

**आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक**

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

**BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM**

**आयकर अपील सं./ITA Nos.259/CTK/2018**

**(निर्धारण वर्ष / Assessment Year :2010-2011)**

Subash Agarwal, Plot No.N-1/93 IRC Village, Nayapalli, Bhubaneswar-751015	Vs.	ACIT, Circle-2(1), Bhubaneswar
स्थायी लेखा सं./PAN No. : <b>AATPA 3716 A</b>		

**AND**

**आयकर अपील सं./ITA Nos.260/CTK/2018**

**(निर्धारण वर्ष / Assessment Year :2010-2011)**

Sunil Agarwal, Plot No.N-1/93 IRC Village, Nayapalli, Bhubaneswar-751015	Vs.	ACIT, Circle-2(1), Bhubaneswar
स्थायी लेखा सं./PAN No. : <b>AATPA 3718 Q</b>		

**AND**

**आयकर अपील सं./ITA Nos.261/CTK/2018**

**(निर्धारण वर्ष / Assessment Year :2010-2011)**

Rajesh Agarwal, Plot No.N-1/93 IRC Village, Nayapalli, Bhubaneswar-751015	Vs.	ACIT, Circle-2(1), Bhubaneswar
स्थायी लेखा सं./PAN No. : <b>ACEPA 5209 R</b>		

**AND**

**आयकर अपील सं./ITA Nos.262/CTK/2018**

**(निर्धारण वर्ष / Assessment Year :2010-2011)**

Anil Agarwal, Plot No.N-1/93 IRC Village, Nayapalli, Bhubaneswar-751015	Vs.	ACIT, Circle-2(1), Bhubaneswar
स्थायी लेखा सं./PAN No. : <b>AATPA 3717 B</b>		

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
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निर्धारिती की ओर से /Assessee by	:	Shri P.S.Panda/Kamal Agarwal,CAs
राजस्व की ओर से /Revenue by	:	Shri Subhendu Dutta, DR

सुनवाई की तारीख / <b>Date of Hearing</b>	:	27/11/2019
घोषणा की तारीख/ <b>Date of Pronouncement</b>	:	19/12/2019

### **आदेश / ORDER**

**Per Bench:**

These four appeals filed by the different assessees against the separate orders passed by the CIT(A)-2, Bhubaneswar, all dated 23.06.2017 for the assessment year 2010-2011, thereby confirming the penalty levied u/s.271(1)(c) of the Act.

2. As per the office note/order sheet entry, all the four appeals of the assessee are barred by 303 days. In this regard, the ld. AR of the assessee has filed application for condonation of delay along with affidavit in the respective appeals under consideration stating therein that as most of the staffs who were looking after the accounts of the assessee have left the job and, therefore, appeals could not be filed in time. On the other hand, ld. DR did not object to condone the delay. Considering the application along with the affidavit of the assessee for condonation of delay filed in the respective appeals, we condone the delay in filing the all the appeals and the appeals are heard finally.

3. The sole issue involved in all these appeals is that the CIT(A) erred in confirming the action of the Assessing Officer in levying penalty u/s.271(1)(c) of the Act.

4. At the outset, ld. Assessee Representative (AR) placing reliance on the decision of Hon'ble Karnataka High Court in the case of

Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) and submitted that the AO issued notice u/s.274 of the Act on 31.03.2013, wherein both the allegations have been noted and the AO has not shown any clear indication too the assessee that on which allegation he intends to impose penalty u/s.271(1)(c) of the Act. Ld. AR also drew our attention towards page 1 para 1 of the relevant assessment order dated 31.03.2013 for A.Y.2010-2011 passed u/s.153A r.w.s.143(3) of the Act and submitted that the AO noted that a voluntary disclosure of Rs.1.6 crore was made u/s.132(4) of the Act as a result of receipt of commission income from sub-contractors and the assessee had undisclosed income to the tune of Rs.1.6 crores as also admitted by the assessee penalty proceedings u/s.271(1)(c) of the Act are initiated. Ld. AR contended that even in the assessment order there is no iota that on which allegation the AO intends to impose the penalty on the assessee either on the allegation on concealment of income or on the allegation of furnishing inaccurate particulars of income. Therefore, on both the counts penalty imposed by the AO and confirmed by the CIT(A) cannot be held as sustainable.

5. Replying to the above, ld. DR strongly supported the penalty order and submitted that the assessee himself voluntarily surrendered Rs.1 crores as undisclosed income and as per addition made by the AO the penalty proceedings u/s.271(1)(c) of the Act was initiated and the

AO has rightly imposed penalty on the assessee by holding that the assessee has concealed his income to the tune of Rs.1 crore. The Ld. CITDR submitted that in the assessment order also the assessee has clearly mentioned that the assessee had undisclosed income to the tune of Rs.1 crore which means the assessee has concealed his income and, therefore, attracts penalty u/s.271(1)(c) of the Act.

6. Placing rejoinder to the above, ld. AR submitted that right from passing of the assessment order and imposing penalty the AO himself was not sure that on which ground he intends to impose the penalty on the assessee as in the assessment order there is no allegation against the assessee on which penalty u/s.271(1)(c) of the Act can be imposed i.e. the AO has neither alleged that the assessee has concealed the particulars of income or has furnished inaccurate particulars of such income in the assessment order. Ld. AR further drew our attention towards notice issued by the AO u/s.274 of the Act for initiation of penalty proceedings wherein both the allegations have been written simultaneously and there is no particular allegation against the assessee. Even from the last operating para of penalty order, it can be observed that the AO stated that the penalty u/s.271(1)(c) of the Act is levied in any case of furnishing of inaccurate particulars of income or concealment of income and assessee by not declaring income in the original return has concealed his income, therefore, only on account of

defective notice penalty imposed by the AO and confirmed by the CIT(A) cannot be sustainable in view of the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra).

7. After considering the rival submissions of both the parties and perusing the entire material available on record as well as orders of lower authorities, we find that the the notice issued u/s 274 r.w.s.271(1)(c) of the Act apparently goes to prove that the Assessing Officer initiated the penalty proceedings by issuing the notice u/s.274/271(1)(c) of the Act without specifying the assessee has concealed "particulars of income" or assessee has furnished "inaccurate particulars of income", so as to provide adequate opportunity to the assessee to explain the show cause notice. Rather notice in this case has been issued in a stereotyped manner without applying any mind which is bad in law, hence is not a valid notice sufficient to impose penalty u/s 271(1)(c) of the Act. The Hon'ble Apex Court vide judgment in case of M/s. SSA's Emerald Meadows, (2016) 73 taxmann.com 248(SC) dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by Hon'ble High Court of Karnataka whereby identical issue was decided in favour of the assessee. Operative part of the judgment in case of M/s. SSA's Emerald

Meadows (supra) decided by Hon'ble High Court of Karnataka is reproduced below :-

*"2. This appeal has been filed raising the following substantial questions of law:*

*(1) Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?*

*(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(l)(c) is bad in law and invalid in spite the amendment of Section 271(1 B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?*

*(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued, under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?*

*3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(l)(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. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of COMMISSIONER or INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.*

*4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court, the appeal is accordingly dismissed."*

8. The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per Hon'ble High Court, where the Assessing Officer proposed to

invoke first limb being concealment, then the notice has to be appropriately marked. The Hon'ble High Court held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clauses would lead to an inference of non-application of mind by the Assessing Officer. The Hon'ble Supreme Court in the case of Dilip N. Shroff vs. JCIT, 291 ITR 519(SC) has also noticed that where the Assessing Officer issues notice under section 274 of the Act in the standard proforma and the inappropriate words are not deleted, the same would postulate that the Assessing Officer was not sure as to whether he was to proceed on the basis that the assessee had concealed the particulars of his income or furnished inaccurate particulars of income. According to the Hon'ble Supreme Court, in such a situation, levy of penalty suffers from non- application of mind. In the background of the aforesaid legal position and, having regard to the manner in which the Assessing Officer has issued notice under section 274 r.w.s. 271(1)(c) of the Act dated 31.03.2013 without striking off the irrelevant words, the penalty proceedings show a non-application of mind by the Assessing Officer and is, thus, unsustainable.

9. The facts of the present appeals are identical to the facts of the case before the Hon'ble Supreme Court in the case of SSA's. Emerald Meadows(supra) and, therefore, the decision of Hon'ble Supreme Court squarely applies to the case of the assessee. Hence, respectfully

following the same, we set aside the impugned order passed by the CIT(A) in case of all the assesseees in their respective appeals and cancel the order of the Assessing Officer dated 11.09.2013 levying penalty u/s.271(1)(c) of the Act and allow the sole ground of appeal raised by all the assesseees in their respective appeals under consideration.

10. In the result, appeals of all the assesseees are allowed.

Order pronounced in the open court on 19/12/2019.

**Sd/-**  
**(C.M.GARG)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**  
**(L.P.SAHU)**

लेखा सदस्य / ACCOUNTANT MEMBER

**कटक** Cuttack; दिनांक Dated 19/12/2019

*Prakash Kumar Mishra, Sr.P.S.*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

**आदेशानुसार/ BY ORDER,**

**(Senior Private Secretary)**

**आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack**