

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No.216/Bang/2020
Assessment year : 2006-07

Toyota Kirloskar Motor Private Limited, Plot No.1, Bidadi Industrial Area, Ramanagar District, Bangalore. <b>PAN: AAAC 5415B</b>	Vs.	The Deputy Commissioner of Income Tax, LTU, Circle 1, Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Padamchand Khincha, CA.
Respondent by	:	Shri R.K. Mishra, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	29.10.2020
Date of Pronouncement	:	03.11.2020

**ORDER**

*Per N.V. Vasudevan, Vice President*

This is an appeal by the Assessee against the order dated 11.12.2019 of the CIT(Appeals), Bengaluru-10, Bengaluru relating to assessment year 2006-07.

2. In this appeal the Assessee has challenged the order of the CIT(A) confirming the order of the AO imposing penalty on the Assessee u/s. 271(1)(c) of the Income Tax Act, 1961 (the Act).

3. The facts and circumstances under which penalty was imposed on the Assessee by the AO are that the assessee which is a company engaged in manufacture of Multi-Utility Vehicle, filed return of income for

AY 2006-07 on 22.11.2006 declaring NIL income. The case was taken up for scrutiny and reference was made to the Transfer Pricing Officer (TPO) as per the provision of section 92CA of the Act. Assessment u/s 143(3) was completed on 18.10.2010 on a total income of Rs. 307,83,31,369. The total income included Rs. 240,11,91.692 being transfer pricing adjustment on account of determination of arm's length price (ALP) of international transactions with the AE of the assessee. Penalty proceedings were initiated accordingly. The assessee filed an appeal before ITAT which was subsequently withdrawn and an application for Mutual Agreement Procedure (MAP) was made. As per MAP, the ALP was determined at Rs. 91,80,00,000. Before the AO, it was contended that the addition was made on account of MAP resolution and that there was no wilful concealment. But the AO did not agree with the contention made by assessee and held that penalty u/s 271(1)(c) is leviable on agreed additions also. Accordingly, he levied penalty of Rs. 30,89,98,800 u/s 271(1)(c).

4. Aggrieved with the order u/s 271(1)(c) passed by the DCIT, LTU, Circle-1, Bangalore, the assessee filed appeal before the CIT(Appeals), who confirmed the order of the AO.

5. Before the Tribunal the learned counsel for the Assessee contended that the notice issued before imposing penalty was not accordance with law and on this ground the order imposing penalty should be quashed. The learned counsel for the Assessee also drew our attention to the show cause notice issued u/s.274 of the Act before imposing penalty and submitted that the said notice does not specify as to whether the Assessee is guilty of having "furnished inaccurate particulars of income" or of having "concealed particulars of such income". He pointed out that the show cause notice does not strike out the irrelevant portion viz., "furnished inaccurate particulars of income" or "concealed particulars of such income". He drew our attention to a decision of the Hon'ble Karnataka High Court in

the case of *CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 218 Taxman 423 (Kar.)* wherein it was held that if the show cause notice u/s.274 of the Act does not specify as to the exact charge viz., whether the charge is that the Assessee has “furnished inaccurate particulars of income” or “concealed particulars of income” by striking out the irrelevant portion of printed show cause notice, than the imposition of penalty on the basis of such invalid show cause notice cannot be sustained. The learned DR relied on the order of the CIT(A).

6. We have also perused the show-cause notice issued u/s.274 of the Act. The AO in the said show cause notice has not struck off the irrelevant portion as to whether the charge against the Assessee is “concealing particulars of income or furnishing of inaccurate particulars of income”. The AO has placed a tick mark in the printed form of notice which has both the charges i.e., “have concealed the particulars of your income or furnished in accurate particulars of such income”. The CIT(A) has construed the placing of tick mark in the beginning of the letters “have concealed” as akin to initiation of penalty proceedings on the ground of concealing particulars of income. This approach of the CIT(A) is contrary to the decision of the Hon'ble Karnataka High Court in the case of *Manjunatha Cotton & Ginning Factory (supra)*. The Hon'ble Karnataka High Court in the case of *CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn)*, 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 certain 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 on one limb and find the Assessee guilty on another limb of Sec.271(1)(c) of the Act. The Hon'ble Karnataka High Court in the case of *CIT & Anr. v. Manjunatha*

Cotton and Ginning Factory (supra) 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.”

8. 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(l)(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)

7. 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 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.

8. 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.

9. In the result, the appeal by the assessee is allowed.

Pronounced in the open court on this 3<sup>rd</sup> day of November, 2020.

Sd/-  
( B R BASKARAN )  
ACCOUNTANT MEMBER

SD/-  
( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 03<sup>rd</sup> November, 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.