

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri M. Balaganesh, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA No. 3447/Mum/2017
(Assessment Year: 2010-11)**

M/s Classic Import Pvt.Ltd.
1001, Corporate Avenue,
Sonawala Cross Lane,
Goregaon (East),
Mumbai – 400 063

I.T.O 12(1)(4)
Room No. 262, 2nd Floor,
Vs. Aayakar Bhavan, M.K. Road,
Mumbai - 20

PAN – AACCC7095E

(Appellant)

(Respondent)

Appellant by: Dr. Prayag Jha, A.R
Respondent by: Kumar Padmapani Bora, D.R

Date of Hearing: 28.01.2020
Date of Pronouncement: 17.02.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-20, Mumbai, dated 30.01.2017, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act') dated 30.09.2013. The assessee has assailed the impugned order on the following grounds of appeal before us:

- "1. The Learned Commissioner of Income-Tax (Appeals) Mumbai erred in Law in Confirming Penalty of Rs,16,90,000/- u/s.271(1)(c) the I.T. Act without appreciation the facts and hence it is bad on facts and also in law.
2. The leaned Commissioner of Income Tax (Appeals) has also erred in confirming Penalty u/s.271(1)(c) through there was no inaccurate Particular furnished which attracts Penalty u/s. 271(1)(c) of I.T. Act.
3. The Learned Commission of Income Tax (Appeals) has erred in levying Penalty through the income was determined on the basis of Book profit u/s.115JB and not under the normal provisions of the Act.
4. The Learned CIT(A) has also erred in considering the bonafide mistake while calculating tax u/s.115JB as furnishing of inaccurate particulars by confirming Penalty u/s.271(1)(c) of I.T. Act which is bad on facts and also in law.

Your petitioner crave leave to add, amend, alter, vary or Withdraw all or any grounds of appeal before or at the time of Hearing of this appeal.”

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and trading of home appliances had e-filed its return of income for A.Y. 2010-11 on 17.09.2010, declaring its total income at Rs.1,88,900/-.The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, the A.O scaled down the assessee's claim for deduction under Sec.80IC from Rs.1,00,67,889/- to Rs.99,30,288/-. Accordingly, the net profit of the Mumbai Unit of the assessee was revised from Rs. 1,88,901/- to Rs.3,26,502/-. On the basis of his aforesaid deliberations the A.O assessed the income of the assessee under the normal provisions at Rs.3,26,502/-. At the same time, the A.O observed that the assessee for the purpose of computing its 'book profit' under Sec. 115JB of the Act had excluded the amount of profit exempt under Sec.80IC and worked out the same at Rs.1,50,961/-. Observing, that there was no provision under Sec.115JB for deduction under Sec.80IC from the net profit for computation of 'book profit', the A.O re-worked out the 'book profit' under Sec. 115JB at Rs.1,02,56,790/-. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) of the Act.

4. After the culmination of the assessment proceedings the A.O called upon the assessee to 'show cause' as to why penalty under Sec. 271(1)(c) as regards the computation of 'book profit' under Sec.115JB may not be imposed on it. As the reply filed by the assessee did not find favour with the A.O, therefore, he imposed a penalty under Sec. 271(1)(c) of Rs.16,90,000/- on the assessee.

5. Aggrieved, the assessee assailed the order imposing penalty under Sec. 271(1)(c) by the A.O before the CIT(A). Observing, that no infirmity did emerge from the order of the A.O as regards the penalty imposed under Sec. 271(1)(c) of the Act, the CIT(A) dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorised Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the A.O had grossly erred in law by imposing penalty on the assessee without putting it to notice as regards the default for which penalty was sought to be imposed upon it. In order to fortify his aforesaid contention the Id. A.R took us through the copy of the 'show cause' notice (SCN) issued by the A.O under Sec. 274 r.w.s. 271(1)(c) of the Act, dated 25.03.2013. It was submitted by the Id. A.R that the A.O had failed to strike off the irrelevant default in the body of the aforesaid SCN, dated 25.03.2013. On the basis of the aforesaid facts, it was the claim of the Id. A.R that the assessee had been subjected to levy of penalty without having been put to notice as regards the default for which the impugned penalty was sought to be imposed upon it. It was the claim of the Id. A.R that as the A.O had wrongly assumed jurisdiction, therefore, the penalty imposed upon the assessee under Sec. 271(1)(c) could not be sustained and was liable to be struck down on the said count itself. In order to buttress his aforesaid claim the Id. A.R had relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Samson Perinchery (2017) 88 taxman 413 (Bom). Also, it was submitted by the Id. A.R that the 'Special Leave' petition filed by the revenue before the Hon'ble Supreme Court in the aforementioned case had also been dismissed. Apart from that, the Id. A.R submitted that as the working of the 'book profit' under Sec.115JB was merely backed by an inadvertent mistake, therefore, no penalty under Sec.271(1)(c) was called for in the hands of the assessee.

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R that as the assessee had intentionally wrongly computed the 'book profit' under Sec. 115JB, therefore, the lower authorities had rightly imposed/sustained penalty under Sec. 271(1)(c) of the Act.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record as well as

the judicial pronouncements relied upon by them. As observed by us hereinabove, the assessee while computing its 'book profit' under Sec.115JB of the Act had claimed a deduction of the profit exempt under Sec. 80IC of Rs.1,01,05,829/- and worked out the resultant 'book profit' at Rs.1,50,961/-. Admittedly, there is no provision under Sec. 115JB of the Act which permits deduction under Sec. 80IC for the purpose of computing the 'book profit' under the said statutory provision. As such, in the backdrop of the aforesaid settled position of law the A.O had rightly disallowed the aforesaid assessee's claim for deduction and re-worked out the 'book profit' under Sec. 115JB at Rs.1,02,56,790/-.

9. Before advertent to the merits of the claim of the assessee that no penalty under Sec. 271(1)(c) on account of the aforesaid inadvertent mistake on its part was liable to be imposed, we shall first deal with its claim that the A.O had erroneously assumed jurisdiction and without validly putting the assessee to notice had wrongly imposed penalty under Sec. 271(1)(c) of the Act. As is discernible from the records, the A.O had issued a 'show cause' notice (for short 'SCN'), dated 25.03.2013 to the assessee therein calling upon it to explain as to why it may not be subjected to penalty under the aforesaid statutory provision. However, a perusal of the aforesaid SCN, dated 25.03.2013, which had been placed on record by the assessee reveals that the A.O had failed to strike off the irrelevant default in the body of the said notice. Resultantly, the aforesaid omission on the part of the A.O had left the assessee guessing about the default for which it was called upon to show cause as to why penalty under Sec. 271(1)(c) of the Act may not be imposed upon it.

10. We have given a thoughtful consideration to the facts of the case and are persuaded to subscribe to the claim of the assessee that the A.O had in the aforesaid 'SCN', dated 25.03.2013 failed to point out the default for which penalty was sought to be imposed by him on the assessee. In our considered view, as both of the two defaults envisaged in Sec. 271(1)(c) i.e 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults which operate in their independent and exclusive fields, therefore, it was obligatory on the part of the A.O to have clearly put the assessee to notice as regards the

default for which it was called upon to explain as to why penalty under Sec. 271(1)(c) may not be imposed on it. As observed by us hereinabove, a perusal of the 'Show cause' notice issued in the present case by the A.O under Sec. 274 r.w. Sec. 271(1)(c), dated 25.03.2013 clearly reveals that there was no application of mind on the part of the A.O while issuing the same. We are of a strong conviction that the very purpose of affording a reasonable opportunity of being heard to the assessee as per the mandate of Sec. 274(1) would not only be frustrated but would be rendered redundant if an assessee is not conveyed in clear terms the specific default for which penalty under the said statutory provision was sought to be imposed on him. In our considered view, the indispensable requirement on the part of the A.O to put the assessee to notice as regards the specific charge contemplated under the aforesaid statutory provision viz. 'concealment of income' or 'furnishing of inaccurate particulars of income' is not merely an idle formality but is a statutory obligation cast upon him, which we find had not been discharged in the present case as per the mandate of law.

11. We would now test the validity of the aforesaid 'Show Cause' notice and the jurisdiction emerging therefrom in the backdrop of the judicial pronouncements on the issue under consideration. Admittedly, the A.O is vested with the power to levy penalty under Sec. 271(1)(c) of the Act, if in the course of the proceedings he is satisfied that the assessee had either 'concealed his income' or 'furnished inaccurate particulars of his income'. In our considered view as penalty proceedings are in the nature of *quasi criminal* proceedings, therefore, the assessee as a matter of a statutory right is supposed to know the exact charge for which he is being called upon to explain that as to why the same may not be imposed on him. The non specifying of the charge in the 'Show cause' notice not only reflects the non application of mind by the A.O but in fact defeats the very purpose of giving a reasonable opportunity of being heard to the assessee as is envisaged in Sec. 274(1) of the I.T Act. We find that the fine distinction between the said two defaults contemplated in Sec. 271(1)(c) viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' had been appreciated at length by the **Hon'ble Supreme Court** in its judgments passed in the case of **Dilip & Shroff Vs. Jt. CIT (2007) 210 CTR (SC) 228** and **T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC)**. The Hon'ble Apex Court in its aforesaid judgments had observed that the two expressions, viz. 'concealment of particulars of income' and 'furnishing of inaccurate particulars of income' have different

connotation. The Hon'ble Apex Court being of the view that the non-striking off the irrelevant limb in the notice clearly reveals a non-application of mind by the A.O had observed as under:-

“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 has furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing reliance on 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. Vs. CIT* (2000) 2 SCC 718].

We are of the considered view that now when as per the settled position of law the two defaults viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults, therefore, in case the A.O sought to have proceeded against the assessee for either of the said defaults, then it was incumbent on his part to have clearly specified his said intention in the 'Show cause' notice, which we find he had failed to do in the case before us. The aforesaid failure on the part of the assessee cannot be characterised as merely a technical default, for the reason, that the same had clearly divested the assessee of its statutory right of an opportunity of being heard and defend its case.

12. We find that the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** has held that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings had been initiated, i.e. whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same has to be held as bad in law. The 'Special Leave Petition' (for short 'SLP') filed by the revenue against the aforesaid order of the **Hon'ble High Court of Karnataka** had been dismissed by the **Hon'ble Supreme Court** in **CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)**. Apart from that, we find that a similar view had been taken by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017)(Bom)**.

13. We find that as averred by the Ld. A.R. the indispensable obligation on the part of the A.O clearly put the assessee to notice of the charge under the aforesaid statutory provision viz. Sec. 271(1)(c) had been deliberated upon by a coordinate bench of the Tribunal, i.e. ITAT "C" Bench,

Mumbai in the case of M/s Orbit Enterprises Vs. ITO-15(2)(2), Mumbai (ITA No. 1596 & 1597/Mum/2014, dated 01.09.2017). The Tribunal in the aforementioned case had in the backdrop of various judicial pronouncements concluded that the failure to specify the charge in the 'Show cause' notice clearly reflects the non application of mind by the A.O, and would resultantly render the order passed under Sec. 271(1)(c) in the backdrop of the said serious infirmity as invalid and *void ab initio*.

14. We have given a thoughtful consideration to the issue before us and after deliberating on the facts, are of the considered view, that the failure on the part of the A.O to clearly put the assessee to notice as regards the default for which penalty under Sec. 271(1)(c) was sought to be imposed on it by failing to strike off the irrelevant default in the 'SCN', dated 25.03.2013, had left the assessee guessing of the default for which it was being proceeded against for. We thus in the backdrop of our aforesaid observations are of a strong conviction that as the A.O had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the default for which it was being proceeded against, therefore, the penalty under Sec. 271(1)(c) of Rs. 16,90,000/- imposed by him in clear violation of the mandate of Sec. 274(1) of the Act cannot be sustained. We thus for the aforesaid reasons not being able to persuade ourselves to subscribe to the imposition of penalty by the A.O, therefore, set aside the order of the CIT(A) who had upheld the same. The penalty of Rs.16,90,000/- imposed by the A.O under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

15. As the penalty imposed on the assessee under Sec. 271(1)(c) of the Act had been quashed by us for want of jurisdiction on the part of the A.O, therefore, we refrain from adverting to and adjudicating the merits of the case.

16. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 17.02.2020.

Sd/-
(M. Balaganesh)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;
Dated: 17/02/2020
Rohit, P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai