IN THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai

Before Shri Manoj Kumar Aggarwal, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA Nos.1166 & 1167/Mum/2019
(Assessment Years: 2012-13 & 2014-15)

Symbyosys Integrated Solutions Pvt.Ltd. Flat No. 1217, Maker Chamber V, Nariman Point, Mumbai 400021	Vs.	Income Tax officer 4(3)(4) Room No. 637, Aayakar Bhavan, M.K. Road, Mumbai - 400021
PAN – AAGCS4206B		
(Appellant)		**(Respondent)**

Appellant by: Shri Jayesh Dadiya, A.R
Respondent by: Shri V. Vinod Kumar, Sr. D.R

Date of Hearing: 15.10.2020
Date of Pronouncement: 19.10.2020

O R D E R

PER RAVISH SOOD:

The captioned appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-9, Mumbai, dated 03.06.2015 and 21.02.2019, which in turn arises from the respective orders passed by the A.O under Sec. 271(1)(c) for A.Y 2012-13 and A.Y 2014-15. As the facts and the issue involved in the present appeals are inextricably interlinked and in fact interwoven, the same, thus, are being taken up and disposed off together by way of a consolidated order. We shall take up the appeal of the assessee for A.Y. 2012-13 as the lead year, and the order therein passed shall equally apply for the purpose of disposal of the appeal for A.Y. 2014-15. The assessee has assailed the impugned order on the following grounds of appeal before us:

"1. The ld. CIT(A) has erred in law and on the facts of the case in confirming the penalty levied by the Assessing Officer which is made on the basis of defective notice as the Assessing Officer has not specified under which limb penalty is being initiated.

2. The Ld CIT (A) has erred in law and on the facts of the case in confirming the action of assessing officer levying penalty of Rs.6,72,836/- under section 271(1)(c) of the Income Tax Act. The action is unjustified and unwarranted.

3. Your Petitioners crave leave to add, amend, alter and / or withdraw any or all the aforesaid ground of appeal."

2. Briefly stated, the assessee company had filed its return of income for A.Y. 2012-13 on 12.09.2012, declaring its total income at Rs.7,79,085/-. The return of income filed by the assessee company was initially 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. During the course of the assessment proceedings it was observed by the A.O that the assessee had claimed to have received rent of Rs.37,20,000/- from letting out of its property situated at 1217, Maker Chamber-V, Nariman Point, Mumbai-21. On a perusal of the records, it was observed by the A.O that the assessee had let out the property @ Rs.1,93,750/- per month, which therein aggregated to an amount of Rs.23,25,000/- for the whole year. Further, the assessee had entered into a separate agreement for provision of amenities @ Rs.1,16,250/- per month, which therein aggregated to Rs.13,95,000/- for the year under consideration. It was observed by the A.O that the receipts from provision of amenities were also reflected by the assessee under the head income from house property. Observing, that only the rental receipts pertaining to letting out of the property @ Rs.1,93,250/- per month was to be accounted for under the head income from house property, the A.O called upon the assessee to explain as to why its income under the said head of income may not be confined to the said extent. In sum and substance, the assessee was called upon to put forth an explanation as to why the amount received from letting out of amenities may not be brought to tax under the head 'other sources'. In reply, it was submitted by the assessee that it was under a bonafide belief that

as the ultimate source of the entire income was the property under consideration, therefore, the receipts from letting out/providing of amenities/furniture in respect of the property under consideration was also liable to be brought to tax under the head 'house property'. However, in all fairness it was submitted by the assessee that the receipts from the provision of amenities/furniture under consideration may be brought to tax under the head 'other sources'. Accepting the aforesaid request of the assessee the A.O therein brought the receipts from the letting out of amenities/furniture of Rs.13,95,000/- to tax in the hands of the assessee under the head "other sources". Further, the A.O while framing the assessment observed that the assessee had claimed a deduction of interest paid on borrowed capital of Rs.18,24,287/- while computing its income under the head 'house property'. On a perusal of the records, it was observed by the A.O that the assessee had purchased a property on 22.02.2005 for a consideration of Rs.56,18,750/-. The assessee had raised a loan of Rs.93,00,000/- from ICICI Bank on 08.06.2006, on which in interest of Rs.9,97,034/- was paid during the year under consideration. Apart from that, the assessee had taken another loan of Rs.51,00,000/- on 31.09.2009 on the same property by way of a loan against property from ICICI Bank, on which interest of Rs.8,27,253/- was paid. The assessee had claimed deduction of an aggregate interest expenditure of Rs.18,24,287/- [Rs.9,97,034/- (+) Rs.8,27,253/-] while computing its income under the head 'house property'. Observing, that the assessee had not utilised the funds borrowed for acquisition of the property in question, the A.O called upon the assessee to put forth an explanation as to why the aforesaid interest expenditure of Rs.18,24,287/- may not be disallowed. In reply, it was admitted by the assessee that the claim for deduction of the interest expenditure was though not allowable under Sec. 24 of the Act, however, the same was on account of a bonafide mistake claimed by the assessee in its return of income. Accordingly, the assessee requested that the interest expenditure of Rs.18,24,287/- so claimed by it while computing its income from house property may be disallowed. In the backdrop of the aforesaid facts, the A.O

disallowed the assessee's claim of interest expenditure of Rs.18,24,287/-. On the basis of his aforesaid observations the A.O reworked out the assessee's income from house property at Rs.16,27,500/-. Accordingly, the income of the assessee was assessed by the A.O vide his order passed under Sec. 143(3), dated 10.11.2014 at Rs.30,34,240/-. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) for concealment of income and also for furnishing inaccurate particulars of income in respect of the aforesaid twin disallowance/addition made in the hands of the assessee. Also, a notice under Sec. 271(1)(c) r.w.s 274, dated 10.11.2014 was issued by the A.O, therein calling upon the assessee to show cause as to why penalty under the aforesaid statutory provision may not be imposed in its hands.

3. After the culmination of the assessment proceedings the AO afforded an opportunity to the assessee to explain as to why penalty under Sec. 271(1)(c) may not be imposed on it. In reply, the assessee tried to impress upon the A.O that no penalty under Sec. 271(1)(c) was liable to be imposed in the totality of the facts pertaining to the additions/disallowances made in its case. However, the A.O not being persuaded to subscribe to the claim of the assessee, therein, vide his order passed under Sec.271(1)(c), dated 21.05.2015 imposed a penalty of Rs.6,72,836/- under Sec.271(1)(c) for concealment of income/filing inaccurate particulars of income.

4. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) of the Act before the CIT(A). In the course of the appellate proceedings the assessee assailed the sustainability of the penalty imposed under Sec.271(1)(c) both on the merits of the case, and also, the validity of the jurisdiction assumed by the A.O without putting the assessee to notice as regards the default for which the impugned penalty was proposed to be imposed in its hands. However, the CIT(A) not finding favour with the contentions advanced by the assessee both on merits as well as on the

validity of the assumption of jurisdiction by the A.O, therein rejected the same and dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. We find that the assessee has assailed the validity of the order of the CIT(A) on two fold grounds viz. (i) that the CIT(A) had erred in failing to appreciate that the failure on the part of the A.O to strike off the irrelevant default in the body of the 'Show cause' notice ('SCN'), had therein divested the assessee of knowing as to for what default the impugned penalty was sought to be imposed in its hands; and (ii) that the CIT(A) was in error in upholding the penalty imposed by the A.O under Sec. 271(1)(c), failing to appreciate that no such penalty in the backdrop of the merits of the case was liable to be imposed.

6. As the assessee has assailed the validity of the jurisdiction assumed by the A.O for imposing penalty under Sec. 271(1)(c) of the Act, we shall, thus, first deal with the same. The ld. Authorized Representative (for short 'A.R') for the assessee took us through the 'SCN' issued under Sec. 274 r.w.s 271(1)(c), dated 10.11.2014. The ld. A.R taking us through the aforesaid 'SCN', dated 10.11.2014 submitted, that the A.O had failed to strike off the irrelevant default in the body of the said notice, as a result whereof the assessee had remained divested of an opportunity to defend its case in the absence of being put to notice as to for what default the impugned penalty was sought to be imposed in its hands. In support of its aforesaid contention that in a case where the assessee was not validly put to notice in the 'SCN', as regards the default for which the penalty was proposed to be imposed, no penalty under Sec. 271(1)(c) could validly be imposed, the ld. A.R relied on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Samson Perinchery [ITA No. 1154 of 2014, dated 05.01.2017]. As such, it was averred by the ld. A.R that the A.O had wrongly assumed jurisdiction and therein imposed penalty under Sec. 271(1)(c) of the Act. On merits, it was submitted by the ld. A.R that as the assessee had duly disclosed the entire

facts as regards its income in the return of income, therefore, merely on account of a bonafide mistake in the claim of the interest expenditure, and also accounting for the receipts from letting out of amenities under a wrong head of income would not justify levy of penalty under Sec. 271(1)(c) of the Act on such standalone basis.

7. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that the failure on the part of the A.O strike off the irrelevant default was merely a technical error, which by no means would lead to rendering the penalty imposed on the assessee as invalid in the eyes of law. As regards the merits of the case it was submitted by the ld. D.R that as the assessee had raised wrong claims in its return of income, therefore, it had rightly been subjected to penalty under Sec.271(1)(c) of the Act.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities, material available on record, as well as the judicial pronouncements that had been pressed into service by them. As is discernible from the orders of the lower authorities, the A.O while culminating the assessment proceedings had initiated the penalty proceedings under Sec. 271(1)(c) for *"have concealed the particulars of your income or.....furnished inaccurate particulars of such income"*. However, on a perusal of the 'SCN', dated 10.11.2014 issued under Sec. 274 r.w.s 271, we find that the A.O had called upon the assessee to show cause as to why penalty may not be imposed upon it for having concealed the particulars of its income OR furnishing inaccurate particulars of such income. Admittedly, the A.O while culminating the assessment had initiated the penalty proceedings under Sec. 271(1)(c) for "concealment of income and also furnishing inaccurate particulars of income", and thereafter, had imposed the penalty vide his order dated 21.05.2015 for concealment of income/filing inaccurate particulars of income:

9. We have given a thoughtful consideration to the issue before us and are unable to persuade ourselves to subscribe to the view taken by the CIT(A). As observed by us hereinabove, it is a matter of fact borne from the records that the A.O had in the aforesaid 'SCN' dated 10.11.2014 failed to point out the default for which penalty was sought to be imposed by him on the assessee company. As observed by us hereinabove, the A.O in the 'SCN', dated 10.11.2014 had called upon the assessee to show cause as to why penalty u/s 271(1)(c) may not be imposed on it for having concealed particulars of its income or furnishing of inaccurate particulars of such income. 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, it was, thus, 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. 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 10.11.2014 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 in fact, 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 it. 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.

10. 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 powers 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 envisaged under 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 seeks to proceed against the assessee for either of the said defaults, then, it would be incumbent on him to clearly specify 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 his statutory right of an opportunity of being heard and defend its case. Apart from that, as the two defaults viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' as contemplated in Sec.271(1)(c) are separate and distinct defaults which operate in their exclusive and independent fields, we, therefore, are unable to subscribe to the view taken by the CIT(A) that the A.O had validly imposed penalty for "concealment of income/ filing inaccurate particulars of income" in respect of the aforesaid two fold addition/disallowance made in the hands of the assessee. Be that as it may, the fact that the A.O vide his 'SCN', dated 10.11.2014 had failed to put the assessee to notice as regards the default for which it was called upon to explain as to why penalty u/s 271(1)(c) may not be imposed on it, in our considered view, would suffice to divest the A.O from valid assumption of jurisdiction for imposing penalty under the said statutory provision. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)**, wherein following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** the High Court had 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)**. Further, we find, that the issue that an indispensable obligation is cast upon the A.O to clearly put the assessee to notice of the charge under the aforesaid statutory provision i.e 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 after considering various judicial pronouncements, had 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 by him under Sec. 271(1)(c) in the backdrop of the said serious infirmity as invalid and *void ab initio.* In fact, a perusal of the order passed by the A.O u/s 271(1)(c), dated 21.05.2015 supports our conviction that there had been total inapplication of mind by the A.O, not only while initiating the penalty proceedings but also at the time of imposition of the same. As is discernible from the order passed u/s 271(1)(c), we find, that the A.O had imposed the penalty under the said statutory provision for concealment of income/filing inaccurate particulars of income. Accordingly, the A.O even at the time of imposing of penalty had not pointed out the default for which penalty u/s 271(1)(c) was being imposed on the assessee.

11. In the backdrop of our aforesaid deliberations, we 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 in the 'SCN', dated 10.11.2014, had left the assessee guessing of the default for which it was being proceeded against. Apart from

that, as the two defaults viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' as contemplated in Sec.271(1)(c) are separate and distinct defaults which operate in their exclusive and independent fields, we, therefore, are unable to subscribe to the view taken by the CIT(A) that the A.O had validly imposed penalty for concealment of income/filing inaccurate particulars of income in respect of the aforesaid addition/disallowance made in the hands of the assessee. We thus in the backdrop of our aforesaid observations 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.6,72,836/- imposed by the A.O under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

12. As the penalty imposed on the assessee company under Sec. 271(1)(c) of the Act has been quashed by us in terms of our aforesaid observations, we thus, refrain from adverting to and adjudicating the merits of the case.

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

ITA No.1167/Mum/2019
A.Y. 2014-15

14. As the facts and the issue involved in the present appeal remains the same as were there before us in the appeal of the assessee for A.Y.2012-13 i.e ITA No.1166/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the disposal of the present appeal for A.Y. 2014-15 in ITA No. 1167/Mum/2019. Accordingly, the penalty imposed by the A.O under Sec. 271(1)(c) of Rs.1,53,814/- is quashed in the same terms.

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

16. The appeals of the assessee for A.Y 2012-13 and A.Y 2014-15 in ITA Nos.1166 & 1167/Mum/2019 are allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963, by placing the details on the notice board.

Sd/-	Sd/-
Manoj Kumar Aggarwal	Ravish Sood
(ACCOUNTANT MEMBER)	(JUDICIAL MEMBER)

Mumbai, Date: 19.10.2020
R. Kumar

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai