

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 210/MUM/2019 (A.Y: 2010-11)

Shri Vinay Giridhari Motwani Elegant Apartment 3, Sobani Road Colaba, Mumbai – 400 005 PAN: AADPM3598G	v.	ACIT – 17(3) Aayakar Bhavan M.K. Road Mumbai – 400 020
(Appellant)		(Respondent)

Assessee by : Shri Nishit Gandhi

Department by : M. Samatha

Date of Hearing : 21.10.2020

Date of Pronouncement : 17.11.2020

ORDER

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals) – 28, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 22.11.2018 for the A.Y. 2010-11 in sustaining the penalty levied u/s. 271(1)(c) of the Act.

2. At the outset, Ld. Counsel for the assessee submitted that the initiation of penalty proceedings is bad in law as the Assessing Officer has not specified the limb for which the penalty was proposed to be levied. Ld. Counsel for the assessee referring to the notice issued u/s. 274 r.w.s 271(1)(c) of the Act submitted that the Assessing Officer is not clear as to the charge for which the penalty is initiated i.e. either for concealment of income or for furnishing inaccurate particulars. Referring to the notice Ld. Counsel for the assessee submitted that the inappropriate limb in the notice was not strike off.

3. Ld. Counsel for the assessee further referring to the Assessment Order submitted that the Assessing Officer merely initiated penalty proceedings u/s. 271(1)(c) by issue of notice. Ld. Counsel for the assessee submitted that the Assessing Officer had not made clear in the Assessment Order for which charge the penalty is initiated either for concealment of income or for furnishing inaccurate particulars. Assessing Officer simply stated that "Issue penalty notice u/s. 271(1)(c) of the Act". Referring to Penalty Order, Ld. Counsel for the assessee submitted that Assessing Officer levied penalty for furnishing inaccurate particulars of income and for concealment of income i.e. for both the charges. In the Assessment Order the Assessing Officer has neither said that the assessee

concealed his income nor it was said that the assessee furnished inaccurate particulars of income. Therefore, it is submitted that there was no proper satisfaction recorded by the Assessing Officer for initiation of penalty u/s. 271(1)(c) of the Act. Therefore, Ld. Counsel submits that the initiation of penalty proceedings itself is improper and not valid. Ld. Counsel for the assessee submitted that there is complete non-application of mind by the Assessing Officer in initiating the penalty proceedings and therefore, levy of penalty is illegal, void, bad in law, initiated by non-application of mind and is without jurisdiction as even in the penalty notice issued by the Assessing Officer does not strike off the irrelevant portion thereon. Reliance was placed on the following decisions in support of his contentions: -

- (1) *CIT v. SSA's Emerald Meadows [242 Taxman 180 (SC)]*
- (2) *CIT v. Samson Perinchery [392 ITR 4 (Bom.)]*
- (3) *Sumer Corporation v. ACIT in ITA.No. 494/Mum/2015*
- (4) *Vision Infpro v. ACIT in ITA.No. 1394/Mum/2018*

4. Ld. DR vehemently supported the orders of the Authorities below. Further Ld. DR strongly placed reliance on the decision of the Hon'ble Bombay High Court in the case of Ventura Textiles Ltd., *v.* CIT [274 Taxman 144]. In reply Ld. Counsel for the assessee submits that though the Hon'ble Bombay High Court in the case of Ventura Textiles Ltd., *v.*

CIT (supra) on which the Ld.DR relied on has held that if the charge as per the Assessment Order is known then setting up invalidity of Notice due to non-striking off the relevant limb would be like taking a pedantic view, however, this judgment in fact supports the case of the assessee wherein it is held that if penalty is levied without any application of mind of initiation and levy are on separate charge, then the penalty imposed must be deleted.

5. We have heard the rival submissions, perused the orders of the Authorities below, notice issued u/s. 274 r.w.s 271(1)(c) of the Act for initiation of penalty proceedings, we find that Assessing Officer did not strike off and specify the charge/limb for which he is proposing to initiate the penalty proceedings. In the assessment order Assessing Officer merely stated that "Issue penalty notice u/s. 271(1)(c) of the Act ". This shows that the Assessing Officer merely initiated the penalty proceedings u/s. 271(1)(c) of the Act. We observe that the Assessing Officer has not made any charge in the Assessment Order for initiation penalty proceedings. Assessing Officer has not made clear as to whether the penalty was initiated is either for concealment of income or for furnishing inaccurate particulars of income. He simply initiated the penalty proceedings without making the charge clear. However, in the penalty

order passed it is stated that penalty is levied for furnishing inaccurate particulars of income and for concealment of income. While coming to the penalty order the Assessing Officer levies penalty for both furnishing inaccurate particulars of income and also for concealment of income which charges were never mentioned in the Assessment Order while initiating the penalty proceedings. Even in the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act the Assessing Officer has not made the charge clear by striking off the inappropriate charge before levying the penalty u/s.271(1)(c) of the Act.

6. An identical situation has been considered by the Coordinate Bench in Meherjee Cassinath Holdings v. ACIT in ITA.No. 2555/MUM/2012 dated 28.04.2017 as to whether the action of the Assessing Officer in initiating penalty proceedings U/s. 271(1)(c) of the Act without striking off one of the limbs and without specifying the specific charge in the notice initiating penalty proceedings for inaccurate particulars of income in the Assessment Order and the Coordinate Bench considering the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery [392 ITR 4] and also various decisions held that action of the Assessing Officer in non-striking off relevant clause in the notice shows that the charge being made against the assessee is not firm therefore

proceedings suffer from non-compliance with principles of natural justice in as much as the Assessing Officer himself is not sure of the charge and the assessee is not made aware as to which of the two limbs of section 271(1)(c) of the Act he has to respond.

7. Following the above decision, similar view has been taken by the Coordinate Bench in the case of Orbit Enterprises v. ITO [60 ITR(Trib.) 252]. In the case of DCIT v. Shri Dhaval D. Shah in ITA.No. 1337/Mum/2016 & C.O.No.08/Mum/2018 dated 16.05.2018 the Coordinate Bench considered similar and identical issue and following the ratio laid down in the Dilip N. Shroff [210 CTR 228 (SC)] and the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery (supra) held that the penalty proceedings initiated by the Assessing Officer is bad in law.

8. We further find that the Hon'ble Bombay High Court at Goa in the case of Pr.CIT v. Goa Coastal Resorts and Recreation Pvt. Ltd., in Tax Appeal No. 24 of 2019 dated 11.11.2019 held as under: -

"5. We have carefully examined the record as well as duly considered the rival contentions. Both the Commissioner (Appeals) as well as the ITAT have categorically held that in the present case, there is no record of satisfaction by the Assessing Officer that there was any concealment of income or that any inaccurate particulars were furnished by the assessee. This being a sine qua non for

initiation of penalty proceedings, in the absence of such petition, the two authorities have quite correctly ordered the dropping of penalty proceedings against the petitioner.

6. *Besides, we note that the Division Bench of this Court in Samson(supra) as well as in New Era Sova Mine(supra) has held that the notice which is issued to the assessee must indicate whether the Assessing Officer is satisfied that the case of the assessee involves concealment of particulars of income or furnishing of inaccurate particulars of income or both, with clarity. If the notice is issued in the printed form, then, the necessary portions which are not applicable are required to be struck off, so as to indicate with clarity the nature of the satisfaction recorded. In both Samson Perinchery and New Era Sova Mine(supra), the notices issued had not struck off the portion which were inapplicable. From this, the Division Bench concluded that there was no proper record of satisfaction or proper application of mind in matter of initiation of penalty proceedings.*

7. *In the present case, as well if the notice dated 30/09/16 (at page 33) is perused, it is apparent that the relevant portions have not been struck off. This coupled with the fact adverted to in paragraph (5) of this order, leaves no ground for interference with the impugned order. The impugned order are quite consistent by the law laid down in the case of Samson Perinchery and New Era Sova Mine(supra) and therefore, warrant no interference.*

8. *The contention based upon MAK Data (P.) Ltd.(supra) also does not appeal to us in the peculiar facts of the present case. The notice in the present case is itself is defective and further, there is no finding or satisfaction recorded in relation to concealment or furnishing of inaccurate particulars.*

9. *For the aforesaid reasons, we hold that no substantial questions of law arises in this appeal. Consequently, this appeal is dismissed”*

9. In the case of Pr.CIT v. New Era Sova Mine in Tax Appeal No. 70 of 2018 dated 18.06.2019 the Hon'ble Bombay High Court at Goa held as under: -

"2. The subject matter of Appeals concerns penalty levied by the Assessing Officer on the ground that the Assessee had not filed returns within the due date. The Assessee was claimed to have filed returns after a search was conducted in their premises under Section 132 of the Income Tax Act. The Department's case was that but for such search, the income now offered to tax by the Assessee would not have been so offered. The Tribunal has correctly observed in its impugned order that the penalty notices in these cases were not issued for any specific charge, that is to say, for concealment of particulars of income or furnishing of inaccurate particulars. When the matter was before the CIT (A), he referred to the decision of Karnataka High Court in the case of CIT vs. SSA's Emerald Meadows (ITA No.380 of 2015 dated 23.11.2015). The Court had held that no notice could be issued under Section 274, read with Section 271(1)(c) of the Income Tax Act, without indicating which particular limb of Section 271(1)(c) was invoked for initiating the penalty proceedings. The Court took the view that the matter was covered by an earlier decision of a Division Bench of that Court and did not involve any substantial question of law. The matter, thereafter, went in an SLP before the Supreme Court, who did not find any merit in the petition. The Tribunal also noticed that the jurisdictional High Court in the case of 392 ITR 4 had also taken the same view.

3. The Appeals, accordingly, do not involve any substantial question of law and do not merit admission. The Appeals are, accordingly, dismissed."

10. In the case of Pr.CIT v. Goa Dourado Promotions Pvt. Ltd., in Tax Appeal No. 18 of 2019 dated 26.11.2019 the Hon'ble Bombay High Court at Goa held as under: -

"2. In this case, Ms. Linhares, the learned Standing Counsel for the appellant urges that the following substantial questions of law arise for consideration: -

1. Whether the Ld. ITAT erred in deleting the penalty by not considering the decision of the Apex Court in the case of Mak Data Pvt. Ltd. reported in 2013 (38) Taxman.com 448?

2. *Whether the Ld. ITAT erred in holding the penalty proceeding fatal for mere failure of the A.O to tick the relevant box in the show cause notice?*

3. *Mr. Rivankar, the learned Counsel for the respondent defends the impugned order of the ITAT, on the basis of the reasons reflected therein. Besides, he relies upon the order dated 11.11.2019 in Tax Appeal No. 24/2019, where under the similar circumstances, this Court, dismissed the Appeal initiated by the Revenue, after considering the decision of the Hon'ble Apex Court in the case of Mak Data (P) Ltd. Vs. Commissioner of Income Tax.*

4. *According to us, the issues raised in this Appeal are fully covered, not only by order dated 11.11.2019 made by us while dismissing Tax Appeal No. 24/2019, but, further, by the decision of this Court in the case of Commissioner of Income Tax-11 Vs. Shri Samson Perinchery and Principal Commissioner of Income Tax Vs. New Era Sova Mine.*

5. *Accordingly, for the reasons set out in our order dated 11.11.2019, we hold that the aforesaid substantial questions of law do not arise in this Appeal. Accordingly, this Appeal is liable to be dismissed and is hereby dismissed. There shall be no order as to costs."*

11. We have also perused the recent decision of the Hon'ble Bombay High Court in the case of Ventura Textiles Ltd., v. CIT (supra) wherein it has been held as under: -

"29. *We have already noticed that in the statutory show cause notice, Assessing Officer did not indicate as to whether penalty was sought to be imposed for concealment of income or for furnishing inaccurate particulars of income though in the assessment order it was mentioned that penalty proceedings were initiated for furnishing inaccurate particulars of income.*

30. *Be that as it may, in the order of penalty, Assessing Officer held that assessee had concealed its income as well as furnished inaccurate particulars of income.*

31. Concealment of particulars of income was not the charge against the appellant, the charge being furnishing inaccurate particulars of income. As discussed above, it is trite that penalty cannot be imposed for alleged breach of one limb of Section 271(1)(c) of the Act while penalty proceedings were initiated for breach of the other limb of Section 271(1)(c). This has certainly vitiated the order of penalty. In appeal, CIT (A) took a curious view that submission of inaccurate particulars of income resulted into concealment, thus upholding the order of penalty. This obfuscated view of the CIT (A) was affirmed by the Tribunal.

32. On the ground that while the charge against the assessee was of furnishing inaccurate particulars of income whereas the penalty was imposed additionally for concealment of income, the order of penalty as upheld by the lower appellate authorities could be justifiably interfered with, still we would like to examine whether there was furnishing of inaccurate particulars of income by the assessee in the first place because that was the core charge against the assessee."

12. As could be seen from the above decision the facts are that the Assessing Officer initiated penalty proceedings in the Assessment Order making the charge as assessee had furnished inaccurate particulars of income but when passing the penalty order the penalty was levied for concealment of particulars of income. The Hon'ble Bombay High Court held that penalty cannot be imposed for alleged breach of one limb of section 271(1)(c) of the Act while penalty proceedings were initiated for breach of the other limb of section 271(1)(c) of the Act.

13. In the case on hand before us, as stated earlier in the Assessment Order the Assessing Officer has not made any charge in initiating penalty proceedings u/s. 271(1)(c) of the Act, he merely stated that notice u/s.

271(1)(c) of the Act is issued. However, while coming to the penalty order the penalty levied stating that the assessee has furnished inaccurate particulars of income and concealed particulars of its income. Even while issuing notice u/s. 274 r.w.s. 271(1)(c) of the Act the Assessing Officer has not made charge clear as to whether he proposed to levy penalty for either concealing particulars of income or furnishing inaccurate particulars of income. Therefore, in our view when there is no mention in the Assessment Order for which the penalty proceedings are initiated, penalty cannot be levied for both the charges i.e. for concealment of particulars and also for furnishing inaccurate particulars of income. In fact, the decision of the Hon'ble Bombay High Court in the case of Ventura Textiles Ltd., v. CIT (supra) supports the case of the assessee. Thus, respectfully following the above said decisions, we hold that since the Assessing Officer failed to record any satisfaction in the Assessment Order by specifying the charge for which penalty was initiated and even in the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act failed to specify the charge for which the said notice was issued and since penalty was levied for both the limbs i.e. for concealment of particulars of income and also for furnishing inaccurate particulars of income, the levy of penalty is on account of non-application of mind and therefore the very initiation of

proceedings are bad in law. Thus, we direct the Assessing Officer to delete the penalty levied U/s. 271(1)(c) of the Act.

14. As we have held that the penalty be deleted on the preliminary point the other arguments raised by the Ld. Counsel for the assessee are not being dealt with as it becomes only academic and they are left open.

15. In the result, appeal of the assessee is allowed as indicated above.

Order pronounced on 17.11.2020 as per Rule 34(4) of ITAT Rules by placing the pronouncement list in the notice board.

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Mumbai / Dated 17/11/2020
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
 2. The Respondent.
 3. The CIT(A), Mumbai.
 4. CIT
 5. DR, ITAT, Mumbai
 6. Guard file.
- //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum