

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 2779/DEL/2018
[A.Y 2012-13]**

CLIX Finance India Pvt Ltd
[Earlier known as CLIX Finance India Ltd]
E029, 1st Floor, Hauz Khas
New Delhi

Vs.

The Dy. C.I.T
Circle - 10(1)
New Delhi

PAN : AAACG 0239 L

[Appellant]

[Respondent]

**Date of Hearing : 23.08.2021
Date of Pronouncement : 23.08.2021**

Assessee by : Shri Sachit Jolly, Adv.
Ms. Disha Jham, Adv

Revenue by : Shri Vinod Sharma, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the
Commissioner of Income Tax [Appeals] - 35, New Delhi dated
26.02.2018 pertaining to Assessment Year 2012-13.

2. The solitary grievance of the assessee is that the Id. CIT(A) erred in confirming the penalty of Rs. 90,27,690/- u/s 271(1)(c) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

3. Representatives of both the sides were heard at length. Case records carefully perused.

4. The roots for levy of penalty lie in the assessment order dated 31.03.2016 framed u/s 143(3) r.w.s 144C of the Act. Pursuant to the order of the TPO dated 20.01.2016 framed u/s 92CA(3) of the Act, the Assessing Officer enhanced the income of the assessee by Rs. 2,78,24,585/-. While proposing enhancement, the TPO observed "The Assessing Officer may examine the feasibility of initiation of penalty u/s 271(1)(c) of the Act in accordance with Explanation 7 of the same.

5. The TPO initiated penalty proceedings by issuing and serving notice u/s 274 r.w.s 271 of the Act dated 31.03.2016, which reads as under:

"Notice Under Section 274 Read With Section 271 of the Income
Tax Act-196

To

MIS GE CAPITAL SERVICES INDIA
401 & 402, 4TH FLOOR,
AGGARWAL MILLENIUM TOWER,
E-1-2-3, NETAJI SUBHASH
PLACE, PITAMPURA,
NEW DELHI- 110034

Date 31.03.2016

Where in the course of proceeding before me for the assessment
year 2012-13 it appears to me that you:-

*have without reasonable cause failed to comply with a notice
under section 142(1)/143(2) of the Income Tax Act, 1961 dated

*have concealed the particulars of your income or furnished
inaccurate particulars of such income n terms of explanation
1,2,3,4 and 5.

You are requested to appear before me at 11:30 A.M./P.M. on
29.04.2016

and show cause why an order imposing a penalty on you should not
be made under section 271 of the Income Tax Act, 1961. If you do
not wish to avail yourself of this opportunity of being heard in
person or through authorised representative you may show cause in
writing on or before the said date which will be considered before
any such order is made under section 271.

Place New Delhi
Date 31.03.2016


Assessing Officer

[D.S. Rathi]

Dy. Commissioner of
Income tax, Circle 10(1), C.R.
Building, New Delhi

Delete inappropriate paragraphs and words."

6. On 05.09.2016, the Assessing Officer once again issued noticed as under:


सत्यमेव जयते

**OFFICE OF THE
DEPUTY COMMISSIONER OF INCOME-TAX CIRCLE-10(1),
ROOM NO. 238A, C.R. BUILDING, I. P. ESTATE, NEW DELHI**

NOTICE UNDER SECTION 274 READ WITH SECTION 271(1)(c) OF
THE INCOME TAX ACT, 1961

Date: 05.09.2016

To,

The Principal Officer,
M/s GE Capital Services India Pvt. Ltd.
401 & 402, 4th Floor, Aggarwal Millenium Tower,
E-1-2-3, Netaji Subash Place, Pitampura,
New Delhi-110034

Sir/Madam,


**Subject: Penalty proceedings u/s 271(1)(c) of the I.T. Act, 1961 for A.Y. 2012-13
(FAN:- AAACG0239L) -rec.**


Please refer to the above.

Penalty notice u/s 271(1) (c) r. w. s 274 of the Income Tax Act, 1961 was issued to the assessee at the time of completion of the assessment u/s 143(3) of the I. T. Act, 1961 and penalty proceedings initiated are pending in your case.

You are, therefore, requested to show cause as to why penalty u/s 271(1) (c) may not be levied upon the company for the year under consideration. You are requested to please furnish your reply before the undersigned on or before 13.09.2016 in Room No. 238A, C. R. Building, New Delhi.

Please note that in case of non-compliance, it will be presumed that you don't have any explanation/evidence to offer on the captioned subject and the proceedings will be finalized on merits on the basis of material available on records.




(Anita Meena)
Deputy Commissioner of Income-tax
Circle-10(1), New Delhi
ANITA MEENA
Dy. Commissioner of Income Tax
Circle-10(1), C.R. Building
New Delhi

7. It can be seen from the above that the notice issued on 05.09.2016 is, in fact, not a notice but in continuation of earlier notice dated 31.03.2016 asking the assessee to furnish reply to the notice dated 31.03.2016.

8. A simple perusal of the notice dated 31,03.2016 would show that the Assessing Officer was not clear in his mind whether he wants to levy penalty for filing inaccurate particulars of income or for concealment of income.

9. In our considered opinion, the extracted notice is vague and ambiguous, as the charge framed by the Assessing Officer is not clear and it is not possible for the person to explain the charge whether it is for concealment of particulars of income or for filing inaccurate particulars of income.

10. The Hon'ble Apex Court in case of CIT Vs. SSA's Emerald Meadows - (2016) 73 Taxmann.com 248 (SC), while dismissing the SLP filed by the Revenue quashing the penalty by the Tribunal as well as Hon'ble High Court on the ground of unspecified notice has held as under:-

"Section 274, read with section 271(l)(c), of the Income-tax Act, 1961 - Penalty - Procedure for imposition of (Conditions precedent) - Assessment year 2009-10 - Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of *CIT v. Manjunatha Cotton X Ginning Factory* [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271 (1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income - High Court held that matter was covered by aforesaid decision of Division Bench and, therefore, there was no substantial question of law arising for determination - Whether since there was no merit in SLP filed by revenue, same was liable to be dismissed - Held, yes [Para 2] [In favour of assessee.

11. Hon'ble Delhi High Court in case of *Pr. CIT vs. Sahara India Life Insurance Company Ltd.* (supra) while deciding the identical issue held as under:

"21. The Respondent had challenged the upholding of the penalty imposed under Sec. 271(1)(c) of the Act, which was accepted by the IT AT. It followed the decision of the Karnataka High Court in *CIT v. Manjunatha Cotton & Ginning Factory* 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1) (c) the penalty

proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in *Commissioner of Income Tax v. SSA's Emerald Meadows -73 Taxmann.com 241 (Kar)*, the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 by order dated 5th August 2016.

12. Following the decisions rendered in the cases of CIT vs. Manjunatha Factory, CIT vs. SSA's Emerald Meadows and Pr. CIT Vs Sahara India Life Insurance Company Ltd. (supra), we are of the considered view that when the notice issued by the AO is bad in law being vague and ambiguous having not specified under which limb of section 271(1)(c) of the Act, the penalty proceedings initiated u/s 271(1)(c) are not sustainable.

13. In view of what has been discussed above, following the decisions rendered by Hon'ble High Courts discussed in the preceding paras and without entering into the other aspects of the case, we are of the considered view that when the very initiation of the penalty by way of issuance of vague and ambiguous notice u/s 271(1)(c) read with section 274 of the Act without specifically charging the assessee if he has concealed the particulars of income

or has furnished inaccurate particulars of such income, subsequent penalty proceedings are not sustainable, hence penalty levied by the AO and confirmed by the Id. CIT (A) is not sustainable and as such, the appeal filed by the assessee is allowed.

14. Considering the totality of the facts in light of the judicial decisions [supra] we direct the Assessing Officer to delete the penalty u/s 271(1)(c) of the Act amounting to Rs. 90,27,690/-.

15. We will not rest our findings at this stage, but would like to proceed on merits of the case.

16. Facts on record show that the assessee has taken his foreign Associated Enterprise as tested party, which bench marking was rejected by the TPO. Observations of the TPO are as under:

"12. The assessee has also stated that it has not tested overall margin of the AE but the margin earned from this particular transaction. Even if that point is accepted about the AE, tire question about the data of the comparables still remains. There is no doubt that we are using the overall margin of the comparables. If the assessee version is accepted, we

are comparing the overall margins of the comparables with the margin earned by the AE in one segment. That does not seem to be a good comparison when we do not have enough data about the comparables.

13. The margin that a commercial entity makes is a combination of various factors. The bedrock of any comparability' analysis is the availability of accurate data. We do not have sufficient and accurate data about the foreign comparables. We do not know what the lands of services that they provide are and what are the various sources of their revenue. We do not know whether their higher margins (as compared to the AEs) are on account of these services or any other kind of income. We do not know the contractual terms that they have entered into with their clients. We do not know whether they supply their services in the domestic market or do they export their services. The AEs are after all exporting their services.

14. In the absence of all this vital information, this benchmarking analysis by the assessee does not help the case. There is also no logic of taking the AEs as the tested party when the assessee is receiving these services for use in India. What we need to judge is whether the assessee is making a payment at arm's length on account of these services. That will be the actual separate benchmarking of this transaction. The

Hon'ble ITAT Delhi has held in *Global Vantage Pvt. Ltd. vs DCIT Cir-12(I), New Delhi. (ITA Nos 14328s2321/Del/2009)* that the use of foreign comparables and foreign tested party was incorrect.

15. Under these circumstances, it cannot be said that by following this course of action, the assessee has 'separately benchmarked' this transaction. This benchmarking approach of the assessee is therefore, rejected. Accordingly, the assessee shall be chosen as the tested party and we shall arrive at the arm's length price that would have been paid in uncontrolled circumstances for the receipt of such services."

17. In our considered view, the TPO simply did not accept the benchmarking of the assessee and has directed the Assessing Officer to consider the levy of penalty u/s 271(1)(c) of the Act in accordance with Explanation 7.

18. The Hon'ble High Court of Delhi in the case of *Verizon India Pvt Ltd ITA No. 460/2016 CM APPL 26591/2016* order dated 22.08.2016 has observed as under:

"We have considered the circumstances. The assessee in this case could not, in the opinion of this Court, visualize that out of the twelve comparables furnished, nine would be rejected and the matrix of calculations, as it worked, would radically undergo change. Pertinently, for the previous year 2006-07, the assessee's comparables - including some of those which were rejected in the present order, were in fact accepted when the matter reached finality. In these circumstances, the interpretation adopted by the AO was plainly erroneous. The Court is also of the opinion that in the absence of any overt act, which disclosed conscious and material suppression, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It might lead to a rather peculiar situation where the assessee who might otherwise accept such determination may be forced to litigate further to escape the clutches of Explanation 7. For the above reasons, we are also satisfied that no substantial question of law arises. The appeal is accordingly dismissed along with the pending application."

19. Considering the facts of the case in light of the decision of the Hon'ble Jurisdictional High Court of Delhi [supra] we do not find any merit in levy of penalty u/s 271(1)(c) of the Act.

20. In the result, the appeal filed by the assessee in ITA No. 2779/DEL/2018 is allowed.

The order is pronounced in the open court on 23.08.2021 in the presence of both the rival representatives.

Sd/-

**[SUCHITRA KAMBLE]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 23rd August, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	