AO did not find the explanation/s as valid, except *qua* the addition for Rs. 64,170, and levied penalty at Rs. 80,000, i.e., the minimum penalty imposable of Rs. 79,890 on the balance addition/s for Rs. 2,58,548. The same found endorsement in first appeal by the ld. CIT(A). The assessee had been unable to discharge the onus on it under *Explanation 1* to sec. 271(1)(c). The plea as to the addition being agreed to, so that it would save penalty, did not find acceptance; the law in the matter having been clarified in *Mak Data (P.) Ltd. v. CIT* [2013] 358 ITR 93 (SC). The plea as to the notice u/s. 274 being bad in law as it show-caused the assessee on both the limbs of the provision, i.e., concealment and furnishing inaccurate, particulars of income, was again found to be not valid. The AO had not omitted to strike off one of the limbs, as stated, so as to be said to signify an uncertainty in his mind in respect of the exact 'charge', but specifically initiated penalty for both. The penalty had been levied on more than one default attracting different charges, even as the notice u/s. 274 is a single notice. In fact, a default could, in the facts and circumstances of a case, attract both the limbs. The assessee's appeal being dismissed thus, it is in second appeal.

3. I have heard the parties, and perused the material on record.

3.1 The assessee's legal argument of the unsustainability, in law, of the penalty levied on account of a defect in the notice u/s. 274, inasmuch as the same does not strike off one of the limbs where-under penalty u/s. 271(1)(c) may be imposed, only needs to be stated to be rejected. The AO, as the ld. CIT(A) observes, has issued notice for both the limbs, recording his satisfaction *qua* both. How could, then, as also observed by the Bench during hearing, and even as the ld. CIT(A) posits, the AO be said to have faulted in not striking off one limb in the penalty

notice u/s. 274? As further observed by the ld. CIT(A), different defaults by the assessee could attract separate limbs, as indeed the AO observes in the instant case, while the notice u/s. 274 is, as it is indeed contemplated to be, a single notice. *How could, then, the AO possibly strike off one of the two limbs*? This is also what the Hon'ble Court notes in *Chandulal* (infra) (pg. 243). In fact, the assessee has furnished explanation/s toward both its' default/s in not returning the relevant incomes, so that no prejudice could be contended to have been caused, i.e., on account of non-strike off of one of the limbs, nor to be fair has been. The entire premises of the argument with regard to the non-strike off of one of the limbs is a prejudice caused to the assessee. The jurisdiction to impose penalty u/s. 271(1)(c), it is again well-settled, is on the basis of a satisfaction, *prima facie*, of the assessing (or other authority imposing penalty), that the assessee does not have a proper, duly substantiated, explanation with regard to the facts material to the computation of his total income under the Act (refer: *D.M. Manasvi v. CIT* [1972] 86 ITR 557 (SC); *CIT v. S.V. Angidi Chettiar* [1962] 44 ITR 739 (SC)), which (satisfaction) may not even be reduced in writing, though ought to be discernible from the record in any proceedings under the Act (refer: *Mak Data Pvt. Ltd. v. CIT* [2015] 358 ITR 593 (SC); *CIT v. Atul Mohan Bindal* [2009] 317 ITR 1 (SC)). The jurisdiction stands validly assumed in the instant case. The legal contention raised is therefore without basis in facts, as well as in law, i.e., where indeed some prejudice stands suffered on account of a failure to effect the said strike off. (also refer para 3.2)

3.2 That apart, the specific issue of the non-strike off of one of the two limbs on which penalty u/s. 271(1)(c) in a notice u/s. 274, inapplicable in the instant case, has the subject matter of consideration by the Honb'le Courts, as in *CIT vs. Mithila Motors (P.) Ltd*. [1984] 149 ITR 751 (Pat); *CIT v. Chandulal* [1985] 152 ITR 238 (AP); *CIT vs. Smt. Kaushalya & Ors*. [1995] 216 ITR 660 (Bom), and recently

again by the Hon'ble Bombay High Court in *Maharaj Garage & Co. v. CIT* [2018] 400 ITR 292 (Bom), to a unanimous verdict, i.e., of it being of no consequence; the satisfaction by the assessing authority at the time of initiation of penalty being even otherwise preliminary and, further, *prima facie*, i.e., prior to the examination of the explanation by the assesseee in the penalty proceedings, only upon which it would stand to be determined as to under which specific limb, which may even overlap in the facts and circumstances of a particular case, the default by the assessee in not returning the impugned income per his return of income falls. Reference in this context may be drawn to the decision in *CIT v. Manu Engineering* Works [1980] 122 ITR 306 (Guj). The notice u/s. 274, it stands explained, is only an administrative device to put the assessee to notice that penalty proceedings in its' case have been initiated, so that it may furnish its' explanation/s toward the same, i.e., to observe to principle of natural justice contained in s. 274. The rules of natural justice are flexible and cannot be put in any rigid formula; the purport of the notice being to allow the opportunity of being heard. Further still, even assuming so, a defect in the notice, it is even otherwise well-settled, only amounts to an irregularity, and is not a jurisdictional defect. As explained in *Mithila Motors Pvt. Ltd*. (supra), with reference to the decision in *Kantamani Vankata Narayana & Sons vs. ITO (First Addl.)* [1967] 63 ITR 638 (SC), a mistake in the notice does not invalidate penalty proceedings (at pg. 757). All these decisions were brought to the notice of Shri Arora, the ld. counsel, during hearing to, however, no substantive response. It is not considered necessary to, in view of the inapplicability of the strike off in the facts of the case, dwell further in the matter, suffice to say that the matter stands comprehensively examined and clarified per a series of decisions by the higher courts of law, which constitutes the judicial precedence on the subject. The decisions by the Tribunal, relied upon, would therefore be of no moment, notwithstanding their reliance on *CIT v. Manjunatha Cotton & Ginning Factory*

[2013] 359 ITR 565 (Kar), which decision is itself without reference to judicial precedents. The same is in fact premised on a prejudice having been caused – a question of fact, and, besides, as explained by the tribunal in many a case, as in *Earthmoving Equipment Service Corporation vs. Dy. CIT* (in ITA No. 617/Mum/ 2014, dated 02/5/2017), rendered considering multiple factors, and not solely on the basis of a defect in the notice u/s. 274. (also refer para 3.3 of this order)

3.3 Coming to the issue on merits, my first observation in the matter is that, in view of *Explanation 1* to sec. 271(1)(c), the assessee' explanation *qua* each specific default in failing to return the relevant income, brought to assessment, and on which penalty stands levied and confirmed, would need to be seen. That is, examined, testing it on the anvil of the said *Explanation*. The law in the matter is trite, so that if the assessee fails to satisfy the mandate of the said *Explanation*, i.e., is unable to furnish an explanation, or substantiate that furnished, with all the facts relevant and material to the computation of his income, or the explanation furnished is found false, *he shall be deemed to have concealed the particulars of his income*. Reference in this context may be drawn to a series of decisions by the Apex Court in the matter, viz. *Mak Data (P.) Ltd. vs. CIT* [2013] 358 ITR 593 (SC); *UoI v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam & Bros. v. CIT* [1999] 236 ITR 977 (SC); *CIT (Addl.) vs. Jeevan Lal Shah* [1994] 205 ITR 244 (SC); *CIT vs. K. R. Sadayappan* [1990] 185 ITR 49 (SC)), to cite some, followed by Hon'ble High Courts throughout the country, including the jurisdictional High Court, as in *CIT v. Lalchand Tirath Ram* [1997] 225 ITR 675 (P&H); *Prem Pal Gandhi v. CIT* (in ITA No. 353 of 2009, dated 22/7/2009), to note two. Here it may also be relevant to state that the deeming fiction of *Explanation 1* shall apply irrespective of whether the non-returning of income is on

account of concealment of particulars of income or furnishing inaccurate particulars of income, which is apparent from a bare reading of the section, besides that of a host of decisions by the Apex Court, including that afore-referred, on the primacy of the explanation furnished in determining the validity or otherwise of the imposition of the penalty u/s. 271(1)(c) (also see *Dilip N. Shroff v. Jt. CIT* [2007] 291 ITR 519 (SC), clarifying it to be always the position).

3.4 The first addition is *qua* a set of incomes, not disclosed, even as the same stand reflected, upon deduction of tax at source thereon, in Form 26AS, w.r.t. which the AO discovered the failure on the assessee's part in not returning the same. The obligation on the assesse to return his income fairly and truly, toward which he in fact signs a verification in the return form, is paramount. The assessee's explanation of the relevant amounts being credited to his account on the last day of the year (or near-about), or that the same is not 'received' by him, is wholly without merit, and rightly not accepted by the Revenue. The assessee's accounts are on mercantile (accrual) basis and, further, its' explanation betrays the non-verification of its' accounts in furnishing the return of income. The penalty proceedings, it is to be appreciated, are only toward providing a deterrence to the non-disclosure of correct income and the concomitant evasion of tax.

The assessee's accounts are audited, a fact I am conscious of, and which aspect cannot be overlooked. This is as it is the Auditor on whom the assesse-auditee relies, and who is charged by law; by the terms of his appointment; by professional code of conduct; as well as morally, to verify the assessee's accounts properly; that indeed being his mandate. The Auditor, in the instant case, has clearly failed to take all reasonable steps to arrive at his satisfaction in the matter. This is particularly so as the assessee's accounts are on mercantile basis, and the TDS represents, in law, receipt of income to that extent (s. 198). There is, without

doubt, dereliction of duty on the part of the assessee's auditor in examining it's accounts and issuing his report thereon in the instant case; representation of a true and fair view of the auditee's affairs as at the end of, as well as of the correct operating results for, the account period, being the cornerstone of any audit of accounts. The question that therefore arises is if the assesse-auditee could be penalized for the same; the auditor being only that engaged by the former. That would not be fair considering that the Auditor is a professional, of independent status, whose professional competence, as indeed his attitude toward his profession, equally relevant, cannot be assessed by an auditee, who does not stand to gain in any manner if the Auditor is not diligent enough. That is, no deliberateness can be attributed to the assessee where the auditor fails to exercise professional judgment or observe the required procedure in undertaking his audit assignment. At the same time, however, comparison with Form 26AS, the access to which is provided to the assessee only and, in any case, is a preliminary step in the verification of it's accounts, is primarily to be carried in-house in completing the same. That is, represents a necessary step in the preparation of the final accounts, even as, the accounts being subject to audit, requisite care on part of the Auditor could have avoided the same. The negligence, thus, is at best contributory, and the burden thereof, while considering the case of penalty, cannot be shifted to the Auditor.

Again, it needs to be borne in mind that the assessee, a firm, does not stand to save on tax by deferring the accounting of its' income in accounts, say, to the subsequent year, being subject to the same tax rate across years. In my view, therefore, if the assesse has *suo motu* disclosed the impugned income in its' accounts for the following year, its' *bona fides* stand established, and no penalty u/s. 271(1)(c) can be levied; the non-returning for the current year being clearly a mistake. Where, however, it is not so, it cannot be said to have acted *bona fide*, and

penalty would be exigible; its' explanation on merits having been already examined, only which led to it being stated to be a result of gross negligence. Again, however, the tax has been deducted and deposited to the credit of the Central Government, where no credit for the same has been claimed, as stated, the same be deducted in computing the tax sought to be evaded by the assesse on non-returning of the relevant income under *Explanation 4* to s. 271(1)(c). This is as the same having been already credited to the account of the Central Government, no credit for the same having been claimed, either for the current or the subsequent year (which could only be against any other income, not permissible in law), the assessee cannot be regarded as having sought to evade tax to that extent. Regard for the same shall accordingly be had by the AO in arriving at the quantum of penalty, if any. The matter, for necessary verification, setting aside the levy to that extent, is restored to the file of the AO, who shall decide in light of, and consistent with, the foregoing, issuing definite findings of fact.

3.5 The second addition (to income) on which penalty stands levied in the instant case is in respect of a difference in the balance of a trade creditor on account of, as explained, an internal inconsistency in the assessee's accounts. In principle, an addition shall follow on account of an unexplained credit in the assessee's accounts during the relevant year. If the liability of the assessee to J.K. Tyres on 31/3/2011, i.e., the close of the immediately preceding year, was at Rs. 7,60,882, how could it possibly get enhanced to Rs. 8,59,683 as at the beginning of the current year, i.e., per the opening balance thereof. The assessee states the difference to be on account of a 'mistake' by its' Accountant. If so, no penalty could be levied. Why, no addition in the first place would arise if the reporting of an increased credit in the opening balance is due to, as stated, a mistake. That is, a wrong reporting of opening balance, or even where the same represents the correct

balance, though the credit (to the extent of the difference) is mistakenly stated (as on 31/3/2011) under a different (incorrect) account head. What is that account head, and what are the implications? The details are missing, which only would determine the issue. This is as a wrong reporting of the balance of a creditor, or a wrong classification of an amount, should not result in an addition (to the income) in the first place, unless of course the same has revenue implications, much less give rise to penalty. Again, the question would be if the income has arisen, or at least come to surface, during the current year, even if by way of the balance as on 01/4/2011, only in which case could it be properly assessed as the income for the current year; each year being a separate and distinct unit of assessment. The assessee, on whom the burden under *Explanation 1* lies; it being only in the know of its' affairs, ought to have clarified matters. The Revenue too ought to have been more proactive, rather than resting content with the lack of proper representation by the assessee. The explanation for the difference, it needs to be appreciated, is in the assessee's accounts itself. What is the enhanced debit, i.e., corresponding to the enhanced credit, or, rather, as is more likely, the account (or the credit balance) which had been overstated earlier and, accordingly, on discovering the mistake, reduced by the said difference. This is the framework, the basic information, coupled with the reason for the wrong statement earlier, that should have informed the assessee's case, constituting its' explanation, which is missing. The conduct of the tax professionals, be it Auditors or representatives before the authorities, leaves much to be desired. The matter, for proper determination, is restored to the file of the AO, who shall decide the same by issuing definite finding of fact, in a time bound manner, also having regard to sec.153. Needless to add, he may draw adverse inference/s, as admissible under the circumstances, in the absence of a proper response/s by the assessee.

3.6 I decide accordingly.

4. In the result, the assessee's appeal is allowed for statistical purposes.

Order pronounced in the open court on June 28, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Date: 28.06.2019
/GP/Sr. Ps.

Copy of the order forwarded to:

(1) The Appellant: Malwa Motors, G. T. Road, Rampuraphul, Distt. Bathinda
(2) The Respondent: The Income Tax Officer, Ward-1(3), Bathinda
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

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By Order