

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 6079/MUM/2018 (A. Y: 2009-10)**

Income Tax Officer – 12(1)(1) Room No. 226, 2 <sup>nd</sup> Floor Aayakar Bhavan, M.K. Road Mumbai – 400 020	v.	M/s. Ampro Forms Private Limited 501-A, Vaibhav Apartment Jamblu Galli, Borivali (West) Mumbai – 400 092  <b>PAN: AADCA4479K</b>
<b>(Assessee)</b>		<b>(Respondent)</b>

**Assessee by : None**

**Department by : Shri S. Michael Jerald**

**Date of Hearing : 14.11.2019**

**Date of Pronouncement : 22.11.2019**

**ORDER**

**PER C.N. PRASAD (JM)**

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals) – 20, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 28.06.2018 for the A.Y. 2009-10.

2. Revenue has raised the following grounds in its appeal: -

(1) *"Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the penalty of Rs.1,49,617/- levied by the Assessing Officer u/s. 271(l)(c) for furnishing inaccurate particulars of income relating to claim of unexplained expenditure*

*u/s. 69C/37(1) on account of bogus purchases and Rs. 4,68,328/- on account of unproved liabilities u/s. 41(1) of the Income Tax Act, 1961, without appreciating the merit of the case and also the fact that the assessee had accepted the quantum addition made in the assessment order?"*

*(2) The appellant prays that the order of the Ld. CIT (A) on the above ground be set aside and that of the Assessing Officer be restored.*

*(3) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.*

3. In spite of issue of notice none appeared on behalf of the assessee nor any adjournment was sought by the assessee. Therefore, we proceed to dispose off this appeal on hearing the Ld. DR on merits.

4. Ld. DR vehemently supported the orders of the Authorities below.

5. We have heard the Ld. DR, perused the orders of the Authorities below. The Assessing Officer while completing the assessment u/s.143(3) r.w.s. 147 of the Act made addition u/s. 69C of the Act treating certain purchases as bogus and also made addition u/s. 41(1) of the Act in respect of trade liabilities. Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act by issue of notice u/s. 274 r.w.s. 271(1)(c) of the Act and passed order dated 28.09.2015 levying penalty of ₹.1,49,617/-. Assessee contended before the Ld.CIT(A) that the notice issued by the Assessing Officer u/s. 274 r.w.s. 271(1)(c) of the Act is

defective in as much as the Assessing Officer did not strike off the irrelevant portion i.e. limb of the notice and specify the charge for which he is proposing to initiate the penalty proceedings. The Ld.CIT(A) deleted the penalty in view of the decision of the Hon'ble Supreme Court in the case of Dilip N. Shroff v. JCIT [291 ITR 519], decisions of the Hon'ble Karnataka High Court in the cases of CIT & Anr. v. Manjunatha Cotton and Ginning Factory [359 ITR 565], CIT v. SSA's Emerald Meadows and also the decision of the Mumbai Tribunal in the case of Trans Conduct (India) in ITA.No. 3198/Mum/2016. The Ld.CIT(A) observing that the Tribunal held that, when the Assessing Officer himself is not clear under which limb of clause(c) of section u/s. 271(1)(c) has been imposed the order passed imposing penalty is to be treated as bad in law as there is no opportunity to the assessee to rebut the charge for which the penalty was imposing i.e. either for concealment of income or furnishing of inaccurate particulars of income. Admittedly in this case also in the notice issued u/s. 274 r.w.s 271(1)(c) of the Act for initiation of penalty proceedings, the Assessing Officer did not strike off and specify the charge/limb for which he is proposing to initiate the penalty proceedings.

6. We find that an identical issue has been considered by the Coordinate Bench in Meherjee Cassinath Holdings v. ACIT in ITA.No.2555/MUM/2012 dated 28.04.2017 as to whether the action of the

Assessing Officer in initiating penalty proceedings U/s. 271(1)(c) of the Act without striking off one of the limbs and without specifying the specific charge in the notice initiating penalty proceedings for inaccurate particulars of income in the Assessment Order and the Coordinate Bench considering the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery [392 ITR 4] and also various decisions held that action of the Assessing Officer in non-striking off relevant clause in the notice shows that the charge being made against the assessee is not firm therefore proceedings suffer from non-compliance with principles of natural justice in as much as the Assessing Officer himself is not sure of the charge and the assessee is not made aware as to which of the two limbs of section 271(1)(c) of the Act he has to respond.

7. Following the above decision, similar view has been taken by the Coordinate Bench in the case of Orbit Enterprises v. ITO [60 ITR(Trib.) 252]. In the case of DCIT v. Shri Dhaval D. Shah in ITA.No. 1337/Mum/2016 & C.O.NO.08/Mum/2018 dated 16.05.2018 the Coordinate Bench considered similar and identical issue and following the ratio laid down in the Dilip N. Shroff [210 CTR 228 (SC)] and the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery (supra) held that the penalty proceedings initiated by the

Assessing Officer is bad in law. While holding so the Coordinate Bench held as under:

“9. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

We begin with the decisions relied on by the Ld. DR. In the case of Smt. Kaushalya & Ors. (supra), the Hon'ble Bombay High Court held:

“9. We will first take up the show-cause notice dated March 29, 1972, pertaining to the assessment years 1968-69 and 1969-70. The assessment orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In this background, it could not be said that either there was non-application of mind by the Income-tax Officer or the so-called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna) (head note):

‘Under section 274 of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings.’

In M/s Maharaj Garage & Co. (supra), the Hon'ble Bombay High Court at para 15 held:

“The requirement of section 274 of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge of asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice u/s 271(1)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice of the action of imposing penalty. We, therefore, do not find either any jurisdiction error or unjust exercise of power by the authority.”

*In Sky Light Hospitality LLP (supra), the assessee (Sky Light Hospitality LLP) who had taken over on 13.05.2016 and acquired rights and liabilities of M/s Sky Light Hospitality Pvt. Ltd. upon conversion under the Limited Liability Partnership Act, 2008, filed a writ petition impugning notice dated 30.03.2017 issued by the AO u/s 147/148 for the AY 2010-11. The contention of the assessee before the Hon'ble High Court was that notice u/s 147/148 of the Act dated 30.03.2017 was addressed and issued to M/s Sky Light Hospitality Pvt. Ltd., PAN No. AALCS3800N, a company which had ceased to exist and was dissolved on 13.05.2016. It was stated that the said notice issued to a dead juristic person is invalid and void in the eyes of law. Also contentions were raised stating that section 292B was inapplicable. The Hon'ble Delhi High Court held as under:*

*“21. Our attention was drawn to Parashuram Pottery Works Co. Ltd. V. ITO, Circle I, Ward A, Rajkot, (1977) 106 ITR 1 (SC) which records that the Assessing Officer entrusted with the task of calculating and realizing tax should familiarize themselves with the relevant provisions and become well versed with the law on the subject. This is a salutary advice. Indeed, there have been lapses and faults resulting in the present litigation. Notice under Section 147/148 of the Act was issued at the end of the limitation period. Noticeably, Assessment Order for the assessment year 2013-2014 was passed on 31.03.2016, one year earlier. Second lapse is also apparent. Despite correctly noting the background, notice under Section 147/148 of the Act was not addressed in the correct name and even the PAN Number mentioned was incorrect. Nevertheless, human errors and mistakes cannot and should not nullify proceedings which are otherwise valid and no prejudice had been caused. This is the effect and mandate of Section 292B of the Act.”*

*In Smt. Shantidevi Mahavir Prasad Gupta (supra), the Tribunal held as under:*

*“10. The question before us is not whether the income is of the nature of “notional income” but the question is whether the assessee has filed inaccurate particulars or concealed the true facts. As stated hereinabove, in our humble opinion, the assessee has concealed the true facts thereby filed inaccurate particulars. Therefore, we do not find any error or infirmity in the findings of the Ld. CIT(A). The penalty u/s. 271(1)(c) is leviable on the facts of the case. The reliance on the decision of the Tribunal is clearly distinguishable on the facts. We, accordingly confirm the levy of penalty u/s. 271(1)(c) of the Act.”*

*In Ms. Laudres Austin (supra), the Tribunal held the following :*

*“In the instant case also we hold that penalty proceedings were initiated properly as there is no defect in the recording of satisfaction by the AO as well there is no defect in the notice issued u/s 271 r.w.s. 274 of the 1961 Act. The decision of Hon'ble Bombay High Court in Samson Perincherry (supra) is concerning the issuance of penalty proceedings under one limb while levying of penalty under another limb of section 271(1)(c) which is no permissible as per ratio of this decision. The Hon'ble Supreme Court in SSA's Emerald Meadows (supra) while dismissing SLP recorded finding that the Hon'ble Lordships did not find any merit in this petition which means ratio of decision of Hon'ble Karnataka High Court in SSA's Emerald Meadows in ITA No. 380 of 2015 stood confirmed. The Hon'ble Karnataka High Court in SSA's Emerald Meadows has affirmed the ratio of judgment of Manjunatha Cotton and Ginning Factory (supra). We have already seen that Hon'ble Karnataka High Court in Manjunatha Cotton and Ginning*

*Factory (supra) has affirmed that alternate charge is possible under both the limbs simultaneously.”*

9.1 *In the instant case, the AO vide his order u/s 143(3) dated 28.12.2011 has initiated the penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income or concealment of income. In the draft penalty order u/s 271(1)(c) dated 24.03.2014, the AO has imposed penalty of Rs.46,59,047/- for concealment of income. Also we find that there is no provision in the Income Tax Act, 1961 for a draft penalty order u/s 271(1)(c) of the Act.*

9.2 *It would be apposite to refer here to the decision in Dilip N. Shroff v. JCIT (2007) 210 CTR (SC) 228, wherein it has been held :*

*“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. Commissioner of Income Tax, Kerala State, (2000) 2 SCC 718]”*

*In CIT vs. Samson Perincherry (ITA No. 953, 1097, 1154 & 1226 of 2014), the Hon’ble Bombay High Court held:*

*“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 order 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 of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the assessee has no notice.”*

*Respectfully following the ratio laid down in Dilip N. Shroff (supra) and Samson Perincherry (supra), we hold that the penalty proceedings initiated by the AO is bad in law. We may herein observe that since the order of the AO has been held as bad in law on the preliminary ground, the other grounds raised by the revenue on merits before us having been rendered as academic, are thus not being dealt with.”*

8. Respectfully following the above said decision, we hold that the notice issued by the Assessing Officer U/s. 274 r.w.s 271(1)(c) of the Act is on account of non-application of mind and therefore the penalty

proceedings initiated are bad in law. Thus, we uphold the order passed by the Ld.CIT(A) and reject the grounds of the Revenue.

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

Order pronounced in the open court on the 22<sup>nd</sup> November 2019

Sd/-  
**(MANOJ KUMAR AGGARWAL)**  
**ACCOUNTANT MEMBER**

Mumbai / Dated 22/11/2019  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**Copy of the Order forwarded to:**

1. The Assessee
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**