

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI A K GARODIA, ACCOUNTANT MEMBER

ITA Nos. 1590 to 1596/Bang/2019
Assessment years : 2009-10 to 2014-15

Shri Mahendra B. Chowhan, No.96/7, Unnati, 1 st Cross, South End Circle, Basavangudi, Bangalore – 560 004. PAN: ACKPC 977DF	Vs.	The Assistant Commissioner of Income Tax, Circle 1(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri C. Ramesh, CA
Respondent by	:	Shri Manjeet Singh, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	14.10.2020
Date of Pronouncement	:	19.10.2020

ORDER

Per N.V. Vasudevan, Vice President

All these appeals are directed against the order of CIT(Appeals)-11, Bengaluru, dated 29.04.2019, common order for the AYs 2009-10 to 2014-15 and a separate order dated 29.4.2019 for AY 2015-16 challenging the imposition of penalty u/s. 271(1)(c) and 271AAB of the Income-tax Act, 1961 [the Act] respectively.

2. The facts and circumstances under which the penalty was imposed on the assessee by the AO in all the aforesaid assessment years are as follows. The assessee is an individual. He is a Director in a company by name, Vardhaman Pharma Distributors Pvt. Ltd. [VDPL]. A search & seizure operation u/s. 132 of the Act was carried out in the case of VDPL.

In the course of such search, certain documents pertaining to assessee were seized. Proceedings u/s. 153C were initiated against assessee for all the assessment years. Based on the material found in the course of search, assessments were framed u/s. 153C of the Act and following additions were made in various assessment years on the basis of following discussion in the orders of assessment for AY 2010-11:-

“4. During the search at his residence on 19-12-2014, cash books containing details of unaccounted cash transactions and investments were found and seized as A/MC/1 and A/MC/3. The assessee was questioned about entries in the said books in his statement u/s. 132(4). The relevant questions are reproduced below :

"Q.No.21 I am showing you the seized material marked as A/MC/1 and A/MC/3 which contain the hand written transactions. Please state who has written these transactions and explain these transactions.

Ans It is stated that these are the transactions written by me and it is explained that the unaccounted cash generated from mu regular business is credited here and corresponding expenses are also shown here.

Q.No. 22 I am consolidating all the credits of your unaccounted income generated from your business as per the seized material A/MC/1 and A/MC/3 in the xl sheets as Annexure-1 and Annexure-2. Further the same is consolidated in the below mentioned table.

S. No	AY	Amount(Rs)
1	2009-10	90, 60, 464
2	2010-11	1,26,16,628
3	2011-12	2,66,29,823
4	2012-13	5,10,79,456
5	2013-14	2,47,27,445
6	2014-15	2,04,21,140
7	2015-16	1,35,20,643

Why these sums should not be treated as your unaccounted incomes u/s. 69 of the IT Act,1961 and be taxed accordingly.

Ans I accept that I had generated cash outside the books of account. However, I request you to grant me two days time to go through the records and come before you to quantify the total amount of disclosure after taking the benefit of telescoping."

4.1 During the course of post search proceedings in his letter to the DDIT (Inv.) Unit-II, Bangalore, the assessee reconciled the entries admitted to undisclosed income as under:

AY	Amount (Rs)
2009-10	71,64,563
2010-11	90,03,946
2011-12	1,47,15,551
2012-13	2,99,26,028
2013-14	1,45,87,132
2014-15	1,52,73,873
Upto 18-12-2014	74,80,090
Total	9,81,51,183

4.2 The assessee has offered the undisclosed income of Rs, 90,03,946/- to tax in the return of income filed by him in response to notice u/s. 153C."

3. In the orders of assessment for all the assessment years (i.e., AY 2009-10 to 2014-15) similar addition was made as per the details set out in the earlier paragraph. The AO has made the following observations with reference to initiation of penalty proceedings in the orders of assessment for the aforesaid AY 2009-10 to 2014-15 :-

"4.3 The undisclosed income came to light only on account of the search. Penalty proceedings u/s. 271(1)(c) are initiated for concealing the particulars of income."

4. In the orders of assessment for AY 2015-16 similar addition was made as per the details set out in the earlier paragraph. As far as AY 2015-16 is concerned, the applicable provisions in as far as it relates to imposition of penalty were section 271AAB and in the assessment order for AY 2015-16 the AO initiated penalty proceedings observing as follows:-

““4.3 The undisclosed income came to light only on account of the search. Penalty proceedings u/s. 271AAB are initiated in respect of the undisclosed income.”

5. In the penalty proceedings, the assessee contended that income which is ultimately brought to tax was the income declared in the return of income and this is accepted by the department and therefore there is no question of any concealment of particulars of income. Another argument advanced was that no assets were found in the course of search and penalty can be imposed only when assets are found in the course of search. The third argument was that the assessee had co-operated with the department and filed return of income disclosing the admitted income and paid taxes thereon and therefore no penalty should be imposed. These arguments were dealt with by the AO in the following manner:-

“7. I have considered the above arguments of the assessee carefully. However, I do not find them acceptable. During the search, the assessee declared additional income of Rs. 90,03,946/- for the year under consideration. This additional income of Rs. 90,03,946/- was offered by, the assessee only on being confronted with incriminating material found during the search. The assessee had filed return of income u /s. 139(1) in which this income had not been declared. In response to notice u/s. 153C, the assessee filed return of income offering the hitherto undisclosed income to tax. Assessment was completed accepting the returned income. Mere surrender of income will not foreclose any action for concealment of income. The additional income offered in the return of income filed in response to notice u/s. 153C is undeniably the assessee's undisclosed income which

came to light only on account of search proceedings. The High Court of Rajasthan in the case of Grass Field Farms & Resorts (P.) Ltd. vs Deputy Commissioner of Income-tax [2017] 79 taxmann.com 426 (Rajasthan) upheld the levy of penalty in a case where it was only when faced with statements as also unrecorded/recorded documents found at business premises of assessee during survey, that the assessee came forward with a surrender and even in penalty proceedings-it did not establish its bona fides.

8. Explanation 5A to section 271(1) which is applicable in the assessee's case raises a presumption of concealment as regards the undisclosed income admitted during the search. As per the provisions of Explanation 5A, when the assessee is found to be the owner of money, bullion, jewellery, valuable article or thing and the assessee claims that such assets have been acquired by him by utilising his undeclared income; then notwithstanding the fact that the assessee declares such income in any return of income filed after the search, he shall for the purpose of imposition of penalty be deemed to have concealed the particulars of his income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. Only when the initial onus placed by the Explanation has been discharged by the assessee; the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.. The assessee in his statement u /s. 132(4) and post search proceedings admitted that he had generated cash out of his regular business and had spent the same on purchase of flat for his daughter Vinita, purchase of jewellery and furniture, daughter's marriage expenses etc. Thus, the assessee's claim that no assets were found and therefore penalty is not leviable is erroneous.

9. The submission of the assessee that he has co-operated in the assessment proceedings, filed the returns and paid the taxes is no enough ground for non levy of penalty. The Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. v Commissioner of Income-tax - II [2013] 38 taxmanm.com 448 (SC) held eld that "the AO shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement" etc to explain away its conduct. The question. is whether the assessee has offered any explanation for concealment

of particulars of income or furnishing inaccurate particulars of income. Explanation to sec.271(11) raised a presumption of concealment when a difference is noticed by the AO, between reported and assessed income, the burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation has been discharged by him, the onus shifts on the revenue to show that the amount in question constituted the income and not otherwise".

6. Accordingly penalty was imposed for the various assessment years as follows:-

AY	Amount (Rs.)
2009-10	23,50,000
2010-11	27,00,000
2011-12	45,00,000
2012-13	90,95,000
2013-14	43,50,000
2014-15	50,00,000
2015-16	22,45,000

7. Aggrieved by the aforesaid orders of AO imposing penalty, the assessee preferred appeals before the CIT(Appeals). Before the CIT(A), the assessee apart from reiterating the submissions that were made before the AO, also made a prayer that the show cause notice issued u/s. 274 of the Act before imposing penalty does not set out the specific charge against assessee and in the light of the decision of the Hon'ble High Court of Karnataka in the case of *CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn)*, penalties cannot be imposed because the specific charge against the assessee has not been spelt out in the show cause notice. The CIT(Appeals) dealt with this argument in the following manner:-

"12. In this context, it may be noted that the Provisions of section 292B provides for curing of defects, if any, in a notice

issued. Further the appellant has not demonstrated with any cogent material, admissible as evidence, to prove his submissions. Therefore additional ground challenging the legality of notice & validity of initiation of penalty proceedings are found to be untenable. Hence the same are dismissed.”

8. The CIT(Appeals) found no fault with the order of AO and she held that Explanation 5A to section 271(1) of the Act was clearly applicable and therefore penalty has to be imposed.

9. Before us, the Id. counsel for the assessee submitted that in the order of assessments, initiation of penalty proceedings was for concealment of particulars of income, whereas in the show cause notice the AO has specified furnishing of inaccurate particulars of income also as a charge. He submitted that initiation of penalty proceedings was illegal and was contrary to the law laid down by the Hon'ble High Court of Karnataka in the case of *Manjunatha Cotton and Ginning Factory (supra)*. It was further submitted that the provisions of section 292BB of the Act cannot cure the fundamental defect in a notice issued u/s. 274 of the Act, as non-mention of specific charge in show cause notice u/s. 274 of the Act cannot be considered as a mistake, defect or omission and it cannot be said that the said defect is in substance and effect in conformity with or according to the intent and purpose of this Act..

10. The Id. DR relied on the order of the revenue authorities.

11. We have given a very careful consideration to the rival submissions. The first aspect which we notice is that in the order of assessment for AY 2009-10 to 2014-15, the AO initiated penalty proceedings against the assessee for 'concealing particulars of income'. However, in the show

cause notice issued u/s. 274 of the Act, the following words have been mentioned:-

“have concealed furnished inaccurate particulars of such income”

12. In the order imposing penalty, the AO has imposed penalty on the assessee for ‘concealing particulars of income’. The Hon’ble High Court of Karnataka in *Manjunatha Cotton and Ginning Factory (supra)* has laid down principles with regard to imposition of penalty u/s. 271(1)(c) of the Act. [The same will be applicable to imposition of penalty u/s. 271AAB of the Act]. The Hon’ble Karnataka High Court has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon’ble High court has further laid down that sending printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings cannot be on one limb and finding the Assessee guilty cannot be on the basis of another limb of Sec.271(1)(c) of the Act. The Hon’ble High Court has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act:-

“NOTICE UNDER SECTION 274

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.**

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be

sustained. **Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.**

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the case of VIRGO MARKETING reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind.”

13. The final conclusion of the Hon'ble Court was as follows:-

“63. In the light of what is stated above, what emerges is as under:

a) Penalty under Section 271(1)(c) is a civil liability.

- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- c) Willful concealment is not an essential ingredient for attracting civil liability.
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.
- f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.
- i) The imposition of penalty is not automatic.
- j) Imposition of penalty even if the tax liability is admitted is not automatic.
- k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry

concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

- l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.
- m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.
- n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.
- o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.
- p) **Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income**
- q) **Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.**
- r) **The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.**
- s) **Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.**

- t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.
- u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings.

The assessment or reassessment cannot be declared as invalid in the penalty proceedings.”

(emphasis supplied)

14. It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. The AO has not applied his mind to the specific charge against the Assessee. The mentioning of furnishing of inaccurate particulars of income in the show cause notice issued u/s.274 of the Act was fatal to the case. 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. The Id. Counsel further brought to our notice that as against the decision of the Hon'ble Karnataka High Court the revenue preferred an appeal in *SLP in*

CC No.11485 of 2016 and the Hon'ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department.

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 Id. 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 cases cannot be sustained and the same is directed to be cancelled. The above discussion will equally apply to imposition of penalty u/s.271AAB for AY 2015-16 because in terms of section 271AAB(3) of the Act, provisions of Sec.274 of the Act are applicable to imposition of penalty u/s.271AAB of the Act also.

16. We are of the view that the argument of the department that the provisions of section 292B of the Act will cure the defect, if any, in the show cause notice cannot be accepted because the non-mentioning of the charge against the assessee in the show cause notice cannot be considered as a mistake, omission or defect, which is in substance and effect in conformity with or according to the intent and purpose of this Act. We therefore hold that the CIT(Appeals) was not right in rejecting the plea of assessee in this regard. We are, therefore, of the view that the penalty imposed in all these assessment years are liable to be cancelled.

17. In view of the decision on the preliminary ground, we have not dealt with the arguments on merits with regard to imposition of penalty which was to the effect that Explanation 5A to Sec.271(1) of the Act will not apply

to an assessment u/s.153C of the Act and that but for Explanation 5A, penalty could not have been levied on the Assessee because the income returned and the income assessed were one and the same.

18. In the result, all the appeals by the assessee are allowed.

Pronounced in the open court on this 19th day of October, 2020.

Sd/-
(A K GARODIA)
ACCOUNTANT MEMBER

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 19th October, 2020.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.