

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

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)  
AND SHRI OM PRAKASH KANT (ACCOUTANT MEMBER)**

**ITA No.592 & 593/MUM/2019  
C.O. No. 93/Mum/2021  
(Arising out of ITA No.592/Mum/2019)  
C.O. No. 94/Mum/2021  
(Arising out of ITA No. 593/Mum/2019)  
Assessment Years: 2012-13 & 2013-14**

DCIT (IT)-2(1)(1)  
1713, 17<sup>th</sup> Floor, Air India  
Building, Nariman Point,  
Mumbai – 400 021

CLSA Ltd.  
**Vs.** C/o BMR & Associates CAS,  
BMR House, 368 DR. RK  
Shirodkar Marg, Parel,  
Mumbai 400012

**PAN No. AACCC4522E**  
**Respondent**

**Appellant**

Assessee by : Mr. Paras Savla, AR  
Revenue by : Mr. Anand Mohan, DR

Date of Hearing : 11/03/2022  
Date of : 31/03/2022  
pronouncement

**ORDER**

**PER OM PRAKASH KANT, AM:**

These appeals by the revenue and Cross Objections by the assessee are directed against two separate orders, each dated 15.11.2018, passed by the Id. Commissioner of Income Tax (Appeals)-56, Mumbai [in short the Id. CIT(A)]for A.Y. 2012-13 and A.Y. 2013-14, respectively, in relation to penalty u/s 271(1)(c) of the Income Tax Act, 1961, (in short 'the Act')

levied by the A.O. As identical issue is involved in same set of circumstances, both these appeals and C.Os were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. The ground of appeal raised by the revenue for A.Y.2012-13 are reproduced as under:

- “1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty levied by the AO without appreciating the fact that in AY 2011-12, the Id. DRP has upheld the quantum addition and the assessee has voluntarily offered the reimbursement of Rs.47,90,32,670/- as fee for technical Services (FTS) to be taxable in India this year i.e. AY 2012-13?
2. Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in holding a view that there was no furnishing of inaccurate particulars of income by relying on its own decision for AY 2011-12 wherein the AO and the Ld. DRP established the fact that income as FTS was knowingly and willfully misclassified as reimbursement of expenses thereby holding assessee has furnished inaccurate particulars of income?
3. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.
4. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

2.1 The Ground of Cross Objection of the assessee for A.Y. 2012-13 are reproduced as under:

- “1. On the facts and circumstance of the case and in law, the CIT(A) erred in upholding the AO's penalty order, without appreciating that the AO had not specified the charge under section 271(1)(c) for levy of penalty, either in the notice under section 274 or under the assessment order. Therefore, the penalty proceedings were void-ab-initio.”

2.2 The Ground of appeal of the revenue for A.Y. 2013-14 are reproduced as under:

- “1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty levied by the AO without

appreciating the fact that in AY 2011-12, the Id. DRP has upheld the quantum addition and the assessee has voluntarily offered the reimbursement of Rs.31,03,43,845/- as fee for technical Services (FTS) to be taxable in India this year i.e. AY 2013-14?

2. Whether on the facts and in the circumstance of the case and in law, the Ld. CIT(A) has erred in holding a view that there was no furnishing of inaccurate particulars of income by relying on its own decision for AY 2011-12 wherein the AO and the Ld. DRP established the fact that income as FTS was knowingly and willfully misclassified as reimbursement of expenses thereby holding assessee has furnished inaccurate particulars of income?
3. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.
4. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

2.3 The Grounds of Cross Objection of the assessee for A.Y. 2013-14 is as under:

- “1. On the facts and circumstance of the case and in law, the CIT(A) erred in upholding the AO's penalty order, without appreciating that the AO had not specified the charge under section 271(1)(c) for levy of penalty, either in the notice under section 274 or under the assessment order. Therefore, the penalty proceedings were void-ab-initio.”

3. At the outset attention of the Id. Counsel of the assessee was drawn to the delay of 523 days pointed out by the registry in filing the C.Os. The Id. Counsel of the assessee submitted that in these cases, copy of Form No. 36 along with ground of the appeal filed by the revenue, were received by the assessee from the Tribunal on 13.01.2020 and therefore, due date of filing of the C.O was 11.02.2020, whereas the C.Os have been filed on 19.07.2021. The Id. Counsel submitted that period from 15.03.2020 till 19.07.2021 is covered by the order of the Hon'ble Supreme Court in M.A. No 665/2021. Therefore, he submitted that effective delay is only of 32 days from 11.02.2020 to 15.03.2020. The Id. Counsel of the assessee submitted that initially the assessee was advised to seek remedy against the order of Id. CIT(A) by way of application under

Rule 27 of the ITAT Rules. However, later on the assessee was advised to file C.O. and therefore delay in filing the C.O is solely on account of legal advise received by the assessee and there was no deliberate or any malicious intention in delay in filing the C.O. The Counsel submitted that delay was due to bonafide belief and circumstances beyond control of the assessee and accordingly, he submitted to condone the delay in filing the appeal. On the contrary, the ld. D.R opposed condoning of the delay.

4. We have heard the rival submission of the parties and perused the material available on record on the issue of condonation of the delay. The delay of 32 days excluding the period covered by the decision of the Hon'ble Supreme Court (supra) has not being disputed by the Revenue. The Hon'ble Supreme Court vide order dated 27.04.2021 in M.A. No. 665/2021 has extended the period of limitation as prescribed under any general or special laws in respect of judicial or quashi judicial proceedings till the further orders. In terms of Sec. 253(5) of the Act, the Tribunal may admit the appeal/C.O. filed beyond the period of limitation where it is satisfied that their exists a sufficient cause on the part of the assessee for not presenting the appeal within the prescribed time. The explanation of the assessee therefore becomes relevant to determine whether the same reflects sufficient and reasonable cause of its part in not presenting the present C.O. within the prescribed time.

5. In the case of **Collector Land Acquisition Anant Nag & Anr. Vs. Mst. Katigi & Ors. (1987) to SCC 107**, the Hon'ble Supreme Court has held that expression 'sufficient cause' employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner to sub-serve the end of the justice that being a life purpose of

the existence of the institution of Courts. It is further held by the Hon'ble Supreme Court that such liberal approach is adopted on one of the principle that refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against these when delay is condoned, the highest that can happen is that a case would be decided on merit after hearing the parties. The Hon'ble Supreme Court has also laid down that when substantial justice and technical consideration are pitted against each other, the cause of substantial justice deserves to be preferred as the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. It is also held by the Hon'ble Supreme Court that there is no presumption that delay is occasioned deliberately or on account of culpable negligence, or on account of malafide. A litigant does not stand to gain by resorting to delay. In fact, he runs a serious risk. In the instant case, applying the same principles, we find that there is no culpable negligence or malafide on the part of the assessee in delayed filing of the present C.O. and it does not stand to gain by resorting to such delay. Therefore, in our opinion there exist a sufficient and reasonable cause for condoning the delay in filing the present cross objections.

6. In the light of aforesaid discussion and in exercise of powers u/s 253(5) of the Act, we hereby condone the delay in filing the present cross objections as we are satisfied that there exist a sufficient cause for not presenting the Cross Objections within the prescribed time and accordingly same are admitted for adjudication.

7. Briefly stated, the facts of the case are that the Id. Assessing Officer in draft assessment orders passed for A.Y. 2012-13 held the

reimbursement for services received by the assessee from its Associated Enterprises as fee for technical services (FTS) following the finding of the ld. Dispute Resolution Panel (DRP) in assessment year 2011-12. In A.Y. 2011-12, the assessee did not prefer appeal against the finding of ld. DRP in this issue. Based on direction of the ld. DRP for A.Y. 2011-12, the aseseee offered the reimbursement amounting to Rs.47,90,32,670/- to tax in India for A.Y. 2012-13. The assessee did not file any objection before the ld. Dispute Resolution Panel (for short 'DRP') against the draft assessment order and accepted the said reimbursement as FTS. The facts in respect of A.Y. 2013-14 are also similar. In view of no appeal filed the A.O levied penalty u/s 271(1)(c) of the Act in AY 2012-13 by way of order dated 27.03.2017 and for A.Y. 2013-14 by way of order dated 31.08.20127. On further appeal, the ld. CIT(A) in both the A.Ys. cancelled the penalty imposed by the A.O. While cancelling the penalty the ld. CIT(A) followed his own finding in A.Y. 2011-12.

8. Before us, the revenue is in appeal challenging deletion of the penalties on merit, whereas the assessee is before us by way of C.Os, that the Assessing Officer has not specified the relevant limb of concealment of income or furnishing inaccurate particulars of income in the notice issued for levying the penalty u/s 271(1)(c) of the Act. We find that identical issue has been raised by the assessee under Rule 27 of the ITAT Rules, 1963 also.

9. We have heard the rival submission of the parties on the issue of Cross objection raised by the assessee. Before us, the ld. Counsel of the assessee submitted that identical issue in A.Y. 2011-12 has been allowed in favour of the assessee by the Tribunal. The ld. Counsel brought our attention to the penalty notices issued by the A.O in both the A.Y. 2012-

13 and 2013-14 and submitted that A.O has not striken out relevant limb of either concealment of income or furnishing of inaccurate particulars of income in these notices. He submitted that in view of the above, issue in dispute is squarely covered by the decision of the Tribunal in A.Y. 2011-12. Relevant finding of the Tribunal in A.Y. 2011-12 in ITA No. 6390/Mum/2018 and C.O. 222/Mum/2019 is reproduced as under:

“8. We heard the rival submissions and perused the material on record. Prima facie, the Ld.AR contentions are that the Notice u/sec 274 r.w.s.271 of the Act issued by the Assessing officer is defective, as it does not mention whether the penalty is levied for concealment of particulars of income or furnishing inaccurate particulars of income. The Ld. AR has filed the submissions and demonstrated the copy of Notice at page 15 of the paper book. We find, the Hon’ble Apex Court dismissed the Special Leave Petition filed by the Revenue against the judgment of the Hon’ble ITA No. 6390/Mum/2018 & CO No. 222/Mum/2019 CLSA Ltd, Mumbai - 10 - Karnataka High Court in ITA No.380 of 2015 dated 23/11/2015 in the case of CIT vs. M/s. SSA’s Emerald Meadows where an identical issue was decided in favour of the assessee. We consider it appropriate to refer to the operative part of the decision of the Hon’ble High Court of Karnataka in the case of CIT Vs. M/s. SSA’s Emerald Meadows (supra) is read as under:

“2. This appeal has been filed raising the following substantial questions of law:

(1) 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?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid despite the amendment of Section 27.41 13) with retrospective effect and bra virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?

(3) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the

basis of notice issued under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?

3. 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 INCOMETAX - VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

4 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.”

9. We are of the opinion that penalty provisions u/s 271(1)(c) of the Act are attracted, when the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is a well accepted proposition that the aforesaid two limbs of section 271(1)(c) of the Act carry different meaning. Therefore, it was imperative for the AO to strike off irrelevant limb so as to make the assessee aware as to what is the charge made against him and so that he can respond. Further, the Hon'ble High Court of Karnataka in the case of CIT vs. Manjunatha Cotton Ginning Factory (2013) 359 ITR 565 has observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per the Hon'ble High Court, where the AO proposes to invoke the first limb being the concealment then, notice has to be appropriately marked. Further, the Hon'ble High Court has held that the standard proforma of notice u/s 274 of the Act, without striking of the relevant clauses would lead to inference of non-application of mind by the AO. In the present case, the learned Authorised Representative demonstrated the notice, we find that the AO is not sure whether he was to proceed on the basis that the assessee has concealed the particulars of his income or furnished inaccurate particulars of income. The Hon'ble High Court also observed that in such a situation, the levy of penalty suffers from non-application of mind.

10. We, considering the ratio of decision of Hon'ble Supreme Court in the case of CIT VS M/s. SSA's Emerald Meadows (supra), Hon'ble High Court of Karnataka in the case CIT VS Manjunatha Cotton Ginning Factory (supra), and Hon'ble jurisdictional High Court decision ITA No 1154/Mum/2014 in CIT Vs Samson Perinchary observe that the action

of the AO in passing the penalty order u/s 271(1)(c) shows that there is non-application of mind thereby the penalty order is not sustainable. We also rely on ratio of the recent decision of the Hon'ble Jurisdictional High Court in Tax Appeal No. 51 & 57 of 2012 of Mohd. Farhan A. Shaikh v. DCIT dated 11.03.2021 has dealt on this disputed issue of validity of notice in question No. 1 Para 180,181 &182 and the observations are read as under:

“180. One course of action before us is curing a defect in the notice by referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice—and that prevention takes just a tick mark. Prudence demands prevention is better than cure.

Answers:

Question No.1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice not striking off the irrelevant matter—vitiate the penalty proceedings?

181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.”

**The Ld. DR fairly accepted the Jurisdictional High Court decision in Mr. Mohd. Farhan A. Shaikh Vs DCIT (supra) and the fact that Assessing Officer has not applied his mind on the issue of penalty notice in non striking of charge, whether the penalty is levied for furnishing in accurate particulars of income or concealment of income which is clearly evident on record. Accordingly, we quash the penalty notice and allow the ground of cross objections in favour of the assessee.**

11. Since, we have allowed the cross objection filed by the assessee and the revenue appeal becomes in fructuous and is dismissed.

(emphasis supplied externally)

10. On perusal of the notices for the year under consideration, we find that relevant limb of either concealment of income or furnishing inaccurate particular of income has not been stricken out in the notices issued for penalties by the Assessing Officer.

In view of the ground raised in the year under consideration being identical to ground before the coordinate bench of Tribunal in A.Y. 2011-12, therefore, respectfully following the finding of the Tribunal (supra) on the issue in dispute, we quash the penalty levied and allow the ground of C.O. in favor of the assessee. Since we have allowed the C.O. filed by the assessee, the appeal filed by the revenue have become infrucous, thus same are dismissed. Since, we have already allowed the C.O. of the assessee, the application(s) under Rule 27 of ITAT Rules filed by the assessee are also rendered infructuous.

11. In the result, the Cross Objections filed by the assessee for both the A.Ys. 2012-13 & 2013-14 are allowed, whereas the appeals of the revenue for A.Y. 2012-13 and 2013-14 are dismissed.

Order pronounced in the open court on 31.03.2022

Sd/-  
(Vikas Awasthy)  
JUDICIAL MEMBER

Sd/-  
(Om Prakash Kant)  
ACCOUNTANT MEMBER

Mumbai,  
Dated 31.03.2022  
PS: Rohit

**आदेश की प्रतिलिपि ढ ग्रेषित/Copy of the Order forwarded to :**

1. अढीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंढित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अढील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अढीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,  
सत्यापित प्रति // True Copy //

( Asst. Registrar)  
ITAT, Mumbai