

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "SMC" BENCH: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

**ITA No.3788/Del/2019
[Assessment Year : 2010-11]**

George Kutty, C/o-M/s. Oasis Tours India (P.) Ltd., C-40, Middle Circle, Dwarka Sadan, Connaught Place, New Delhi-110001. PAN-AAJPK4005H	vs	DCIT, Circle-13(1), New Delhi.
APPELLANT		RESPONDENT
Appellant by	Shri Manish Malik, Adv.	
Respondent by	Shri Om Parkash, Sr.DR	
Date of Hearing	11.08.2022	
Date of Pronouncement	24.08.2022	

ORDER

PER KUL BHARAT, JM :

The present appeal filed by the assessee for the assessment year 2010-11 is directed against the order of Ld. CIT(A)-7, New Delhi dated 12.04.2019.

The assessee has raised following ground of appeal:-

1. *"That in the facts and circumstances of the case the Ld. CIT(A) grossly erred in imposing the penalty amounting to Rs. 6,00,232/- u/s 271(l)(c) of the IT Act, 1961 by the Ld. DCIT, Circle 13(1), New Delhi.*
2. *That on the facts and circumstances of the case the Ld. CIT(A) grossly erred in sustaining the action of the Ld. DCIT, Circle 13(1) New Delhi in holding that the appellant has furnished inaccurate particulars of income on account of the following claim- addition u/s 68 on account of cash credit in bank account- Rs. 19,42,500/-*
3. *That on the facts and circumstances of the case the Ld. CIT(A) grossly erred in sustaining the action of the Ld. DCIT, Circle 13(1), New Delhi to record his satisfaction towards furnishing of inaccurate particulars of income in the course of assessment*

proceedings as required by the provisions of section 271(l)(c) of the Income Tax Act, 1961.

4. *That the Ld. CIT(A) was not justified in deciding the appeal against the appellant on the basis of notice issued u/s 274 r.w.s. 271 (l)(c) of the IT Act, 1961 ,which is bad in law as it does not specify under which limb of section 271 (l)(c) of the Income Tax Act, 1961 the penalty proceeding had been initiated i.e. whether for concealment of particulars of income or furnishing inaccurate particulars of income.*
5. *That the appellant craves, leave to add, amend or alter any grounds of appeal either before or at the time of hearing of appeal.”*

FACTS OF THE CASE

2. Facts giving rise to the present appeal are that the assessment was framed by the Assessing Officer [“AO”] vide order dated 08.03.2013 u/s 143(3) of the Income tax Act, 1961 [“the Act”]. Thereby, the AO made addition of Rs.15,69,500/- on account of cash credits u/s 68 of the Act. Further, the AO made addition of Rs.17,83,073/- on account of credit card payments. The AO also initiated penalty proceedings u/s 271(1)(c) of the Act and subsequently, the AO imposed penalty of Rs.6,00,232/- u/s 271(1)(c) of the Act.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A) who after considering the submissions, dismissed the appeal of the assessee.

4. Aggrieved against the order of Ld.CIT(A), the assessee is in appeal before this Tribunal.

5. At the outset, Ld. Counsel for the assessee submitted that the imposition of penalty suffers from patent illegality as the notice u/s 271(1)(c) of the Act, was issued mechanically without specifying the charge. He further

submitted that there is no concealment on the part of the assessee. He placed reliance on the various case laws.

6. On the contrary, Ld. Sr. DR appearing on behalf of the Revenue, opposed these submissions and also filed written submissions. For the sake of clarity, the same is reproduced as under:-

In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to levy of penalty u/s 271(1)(c) of I.T.Act:

1. Union of India v. Dharamendra Textile Processors [(2007) 295 ITR 244]

where Hon'ble Supreme Court held that Penalty under section 271(1)(c) is a civil liability for which willful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of proceedings under section 276C

2. R L Traders Vs ITO (2017-TIOL-2583-HC-DEL-IT)

where Hon'ble Delhi High Court held that citing of past instance or lack of absence of cross-examination, cannot vitiate the initiation and culmination of penalty proceedings in case of accommodation entry

3. CIT Vs Zoom Communication (P.) Ltd. [191 Taxman 179 (Delhi)]/[2010] 327 ITR 510 (Delhi)/[2010] 233 CTR 4651

where Hon'ble Delhi High Court held that If assessee makes a claim which is not only incorrect in law, but is also wholly without any basis and explanation furnished by him for making such a claim is not found to be bona fide, Explanation 1 to section 271(1)(c) would come into play and assessee will be liable to penalty

4. Khandelwal Steel And Tube Traders Vs ITO [2018] 95 taxmann.com 15 (Madras)

where Hon'ble Madras High Court held that explanation as to why there was an omission or wrong statement in original return must be due to bona fide inadvertence or bona fide mistake on part of assessee and even

if assessee agreed to addition with a condition that penalty could not be imposed, department is not precluded from initiating penalty proceedings

5. B.A. Balasubramaniam & Bros. Co Vs CIT [116 Taxman 842, 236 ITR 977, 157 CTR 556]

where Hon'ble Supreme Court held that difference between income assessed and income returned being more than 20 per cent, Explanation to section 271(1)(c) became applicable and assessee having failed to discharge onus being cast on assessee by virtue of said Explanation, Assessing Officer was justified in imposing penalty

6. CIT vs Gates Foam & Rubber Co [91 ITR 467] CIT vs India Seafood M05 ITR 708]

where Hon'ble Kerala High Court held that Claiming excessive deduction also amounts to concealment of income

7. Steel Ingots Ltd vs. CIT [296 ITR 228]

where Hon'ble Madhya Pradesh High Court held that in case of concealment of true income chargeable to tax by making bogus claim, levy of penalty u/s 271(1)(c) read with Explanation 1 is justified

8. CIT Vs Escorts Finance Ltd [183 Taxman 453 (Delhi)]/[2010] 328 ITR 44 (Delhi)]/[2009] 226 CTR 105]

where Hon'ble Delhi High Court held that if claim made in return of income appears to be ex facie bogus, it would be treated as a case of concealment or furnishing of inaccurate particulars and penalty proceeding would be justified

9. CIT Vs R.M.P. Plasto (P.) Ltd H84 Taxman 372 (SC)]/[2009] 313 ITR 397 (SC)]/[2009] 227 CTR 635]

where Hon'ble Supreme Court held that Confirmed penalty upon assessee for concealment of income under section 271(1)(c) because positive income of assessee was reduced to nil after allowing set-off of carried forward losses of earlier years

10. K.P. Madhusudhanan Vs CIT [2001] 118 Taxman 324 (SC)]/[2001] 251 ITR 99 (SC)]/[2001] 169 CTR 489 (SC)]

The Hon'ble Apex Court held that the onus is on the assessee to prove that he has not concealed or furnished inaccurate particulars of his income. Hon'ble Supreme Court held that where assessee was unable to furnish evidence for loans and it offered amount of transaction as additional income, Assessing Officer was justified in imposing penalty u/s 271(1)(c) after finding the explanation to be unacceptable and applying Explanation 1(B) of the section.

11. The Hon'ble Supreme Court in the case of CIT Vs Atul Mohan Bindal [2009] 317 ITR [SC] 1 has held that penalty u/s 271 [1][c] is neither criminal nor quasi criminal but a civil liability, albeit a strict liability. Such liability being civil in nature, mens-rea is not essential.

On the issue of not marking the specific limb in the Penalty Notice:

1. ITO Vs. Rajan Kalimuthu [ITA No.2900/CHNY/2018] [TS-289-ITAT-2019(CHNY)]

ITAT: AO's failure to strike -off column in SCN, no ground for deleting penalty.

Chennai ITAT sets aside CIT(A) order for AY 2014-15, rules that penalty order passed by AO could not be quashed on the ground that the relevant column of the Show Cause Notice (SCN) had not been struck off, remands back matter to CIT(A) for fresh adjudication on merits; Assessee- individual had failed to disclose long term capital gains on sale of land and building and could not substantiate his claim about purchase of another house property, and thus the AO brought to tax LTCG and also levied penalty u/s 271(1)(c) ; Notes that CIT(A) had deleted the penalty by applying the ratio laid down by Karnataka HC in Manjunatha Cotton and Ginning Factory case; Further takes note of Bangalore ITAT ruling in case of P.M.Abdulla, wherein it was clarified that the said HC decision had not considered the provisions of sec.292B, also notes that as per subsequent Karnataka HC ruling in case of Sri. Durga Enterprises, it was held that in a case where the assessee participated in the entire proceedings, if such a defect in the notice was not allowed to be cured, the purpose/intent of sec.292B would be defeated; Thus remarks that, "... we are of the considered opinion that

Id. CIT(A) ought not have deleted the penalty based on the decision of Manjunatha Cotton and Ginning Factory.”: ITAT

In Manjunatha Cotton case [TS-936-HC-2012(KAR)1, Karnataka HC had held that ground of initiation of penalty should be clearly stated in notice for initiation.

Last year, Revenue had filed a SLP before SC. regarding Karnataka HC interpretation of Sec. 271(1) (c) in State Bank of Mysore case [TS-6803-HC-2017(KARNATAKA)-Q] which relied upon Manjunatha Cotton decision. The issue is still pending adjudication.

2. Sundaram Finance Ltd. Vs CIT T20181 99 taxmann.com 152 (SC)

SLP dismissed against High Court ruling that where assessee claimed depreciation on non-existent assets, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income

3. Sundaram Finance Ltd. Vs CIT [2018] 93 taxmann.com 250 (Madras)/[2018] 403 ITR 407 (Madras)

Where Hon’ble Madras High Court held that where notice did not show nature of default, it was a question of fact. The assessee had understood purport and import of notice, and hence, no prejudice was caused to the assessee. It considered decision of Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.).

Relevant part of the order is reproduced below:

"15. Before us, the assessee seeks to contend that the notices issued under Section 274 r/w. Section 271 of the Act are vitiated since it did not specifically state the grounds mentioned in Section 271(l)(c) of the Act.

16. We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question

of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.

17. Thus, for the above reasons, Substantial Questions of law Nos. 1 and 2 are answered against the assessee and in favour of the revenue. The additional substantial question of law, which was framed is rejected on the ground that on facts the said question does not arise for consideration as well as for the reasons set out by us in the preceding paragraphs.

In the result, Tax Case Appeals are dismissed. No costs."

4. CIT Vs Smt. Kaushalya T19941 75 Taxman 549 (Bombay)/[1995] 216 ITR 660 (Bombay)

In the above case, IAC had issued show-cause notice dated 28-3-1972 under section 274(2). Assessee had no knowledge of exact charge against him. Not only word 'or' had been used between two groups of charges but there was use of word 'deliberately' also. IAC imposed penalty of Rs. 13,000 for assessment year 1967-68 and ITO imposed penalty of Rs.

22,000 and Rs. 10,000 for assessment years 1968-69 and 1969-70, respectively. Tribunal quashed penalties and held that there was absence of reasonable opportunity of hearing because three show-cause notices were ambiguous and defeated very purpose of giving reasonable opportunity of hearing as contemplated under section 274 and two orders of ITO were without jurisdiction. It was held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate notice under section 274. Penalty orders passed by ITO for assessment years 1968-69 to 1969-70 were perfectly valid and there was no justification for quashing same on ground of absence of jurisdiction

5. Trimurti Engineering Works Vs ITO T20121 25 taxmann.com 363 (Delhi)/[2012] 138 ITD 189 (Delhi)/[2012] 150 TTJ 195 (Delhi)

where Hon'ble ITAT Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

Relevant part of the order is reproduced below:

"5.2 It is also submitted that the notice is vague. We have already seen that in the notice one of the alternatives, i.e., concealment of particulars of income or furnishing of inaccurate particulars of income has not struck off. In the case of Gujarat Credit Corpn. Ltd. v. Asstt. CIT [2008] 113 ITD 133 (Ahd.) (SB), relied upon by the Id. Counsel, the AO had initiated penalty proceedings for disallowance of loss as capital loss. This ground was not accepted by the CIT (Appeals) as correct. It was held that in view of the finding of the CIT (Appeals), the foundation on which penalty was initiated has fallen down. Therefore, the penalty on that ground cannot fructify. The CIT (Appeals), however, upheld the disallowance on a totally different ground. In such a situation, the penalty could have been initiated by the CIT (Appeals) but that will not give jurisdiction to the AO to levy the penalty. 1/1/e have given serious consideration to this issue also. This decision may have some implication on the levy of penalty in respect of first addition regarding the cash shortage. At the same time, it is also true that the assessee must be appraised of the charge in the notice for which he is sought to be penalized. The whole issue has to be decided on the

basis of the facts of each case. When we go through the assessment order, it is seen that the AO has examined the cash book in a great detail and various entries therein between 01.07.2004 to 31.3.2005 have been reproduced on page nos. 14 to 27. Similarly, the receipts by way of advances from Trimurti Engineering Works, having implication on the second addition, have been reproduced in the assessment order on page nos. 27 to 29. The finding of the AO in respect of the first addition is that cash flow statement filed by the assessee is nothing but an afterthought and a colourable device to avoid tax. This cash flow statement was sought to be supported by cash flow statement in respect of two partners, Shri N.S. Panwar and Shri Y.S. Panwar. These statements were also examined and various defects were noticed. Coming to advances for job work, it is inter-alia mentioned that most of the entries are above Rs. 20,000/-, but in the reconciliation statement the entries have been bifurcated so that each one of them is less than Rs. 20,000/-, which seems to have been done to avoid penalties under sections 271D and 271E of the Act. The assessee has not done any job work and no income has been shown although an amount of Rs. 16.25 lakh is stated to have been taken from a single party on a number of occasions. Finally, it has been recorded in respect of both the additions that the amount is treated as income from undisclosed sources. All these observations made by the AO show that it was his case that particulars of income have been concealed. It is not a case where any disallowance has been made but a case where the assessee was found in possession of certain unaccounted money which was utilized in the course of business without paying tax thereon. Therefore, when we see the notice and the contents of assessment order, it is clear that the notice was issued for concealing particulars of income. The notice is not a stand alone document. It is based on the assessment order. Without finding regarding one or the other charge, the notice cannot be issued. However, if two are read together, it is clear that the notice has been issued in respect of concealment of particulars of income. In view of these observations, it is held that the notice is not vague."

6. Hybrid Rice International Pvt.Ltd. Vs CIT (ITA no. 285/Del/2007)

where Hon'ble ITAT Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

Relevant part of the order is reproduced below:

6.7. We now deal with the case laws cited by the Ld. Counsel for the Assessee.

(i) *CIT vs. Manjunatha Cotton and Ginning Factory and others (2013) 359 ITR 565 (Kar.)*: The Hon'ble Karnataka High Court was considering the case where there was no proof of concealment of income. It was a case where the Hon'ble High Court held that the Explanation given by the assessee was bonafide and merely because the assessee agreed to the addition and the assessment order was passed on the basis of this admission, in the absence of any material on record to show concealment of income, no penalty can be levied. The facts of the case on hand are entirely different. Our finding of fact is that the assessee has not voluntarily offered the income to tax. In fact the explanation given is in our opinion not bonafide...

(ii) The Hon'ble Delhi High Court in the case of *Ms. Madhushree Gupta vs. UOI and another (2009)* reported in 317 ITR 107 has laid down that prima facie satisfaction of the AO that the case may be served imposition of penalty should be discernible from the order passed during the course of the proceedings. In the case on hand the prima facie satisfaction of the AO is discernible from the assessment order. At para 36, page 128 of this order the Hon'ble Court has observed as follows.

"A bare reading of section 271(l)(c) would show that to initiate penalty proceedings following pre-requisites should obtain.

- (i) The Assessing Officer should be satisfied that:-
- a) The assessee has either concealed particulars of his income; or
 - b) furnished inaccurate particulars of his income; or
 - c) infringed both (a) and (b) above

(ii) This satisfaction should be arrived at during the course of any proceedings. These could be assessment; reassessment or rectification proceedings, but not penalty proceedings.

(Hi) If ingredients contained in (i) and (ii) are present a notice to show cause under Section 274 of the Act shall issue setting out therein the infraction the assessee is said to have committed. The notice under Section 274 of the Act can be issued both during or after the completion of assessment proceedings, however, the satisfaction of the Assessing Officer that there has been an infraction of clause (c) of sub-section (1) of Section 271 should precede conclusion of the proceedings pending before the Assessing Officer.

(iv) The order imposing penalty can be passed only after assessment proceedings are completed. The time frame for passing the order is contained in Section 275 of the Act.

To summarize: the Supreme Court held that the satisfaction which the Assessing Officer was required to arrive at during the course of assessment proceedings for initiation of penalty proceedings was *prima facie* in nature as against a final conclusion that the assessee had committed an act of omission or commission which would bring him within the ambit of the provisions of clause (c) of subsection (1) of Section 271. The notice under Section 274 was to follow. What was important was that satisfaction had to be arrived at during the course of assessment proceedings and not issuance of notice under Section 274 of the Act. (See *D.M. Manasvi (1972) 86 ITR 557* and *S.V. Angidi Chettiar (1962) 44 ITR 739*.)

A bare reading of the aforesaid extract from *Rampur Engineering (supra)* would show that the Full Bench:

(i) applied the law, as it ought to, as declared in *D.M. Manasvi (supra)* and *S.V. Angidi Chettiar (supra)* WP(C) No. 5059-2008 Page 49 of 64

(ii) *a fortiori* the principle for initiation of penalty proceedings being the *prima facie* satisfaction of the Assessing Officer during the course of assessment proceedings being discernible from the record, was reiterated.

(iii) *the irrelevance of - the Assessing Officer having to say so in so many words that I am satisfied' was highlighted.*

(iv) *the judgment of the Division Bench in Ram Commercial was affirmed which enunciated that: Firstly satisfaction should be that of Assessing Officer.*

Secondly; the assessment order should reflect such satisfaction.

In our opinion the impugned provision only provides that an order initiating penalty cannot be declared bad in law only because it states that penalty proceedings are initiated', if otherwise it is discernible from the record, that the Assessing Officer has arrived at prima facie satisfaction for initiation penalty proceedings. The issue is of discernibility of the satisfaction arrived at by the Assessing Officer during the course of proceeding before him.

In the result, our conclusion are as follows:

(i) *Section 271(1B) of the Act is not violative of Article 14 of the Constitution.*

(ii) *The position of law both pre and post amendment is similar, in as much, the Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings.*

(iii) *Prima facie' satisfaction of the Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the Assessing Officer would arrive at a decision, i.e., a final conclusion only after hearing the assessee.*

(iv) *At the stage of initiation of penalty proceeding the order passed by the Assessing Officer need not reflect satisfaction vis-a-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for.*

(v) However, this would not debar an assessee from furnishing evidence to rebut the prima facie satisfaction of the Assessing Officer; since penalty proceedings are not a continuation of assessment proceedings. [See *Jain Brothers v. Union of India* (1970) 77ITR 107(SC)]

(vi) Due compliance would be required to be made in respect of the provisions of Section 274 and 275 of the Act.

(vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessment order states penalty proceedings are initiated separately' if otherwise, it conforms to the parameters set out hereinabove are met."

6.8. Applying the propositions laid down to the facts of the case, we are of the considered opinion that the penalty proceedings were rightly initiated in this case and that the penalty was rightly confirmed by the Ld.CIT(A).

7. Earthmoving Equipment Service Corporation Vs DCIT [2017] 84 taxmann.com 51 (Mumbai - Trib.)/[2017] 166 ITD 113 (Mumbai - Trib.)/[2017] 187 TTJ 233 (Mumbai - Trib.)

where Hon'ble ITAT Mumbai held as follows:

"6. We have heard the rival contentions and perused the relevant material on record including cited case laws. So far as the legal grounds are concerned, a perusal of quantum order reveals that the penalty was initiated for furnishing of inaccurate particulars and finally the same was levied on the same ground. We find that the assessee was issued two show cause notices- one in the standard printed form u/s 274 dated 04/03/2013 as placed on Page No.-86 of the paper book and another dated 27/08/2013 by way of letter as placed in Page No. 92 of the paper book. We find that in the first notice, the relevant clause has not been ticked off and the second notice is simply a show cause notice. However, in the quantum order Ld. AO, after due deliberations, clearly initiated the penalty proceedings for furnishing of inaccurate particulars which shows due application of mind qua penalty proceedings. The penalty was finally levied on the same ground as well. Therefore, mere marking of relevant

clause, in our opinion, on the facts of the case, has not caused any prejudice to the assessee particularly when the assessee voluntarily offered certain additions in the quantum proceedings with a specific request to AO for not initiating the penalty against the same. The assessee very well knew the charges / grounds for which he was being penalized and he actively contested the penalty before the Ld. AO. At this juncture, we find that the provisions of Section 292B comes to the rescue of the revenue which cures minor defect in the various notices issued provided such notice in substance and effect was in conformity with the intent and purpose of the act. On overall facts and circumstances, we find that such condition was fulfilled in the instant case. We find that the revenue's Special Leave Petition [SLP] dismissed by the Apex court in SSA'S Emerald Meadows (supra) confirmed the decision of Hon'ble High court, which in turn, relied upon the judgment rendered in Manjunatha Cotton & Ginning Factory (supra). The decision rendered by Hon'ble Bombay High court in Samson Perinchery (supra) also placed the reliance on this judgment. After perusing the ratio of the judgment rendered in Manjunatha Cotton & Ginning Factory (supra), we find that the assessee's appeal was allowed by Hon'ble High court after considering the multiple factors and not solely on the basis of defect in notice u/s 274. Therefore, we are of the opinion that the penalty could not be deleted merely on the basis of defect pointed by the Ld. AR in the notice and therefore, the legal grounds raised are rejected."

8. DCIT Vs Shah Rukh Khan [2018] 93 taxmann.com 320 (Mumbai - Trib.)

Where Hon'ble ITAT Mumbai held as follows:

13. The Id. A.R further to support his contention that because of the failure on the part of the A.O to strike off the irrelevant default in the body of the 'SCN', the assessee had remained divested of any opportunity of putting forth its case before the A.O that no penalty under the aforesaid statutory provision was liable to be imposed in his hands, relied upon the following judicial pronouncements:-

- (i) *CIT v. Manjunatha Cotton & Ginning Factory* (2013) 359 ITR 565 (Kar.)
- (ii) *Dilip N. Shroff v. JCIT* (2007) 291 ITR 519 (SC)
- (iii) *Commissioner of Income-tax v. Samson Pernchery* (2017) 98 CCH 0039 (Bom.).
- (iv) *CIT v. SSA's Emerald Meadows* 73 Taxman.com 241 (Kar.)
- (v) *SSA's Emerald Meadows v. CIT* 242 Taxman 180 (SC)

Per contra, the Id. D.R submitted that the contentions advanced by the Id. A.R as regards the validity of the penalty proceedings not being maintainable, thus may not be admitted. The Id. D.R submitted that though the assessee was at a liberty to raise an objection, but however, the same had to be strictly confined as per Rule 27 of the Appellate Tribunal Rules, 1963. It was submitted by the Id. D.R that raising of an objection for the very first time by the Id. A.R during the course of the hearing of the appeal, and that too orally, without putting the revenue to notice in advance, could not be admitted. The Id. D.R to support his aforesaid contentions relied on the following judicial pronouncements:

- (i) *CIT, Central-II v. Divine Infracon Pvt. Ltd.* (ITA No. 771/Mum/20 13.08.2018, (High Court of Delhi)
- (ii) *CIT-4 v. Jamunadas Virji Shares and Stock Brokers Pvt. Ltd.* (2013) 458 (Bom.)
- (iii) *DCIT v. Sandip M. Patel* (2012) 137 ITD 104 (Ahmedabad)
- (iv) *CIT v. Jindal Ployster Ltd.* (2017) 397 ITR 282 (All.)
- (v) *Addl. CIT v. Gurjargravures (P.) Ltd.* (1978) 111 ITR 1 (SC)
- (vi) *CIT v. EdwertKeventer (Successors) P. Ltd.* (1980) 123 ITR 200 (Dr)
- (vii) *Ultratech Cement Ltd. v. Addl. CIT, Range-2(2)* (2017) 298 CTR 43'
- (viii) *Self Knitting Works v. CIT* (2014) 227 taxman 253 (P & H)

The Id. D.R relying on the aforesaid judicial pronouncements, submitted that as per the settled position of law, the objection raised by the Id. A.R during the course of hearing of the appeal as regards the validity of the

jurisdiction assumed by the A.O for imposing penalty 271(l)(c) was not admissible and thus no cognizance of the same may be drawn. Alternatively, and without prejudice to the objection raised to the admission of the challenge thrown by the Id. A.R to the validity of the assumption of jurisdiction by the A.O for imposing penalty under Sec. 271(l)(c), it was averred by the Id. D.R that even otherwise the failure on the part of the A.O to strike off the irrelevant default did not in any way affected the validity of the penalty imposed by the A.O under Sec. 271(l)(c). The Ld. D.R. in support of his said contention relied on the following judicial pronouncements:-

(i) M/s. Maharaj Garage & Company v. The Commissioner of Inc Nagpur (Income tax reference No. 21 of 2008, dated 22.08.2017.

(ii) Commissioner of Income tax v. Smt. Kaushalya & Others (1995) 216 ITR 660 (Bom.).

(iii) Earthmoving Equipment Service Corporation v. DCIT 22(2), Mumbai (ITA No.6617/Mum/2014, dated 02.05.2017).

(iv) Dhaval K. Jain v. ITO. Ward 16(3)(1), Mumbai (ITA No. 996/Mum/2014, dated 30.09.2016).

19...We are of the considered view that in the backdrop of the aforesaid judgment of the Hon'ble High Court of Jurisdiction, allowing the assessee respondent to proceed with his objection which was for the very first time orally raised during the course of hearing of the appeal before us, undoubtedly would be nothing short of proceeding with the hearing of the appeal, without affording an opportunity of being heard to the appellant revenue in context of the issue under consideration.

9. Dhanraj Mills Pvt. Ltd. Vs ACIT ITA Nos.3830 & 3833/Mum/2009

Where Hon'ble ITAT Delhi held as follows:

"2.16. We have considered the rival contention and gone through the various decisions relied by them. We have also gone through the order of penalty passed by Assessing Officer and the order passed by Ld. Commissioner of Income Tax (Appeal). We are conscious that any of the

party may raise legal issue at this stage, if the same can be emanated from the record of the case. The Hon'ble jurisdictional High Court in *CIT vs Smt. Kaushalya (supra)* while dealing with the similar ground about the limb of charge, whether mere mistake in language used or mere not striking off of inaccurate portion cannot by itself invalidate notice issued under section 274 of the Act. The language of the section does not speak about the issuance of notice. All that is required is that the assessee be given an opportunity of show cause. The issuance of notice is an administrative device for informing the assessee about the proposal of levy of penalty in order to enable him to explain why it should not be levied against him. If it is taken for the sake of argument that mere mistake in the language in the notice for non-striking off of 'inaccurate particular' or marking on 'concealment of income' portion cannot by itself invalidate the notice. Entire facts and backgrounds thereof are to be kept in mind. Every concealment of fact may ultimately result in filing of or furnishing inaccurate particular. It was further argued that no statutory notice has been prescribed in this behalf in the Income tax Act.

2.17. The Hon'ble Karnataka High Court in *CIT Versus Manjunatha Cotton & Ginning Factory (supra)* held that notice under section 274 of the act should specifically state the grounds mentioned in section 271(l)(c) that is, whether it is for concealment of income or for furnishing of inaccurate particular of income, sending printed form where all the grounds mentioned in the section 271 are mentioned would not specify the requirement of law, the assessee should know the grounds which he has to meet specifically. Otherwise, the Principles of Natural Justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee. Taking up the penalty proceeding on one limb and finding the assessee guilty on another limb is also bad in law. Though the penalty proceeding emanate from proceeding of assessment, they are independent and separate aspect of proceeding. All the other decisions relied by the Ld counsel for the assessee is based on the decision of *CIT v/s Manjunatha Cotton & Ginning Factory (supra)*, wherein the decision of *CIT Vs Kaushlyya (supra)* was not brought in the notice of coordinate bench of Mumbai Tribunal.

2.18. *The Hon'ble Karnataka High Court in CIT Versus SSA'S Emerald Meadows in ITA No. 380 of 2015 order dated 23/11/2015, while dismissing the appeal of Revenue followed the decision of CIT Versus Manjunatha Cotton & Ginning Factory (supra). Against the judgment of Karnataka High Court the Revenue filed Special Leave Petition before the Hon'ble Apex Court and the same was dismissed vide SLP (CC No. 11485/2016) on 05/08/2016. There is no dispute to the settled proposition of law that dismissal of the Special Leave Petition in limine by Hon'ble Apex Court does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that Apex Court did not consider the case for worth examining for the reason, which may be other than merit of the case. Nor such an order of Apex Court operates as res-judicata. An order rejecting the Special Leave Petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent. And the similar view was expressed in various judgments, viz,*

A. *The Workmen of Cochin Port Trust Vs The Board of Trustees of the Cochin Port Trust & Anr AIR 1978 SC 1283;*

B. *Ahmedabad Manufacturing & Calico Printing Co Ltd Vs The Workmen & Anr AIR 1981 SC 960;*

C. *Indian Oil Corporation Ltd. Vs. State of Bihar & Ors. AIR 1986 SC 1780;*

D. *Supreme Court Employees' Welfare Association Vs. Union of India & Ors. AIR 1990 SC 334;*

E. *Yogendra Narayan Chowdhury & Ors l/s. Union of India & Ors AIR 1996 SC 751;*

F. *Union of India & Anr. Vs Sher Singh & Ors, AIR 1997 SC 1796;*

G. *V.M. Salgaocar & Bros. (P) Ltd. Vs. Commissioner of Income Tax AIR 2000 SC 1623;*

H. *Saurashtra Oil Mills Association Gujrat vs. State of Gujrat & Anr.* AIR 2002 SC 1130;

I. *Union of India & Ors vs. Jaipal Singh (2004) 1 SCC 121; and*

J. *Y. Satyanarayan Reddy vs Mandal Revenue Officer, Andhra Pradesh (2009) 9 SCC 447.*

2.19. *The Hon'ble Apex Court in Kunhoyammed & Ors Vs State of Kerala & Anr. AIR 2000 SC 2587, considered the similar issue and some of the earlier judgments and came to the conclusion that dismissal of special leave petition in limine by a non-speaking order may not be a bar for further reconsideration of the case for the reason that the Court might not have been inclined to exercise its discretion under*

Article 136 of the Constitution of India. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment as in that case doctrine of merger would come into play. This Court laid down the following principles:-

"(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the

Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a nonspeaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res-judicata in subsequent proceedings between the parties."

2.20. As there is no declaration of law which may be governed by Article 141 of the Constitution of India in the case of CIT Versus SSA'S Emerald Meadows dismissed by Hon'ble Apex Court; vide SLP (CC No. 11485/2016) on 05/08/2016. The judgment of Hon'ble Jurisdictional High Court in CIT Vs Kaushalya (supra) is still having a binding force on us. Thus, with utmost regards to the judgment of Karnataka High Court in CIT vs Manjunatha Cotton & Ginning Factory (supra) we are bound to follow the judgment of jurisdictional High Court in CIT Vs Kaushalya (supra).

Our view also find support from a decision of the Mumbai Bench of the Tribunal in the case of Dhawal K. Jain vs Income Tax Officer (ITA No.996/Mum/2014) order dated 30/09/2016. With these observations, the argument of Id. counsel of the assessee on the legal/technical ground is rejected. Thus, all these four appeals are, therefore, dismissed and the stand of the Ld. Commissioner of Income Tax (Appeal) is affirmed."

7. I have heard the contentions of Ld. Authorized representatives of the parties and perused the material available on record and gone through the orders of the authorities below. I find that there is no dispute with regard to the fact that the notice issued u/s 271(1)(c) of the Act is defective. The AO failed to strike down the correct limb under which he sought to impose penalty. Undisputedly, the AO was required to specify the charge. Ld. Counsel for the assessee has placed reliance on the judgement of Hon'ble Supreme Court in the case of *Pr.CIT vs GOA Coastal Resorts and Recreation Pvt. Ltd. [2021] 282 Taxman 463 (SC)* and further placed reliance on the judgement of Hon'ble Delhi High Court in the case of *CIT & Ors vs Sahara India Life Insurance Company Ltd. & Ors. [2021] 432 ITR 84 (Del.)*.

7.1. The Revenue has not pointed out from the record that any notice u/s 271(1)(c) of the Act specifying the particular charge was issued to the assessee. A notice dated 08.03.2013 has been placed on record by the assessee at page 39 of the Paper Book. For the sake of clarity, the same is reproduced herein below:-

Date-08.03.2013

*To,
Sh. George Kutty
C/o Oasis Tours Pvt. Ltd.
C-40, Middle Connaught Place,
New Delhi – 110001*

Sir/Madam,

Whereas in the course of proceedings before me for the assessment year 2010-11 it appears to me that you:-

**have without reasonable cause failed to furnish the return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139(2)/ 148 of the Income tax Act, 1961 No..... dated or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139(1) or by such notice.*

✓ **have without reasonable cause failed to comply with a notice 142(1)/ 143(2) of the Income tax Act, 1961.*

✓ **have concealed the particulars of your income or.....or furnished inaccurate particulars of such income.*

You are hereby requested to appear before me at 11.00 AM/PM onand 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 authorized representative you may show cause in writing or before the said date which will be considered before any such order is made under section 271.

Sd/-

**DCIT,
Circle 13(1),
New Delhi**

8. From the above, it is clear that there is a complete non-application of mind by the assessing authority hence, has simply put her signature without stating the guilt of the assessee. The case laws as relied by Ld. Sr. DR are not applicable on the facts of the present case. On the contrary, the ratio of judgement of the Hon'ble Delhi High Court in the case of Sahara India Life

Insurance Company (supra) is squarely applicable. I therefore, respectfully following the judgements of the Hon'ble Supreme Court and Hon'ble Delhi High Court, hereby quash the penalty order and impugned penalty is thus, deleted. The grounds raised by the assessee are allowed.

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

Order pronounced in the open Court on 24th August, 2022.

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI