

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

**BEFORE SHRI MANOJ KUMAR AGGARWAL (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.5446/MUM/2019
(Assessment Year: 2013-14)**

Bhupendra Jain
Karni House, 2nd Floor,
17/19 Shamseth Street,
400002

Asstt. Commissioner
Vs. of Income Tax 18(1),
Income Tax Department,
2nd Floor, Earnest House,
Nariman Point, 400021

PAN No. AADPJ1648Q

(Assessee)

(Revenue)

Assessee by : Shri R. M. Jain, A.R
Revenue by : Shri Tharian Oommen, D.R

Date of Hearing : 17/02/2021
Date of pronouncement : 18/02/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-53, Mumbai, dated 15.05.2019, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) r.w.s 274 of the Income Tax Act, 1961 (for short 'Act'), dated 30.09.2016 for A.Y. 2013-14. The assessee has assailed the impugned order on the following grounds of appeal before us :

- “1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming penalty levied.
 2. On the facts and in circumstances of the case and in law, the Ld. CIT(A) erred in confirming the penalty on the addition of interest.
 3. The assessee craves leave to add, alter or amend the existing grounds of appeal on or before the date of hearing.”
2. Briefly stated, the assessee who is engaged in the business of trading in yarn had filed his return of income for A.Y. 2013-14 on 29.03.2013, declaring a total

income of Rs.1,03,99,670/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. The A.O after inter alia making two additions/disallowances viz. (i) disallowance of interest on borrowed funds under Sec. 36(1)(iii): Rs.2,75,826/-; and (ii) addition towards undisclosed interest income received from N.V. Fab Tex : Rs.6,34,416/-, therein assessed the income of the assessee vide his order passed under Sec. 143(3), dated 14.03.2016 at a net taxable income of Rs.1,14,81,360/-. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) insofar the aforesaid two additions/disallowances were concerned.

3. As the assessee had not assailed the assessment order any further in appeal before the CIT(A), the same, thus attained finality.

4. After the culmination of the assessment proceedings the A.O called upon the assessee to put forth an explanation as to why penalty under Sec. 274 r.w.s 271(1)(c) may not be imposed on him. Initially the A.O while culminating the assessment issued a 'Show cause' notice (for short 'SCN') under Sec. 274 r.w.s 271(1)(c) on 14.03.2016. Subsequently, the assessee was given another opportunity vide a reminder letter dated 12.09.2016. In reply, the assessee tried to impress upon the A.O that no penalty under Sec. 271(1)(c) was called for with respect to either of the aforesaid two additions/disallowances. However, the A.O did not find favour with the aforesaid claim of the assessee and by his order dated 30.09.2016 imposed a penalty of Rs.2,81,265/- i.e @ 100% of the tax sought to be evaded for furnishing the inaccurate particulars of income leading to concealment of income for the year in question.

5. Aggrieved, the assessee assailed the penalty imposed on him under Sec. 271(1)(c) before the CIT(A). Observing that the assessee had come forth with a bonafide explanation insofar the addition that was made by the A.O with respect to interest income pertaining to N.V. Fab Tex was concerned, the CIT(A) excluded the said amount for levy of penalty and restricted the penalty only as regards the disallowance of interest expenditure under Sec. 36(1)(iii) of Rs.2,75,826/-.

6. The assessee being aggrieved with the order passed by the CIT(A) to the extent the latter had upheld the penalty imposed by the A.O under Sec. 271(1)(c) of

the Act, has carried the matter in appeal before us. It was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that the A.O without specifying the default for which the assessee was called upon to put forth an explanation as to why penalty under Sec. 271(1)(c) may not be imposed on him had thereafter imposed penalty under the said statutory provision for furnishing inaccurate particulars of income leading to concealment of income. It was averred by the Id. A.R that as the assessee was at no stage put to notice about the default for which the penalty was sought to be imposed on him thus, the impugned penalty could not be sustained and was liable to be vacated.

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We are herein concerned only as regards the sustainability of the penalty u/s 271(1)(c) that has been upheld by the CIT(A). As is discernible from the orders of the lower authorities, the A.O had inter alia initiated the penalty proceedings as regards the disallowance under Sec.36(1)(iii) of Rs.2,75,826/- for concealment of income. However, the A.O thereafter while culminating the assessment had stated in his order that the penalty proceedings under Sec. 271(1)(c) were being initiated separately for furnishing inaccurate particulars of income which leads to concealment of income. Be that as it may, the A.O had thereafter vide his order passed under Sec. 271(1)(c) r.w.s 274 of the Act, dated 30.09.2016 imposed a penalty under the said statutory provision w.r.t the impugned disallowance of the interest expenditure u/s 36(1)(iii) for furnishing of inaccurate particulars of income leading to concealment of income for the year under consideration. Apart from that, we find that the A.O vide his 'SCN', dated 14.03.2016 while calling upon the assessee to explain as to why the penalty under the aforesaid statutory provision may not be imposed on him had failed to specify the exact default for which the impugned penalty was sought to be imposed. The aforesaid SCN dated 14.03.2016 was thereafter followed by a simple reminder letter dated 12.09.2016, wherein the A.O referring to the aforesaid SCN dated 14.03.2016 had called upon the assessee to furnish his reply latest by 19.09.2016.

9. We find that the assessee had assailed the levy of penalty imposed under Sec. 271(1)(c) r.w.s 274, dated 30.09.2016 before the CIT(A) inter alia on the ground that he was not put to notice as to for which default the impugned penalty was sought to be imposed on him. As is discernible from the order passed by the CIT(A), we find that the appellate authority had scrapped the contention of the assessee that as the A.O had failed to strike off the irrelevant default in the SCN, dated 14.03.2016, he was thus not validly put to notice about the default for which penalty u/s 271(1)(c) was sought to be imposed on him. The CIT(A) while observing as hereinabove, was of the view that as assessee had not referred to the subsequent opportunity which was granted to him by the A.O, thus its aforesaid claim did not merit acceptance. Apart from that, it was observed by the CIT(A) that the assessee had also not indicated nor furnished any evidence to show that he had any difficulty in replying to the show cause notice nor had taken any action to seek clarification from the A.O. Backed by his aforesaid observations, we find that the CIT(A) had rejected the claim of the assessee that the A.O had wrongly assumed jurisdiction and without validly putting him to notice had imposed penalty under Sec. 271(1)(c) of the Act.

10. We have given a thoughtful consideration to the issue before us in the backdrop of the contentions advanced by the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. Admittedly, on a perusal of the 'SCN', dated 14.03.2016, it stands revealed that the Assessing Officer had failed to strike off the irrelevant default while calling upon the assessee to explain as to why penalty u/s 271(1)(c) of the I.T Act may not be imposed on him. Insofar the validity of the jurisdiction assumed by the A.O is concerned, we find that the same has been assailed before us on the ground that as the irrelevant default in the 'Show cause' notice, dated 14.03.2016 was not struck off by the A.O thus, the assessee was not validly put to notice as regards the default for which he was called upon to explain as to why penalty may not be imposed on him under Sec. 271(1)(c) of the Act. Admittedly, the A.O in the aforesaid 'SCN', dated 14.03.2016 had failed to point out the default for which penalty was sought to be imposed on the assessee. 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, therefore, it was obligatory on the part of the A.O to have clearly put the assessee to notice as regards the default for which he was being called upon to explain as to why penalty under Sec. 271(1)(c) may not be imposed on him. 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 14.03.2016 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 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 him. 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 '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 power 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, it was incumbent on the part of the A.O to have clearly specified 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 as the same had clearly divested the assessee of his statutory right of an opportunity of being heard and defend his case. Apart from the aforesaid, we are unable to comprehend that now when the two expressions/defaults viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' contemplated in Sec. 271(1)(c) of the Act have different connotation thus, it is beyond our comprehension as to on what basis the A.O had imposed penalty under the aforesaid statutory provision for furnishing of inaccurate particulars of income leading to concealment of income for the year under consideration. Accordingly, we are unable to concur with the aforesaid imposition of penalty by the A.O for a default which is not discernible from the order passed by him under Sec. 271(1)(c) of the Act.

12. Coming back to the validity of the 'SCN' dated 14.03.2016 issued by the A.O without pointing out the default for which the penalty was sought to be imposed, we shall hereinafter deliberate on the same in the backdrop of the various judicial pronouncements. We find that the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** 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 were 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)**.

13. We have given a thoughtful consideration to the issue before us and after deliberating on the facts 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 him in the 'SCN', dated 14.03.2016, had left the assessee guessing of the default for which he was being proceeded against for. We, thus, in the backdrop of our aforesaid observations are of a strong conviction that as the A.O had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the default for which he was being proceeded against, therefore, the penalty under Sec. 271(1)(c) of Rs. 85,230/- sustained by the CIT(A) being in clear violation of the mandate of Sec. 274(1) of the Act cannot be sustained. We, thus, for the aforesaid reasons 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.85,230/- sustained by the CIT(A) under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

14. In the backdrop of our aforesaid deliberations we herein quash the penalty under Sec. 271(1)(c) of Rs.85,230/- that has been sustained by the CIT(A).

15. Resultantly, the appeal of the assessee is allowed.

Order pronounced in the open court on 18.02.2021

Sd/-
Manoj Kumar Aggarwal
(ACCOUNTANT MEMBER)

Mumbai, Date: 18.02.2021
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 "B" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai