

आयकर अपीलिय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
 (समक्ष) Before श्री जे. सुधाकर रेड्डी, लेखा सदस्य एवं/and श्री ऐ. टी. वर्की, न्यायीक सदस्य)
 [Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 510/Kol/2019
Assessment Year: 2006-07

Varun Finance Pvt. Ltd. (PAN: AABCV0302L)	Vs.	Income-tax Officer, Wd-5(4), Kolkata
Appellant		Respondent

Date of Hearing (Virtual)	22.09.2020
Date of Pronouncement	24.09.2020
For the Appellant	N o n e
For the Respondent	Shri Jayanta Khanra, JCIT

ORDER

Per Shri A.T.Varkey, JM

This is an appeal filed by the assessee against the order of Ld. CIT(A)-2, Kolkata dated 14.01.2019 for A Y 2006-07 confirming the penalty levied u/s. 271(1) (c) read with section 274 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. None appeared for the assessee. However, we have gone through the grounds of appeal raised by the assessee and note that the Ld. CIT(A) has passed an ex parte order without adjudicating the grounds of appeal preferred by the assessee. The grounds of appeal of assessee reads as under:

“1. For that Ld. CIT(A) was wrong in dismissing the appeal ignoring (a) fact that appellant had opted for e-proceedings (b) submitted written submissions and judgments relied on through e-Proceedings In my account on departmental website and also by way of emails on official email id of Ld. CIT(A), (c) Ld. CIT(A) has himself considered the appeal through e-proceedings and had uploaded order on portal and did not serve hard copy of order and (d) the notice of Ld. CIT(A) clearly mentioned to the effect that personal appearance is not necessary and appellant can file written submission by email etc.

2. For that Ld. CIT(A) was wrong in holding that appellant had not made representations and has not filed written submissions there was no compliance etc. and that appellant is not interested in pursuing appeal etc.

3. For that Id. CIT(A) has not passed order, as he is required to pass an order on appeal and after considering material available on records and on merit.

4. For that Ld. CIT(A) was wrong in ignoring that the appellant had paid appeal fees and had filed appeal with documents, and also filed written submissions, therefore presumption of appellant not being interested is wrong, unjust and illegal.

5. For that even on basis of statement of facts and grounds of appeal the Id. CIT(A) must have allowed appeal as per precedence relied on in the statement of facts and before the LD. AO.

6. For that the Penalty order is without jurisdiction, the notice u/s. 271 was not specific of charge, and in any case disallowances made by AO and partially confirmed by Ld. CIT(A) are on highly contentious issues therefore, the penalty levied by Ld.AO and confirmed by Ld. CIT(A) be deleted fully.”

3. Thus, we note from perusal of ground no. 1 to 3 that assessee opted for e-proceedings and filed all documents along with written submission before Ld CIT(A) and since Ld. CIT(A) did not insist on the physical presence of assessee/AR, the action of Ld. CIT(A) to have dismissed ex parte without going into the merits of the ground and that too by blaming the assessee cannot be countenanced. Be that as it may, we note that before the Ld. CIT(A) as well as by preferring ground no. 6 the assessee has raised the legal issue of non-validity of penalty notice by relying on the decision of the Hon'ble Karnataka High Court in CIT Vs. SSA Emerald Medow (infra) and thereafter against the order, the SLP preferred by Revenue was dismissed by the Hon'ble Supreme Court. In order to adjudicate the legal issue, we have heard the learned DR and having carefully gone through the penalty notice dated 05.12.2008 issued u/s. 274 read with section 271 of the Act , which is reproduced as under for the sake of understanding:

बा० मु० सि०-29 I. T. N. S-29
आयकर अधिनियम, 1961 की धारा 271 के साथ पढ़ी गयी धारा 274 के अन्तर्गत सूचना
NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME TAX ACT, 1961

सेवा में./To

The Principal Officer,
Varun Finance (P) Ltd.
21, Chakrabarti Lane,
Kolkata - 70020

आयकर कार्यालय/Income-tax Office.

Ward-5(4) / W

तारीख /Dated
05/12/08

PAN - AAABEV0302

चूंकि कर निर्धारण वर्ष..... के सम्बन्ध में मेरे यहां होन वाली कांवाई के दौरेन मुझे प्रतीत होता है कि आपने :—

Whereas in the course of proceedings before me for the assessment year..... it appears to me that you :—

*बिना उचित कारण के वह आय विवरणी नहीं दी है जो आपको भारतीय आयकर अधिनियम, 1922 की 22(1)/22(2)/34 के अधीन दी गई सूचना के अनुसार देनी थी या जो आपको धारा 139(1) के अधीन या आयकर अधिनियम, 1961 की धारा 139(2)/148 के अधीन दी गई सूचना सं०..... ता०..... अनुसार दाखिल करनी थी अथवा उचित कारण के बिना आपने दिए गए समय के अन्दर और उक्त धारा 139(1) या इस प्रकार की सूचना द्वारा अपेक्षित शक्ति से विवरणी नहीं दी है।

*have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22 (1)/22 (2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139 (1) or by a notice given under section 139 (2)/148 of the Income-tax Act, 1961, No..... dated..... or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.

[ह० प० उ०/P. T. O.]



*बिना उचित कारण के आपने भारतीय आयकर अधिनियम, 1922 की धारा 22(4)/23(2) या आयकर अधिनियम, 1961 की धारा 142(1)/143(2) के अधीन दी गई सूचना से ता०..... का अनुपालन नहीं किया है।

*have without reasonable cause failed to comply with a notice under Section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under Section 142(1)/143(2) of the Income-tax Act, 1961.

No..... dated.....

*अपनी आय के बारे छिपा लिए हैं या..... इस प्रकार की आय के बारे गलत दिए हैं।

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

आपको एतद्द्वारा सूचित किया जाता है कि ता०..... 19..... को..... वजे अ०म०/पू०म० में आप मेरे कार्यालय में उपस्थित हों और कारण बताएं कि आयकर अधिनियम, 1961 की धारा 271 के अधीन आप पर दण्ड लगाने का आदेश क्यों न दिया जाए। यदि आप स्वयं उपस्थित होकर या प्राधिकृत प्रतिनिधि द्वारा मुनवाई के लिए दिए गए अवसर का लाभ नहीं उठाना चाहते तो उक्त तारीख को या उससे पूर्व लिखकर इसका कारण बताएं, जिस पर धारा 271 के अधीन कोई ऐसा आदेश देने के पूर्व विचार किया जाएगा।

You are hereby requested to appear before me at... 11.30 A.M./P.M. on 1.9/1/2009 and show cause why an order imposing a 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 any such order is made under Section 271. (1) (c)

(मुहर)
(Seal)

निर्धारण अधिकारी
Assessing Officer

*जो शब्द या पंरे अनुपयुक्त हों, उन्हें काट दीजिए।
*Delete inappropriate words and paragraphs.

I.T.O. Wd. 5(4), Kol
Code No. WBO-W-105-(4)

4. Thus, from the perusal of the impugned notice we note that the AO had sent show cause notice for both the faults envisaged under section 271(1) (c) of the Act i.e. for both (i) concealment of particulars of income and (ii) for furnishing of inaccurate particulars of income. So prima facie we note that the show cause notice issued by AO proposing levy of penalty u/s. 271(1) (c) of the Act is defective/invalid in the eyes of law and consequent levy of penalty was bad in law as held by the Hon'ble Karnataka High Court and SLP preferred by the Revenue against this decision of High Court has been dismissed by the Hon'ble Supreme Court, which will be discussed detail infra. Since the assessee has challenged the impugned action of penalty levied by the AO and confirmed by CIT(A) and as discussed [supra] we have taken note of the invalid notice issued by AO before imposing

penalty, which is a legal issue, we are inclined to adjudicate this appeal of assessee by considering this legal issue which is no longer *res-integra*.

3. As discussed above, a reading of the penalty notice, we note that the AO has not stricken out the irrelevant portion of the fault/charge which would have spelt out the specific fault/charge against the assessee as per section 271(1) (c) of the Act. Since the proposed notice itself is defective, all subsequent proceedings are bad in law and the penalty imposed by the AO u/s. 271(1)(c) of the Act and confirmed by the Ld. CIT(A) should be cancelled. For coming to such a conclusion we rely on the decision of the Hon'ble Karnataka High Court in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble Karnataka High Court following its own decision in the case of CIT vs Manjunatha Cotton and Ginning factory (2013) 359 ITR 565 took a view that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason that the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of inaccurate particulars of income. Further we note that as against the decision of the Hon'ble Karnataka High Court, the revenue preferred an appeal before the Hon'ble Supreme Court [SLP in CC No.11485 of 2016] and the Apex Court by its order dated 05.08.2016 dismissed the SLP preferred by the department. Further we note the decision of the Hon'ble Bombay High Court in the case of CIT vs Shri Samson Perinchery in ITA No.1154 of 2014 dated 05.01.2017 wherein the Hon'ble Bombay High Court following the decision of the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning factory (supra) came to the conclusion that imposition of penalty on defective show cause notice without specifying the charge against the assessee cannot be sustained. We also note the decision of ITAT in the case of Suvaprasanna Bhattacharya vs ACIT in ITA No.1303/Kol/2010 dated 06.11.2015 wherein identical legal proposition has been followed by the Tribunal.

4. Ld. DR vehemently opposed the action suggested by us and has cited various case laws to oppose the case laws suggested by us (supra). We note that all the case laws cited before us by the Ld. DR has been dealt with elaborately by the Coordinate Bench of this

Tribunal in the case of Jeetmal Choraria Vs. ACIT, ITA No. 956/Kol/2016 for AY 2010-11 dated 01.12.2017, wherein the Tribunal has noted as under:

“7. The learned DR submitted that the Hon’ble Calcutta High Court in the case of Dr. Syamal Baran Mondal Vs. CIT (2011) 244 CTR 631 (Cal) has taken a view that Sec.271 does not mandate that the recording of satisfaction about concealment of income must be in specific terms and words and that satisfaction of AO must reflect from the order either with expressed words recorded by the AO or by his overt act and action. In our view this decision is on the question of recording satisfaction and not in the context of specific charge in the mandatory show cause notice u/s.274 of the Act. Therefore reference to this decision, in our view is not of any help to the plea of the Revenue before us.

8. The learned DR relied on three decisions of Mumbai ITAT viz., (i) Dhanraj Mills Pvt. Ltd. Vs. ACIT ITA No.3830 & 3833/Mum/2009 dated 21.3.2017; (ii) Earthmoving Equipment Service Corporation Vs. DCIT 22(2), Mumbai, (2017) 84 taxmann.com 51 (iii) Mahesh M.Gandhi Vs. ACIT Vs. ACIT ITA No.2976/Mum/2016 dated 27.2.2017. Reliance was placed on two decisions of the Hon’ble Bombay High Court viz., (i) CIT Vs. Kaushalya 216 ITR 660(Bom) and (ii) M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017. This decision was referred to in the written note given by the learned DR. This is an unreported decision and a copy of the same was not furnished. However a gist of the ratio laid down in the decision has been given in the written note filed before us.

9. In the case of CIT Vs. Kaushalya (supra), the Hon’ble Bombay High Court held that [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 ITAT Mumbai Bench in the case of Dhanraj Mills Pvt.Ltd. (supra) followed the decision rendered by the Jurisdictional Hon’ble Bombay High court in the case of Kaushalya (supra) and chose not to follow decision of Hon’ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra). Reliance was also placed by the ITAT Mumbai in this decision on the decision of Hon’ble Patna High court in the case of [CIT v. Mithila Motor's \(P.\) Ltd.](#) [1984] 149 ITR 751 (Patna) wherein it was held that 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.

10. In the case of Earthmoving Equipment Service Corporation (supra), the ITAT Mumbai did not follow the decision rendered in the case of Manjunatha Cotton & Ginning Factory (supra) for the reason that penalty in that case was deleted for so many reasons and not solely on the basis of defect in show cause notice u/s.274 of the Act. This is not factually correct. One of the parties before the group of Assessee before the Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) was an Assessee by name M/s.Veerabhadrappa Sangappa & Co., in ITA NO.5020 OF 2009 which was an appeal by the revenue. The Tribunal held that on perusal of the notice issued under Section 271(1)(c) of the Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing

Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non application of mind on the part of the Assessing authority. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. In the appeal, the said finding was set-aside. But addition was sustained on a new ground, that is under valuation of closing stock. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the Appellate Authority, the initiated penal proceedings, no longer exists. If the Appellate Authority had initiated penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside by its order dated 9th April, 2009. Aggrieved by the said order, the revenue filed appeal before High Court. The Hon'ble High Court framed the following question of law in the said appeal viz., 1. Whether the notice issued under Section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal? 2. Whether the proceedings initiated by the Assessing Authority was legal and valid? The Hon'ble Karnataka High Court held in the negative and against the revenue on both the questions. Therefore the decision rendered by the ITAT Mumbai in the case of Earthmoving Equipment Service Corporation (supra) is of no assistance to the plea of the revenue before us.

11. In the case of M/S. Maharaj Garage & Co. Vs. CIT dated 22.8.2017 referred to in the written note given by the learned DR, which is an unreported decision and a copy of the same was not furnished, the same proposition as was laid down by the Hon'ble Bombay High Court in the case of Smt. Kaushalya (supra) appears to have been reiterated, as is evident from the extracts furnished in the written note furnished by the learned DR before us.

12. In the case of Trishul Enterprises ITA No.384 & 385/Mum/2014, the Mumbai Bench of ITAT followed the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya (supra).

13. In the case of Mahesh M. Gandhi (supra) the Mumbai ITAT the ITAT held that the decision of the Hon'ble Karnataka High Court in the case Manjunatha Cotton & Ginning (supra) will not be applicable to the facts of that case because the AO in the assessment order while initiating penalty proceedings has held that the Assessee had concealed particulars of income and merely because in the show cause notice u/s.274 of the Act, there is no mention whether the proceedings are for furnishing inaccurate particulars or concealing particulars of income, that will not vitiate the penalty proceedings. In the present case there is no whisper in the order of assessment on this aspect. We have pointed out this aspect in the earlier part of this order. Hence, this decision will not be of any assistance to the plea of the revenue before us. Even otherwise this decision does not follow the ratio laid down by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) in as much as the ratio laid down in the said case was only with reference to show cause notice u/s.274 of the Act. The Hon'ble Court did not lay down a proposition that the defect in the show cause notice will stand cured if the intention of the charge u/s.271(1) (c) is discernible from a reading of the Assessment order in which the penalty was initiated.

14. From the aforesaid discussion it can be seen that the line of reasoning of the Hon'ble Bombay High Court and the Hon'ble Patna High Court is that 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

Tribunal Benches at Mumbai and Patna being subordinate to the Hon'ble Bombay High Court and Patna High Court are bound to follow the aforesaid view. The Tribunal Benches at Bangalore have to follow the decision of the Hon'ble Karnataka High Court. As far as benches of Tribunal in other jurisdictions are concerned, there are two views on the issue, one in favour of the Assessee rendered by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) and other of the Hon'ble Bombay High Court in the case of Smt.Kaushalya. It is settled legal position that where two views are available on an issue, the view favourable to the Assessee has to be followed. We therefore prefer to follow the view expressed by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra).

15. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the ld. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present case cannot be sustained and the same is directed to be cancelled."

5. Respectfully following the aforesaid order of the coordinate bench of this Tribunal, we, therefore, hold that imposition of penalty and subsequently confirmed by the Ld. CIT(A) in the present case cannot be sustained and the same is hereby deleted. Therefore, the appeal of assessee is allowed.

6. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 24th September, 2020.

Sd/-

(J. Sudhakar Reddy)
Accountant Member

Sd/-

(A. T. Varkey)
Judicial Member

Dated: 24th September, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Varun Finance Pvt. Ltd., C-3/3, Gillander House, 8, Netaji Subhas Road, Kolkata-700 001.
2. Respondent – ITO, Ward-5(4), Kolkata
3. The CIT(A) –2, Kolkata (sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)
/True Copy,

By order,

Assistant Registrar