

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A' NEW DLEHI**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 4932/Del/2017
Assessment Year: 2009-10**

Bumi Hiwat (India) P. Ltd., vs. DCIT, Circle 5(1),
A1/292, Pankha Road, New Delhi,
Janakpuri, New Delhi.

PAN : AABC5995M
(Appellant)

(Respondent)

Appellant by : Mrs. Shashi M. Kapila, Adv.
Sh. R.R. Maurya, Adv.
Sh. Pravesh Sharma, Adv.
Respondent by: Sh. Satpal Gulati, CIT/DR

Date of hearing: 30.11.2021
Date of order : 30.11.2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 29.03.2017 passed by the learned Commissioner of Income Tax (Appeals)-2, New Delhi ("Ld. CIT(A)") for the assessment year 2009-10, Bumi Hiwat (India) P. Ltd. ("the assessee"), preferred this appeal.

2. Brief facts of the case as could be culled out from the record that the assessee is engaged in the business of construction of highways as an approved NHAI engineering procurement construction contractor and also providing related services. For the assessment year 2009-10 they

have filed their return of income declaring a loss of Rs. 19,84,59,799/-. Assessment under section 143(3) of the Income Tax Act, 1961 (for short "the Act") was complete by order dated 24/12/2011 by making certain additions on account of disallowance of legal expenses, interest on working capital, banking charges and foreign exchange loss. Learned Assessing Officer simultaneously initiated proceedings under section 271(1)(c) of the Act against the assessee for concealment of income/furnishing of inaccurate particulars thereof. Notice under section 271(1)(c) read with section 274 of the Act was issued on 23/12/2011. By order dated 24/3/2015 learned Assessing Officer levied a penalty of Rs.3,39,27,424/-for furnishing of inaccurate particulars of income.

3. Assessee preferred appeal before the Ld. CIT(A) and by order dated 29/3/2017 Ld. CIT(A) upheld the penalty and dismissed the appeal. Hence, the assessee filed this appeal both on technical issues and also on merits. Though the assessee sought to challenge the penalty proceedings on the ground of limitation by way of additional grounds, at the time of arguments, Ld. AR submitted that the assessee is not pressing the additional ground. Recording the same, we observe that the additional ground is not pressed and therefore, the request for admission of additional ground stands rejected.

4. It is submitted on behalf of the assessee that the penalty order passed by the learned Assessing Officer is in violation of the principles of natural Justice and void-ab-initio as the penalty notice issued by the Assessing Officer under section 271(1)(c) read with section 274 of the Act does not specify the ground for which the penalty was levied, namely, whether the penalty is on account of furnishing of inaccurate particulars

of income or for concealment of income. Assessee also challenged the penalty proceedings on merits stating that there is no concealment of income whatsoever nor any furnishing of inaccurate particulars, inasmuch as all the facts assessee for the assessment were revealed before the learned Assessing Officer, and therefore, no penalty is leviable. By placing reliance on the decisions of the Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565, Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 taxman.com 241 (SC) and also the decision of the Hon'ble jurisdictional High Court in the case of Ld. PCIT vs. Sahara India Life Insurance Co Ltd in ITA No. 475 and batch of 2019, Ld. AR submitted that penalty cannot be sustained.

5. Per contra, placing on the decision of the Hon'ble Madras High Court in the case of Sundaram Finance Ltd vs. CIT (2018) 403 ITR 407 (Madras), Ld. DR submitted that the assessee understood the purport of the notice and without raising any objection whatsoever they have participated in the penalty proceedings as well as the proceedings before the Ld. CIT(A) and, therefore, no prejudice was caused to the case of the assessee. He therefore, prayed to dismiss the appeal. He further submitted that the conduct of the assessee in making untenable claims amounts to furnishing of inaccurate particulars of income and thereby concealment of income.

6. We have gone through the record in the light of the submissions made on either side. Assessment order dated 24/12/2011 clearly shows that the AO recorded satisfaction that the assessee was guilty of

concealment of income/filing inaccurate particulars of income and therefore proceedings under section 271(1)(c) of the Act were to be initiated separately. A copy of notice dated 23/12/2011 is produced before us and it shows that the penalty was proposed for the assessee having concealed the particulars of income or furnishing inaccurate particulars of such income. Neither the assessment order, nor the notice issued under section 271(1)(c) read with section 274 of the Act specify the ground on which the penalty was proposed. It simply states that either for concealment of income or for furnishing of inaccurate particulars, such proceedings are initiated. It is therefore, clear that neither the assessment order nor the notice issued under section 274 of the Act give any reasonable grounds for the assessee to defend themselves.

7. In the case of CIT vs Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar). Vide paragraph 60, the Hon'ble Karnataka High Court has held as follows :-

"60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the

grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.”

8. In Commissioner of Income Tax v. SSA’s Emerald Meadows (2016) 73 taxman.com 241 (Kar) the Hon’ble Karnataka High Court Considered the question of law as to,-

“Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?”

- And the Hon’be High Court ruled answered the same in favour of the assessee observing that:

“The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short ‘the Act’) to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the

case of Commissioner Of Income Tax -Vs- Manjunatha Cotton And Ginning Factory (2013) 359 ITR 565. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."

The Special Leave Petition filed by the Revenue challenging the aforesaid judgement of the High Court was dismissed by the Hon'ble Supreme Court holding :

"We do not find any merit in this petition. The special leave petition is, accordingly, dismissed."

9. In PCIT vs. Sahara India Life Insurance company limited case ITA No 475/2019 and batch order dated 02/08/2019, Hon'ble Delhi High Court, upheld the view taken by the Tribunal basing on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) and SSA's Emerald Meadows (supra) wherein it was held that the notice issued by the learned Assessing Officer would be bad in law if it did not specify which limb of section 271(1)(c) of the Act the penalty proceedings had been initiated under i.e., whether for concealment of particulars of income or for furnishing of inaccurate particulars thereof. Relevant observations of the Hon'ble High Court read that,-

"21. The Respondent had challenging the upholding of the penalty imposed under section 271(1)(c) of the Act, which was accepted by the ITAT. It followed the decision of 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 judgement in the subsequent order in

Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 taxman.com 241 (Kar), the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.

22. *On this issue again this court is unable to find any error having been committed by the ITAT."*

10. It is, therefore, clear that for the AO to assume jurisdiction u/s 271(1)(c), proper notice is necessary and the defect in notice u/s 274 of the Act vitiates the assumption of jurisdiction by the learned Assessing Officer to levy any penalty. In this case, facts stated supra, clearly establish that the notice issued under section 274 read with 271 of the Act is defective and, therefore, we find it difficult to hold that the learned AO rightly assumed jurisdiction to passed the order levying the penalty. Since the assessee succeeds on technical ground, any discussion on merits would be academic. As a consequence of our findings above, we direct the Assessing Officer to delete the penalty in question.

11. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 30th November, 2021.

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER

Dated: 30/11/2021

'aks'

Sd/-

(K. NARSIMHA CHARY)
JUDICIAL MEMBER