IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA Nos.6110 to 6113/Mum/2019
(A.Ys. 2011-12 & 2014-15)

Gaurishankar Chaudhary Flat No. 103 & 104, Sea Shell Apartment, Opp. Nana Nani Park, Seven Bungalows, Andheri West Mumbai – 400 061	Vs.	ACIT, CC-4(4) 1922, 19th Floor, Air India Building, Nariman Point, Mumbai - 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: ACXPC8039Q		
Appellant	..	Respondent

Appellant by :	None
Respondent by :	Harmesh Lal

Date of Hearing	04.10.2022
Date of Pronouncement	31.10.2022

आदेश / O R D E R

Per Amarjit Singh (AM):

All the appeals are filed by the assessee, the assessee has urged identical grounds of appeal the only difference being the figures relating to amount of penalty levied u/s 271(1)(c) of the Act i.e ITA No. 6110/Mum/2019 for A.Y. 2011-12 of Rs.4,39,150/-, ITA No.6111/Mum/2019 for A.Y. 2012-13 of Rs.7,70,000/-, ITA No. 6112/Mum/2019 for A.Y. 2013-14 of Rs.2,13,7670/- and ITA No.6113/Mum/2019 for A.Y. 2014-15 of Rs.1,07,420/- respectively,

therefore, the same are decided by way of this common order by taking the ITA No. 6110/Mum/2019 as a lead case and its findings will be applied to other cases.

2. Fact in brief is that in this case the return of income declaring income of Rs.1,54,380/- was filed on 27.02.2012. Subsequently, the case of the assessee wsa reopened u/s 147 of the Act on the basis of information obtained from the survey conducted in the case of M/s Dayal Tours and Travel (I) Pvt. Ltd. In response to notice u/s 148 of the Act assessee filed copy of return of income filed on 27.11.2007 declaring total income of Rs.10,05,832/-. On the basis of statement of Shri Suresh, Deep, Chand Sharma and Shri Gaurishankar Chaudhary assessee and from the books impounded during the course of survey proceedings the A.O noticed that assessee was a broker who had arranged loan from/for various parties in cash/cheque on which he charged brokerage/commission. During the course of survey 3 diaries and one notebook belonging to Shri Suresh Deep Chand Sharma contained details of cash loan and loans given vide cheque to various parties arranged by Shri Gaurishankar Chaudhary were found and seized where he acted as a broker and received commission/brokerage ranging from 0.25% to 1.5% per month. On perusal of the return of income filed by the assessee u/s 148 of the Act the A.O noticed that assessee had declared brokerage income @ 0.25% per month on the loan amount arranged by him. Therefore, the A.O show caused the assessee that why the brokerage income should not be estimated @ 0.30% per month. The assessee submitted that this fact was already submitted before the DDIT and same was never questioned by the DDIT. The assessee further submitted that the prevailing rate of the brokerage was ranged from 0.10% per month to 0.25% per month and there was no point in making

addition @ 0.05% per month without any documentary evidences available on record. However, the A.O has not agreed with the submission of the assessee and estimated the brokerage income earned by the assessee for arranging loans and advances for various persons @ 0.30% per month and made addition of Rs.1,70,000/- to the total income of the assessee.

3. The A.O also stated that assessee had not provided PAN details of Shri Kailash Aggrawal for whom cash loan of Rs. 4 lac was arranged by the assessee, therefore, the same was also treated as income of the assessee. The A.O had also initiated penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particular of income. Thereafter vide order u/s 271(1)(c) dated 19.11.2018 the A.O had levied penalty of Rs.4,39,150/- on the amount of Rs.10,21,200/- comprising income of Rs.8,51,000/- shown in the return of income filed u/s 148 of the Act and sum of Rs.1,70,200/- added by the A.O while estimating the commission income. In the assessment order the A.O had initiated penalty proceedings u/s 271(1)(c) of the Act for furnishing inaccurate particular of income whereas the A.O had levied penalty of Rs.4,39,150/- for concealment of particular of income vide order dated 19.11.2018.

4. The assessee preferred appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee. The relevant operating part of the decision of ld. CIT(A) is reproduced as under:

> *"5.2 In the submissions made during appellate proceedings, the assessee has contended that the action of the AO of levying penalty u/s 271(1)(c) is incorrect primarily for the following reasons:*
>
> *i. The AO in the assessment order has initiated penalty for "furnishing of inaccurate particulars of income" whereas he has finally levied penalty on the charge of "concealment of particulars of income" and therefore, as per the decision of the Karnataka HC in the case of*

Manjunatha Cotton and Ginning Factory (359 ITR 565), the penalty is invalid.

ii. *The additional income of Rs. 8,51,000/- was voluntarily offered in the return filed in response to notice u/s 148 @ 0.25% p.m. as commission/brokerage for arranging loans.*

iii. *The further addition of Rs.1,70,200 towards suppressed commission/brokerage income has been made by the AO by estimating @ 0.30% p.m. as against the estimate done by him @25% pm in the return filed in response to notice u/s 148.*

iv. *The details in respect of the cash loan of Rs. 4,00,000/- were available in the seized records and therefore it cannot be said that the relevant particulars were not disclosed by him.*

Whether penalty proceedings have been vitiated, since the AO in the assessment order has initiated penalty for "furnishing of inaccurate particulars of income whereas he has finally levied penalty on the charge of "concealment of particulars of income" as per the decision of the Karnataka HC in the case of Manjunatha Cotton and Ginning Factory (supra)

5.3. The assessee contends that the AO is not sure as to what is the specific charge against him considering that in the assessment order, it has been mentioned that penalty is initiated for inaccurate particulars of income" whereas the finally penalty has been levied for "concealment of particulars of income" Therefore the assessee contends that as per the decision of the Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (359 ITR 565), the penalty u/s 271(1)(c) gets vitiated. The assessee has further submitted that the decision of Karnataka High Court in ITA No.380 of 2015 in the case of SSA Emerald Meadows wherein decision of Manjunatha Cotton and Ginning Factory (supra) was followed, has become final since the Hon'ble Supreme Court has dismissed the SLP of the Department Accordingly, the assessee contends that the penalty proceedings have been vitiated and therefore, the penalty levied by the AO u/s 271(1)(c) should be cancelled.

5.4 I have gone through the decisions of Karnataka High Court in the said 2 cases. It has been held in these decisions that in the interest of natural justice, the AO should specify the charge on which penalty was initiated and then should levy penalty on the same charge for which it was initiated. The Hon'ble Karnataka High Court further held that the assessee must be aware of the specific charge so that he can file appropriate response to the show cause notice u/s 274. It finally concluded that if the AO has not applied his mind at the time of initiation of penalty and the assessee has not been made aware of the specific charge due to non-striking of redundant words in the show cause notice issued u/s 274, the penalty proceedings would get vitiated. This issue has also been adjudicated by the jurisdictional Bombay High Court in case of Smt. Kaushalya Devi and Others (216 ITR 0660) wherein it has been held that if the specific charge is mentioned in the assessment order while initiating the penalty then mere non striking of the redundant portion of the notice u/s 274 would not vitiate the penalty proceedings

5.5 In a recent judgment in the case of Maharaj Garage & Co. Vs. Commissioner of Income-tax, Nagpur, [2017] 85 taxmann.com 86 (Bombay), the Hon'ble Bombay High Court has held that the requirement of section 274 for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice under section 271(1)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice of the action of imposing penalty, therefore, there was neither any jurisdictional error or unjust exercise of power by the authority The relevant excerpts of the said judgment are reproduced hereunder:

> *"15. The requirement of Section 274 of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice under Section 271(1)(c) was issued, initiating the proceedings of imposing the penalty The assessee had sufficient notice of the action of imposing penalty. We, therefore, do not find either any jurisdictional error or unjust exercise of power by the authority.*
>
> *16. It is not in dispute that a reasonable opportunity of being heard in the matter, as required by Section 274 of the said Act was given to the assessee before imposing the penalty by the Income Tax Officer. The assessee furnished his explanation, which has been taken into consideration in the order. The mandatory requirement of obtaining the previous approval of the Inspecting Assistant Commissioner was followed. The penalty imposed by the Income Tax Officer was reduced by the Appellate Authority. There was no arbitrary exercise of discretion and the reasons are recorded after taking into consideration the explanation submitted by the assessee. The exercise of jurisdiction in respect of quantum of penalty is neither unjust nor beyond jurisdiction. The questions of law at serial Nos. 1 and 3 are, therefore, answered in the negative."*

5.6 On careful examination of the various decisions on this issue by the Hon'ble Karnataka High Court as well as the Hon'ble Jurisdictional High Court, it is observed that in certain cases non-striking of the redundant words will vitiate the penalty proceedings, however, if the specific charge is duly mentioned in the assessment order while initiating the penalty, then mere non-striking of the redundant portion in the notice u/s 274 would not vitiate the penalty proceedings. As per the principles emerging from the various decisions of the Hon'ble Courts, non striking of the redundant portion of the notice will not vitiate the penalty proceedings if (i) the AO has duly applied his mind at the time of initiation of penalty proceedings in the assessment order by specifically giving a finding on whether the default of the assessee is of "furnishing of inaccurate particulars of income or of "concealment of particulars of income or both. In such a

situation, from the assessment order it will be clear to the assessee as to what is/are the charge(s) that are being levied by the AO and therefore the assessee will not be put to a disadvantageous position or will impair or prejudice assessee's right of reasonable opportunity of being heard and (ii) the AO has also levied penalty u/s 271(1)(c) for the same charge(s) for which penalty has been initiated in the assessment order.

5.7 To examine whether the aforesaid conditions have been satisfied or not in the penalty levied u/s 271(1)(c) in the instant case, the assessment order wherein the said penalty was initiated, the notice issued u/s 274 and the penalty order were examined. From the notice issued u/s 274, it is observed that the AO has duly licked off the redundant portion and as per this notice, the charge against the assessee is of concealment of particulars of income" The AO has levelled this charge since the additional income of Rs.8,51,000/ offered by the assessee in his return filed in response to notice u/s 148 was not disclosed in the original return of income Moreover this charge has also been levelled by the AO for the addition made of Rs. 1,70,200 by estimating the brokerage income @ 0.30% p.m as against 0.25% p.m. offered by the assessee and also the addition made of Rs.4,00,000/- in respect of an alleged cash loan arranged since these transactions related to arranging loans were never disclosed by the assessee in the original return of income. Moreover, the AO has also finally levied penalty for a charge which is not different from the charge of "concealment of particulars of income" Therefore, the ratio of said decision in the case of Manjunatha Cotton and Ginning Factory (supra) cannot be applied to the facts of the case of our assessee and accordingly the penalty initiated and levied on the assessee u/s 271(1)(c) is held to have not been vitiated.

Whether the additional income of of Rs 8,51,000/- offered by the assessee in the return filed in response to notice u/s 148 can be considered as voluntarily

5.8 The assessee further contends that its disclosure of the additional income of Rs.8,51,000/- in the return in response to notice u/s 148 has been voluntarily made and therefore it is not liable for levy of penalty "Voluntarily means out of free will ie without any compulsion. It has been held in the cases of K.L. Swamy Vs. CIT (Kar) 239 ITR 386, Bhairav Lal Verma Vs Union of India (All) 230 ITR 855 and M.N. Rajaraman Vs. ACIT (ITAT, Chennai) 119 ITD 362 that if the department has incriminating material with regard to the undisclosed income, the disclosure made by the assessee cannot be considered to be voluntary. Further, in the cases of P.C. Joseph & Bros. Vs. CIT (Ker) 240 ITR 818, CIT vs. Rakesh Suri (All) 331 ITR 458 and CIT vs. Sushma Devi Agarwal (ITAT, Kol-TM) 67 DTR 430, it has been held that simply because the assessee agreed for addition of undisclosed income subsequent to detection thereof and filed return in response to notice u/s 148 offering the said amount as additional income, the assessee cannot escape levy of penalty u/s 271(1)(c). In the instant case, the said additional income on account of brokerage for arranging loans was never disclosed in the original retum of income and only due to the impounding of incriminating documents in the survey action, the assessee was left with no option but to include the said brokerage income in the return in response to notice u/s 148 Thus, the claim of the assessee that the said additional income of Rs 8,51,000/- was voluntarily

declared in the return of income in response to notice u/s 148, cannot be accepted

5.9 The facts of the case of the assessee are some what similar to the cases decided by the Hon'ble Supreme Court in the cases of Mak Data (P) Ltd (38) Taxman.com 448) and K P Madhusudanan (118 Taxman 224) wherein the said assessees had come forward with an offer of undisclosed income in course of the assessment proceedings on being confronted with adverse evidences, however, the levy of penalty on the undisclosed income offered was upheld. Therefore, the contention of the assessee that it had voluntarily offered the said additional brokerage income of Rs. 8,51,000/- and therefore penalty is not leviable, is rejected.

Whether penalty is leviable where the addition of Rs 1.70,200/ has been made on an estimated basis

5.10 It has further been contended by the assessee that the addition of Rs.1,70,200/- to the brokerage income has been made by the AO on estimated basis by applying a rate of 0.30% pm as against 0.25% pm offered by him and therefore, penalty u/s 271(1)(c) cannot be levied As noted earlier, the transactions related to activity of arranging loans was never disclosed in the original return of income and the said income was offered in the subsequent return only after the detection in course of the survey action. It is clear that the of the assessee was to take a risk and disclose a lesser income than what he was actually earning In this case, the quanturn of loans arranged by the assessee on commission/brokerage basis has not been estimated but it is only the profit earned which has been estimated @ 0.30% p.m. as against @0.25% p.m. offered in the subsequent return. Therefore, the benefit of non levy of penalty cannot be extended to the assessee. In support of this view, reliance is placed on the decision of the Hon'ble Delhi High Court in the case of Kalindi Rail Nirman Engg. Ltd. 51 taxmann.com 523 (Delhi) wherein levy of penalty on the additions made by estimating the income of the assessee by applying rate of 11% (agreed by the assessee) on the gross receipts which were actual, has been upheld. Therefore, the contention of the assessee that penalty is not leviable in its case since the said addition of Rs. 1,70,200/- has been made on an estimated basis, is rejected.

Whether the ratio of the decision of the Hon'ble Supreme Court in the case of Reliance Petroproducts (322 ITR 158) can be applied to the facts of the case of our assessee.

5.11 The assessee also contends that all the relevant details were duly disclosed to the AO and therefore, the additions made do not automatically lead to levy of penalty as held by the Hon'ble Supreme Court in the case of Reliance Petroproducts (supra). In the instant, it is observed that the assessee had not at all disclosed the transactions related to his business activity of arranging loans on commission/brokerage basis in the original return of income and the said brokerage income was offered in the subsequent return only after the detection in course of the survey action The fact that the details related to this activity of arranging loans were available with the AO from the material seized in course of the survey action cannot be considered in favour of the assessee to hold that all the material facts were duly disclosed to the AO. Even if the relevant facts related

to this activity were disclosed to the AO in the re-assessment proceedings, the same was only after detection in the survey action. Moreover, the details related to the cash loan of Rs 4,00,000/- were not disclosed even in the re-assessment proceedings. Therefore, the ratio of said decision in the case of Reliance Petroproducts (supra) cannot be applied to the facts of the case of our assessee. As regards, the contention of the assessed that in respect of the cash loan of Rs 4,00,000, penalty should have been levied u/s 271D/E and not u/s 271(1)(c), it is noted that the AO in the quantum order has added the said amount of Rs.4,00,000/- by treating it to be income of the assessee itself and has not treated it as a loan given/received. Therefore penalty has been rightly levied by the AO u/s 271(1)(c) in respect of quantum addition of Rs.4,00,000/-.

5.12 In view of the above detailed discussion, no infirmity is found in the action of the AO of levying penalty of Rs.4,39,150 @ 100% of the tax sought to be evaded. on the aggregate concealment of income of Rs.14,21,200/-. Accordingly, both the grounds of appeal of the assessee are dismissed."

5. Heard the ld. D.R and perused the material on record. During the course of appellate proceedings before the ld. CIT(A) the assessee has categorically brought to the notice of the ld. CIT(A) that in the assessment order the A.O has initiated penalty proceedings on account of furnishing inaccurate particular of income, however, in the notice u/s 274 r.w.s 271 of the Act dated 20.06.2018 the A.O has charged the assessee for levy of penalty on account of concealment of particular of income. The assessee also submitted before the ld. CIT(A) that A.O was not sure on the foundation on which the penalty was to be initiated. The assessee had also placed reliance on the decision of Karnataka High Court in the case of Manjunatha Cotton and Ginny Factory 359 ITR 565 during the course of appellate proceedings before the ld. CIT(A). However, the ld. CIT(A) referred the decision of Hon'ble jurisdictional Bombay High Court in the case of Smt. Kaushalya Devi & Others (216 ITR 0660) wherein it has been held that if the specific charge is mentioned in the assessment order while initiating penalty the mere non striking of the redundant portion of the notice u/s 274 would not vitiate the penalty proceedings. In this regard we find that Hon'ble jurisdictional Bombay

High Court in the case of Mohd Farhan A. Shaikh Vs. DCIT (2021) 125 taxmann.com 253 (Bom) after considering the decision in the case of Smt. Kaushalya Devi & Others held that the case of Smt. Kaushalya Devi & Others does not lay down the correct position of the law. Therefore, after considering the decision of Hon'ble Supreme Court in the case of Dilip N. Shroff the Hon'ble jurisdictional court in the case as supra held that a contravention of a mandatory condition or requirement to be valid communication is fatal with no further proof. It is in the interest of the fairness and justice that the notice must be precise. It should not give room for ambiguity. We have also considered the decision of coordinate bench of the ITAT, Mumbai, in the case of Dharni Developers Vs. ACIT (2015) 65 taxmann.com 208 (Mumbai Trib) wherein it is held that where an A.O initiated proceedings u/s 271(1)(c) for concealment of particular of income by assessee but levy penalty for furnishing of inaccurate particular of income impugned penalty could not be sustainable. It is undisputed fact that as per notice u/s 274 r.w.w 271 of the Act dated 20.06.2018 the A.O has initiated the penalty for concealment of particular of income, however, in the assessment order dated 19.06.2018 the A.O recorded satisfaction as per para 12 of the assessment order that assessee has furnished inaccurate particular of income. Even in the penalty order u/s 271(1)(c) of the Act dated 19.11.2018 at para 8 of the penalty order the A.O simply stated that assessee has concealed his income, without specifying whether the penalty was levied for furnishing inaccurate particular of income or concealment of particular of income. We therefore hold that impugned order imposing penalty in all the 4 assessment years are invalid and consequently penalty imposed are cancelled. Therefore, legal ground no. 1 of the assessee of the 4 appeals are allowed.

6. The ground of appeal no. 2 on merit in all the 4 appeals are dismissed having become infructuous as we have already deleted impugned penalty of legal ground for all the 4 assessment years under consideration.

7. In the result, all the appeals of the assessee vide ITA No. 6110 to 6113/Mum/2019 are partly allowed.

Order pronounced in the open court on 31.10.2022

Sd/-	Sd/-
(Kuldip Singh) Judicial Member	(Amarjit Singh) Accountant Member

Place: Mumbai
Date 31.10.2022
Rohit: PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.