

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 1862/MUM/2018
(Assessment Year: 2013-14)**

Spykar Lifestyles Pvt. Ltd.
19th Floor, A Wing,
Lotus Corporate Park,
Jaycoach Junction,
Off. Western Express
Highway, Goregaon East,
Mumbai – 400 063

Vs. Assistant Commissioner
of Income Tax -13(2)(1),
146, Aayakar Bhavan,
Mumbai 400 020

PAN No. AAEC3455N

Appellant

Respondent

Appellant by : Shri Prayag Jha, A.R
Respondent by : Shri V. Vinod Kumar, D.R

Date of Hearing : 21.10.2020
Date of pronouncement : 09.11.2020

ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 15.12.2017, 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 30.08.2016 for A.Y. 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us:

"Ground I:

1. On the facts and circumstances of the case and in law, the Commissioner of Income Tax (Appeals)-21, Mumbai ("the CIT") erred in upholding the validity of the penalty order passed by the Assistant Commissioner of Income Tax-13(2)(1) ("the AO").

2. He failed to appreciate and inter-alia ought to have held that:
 - a. No penalty should have been levied for the year under consideration.
 - b. No clear charge has been alleged by the AO on the penalty notice rendering the notice to be invalid.
 - c. The charge on which penalty has been levied is different from the charge on which penalty was initiated.
3. The Appellant prays that the penalty order be held as void-ab-initio and be quashed accordingly.

Without Prejudice to Ground – I

Ground II:

1. On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the action of the AO in levying penalty in respect of disallowance on account of the payment of Fringe Benefit Tax ("FBT") amounting to Rs. 38,50,000/-.
2. He failed to appreciate and ought to have held that the Appellant has inadvertently claimed as the said amount was appearing in the Tax Audit Report under clause 21(I)(A) (in relation to section 43B) and therefore on being pointed during Assessment proceedings the Appellant accepted the same being inadvertent error.
3. The Appellant prays that the said penalty deleted.

Ground III:

The appellant craves leave to add, to alter and to amend above grounds of appeal at the time of hearing.”

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and selling branded readymade garments and lifestyle accessories through a network of exclusive business outlets and large retails chains had e-filed its return of income for A.Y. 2013-14 on 29.09.2013, declaring a total income of Rs.nil (after claiming set off of current year business loss of Rs.5,46,83,396/- and earlier year unabsorbed depreciation of Rs.6,37,32,377/-). 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, it was observed by the A.O that the assessee company had inter alia debited an amount of Rs. 38,20,500/- on account of “Fringe Benefit Tax” (for short ‘FBT’) in its Profit & loss account for the year under consideration. Observing, that the sum paid on

account of FBT was not allowable as a deduction in view of the provisions of Sec.40(a)(ic) of the Act, the A.O called upon the assessee to put forth an explanation in support of its aforesaid claim of deduction. However, the assessee agreed to the disallowance of the aforesaid amount and did not file any reply with the A.O. In the backdrop of the aforesaid facts, the A.O disallowed under Sec. 40(a)(ic) the assessee's claim for deduction of FBT of Rs.38,20,500/- and added the same to its returned income. The A.O while culminating the assessment initiated penalty under Sec. 271(1)(c) for "furnishing of inaccurate particulars" under Sec. 271(1)(c) of the Act in the body of the assessment order. Further, as is discernible from the orders of the lower authorities, the A.O issued a "Show Cause" notice (for short "SCN") to the assessee u/s 271(1)(c) r.w.s 274 of the Act, dated 29.02.2016, therein calling upon it to explain as to why it may not be subjected to penalty under the aforesaid statutory provision.

4. After the culmination of the assessment proceedings the A.O once again issued a 'SCN', dated 11.07.2016 and called upon the assessee to explain as to why penalty under Sec. 271(1)(c) may not be imposed on it as regards the disallowance of FBT amounting to Rs.38,20,500/- that was made in its hands while framing the assessment. In reply, it was submitted by the assessee that the aforesaid claim of deduction of FBT was inadvertently raised on account of a bonafide mistake. Accordingly, the assessee tried to impress upon the A.O that no penalty under Sec. 271(1)(c) was liable to be imposed. However, the A.O not finding favour with the aforesaid claim of the assessee imposed a penalty of Rs. 12 lac under Sec. 271(1)(c) for concealment of income by the assessee.

5. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 271(1)(c) before the CIT(A). However, the CIT(A) not finding favour with the claim of the assessee upheld the penalty imposed by the A.O under Sec. 271(1)(c) of the Act, and 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. Authorized Representative (for short 'A.R') for the assessee has assailed the penalty imposed by the A.O under Sec. 271(1)(c) both on the issue of the validity of jurisdiction assumed by the A.O for imposing the aforesaid penalty, and also the merits of the case. It was submitted by the Id. A.R that though the A.O in the assessment order had initiated penalty under Sec. 271(1)(c) for "furnishing of inaccurate particulars of income" by the assessee, but then, the same was thereafter imposed by him vide his order passed under Sec. 271(1)(c), dated 30.08.2016 for "concealment of income" by the assessee. In the backdrop of the aforesaid facts, it was submitted by the Id. A.R that the A.O had gravely erred in law and the facts of the case in assuming jurisdiction for imposing penalty under Sec. 271(1)(c) in the hands of the assessee. Further, it was averred by the Id. A.R that as the A.O had failed to strike-off the irrelevant default in the body of the 'SCN', therefore, the penalty on the said count also was not sustainable in the eyes of law. On merits, it was submitted by the Id. A.R that as the assessee had inadvertently on account of a bonafide mistake claimed deduction of FBT of Rs.38,20,500/-, which it had withdrawn in the course of the assessment proceedings, therefore, in the backdrop of the aforesaid facts no penalty under Sec.271(1)(c) could have validly been imposed on 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 the A.O had validly assumed jurisdiction and imposed penalty under Sec. 271(1)(c) of the Act. Further, it was submitted by the Id. D.R that as the assessee had agreed to the disallowance of FBT that was wrongly claimed as a deduction only when the said aspect was unearthed by the A.O and confronted to him in the course of the assessment proceedings, therefore, the claim of the Id. A.R that the mistake in raising of the aforesaid claim was on account of a bonafide mistake was clearly ruled out.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the assessee had debited an amount of Rs.38,20,500/- on account of FBT in its Profit and loss account for the year under consideration. As observed by us hereinabove, on being confronted by the A.O as regards the allowability of its aforesaid claim of deduction, we find that the assessee accepted its mistake and did not file any reply to support his aforesaid claim of deduction.

9. Before us, the assessee has assailed the validity of the jurisdiction assumed by the A.O for imposing penalty under Sec. 271(1)(c) on two counts, viz. (i). that as the A.O had initiated penalty u/s 271(1)(c) for “furnishing of inaccurate particulars of income” in the body of the assessment order but had thereafter imposed the same for “concealment of income”, the same, was thus not sustainable in law; and (ii). that as the A.O had failed to strike off the irrelevant default in the ‘SCN’, therefore, the penalty imposed u/s 271(1)(c) was liable to be vacated. As the assessee has challenged the assumption of jurisdiction by the A.O for imposing the impugned penalty u/s 271(1)(c), we shall, therefore, first advert to and therein adjudicate the said aspect. On a perusal of the orders of the lower authorities, we find, that though the A.O in his assessment order had initiated penalty under Sec. 271(1)(c) for “furnishing of inaccurate particulars” but had thereafter imposed the same vide his order dated 30.08.2016 for “concealment of income” by the assessee. In sum and substance, though the A.O had initiated penalty for one default i.e “furnishing of inaccurate particulars of income” in the body of the assessment order, however, he had imposed the same for the other default i.e “concealment of income”. Usage of the term “concealed income by way of furnishing of inaccurate particulars of income” by the A.O in his order u/s 271(1)(c), in our considered view can by no means be construed to take the imposition of penalty outside the realm of “concealment of income”. 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, thus, it is beyond comprehension as to how the A.O could have initiated the said penalty for one default i.e “furnishing of inaccurate particulars of income” in the body of the assessment order, and thereafter, imposed the same for the other default i.e “concealment of income”. 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. 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, it was not permissible on the part of the A.O to have initiated penalty proceedings u/s 271(1)(c) in the body of the assessment order for one default i.e “furnishing of inaccurate particulars” and thereafter saddled the assessee with penalty under the said statutory provision for the other default i.e “concealment of income”. 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” in respect of the aforesaid solitary addition of Rs.38,20,500/- made in the hands of the assessee. In the backdrop of our aforesaid deliberations, we are of the considered view that as the AO had de hors valid assumption of jurisdiction for imposing penalty under Sec. 271(1)(c), therein proceeded with and saddled the assessee with penalty under the aforesaid statutory provision, the same, thus, cannot be sustained and is liable to struck down on the said count itself.

10. Alternatively, on a perusal of the order of the CIT(A), we find, that it is a matter of fact borne from the records that the A.O had failed to “strike off” the irrelevant default in the “SCN” issued to the assessee under Sec. 274 r.w.s 271(1)(c) of the Act. Pointing out the said serious infirmity the assessee had assailed the validity of the jurisdiction that was assumed by the A.O for saddling the assessee with penalty u/s 271(1)(c) of the Act. However, the CIT(A) justifying the penalty imposed by the A.O u/s 271(1)(c), on the ground, that the penalty was levied by the A.O for furnishing of inaccurate particulars which led to concealment of income by the assessee, had held, that the claim of the assessee that the A.O had erred in not striking off the irrelevant default in the “SCN” was misconceived. We have given a thoughtful consideration 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 ‘SCN’ issued u/s 274 r.w.s 271(1)(c) failed to point out the default for which penalty was sought to be imposed by him on the assessee company. 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 on it. We are unable to subscribe to the view taken by the CIT(A) that as the penalty was levied by the A.O for furnishing of inaccurate particulars which led to concealment of income by the assessee, therefore, no mistake could be attributed to the A.O in not striking off the irrelevant default in the body of the “SCN”. 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 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.

11. We would now test the validity of the aforesaid ‘SCN’ 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 it. The non-specifying of the charge in the ‘SCN’ 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. As observed by us hereinabove, 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 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 upon him to clearly specify his said intention in the ‘SCN, 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 “furnishing of inaccurate particulars which led to concealment of income by the assessee” in respect of the aforesaid solitary addition/disallowance of Rs. 38,20,500/- made in the hands of the assessee. Be that as it may, the fact that the A.O in his ‘SCN’ 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 had after considering 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 by him under Sec. 271(1)(c) in the backdrop of the said serious infirmity as invalid and void ab initio. 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’, 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 “furnishing of inaccurate particulars which led to concealment of income by the assessee” in respect of the solitary addition/disallowance of Rs. 38,20,500/- 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. 12 lac 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 therein adjudicating the merits of the case.

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

Order pronounced in the open court on 09.11.2020

Sd/-
Pramod Kumar
(VICE PRESIDENT)
Mumbai, Date: 09.11.2020
PS: Rohit

Sd/-
Ravish Sood
(JUDICIAL MEMBER)

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