

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

ITA No.513/Coch/2019
Assessment Year:2014-15

The Deputy Commissioner of Income-tax, Circle-1(1), Trivandrum.	<b>Vs.</b>	M/s. R.R. Holidays Homes (P) Ltd., TC-34/495, Karthikeyam, SangumugHom Beach P.O. Trivandrum-695 027. [PAN:AACCR 7529L]
<b>( Revenue-Appellant)</b>		<b>(Assessee-Respondent)</b>

<b>Revenue by</b>	Smt. A.S. Bindhu, Sr. DR
<b>Assessee by</b>	Shri M.R. Ranjith Karthikeyan, FCA

<b>Date of hearing</b>	06/11/2019
<b>Date of pronouncement</b>	08/11/2019

### **ORDER**

Per CHANDRA POOJARI, AM:

This appeal filed by the Revenue is directed against the order of the CIT(A), Trivandrum dated 14/11/2018 and pertains to assessment year 2014-15.

2. The Revenue has raised the following grounds of appeal:

The Learned Commissioner of Income tax (Appeals), Trivandrum erred in concluding that *"the notice issued u/s 274 r w s 271(1)(c) of the Act without, striking off the irrelevant limb is invalid and consequently, penalty order passed by the Assessing Officer is also invalid."*

2. While relying on the decision in the case of Babu Mathew Vs ACIT in ITA No. 95 & 96/Coch/2016, the CIT(A) ought to have noticed that in the said case, penalty was cancelled observing that notice issued by the AO was not in conformity with or according to the intent and purpose of the Act since AO did

not specify the charge for which penalty proceedings were initiated and further there was non-application of mind on the part of the Assessing Officer. The facts and circumstances of the case relied upon by the CIT(A) is not applicable in the present case where both limbs of section 271(1)(c) i.e. "*concealment of particulars of income*" as well as "*furnishing of inaccurate particulars of income*" is relevant and applicable. Thus the CIT(A) ought to have noticed that the notice issued by the Assessing officer is valid.

3. For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Income-tax(Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored.

3. At the outset, there was a delay of 232 days in filing the appeal before the Tribunal. The Ld. DR has filed condonation petition accompanied by an affidavit stating that as directed by the Pr. CIT, Trivandrum, all the required documents had been sent to the office of the Assistant Registrar, ITAT, Cochin Bench on 02/01/2019. It was submitted that the copy of the same was sent to the office of the Commissioner of Income-tax(DR) also. According to the Ld. DR, inadvertently, both the tapals were delivered to the O/o the Commissioner of Income-tax(DR) and both the copies were retained there on the impression that it pertains to that office and later on, it was learnt that this case was not filed before the ITAT. Subsequently, vide letter dated 31/07/2019, the CIT(DR), ITAT, Kochi directed this office to file the appeal afresh with necessary condonation petition after completing the formalities from the Higher Authorities. On that basis this office had once again obtained the order u/s. 253(2) from the Pr. CIT, Trivandrum on 26/08/2019. Thus, there was a delay of 232 days. It was submitted that delay may be condoned and the appeal heard on merits, otherwise it will cause heavy loss to the appellant.

3.1 We have gone through the condonation petition. The delay in filing the appeal before the Tribunal was due to administrative reasons. We find there is good and sufficient cause for belatedly filing the appeal before the Tribunal. Hence, we condone the delay of 232 days in filing the appeal and admit the appeal on merits for adjudication.

4. The facts of the case are that the Assessing Officer levied penalty of Rs. 2,20,48,706/- under section 271(1)(c) of the Act for furnishing inaccurate particulars of income and concealing its true and correct taxable income. However, during the appeal proceedings, the learned AR raised additional legal ground that the order under section 271(1)(c) of the Act was not valid as the notice issued under section 274 r.w.s. 271(1)(c) of the Act did not specify the limb under which the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or for furnishing inaccurate particulars of income. The learned AR furnished a copy of the notice issued under section 274 of the Act and the contents of the same are as under:

NOTICE U/S 274 READ WITH SECTION 271(1)(C) OF THE INCOME TAX ACT, 1961

No. AACCR7529L/C-1(1)/TVM/2016-17

Dated: 27.12.2016

To  
M/s. R R Holiday Homes Pvt Ltd, T  
T.C. 34/495, Karthikeyam,  
Sanghumugham Beach P.O.  
Trivandrum-695024

Where as in the course of proceedings before me for the assessment year 2014-15, it appears that you

"have concealed the particulars of your Income or ..... furnished inaccurate particulars of such income.

You are requested to appear before me at 2.40 P.M. on 04.01.2017 and show cause why an order imposing 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 authorised representative, you may show cause in writing on or before the said date which will be considered before my such order is made under section 271.

sd/-  
(Aswathy V)  
Assistant Commissioner of Income Tax  
Circle 1(1), Thiruvananthapuram

5. On appeal, the CIT(A) observed that a similar issue was decided by the Tribunal in favour of the assessee in the case of Babu Mathew vs. ACIT in ITA Nos. 95&96/Coch/2018 dated 19/01/2018 wherein it was held as follows:

*"10. We have heard the rival submissions and perused the material on record. We have given a careful consideration to the rival submissions. The argument of the learned counsel for the Assessee was that the show cause notice u/s.274 of the Act which is in a printed form and the AO has indicated in the said notice as to whether the penalty is sought to be levied on the assessee for "furnishing inaccurate particulars of income" or "concealing particulars of such income" by striking off the irrelevant portion of the printed show cause notice. On this aspect we find that in the show cause notice u/s.274 of the Act the AO has not struck out the irrelevant part. It is not spelt out as to whether the penalty proceedings are sought to be levied for "furnishing inaccurate particulars of income" or "concealing particulars of such income".*

*11. The Hon'ble Karnataka High Court in the case of [CIT & Anr. v. Manjunatha Cotton and Ginning Factory](#), 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in [section 271](#) are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and finding the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will*

*squarely apply and the orders imposing penalty have to be held as bad in law and liable to be quashed.*

12. *The Hon'ble Karnataka High Court in the case of [CIT & Anr. v. Manjunatha Cotton and Ginning Factory](#) (supra) has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act.*

**"NOTICE UNDER SECTION 274**

*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 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(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 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 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 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."*

The final conclusion of the Hon'ble Court was as follows:-

"63. In the light of what is stated above, what emerges is as under:

- a) Penalty under Section 271(1)(c) is a civil liability.
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

- c) Willful concealment is not an essential ingredient for attracting civil liability.
- d) Existence of conditions stipulated in [Section 271\(1\)\(c\)](#) is a sine qua non for initiation of penalty proceedings under [Section 271](#).
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.
- f) Even if there is no specific finding regarding the existence of the conditions mentioned in [Section 271\(1\)\(c\)](#), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under [Section 271\(l\)\(c\)](#) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in [Section 1\(B\)](#).
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.
- i) The imposition of penalty is not automatic.
- j) Imposition of penalty even if the tax liability is admitted is not automatic.
- k) *Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.*
- l) *Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.*
- m) *If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*

n) *The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*

o) *If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*

p) *Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income*

q) *Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*

r) *The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.*

s) *Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.*

t) *The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*

*The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."*

13. *It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.*

14. We may also add that the provision of [section 292B](#) of the Act cannot cure the basic defect in assumption of jurisdiction and only cure the mistake, defect or omission in return of income, assessment, notice or the proceeding is in substance and effect in conformity with or according to intent and purpose of the Act. As we have already seen that the Hon'ble Karnataka High Court in the decision referred to earlier view the show cause notice and the reasons mentioned in the show cause notice are part of the process of the natural justice and the defect in such notice cannot be overlooked. In view of the aforesaid decision we do not find any infirmity in the arguments advanced by the learned AR before us.

15. The contention of the Ld. DR is that the assessee has participated in the penalty proceedings and hence the error, if any that has occurred would be cured in view of the provisions of sec. 292B/292BB of the Act. Opposing the said contention, reliance was placed on the decision rendered by the Bangalore Bench of the Tribunal in the case of *Shri K. Prakash Shetty vs. ACIT (ITA Nos. 265 to 267/Bang/2014 dt. 05/06/2014)* wherein it was held that the provisions of sec.292BB would not come to the rescue of the revenue, when the notice was not in substance and effect in conformity with or according to the intent and purpose of the Act. In our view, the notice issued by the Assessing Officer was not in substance, and effect in conformity with or according to the intent and purpose of the Act, since the Assessing Officer did not specify the charge for which penalty proceedings were initiated and further there was non-application of mind on the part of the Assessing Officer.

15. For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. We therefore cancel the orders imposing penalty on the Assessee and allow the appeals by the Assessee."

4.1 In view of the above decision of the Tribunal, the CIT(A) held that the notice issued under section 274 r.w.s. 271(1)(c) of the Act without striking off the irrelevant limb was invalid and consequently, penalty order passed by the Assessing Officer was also invalid. Hence, the CIT(A) deleted the penalty levied u/s. 271(1)(c) of the Act and allowed the appeal of the assessee.

5. Against this, the Revenue is in appeal before us.

6. We have heard the rival submissions and perused the record. The main contention of the Id. DR is that penalty was levied by the Assessing Officer for concealment of particulars of income and furnishing inaccurate particulars of such income. We have gone through the assessment order dated 27/12/2016. As seen from the assessment order, it was mentioned in last para that penalty u/s. 271(1)(c) would be initiated separately for furnishing inaccurate particulars of income. In the penalty order dated 29/06/2017, in the last para of page 2 of it, the Assessing Officer mentioned as follows:

*“Considering all of the above and based on the facts of the case, it is clear that the assessee had concealed the particulars of income till the survey was carried out and had failed to furnish return voluntarily. Only after the survey was conducted by the department, assessee has furnished the return of income.”*

6.1 However, contrary to this, the Assessing Officer has mentioned in last but one para in page 3 of the penalty order as follows:

*“Accordingly, a penalty of Rs.2,20,48,706/- is imposed u/s. 271(1)(c) of the I.T. Act, 1961 for furnishing inaccurate particulars of income and concealing its true and correct taxable income.”*

6.2 Hence, in our opinion, it cannot be said that the penalty was levied for furnishing inaccurate particulars of income and concealment of income. When the penalty is levied for one of the offence, it is incumbent upon the Assessing Officer to struck down the irrelevant portion of the notice issued u/s 274 of the Act. We have gone through the contents of the notice issued u/s. 274 of the Act. As held by

the Karnataka High Court in the case of CIT & Anr. vs. M/s. SSA's Emerald Meadows (2015) (11) TMI 1620 that the notice issued by the Assessing Officer u/s. 274 r.w.s 271(1)(c) is to be bad in law as it did not specify which limb of section 271(1)(c) of the Act, the penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. This view was confirmed by the Supreme Court in the same case, i.e., CIT & Anr. vs. M/s. SSA's Emerald Meadows reported in (2016) (8) TMI 1145.

6.3 In view of the above discussion, we are inclined to hold that the penalty proceedings initiated by the AO is void ab initio and allow the appeal of the assessee. Hence, we do not find any infirmity in the order of the CIT(A) and confirm the same. Since we have quashed the penalty proceedings itself, we refrain from adjudicating the other grounds of appeal raised by the assessee.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 8<sup>th</sup> November, 2019.

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi  
Dated: 8<sup>th</sup> November, 2019

GJ  
Copy to:

1. M/s. R.R. Holidays Homes (P) Ltd., TC-34/495, Karthikeyam, Sangumughom Beach P.O., Trivandrum-695 027.
2. The Deputy Commissioner of Income-tax, Circle-1(1), Trivandrum.
3. The Commissioner of Income-tax(Appeals), Trivandrum.
3. The Pr. Commissioner of Income-tax, Trivandrum.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin