

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

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

**ITA No.5403/MUM/2019
(Assessment Year: 2014-15)**

M/s UMC Exports Corporation 502, 5 th Floor, Embassy Chambers, 3 rd Road, Khar (West), Mumbai – 400 052	Vs. ITO 26(3)(5) Room No. 504, Bld. No. C-11, Pratyakshakar Bhavan, Bandra (East), Mumbai 400051
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PAN No. AABFU9427G

(Assessee)

(Revenue)

Assessee by : Shri Vimal Punamiya, A.R
Revenue by : Shri Jitendra Kumar, D.R

Date of Hearing : 15/06/2021
Date of pronouncement : 16/06/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-38, Mumbai, dated 28.03.2019, 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, 28.06.2017 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) erred in confirming the penalty of Rs.3,35,707/- under Sec. 271(1)(c) of the Income Tax, Act 1961.
2. The appellant craves leave to add further grounds or to amend or alter the existing grounds of appeal on or before the date of hearing.”

2. Briefly stated, the assessee firm had e-filed its return of income for A.Y. 2014-15 on 14.09.2014, declaring a total income of Rs.nil. The return of income was processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

3. Original assessment was framed by the A.O vide his order passed u/s 143(3), dated 07.12.2016, wherein after inter alia disallowing the assessee's claim of property expenses of Rs.10,86,430/-, the income of the assessee was assessed at Rs.4,90,090/-.

4. The A.O while culminating the assessment also initiated penalty proceedings u/s 271(1)(c) r.w.s 274 of the Act and issued a 'Show cause' notice (SCN), dated 07.12.2016.

5. Subsequently, the A.O called upon the assessee to explain as to why penalty u/s 271(1)(c) with respect to the disallowance of property expenses of Rs.10,86,430/- may not be imposed on it. As the reply filed by the assessee did not find favour with the A.O, therefore, vide order u/s 271(1)(c), dated 28.06.2017 penalty u/s 271(1)(c) of Rs.3,35,707/- was imposed by him on the assessee firm.

6. Aggrieved, the assessee assailed the order passed by the A.O u/s 271(1)(c), dated 28.06.2017 before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the penalty that was imposed by the A.O u/s 271(1)(c) of the Act.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the very outset, it was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that the A.O had wrongly assumed jurisdiction u/s 271(1)(c) of the Act and imposed penalty on the assessee firm. In order to drive home his aforesaid claim, it was submitted by the Id. A.R that the impugned penalty had been imposed by the A.O without putting the assessee to notice as regards the default for which the same was sought to be imposed. The Id. A.R took us through Page 1 of the

assessee's 'Paper Book' (APB), i.e the 'SCN', dated 07.12.2016 that was issued by the A.O u/s 274 r.w.s 271(1)(c) of the Act. It was submitted by the Id. A.R that in the aforesaid notice the A.O had failed to strike-off the irrelevant default for which the impugned penalty was sought to be imposed on the assessee i.e 'concealment of income' or 'furnishing of inaccurate particulars of income'. It was, thus, submitted by the Id. A.R that pursuant to the aforesaid failure on the part of the A.O to validly put the assessee to notice as regards the default for which he was being called upon to explain as to why penalty may not be imposed on it, the latter, had remained divested of an opportunity of putting forth its case that no penalty could validly be imposed on it. On merits, it was submitted by the Id. A.R that the impugned disallowance of the property expenses of Rs.10,86,430/- was backed by an inadvertent mistake on the part of the assessee at the time of compiling its return of income. It was submitted by the Id. A.R that as against the property expenses of Rs.28,140/- the amount of Rs.10,86,430/- was wrongly booked under the head 'administrative expenses' by the assessee in its profit and loss account for the year under consideration. In order to buttress his aforesaid claim the Id. A.R took us through the bifurcated details of the 'administrative expenses' at Page 11 of the APB. It was, thus, submitted by the Id. A.R that as the impugned disallowance of the property expenses was based on an inadvertent mistake on the part of the assessee, therefore, no penalty u/s 271(1)(c) could have validly been imposed on it. In support of his aforesaid claim that penalty u/s 271(1)(c) cannot be imposed for a genuine mistake, the Id. A.R relied on the judgment of the Hon'ble Supreme Court in the case of Price Water House Coopers Pvt. Ltd. Vs. CIT, Kolkata-1, Civil Appeal No. 6924 of 2012. It was, thus, submitted by the Id. A.R that in the backdrop of the aforesaid factual position the penalty imposed by the A.O u/s 271(1)(c) could not be sustained and was liable to be vacated.

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

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Id. A.R. Admittedly, the Assessing Officer in the "SCN" issued under Sec. 274 r.w Sec. 271(1)(c), dated 07.12.2016 had failed to strike off the irrelevant default viz "concealment of particulars of income" or "furnishing of inaccurate particulars of income". As submitted by the Id. A.R, and rightly so, the Assessing Officer by not striking-off the irrelevant default in the body of the "SCN", dated 07.12.2016 had failed to point out the default for which the assessee firm was called upon to explain as to why penalty u/s 271(1)(c) may not be imposed on it. On a bare perusal of the "SCN" dated 07.12.2016, it can safely be gathered that the Assessing Officer himself was not aware as to for what default the assessee firm was being put to notice and therein called upon to explain as to why penalty may not be imposed on it. Be that as it may, it remains as a matter of fact borne from the record that the Assessing Officer had blatantly failed to validly put the assessee to notice as regards the default for which the penalty was sought to be imposed on it. 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 respective 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 it was being called upon to explain as to why penalty under Sec. 271(1)(c) may not be imposed on it. 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 07.12.2016 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 aforesaid

statutory provision was sought to be imposed. 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, dated 07.12.2016 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. The non-specifying of the charge in the 'Show cause' notice not only reflects the non application of mind by the A.O, but the same seriously 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 sought to have proceeded against the assessee for either of the said defaults, then, it was incumbent on his part 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 a technical default, as the same has clearly divested the assessee of his statutory right of an opportunity of being heard and defend his case.

11. 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)**, has 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 therefrom, 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).**

12. We find that the indispensable obligation on the part of the A.O to clearly put the assessee to notice of the charge under the aforesaid statutory provision viz. 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 in the backdrop of 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 render the order passed by him under Sec. 271(1)(c) in view of the said serious infirmity as invalid and *void ab initio*.

13. We have given a thoughtful consideration to the issue before us, and are of the considered view, that the failure on the part of the A.O to strike-off the irrelevant default in the 'SCN', dated 07.12.2016, had left the assessee guessing of the default for which it was being proceeded against for. We, thus, in the backdrop of our aforesaid observations, are of a strong conviction that the A.O had clearly failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the default for which it was being proceeded against, therefore, the penalty under Sec. 271(1)(c) of Rs. 3,35,707/- imposed by him in clear violation of the mandate of Sec. 274(1) of the Act cannot be sustained. Accordingly, the penalty of Rs. 3,35,707/- imposed by the A.O under Sec.271(1)(c) is quashed in terms of our aforesaid observations.

14. As we have quashed the penalty imposed by the A.O u/s 271(1)(c) for want of jurisdiction on his part, therefore, we refrain from adverting to and

therein adjudicating the contentions advanced by the Id. A.R as regards the merits of the case, which are left open.

15. Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 16.06.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 16.06.2021

PS: Rohit

Copy of the Order forwarded to :

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

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai