

IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR

BEFORE SH. N.K.CHOUDHRY, JUDICIAL MEMBER AND
DR. A.L.SAINI, ACCOUNTANT MEMBER

ITA No.46 /Asr/2017

Assessment Year: 2007-08

ITA No.190/Asr/2015

Assessment Year: 2008-09

Sh. Kasturi Lal Mahajan,
51, B/C Gandhi Nagar,
Jammu.

Vs.

Dy. CIT
Central Circle, Jammu.

[PAN:ADPPM 5842C]

(Appellant)

(Respondent)

ITA Nos.40, 41 & 42/Asr/2017

Assessment Years: 2006-07, 2007-08 & 2008-09

Sh. Amit Mahajan,
51, B/C Gandhi Nagar,
Jammu.

Vs.

Dy. CIT
Central Circle, Jammu

[PAN:AKMPM 9681M]

(Appellant)

(Respondent)

ITA Nos.43, 44 & 45/Asr/2017

Assessment Years: 2006-07, 2007-08 & 2008-09

Sh. Sumit Mahajan,
51, B/C Gandhi Nagar,
Jammu.

Vs.

Dy. CIT
Central Circle, Jammu

[PAN:AKMPM 9682J]

(Appellant)

(Respondent)

ITA Nos.49 & 50/Asr/2017

Assessment Years: 2009-10 to 2010-11

Sh. Chander Mohan Arora
789/A, Gandhi Nagar,
Jammu.

Vs.

Dy. CIT
Central Circle, Jammu

[PAN:ACCPA 1863D]

(Appellant)

(Respondent)

Appellant by : Sh. Joginder Singh (Ld. CA)
Respondent by: Smt. Prabhjot Kaur (Ld. CIT-DR)

Date of hearing: 29.11.2019
Date of pronouncement: 30.12.2019

ORDER

PER N.K.CHOUDHRY, JM:

All the above appeals preferred by the Assesseees against separate orders dated 17/10/2016 & 25/02/2015 passed by the Ld. CIT(A)-5, Ludhiana, as detailed below, involved similar and identical facts and issues on merits and of law which has been specifically raised as additional ground of appeal, therefore, for the sake of brevity, all the appeals have been taken simultaneously for adjudication by this composite order and for the sake of brevity facts of ITA No.46/Asr/2017 shall be referred.

SL. No.	Appeal Number & Asst. Year	Date of impugned order	Office of CIT(A)	Penalty affirmed by the Ld. CIT(A)
1.	ITA No.46/Asr/2017 (A.Y.2007-08)	17/10/2016	CIT(A)-5, Ludhiana	5,79,000/-
2.	ITA No.190/Asr/2015 (A.Y.2008-09)	25/02/2015	-Do-	18,50,200/-
3.	ITA No.40/Asr/2017 (A.Y.2006-07)	17/10/2016	-Do-	9,50,000/-
4.	ITA No.41/Asr/2017 (A.Y.2007-08)	17/10/2016	-Do-	2,63,400/-
5.	ITA No.42/Asr/2017 (A.Y.2008-09)	17/10/2016	-Do-	1,83,810/-
6.	ITA No.43/Asr/2017 (A.Y.2006-07)	17/10/2016	-Do-	9,80,980/-
7.	ITA No.44/Asr/2017 (A.Y.2007-08)	17/10/2016	-Do-	39,580/-
8.	ITA No.45/Asr/2017 (A.Y.2008-09)	17/10/2016	-Do-	34,000/-
9.	ITA No.49/Asr/2017 (A.Y.2009-10)	17/10/2016	-Do-	25,29,160/-
10.	ITA No.50/Asr/2017 (A.Y.2010-11)	17/10/2016	-Do-	1,85,400/-

2. The brief facts of the ITA No.46/Asr/2017 are that a search and seizure operation u/s 132 of the I.T. Act was conducted on dated 30.06.2009 at the residential premises of the assessee. Survey operations u/s 133A of the Act were also conducted simultaneously at several business and office premises of assessee's close relatives. Thereafter notice u/s 153A of the Act was issued to the assessee, in response to which, the assessee had filed his return of income on 31.03.2010 by declaring an income of Rs.22,20,870/- which was duly assessed u/s 143(3)/153A of the Act. It was observed by the assessing officer that the assessee has shown the income at Rs.5,20,870/- in the original return of income filed u/s 139 of the Act on dated 29-10-2007, whereas in response to notice u/s 153A, the assessee had declared the income of Rs.22,20,870/- which was assessed at Rs. 22,40,870/ on dated 16.12.2011. Consequently, the Assessing Officer recorded the satisfaction in the assessment Order and had issued the notice dated 16.12.2011 u/s 274 r.w.s 271 of the Act for concealment of income to the tune of Rs.17,00,000/- and ultimately vide penalty order dated 21.03.2014, levied the penalty 5,79,000/- on the addition of Rs.17,20,300/- for concealment of particulars of income.

3. The assessee challenged the said order before the Ld. CIT(A), who vide impugned order dated 17.10.2016, affirmed the levy of penalty by dismissing the appeal of the assessee, against which the assessee has filed the instant appeal as ITA No.46/Asr/2017, by raising the following grounds of appeal.

“1. That the order of the Ld. CIT(A) is bad and against the facts & law.

2. That the Ld. CIT(A) has erred in confirming the penalty amounting to Rs.5,79,000/- u/s 271(1)(c) read with Explanation 5A on the declared income in the return filed in response to notice u/s 153A of the Act after

search and failed to appreciate the facts that there is no difference between assessed income & returned income/ declared income in response to notice u/s 153A of the Act. The Ld. CIT(Central) appeals has also failed to appreciate the facts that AO has not discussed the merit a reason for levying penalty and he has passed order mechanically without application of mind.

3. That the Ld. CIT(A) has erred in confirming the penalty without appreciating the facts that the Ld. AO has not discussed the reasons for levying penalty & merit of additional income on which penalty has been levied.

4. That the appellant craves to added or amend the grounds of appeal before the appeal is finally heard and disposed off.”

4. The assessee subsequently raised the additional ground which is reproduced herein below.

*“On the facts and circumstances of the case, the show cause notice issued by the L.D. AO mentioning **“you have concealed the particulars of your income or furnished inaccurate particulars of such income”** which is illegal and void ab initio as notice u/s 274 r.w.s 271 of the Act has not specified as to which limb of the penalty proposed is to be levied.”*

The assessee in support of raising additional ground also submitted that the legal ground can be taken at any stage in view of the Hon'ble Supreme Court judgment in the case of NTPC vs. CIT, 229 ITR 383 (SC) because the additional ground goes to the root of the matter and clearly transpired from the proceedings before the lower authorities with complete facts already on record.

5. The Ld. DR submitted that at this stage assessee cannot be allowed to raise the additional ground.

6. Having heard both the parties on the point of raising the additional ground. It is well settled by the Apex Court in the NTPC case (supra) that the legal ground can be taken at any stage, if no new

facts are required to be introduced and ground is based upon the documents and facts already on record, which in the instant case is not denied by the Id. DR, hence, we are inclined to allow the assessee to raise the additional ground, consequently the ground raised stands allowed.

7. The Assesse had submitted that no incriminating document was found during search operation and the addition is based upon only on the additional income offered by the assessee voluntarily but without any penalty. Further the assessee also relied upon the judgment passed by the Hon'ble Delhi High Court in the case of CIT vs. Harjeev Aggarwal, date of decision 10th March, 2016 ITA No. 08/2004 [2016] 241 Taxmann.com 199 (Delh) wherein it was held that "*a plain reading of section 158 BB (1) of the Act does not contemplate computing of undisclosed income solely on the basis of statement recorded during the search. The words "evidence found as result of search" would not take within its sweep statements recorded during search and seizures operations. However, the statements recorded would certainly constitute information and if such information is relatable to the evidence or material found during search, the same could certainly be used in evidence in any proceedings under the Act as expressly mandated by virtue of the Explanation to Section 132(4) of the Act. **However, such statement on a standalone basis without reference to any other material discovered during search and seizure operations would not empower the AO to make a black statement merely because any admission was made by the assessee during the search operation.***"

8.1 The Ld. AR further relied upon the judgment passed by the Gujrat High in the case of Kirthi Dahyabhai Patel vs. Asst. CIT, Appeal No.1181, 1132, 1185/2010 decided on 3rd December, 2014 [2015]

280 CIT 2016 (Gujrat High Court) to the same footing. Further the Ld. AR submitted that when the assessee has filed revised return after the search and such revised return has been accepted by the Assessing Officer, then merely by virtue of fact that such return shows a higher income, the penalty u/s 271(1) (c) cannot be automatically imposed. The Ld. AR further relied upon the judgment passed by the Andhra Pradesh High Court in the case of CIT vs. Ram Das Motors Transport [1999] 238 ITR 177 *wherein it has been held that in cases where no unaccounted documents or incriminating material is found, the powers u/s 132(4) of the Act cannot be invoked.*

8.2 The Ld. AR finally argued that the penalty notice issued, does not spell out under which limb of section 271(l)(c) whether it is for concealment of income or furnishing of inaccurate particulars of income, the penalty was proposed. For this proportion reliance is placed on CIT v/s Manjunatha Cotton Ginning Factor [2013] 359 ITR 565 (Kar)(HC) and CIT Vs. SSA's Emerald Meadows (SC) in CC No.11485/2016 dated 05.08.2016.

8.3 Further the Hon'ble Jurisdictional ITAT bench at Amritsar in third member case titled as Harvinder Wine Shop {ITA No.165, 166, 167/ASR/2015, decided on dated 06.02.2019} considered the identical issue and decided in favour of the assessee. The assessee has also placed reliance of following judgments specifically on the identical facts such as penalty based on Explanation 5A of Section 271(I)(C) of the Act and submitted the co-ordinate bench of ITAT at Delhi has decided both the appeal on merit as well as legal ground qua defective notice u/s 274 of the Act in favour of the assessee.

(i) Tripat Kaur, New Delhi v/s ACIT, New Delhi in ITA No.1829 to 1833/Del/2015 dated 08th May, 2018;

(ii) M/s Ose Infrastructure Ltd. v/s ACIT, New Delhi in ITA No.5891 to 5895/Del/2016 dated 14th August, 2018

9. On the contrary, the Ld. CIT DR relied upon the judgment passed by the Kolkata High Court in the case of CIT vs. Prasanna Dugar [2015] 371 ITR 19 (Kol) and submitted that all the cases relied upon by the assessee qua non-recovery of incriminating material did not deal with the Explanation-5A of Sec.271(1) (c) of the Act as the same pertains to the previous year when the provisions of Explanation-5A were not introduced. The Ld. CIT DR also relied upon the order passed by the ITAT Bench at Jaipur in the case of Radha Govind Lashkari vs. ACIT order dated 24.05.2017 [2017] 59 ITR (Tribunal) 578 (JP) and submitted that as per Explanation-5A the penalty is liable to be imposed upon the assesses by virtue of deemed provisions.

9.1 With regard to the additional ground qua defective notice, it was submitted by the Id. CIT DR that defective notice cannot invalidate and vitiate the penalty proceedings. Therefore, both the authorities below have rightly levied the penalty.

10. Having heard the parties at length and perused the material available on record. Though the Id. AR of the assessee and the Id. CIT-DR extensively argued the matter on either side on merits as well on legal ground and cited various judgments qua merits of the case and on the additional ground, however, as the additional ground raised by the assessee is a legal ground, therefore, before proceeding on merits of the case, we are inclined to deal with the legal ground first.

10.1 By way of legal ground, the assessee has raised the issue that in the notice issued u/s 274 r.w.s 271 of the Act, the Assessing Officer

did not specify the limb of the default for which the assessee was supposed to reply and to defend his case, therefore, the question arise as to whether the penalty can be levied on the basis of defective notice or not.

10.2 The Hon'ble Karnataka High Court in the case of *CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar)*, dealt with identical situation qua issuing the notice u/s 274 rws 271(1)© of the Act and held that notice issued under Section 274 should satisfy the grounds which the assessee has to meet specifically. Otherwise, principles of natural justice is offended if the show cause notice is vague and on the basis of such proceedings, no penalty could be imposed on the assessee. For the sake of brevity and ready reference, concluding part of the judgment qua defective notice is reproduced herein .

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.

10.3 Hon'ble Apex Court in case of Commissioner of **Income Tax, Bangalore** Versus **M/s. SSA's Emerald Meadows**, (2016) 73 *taxmann.com* 248(SC) dismissed the Special Leave Petition filed by the Revenue against the judgment in **M/s. SSA's Emerald Meadows case** **{(2016) 73 taxmann.com 248}**, rendered by Hon'ble High Court of Karnataka, *wherein* identical issue was decided in favour of the assessee. Operative part of the decision made in the case of *M/s. SSA's Emerald Meadows* (supra), 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(1)(c) is had in law and invalid inspite 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(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. The Tribunal, while allowing the appeal of the assessee, has relied 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."

10.4 The Co-ordinate benches in the similar and identical circumstances, in the cases of Dy. CIT Coimbatore Vs Sh. R. Elanngovan, Karamradai 641(104) {ITA no. 1119/CHNY/2017 & C.O. no. 75/CHNY/2017} Chennai Bench, Anuj Mathur Vs Dy. Commissioner of Income tax (2018) 53 CCH 0276 Jaipur Bench and Sh. Ravinder Aggarwal and Ors Versus Dy CIT, Jammu {ITA Nos.410, 409, 406, 405, 402 & 401 of 2018 decided on 04-04-2019 Amritsar bench, while relying upon the judgments passed in *Manjunatha Cotton & Ginning Factory, (supra)* and *M/s. SSA's Emerald Meadows (supra)* by the Karnatka High Court, deleted the penalty imposed u/s 271AAB of the Act as well .

10.5 The coordinate bench of ITAT at Delhi in Tripat Kaur, New Delhi v/s ACIT, New Delhi in ITA No.1829 to 1833/Del/2015 decided on dated 08th May, 2018 and M/s Ose Infrastructure Ltd. v/s ACIT, New Delhi in

ITA No.5891 to 5895/Del/2016, decided on dated 14th August, 2018, *wherein penalty was imposed under Explanation 5A of section 2781(1)© of the act*, while respectfully following the judgments of Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) and M/s. SSA's Emerald Meadows (supra) and apex Court in SSA's Emerald Meadows (Supra), deleted the penalty .

10.6 In the instant case, the penalty has been levied on the basis of Explanation 5A of Section 271(I) of the Act. For the sake of brevity, let us to reproduce the provisions:-

271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—

(a) [***]

(b) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) **has concealed the particulars of his income or furnished inaccurate particulars of such income, or**

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits,

he may direct that such person shall pay by way of penalty,—

(i) [***]

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure ;

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his

income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

Explanation 1. [*****]

Explanation 2. [*****]

Explanation 3. [*****]

Explanation 4. [*****]

Explanation 5[*****]

Explanation 5A- *Where in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of,-*

- (i) *any money, bullion, jewelry or other valuable article or thing (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or*
- (ii) *any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of the search and due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, **be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.***

10.7 Explanation 5A of section 271(I) of the Act has legal fiction which mandates that notwithstanding that such income is declared by the assessee in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income **OR** furnished inaccurate particulars of such income. In our considered view in the notice it is

also required to be specified as to whether the assessee deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income. Meaning thereby specification of charge in the Notice u/s 274 read with section 271(I) (C) of the Act is must and imperative for levy of penalty.

10.8 The penalty provisions of section 271(1)(c) of the Act are attracted where the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is also a well-accepted proposition that the aforesaid two limbs of section 271(1)(c) of the Act carry different meanings. It cannot be said that notice u/s 274 r.w.s. 271(1)(c) of the Act is not required to be given while initiating the penalty Explanation 5A of section 271(I)(c) of the Act . It is also well settled by the Courts that the notice has to be very much clear and cannot be a vague and before imposition of penalty the assessee is required to be given an opportunity as to under which limb his case falls. Therefore, it was imperative for the Assessing Officer to strike - off the irrelevant limb so as to make the assessee aware as to what is the charge made against him so that he could have responded accordingly. The Hon'ble Karnataka High Court in the case of *Manjunatha Cotton & Ginning Factory*, 359 ITR 565 (Kar) observed that where the Assessing Officer has 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 the assessee had concealed the particulars of his income or furnished inaccurate particulars of income. According to the Hon'ble Apex Court, in such a situation, levy of penalty suffers from non-application of mind.

10.9 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 16.12.2011 without striking off the irrelevant words, 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 whether 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 mind which is bad in law, hence can not be considered a valid notice sufficient to impose penalty u/s 271(1)(c) of the Act, because as per Manjunatha Cotton & Ginning Factory (supra) case, if the show cause notice is vague then principles of natural justice is offended and on the basis of such proceedings, no penalty could be imposed on the assessee. Hence we are inclined to delete the penalty imposed by the Assessing Officer and upheld by the Ld. CIT(A).

11. As we have decided the legal ground and deleted the penalty, therefore not advertent to the merits of the case because the same shall become academic and futile exercise only.

12. In the result, all the appeals filed by the assessee stands allowed.

Order pronounced in the open Court on 30/12/2019.

Sd/-

(DR. A.L.SAINI)
ACCOUNTANT MEMBER

Dated: 30/12/2019.

/PK/ Ps.

Copy forwarded to:

1. The Appellant
2. The Respondent
3. The CIT
4. Then CIT(Appeals)
5. SR DR, I.T.A.T. Amritsar
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Sd/-

(N.K.CHOUDHRY)
JUDICIAL MEMBER

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By Order