

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.590/Kol/2022
Assessment Year: 2011-12**

Deputy Commissioner of Income Tax, Central Circle- 4(4), Kolkata.	Vs.	Gallon Commodities Pvt. Ltd. 8, Shantiniketan, Camac Street, Kolkata-700017. (PAN: AACCG2675E)
(Appellant) (Respondent)		

Present for:

Appellant by : Shri Vijay Kumar, Addl. CIT, DR
Respondent by : Shri Miraj D. Shah, AR

Date of Hearing : 08.02.2023
Date of Pronouncement : 24.02.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the revenue is against the order of Ld. CIT(A), Kolkata-21 vide Order No. ITBA/APL/S/250/2022-23/1045090520(1) dated 31.08.2022 against the penalty order passed by DCIT, Central Circle-4(4), Kolkata u/s.271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") dated 20.09.2016.

2. Ground raised by the revenue is reproduced as under:

"1. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and facts of the case in cancelling the penalty of Rs.56,12,420/- levied u/s 271(1)(C) of the Act without appreciating that the AO did not mention the specific charge, viz. "concealment of the particulars of income" or "furnishing of inaccurate particulars of such income" and did not strike out the inappropriate words though in assessment order dated 31.03.2016 the assessing officer had specified in very clear terms that the penalty proceedings u/s 271(1)(C) of the I. T. Act, 1961 is

initiated for concealed particulars of income and had also clearly specified the particular condition for which penalty proceedings was initiated with the arrow symbol in the notice u/s 274 w]» sanction 271(1)(C) of the I. T. Act, 1961 dated 31.03.2016.”

3. Brief facts of the case as culled out from records are that assessee is a company. It filed its return of income on 30.09.2011 declaring Nil income. Survey operation u/s. 133A was conducted on 05.05.2014 on Shri Adish Jain and group in which a total disclosure of Rs.20,79,41,930/- was made. Subsequently, it was revised to Rs.23,33,19,194/- out of which Rs.1,68,95,974/- was disclosed in the case of the assessee company for the relevant year. Further, the instant case was reopened u/s 147. Ld. A/R of the assessee filed all the relevant details and documents as required. Assessment was completed accordingly determining Nil income.

3.1. Ld. AO also initiated penalty proceedings u/s 271(1)(c) of the Act. In response to the same,ld. A/R filed a detailed submission as to why penalty should not be imposed in the instant case. However, ld. A.O. was not satisfied with the same and passed the order u/s 271(1)(c) imposing penalty amounting to Rs.56,12,420/-. Aggrieved, assessee preferred appeal before the Ld. CIT(A).

3.2.Before the Ld. CIT(A), assessee submitted that Ld. AO had, in the notice u/s 274 r/w section 271(1)(c), failed to specify the particular condition or limb for which penalty proceedings are initiated. He has stated that it was the duty of Ld. Assessing Officer to mention as to the violation of which limb and condition, that is, whether it was for “the concealment of particulars of income” or for “the furnishing

of inaccurate particulars of income" that the penalty proceedings were being conducted and the assessee was being put to hearing through the said notice. Ld. AO has not done this in the present case and for such a failure, the entire penalty proceedings become void and penalty levied in this case, deserves to be deleted. During appeal, assessee has also produced a copy of the notice u/s 274 r/w section 271(1)(c), as issued by the Ld. AO.

4. Fact that the Ld. AO had indeed failed to specify the particular limb under which the penalty was proposed to be imposed is not only apparent from the copy of the notice itself, but is also borne out by the discussion in this relation by the Ld. AO, in his penalty order. In the impugned penalty order, in paragraph 4.d., Ld. AO has admitted that he did not specify the particular limb in his notice u/s 274 r/w 271(1)(c) of the Act. On the contrary, he has placed reliance on the decision of Hon'ble Apex Court in the case of *K.P. Madhusudhanan v. CIT [2001] 251 ITR 99* to argue that there was no need to strike out the limb not relevant, meaning thereby that there was no need to strike out one of the two limbs mentioned on the said notice... "concealment of particulars of income" and "furnishing of inaccurate particulars of income". Therefore, it is undisputed that Ld. AO did, indeed not strike out the limb, not applicable in this case.

5. While giving his finding, Ld. CIT(A) observed as under:

"The present matter of this appeal is completely different and is squarely covered by several decisions of various authorities including decisions of the jurisdictional Tribunal. The Hon'ble

Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565, while speaking about the procedure for the issue of notice u/s. 274 of the Act, has observed as under: "(Para 59).....

Though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that the assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100 per cent. to 300 per cent. of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under section 274 should satisfy the grounds which he has to meet specifically. Otherwise, the principles of natural justice is offended if the show-cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee."

This decision has been relied upon by the Hon'ble Karnataka High Court in the case of SSA Emerald Meadows to take a similar view. The Hon'ble Supreme Court has dismissed the appeal of the department in the case of Commissioner of Income Tax and others vs. SSA Emerald Meadows 2016 73 taxmann.com 248 SC by stating that no merits have been found in the Department's SLP against the order of the Hon'ble High Court of Karnataka.

In fact this position of the mandatory need for specifying the correct limb under which penalty u/s 271 (1) is proposed to be imposed has been affirmed to be valid even in those cases where the assessee has not challenged the order for assessment and has paid the corresponding taxes and interest. The Hon'ble Karnataka High Court, in the case of MANJUNATHA COTTON AND GINNING FACTORY, mentioned supra, has once again underlined this necessity by stating that merely because the assessee has not challenged the order for assessment and has paid the corresponding taxes and interest, it would not be sufficient reason either to initiate or impose penalty u/s 271(1)(c). Once the initiation is not automatic, it stands to reason that the proper procedure for initiation of penalty proceedings would necessarily have to be followed. One of the necessary conditions to be satisfied in this context, as already discussed above, is the specification of the particular limb under which penalty is proposed to be imposed. This has admittedly not been done by the AO in the present appeal.

I find that the Hon'ble Kolkata ITAT has also consistently been taking the aforementioned view in its decisions and has not been upholding penalty orders u/s 271 (1)c where the AO has failed to mention in the penalty notice the specific limb, under which the penalty has been initiated. For instance, in the case of Dadheech Furniture Pvt Ltd vs ITO Ward 7(3), Kolkata (ITA no 1923/ko1/2017) [Date of Order: 10.08.2018.], the Hon'ble Tribunal has held:

" We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the Id. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order. has to be accepted. We therefore hold that imposition of penalty in the present-case cannot be sustained and the same is directed to be cancelled."

Some of the other relevant decisions which have adjudicated upon on the point of not striking off the irrelevant portion in the penalty notice are listed below:-

- 1. Order of Bombay High Court in the case of CIT VS. Shri Samson Perinchery.*
- 2. ITAT Order, Kolkata Bench in the case of Gautam Jhunjunwala VS. ITO.*
- 3.ITAT Order, Kolkata Bench in the case of Abu Mansur Ali VS. DCIT ITA No. 2104/Ko1/2017 A.Y. 2012-13 ITO Wd-13(1), Kol. Vs. M/s Ambey Retailers Pvt. Ltd. Page 3*
- 4. ITAT Order, Kolkata Bench in the case of M/s Atmaram& Co. v. DCIT.*
- 5. ITAT Order, Kolkata Bench in the case of ITO VS. M/s Swastik Refinery Pvt. Ltd.*
- 6. Order of Hon'ble Supreme Court in the case ofCIT VS. M/s V.S. Lad& Sons.*
- 7. Order of Hon'ble Supreme Court in the case of CIT vs. VeerabhadrapaSangappa& Co.*
- 8. ITAT order, Kolkata Bench in the case of Suresh Karmakar vs. DCIT.*

In an elaborately discussed decision by the Hon'ble Kolkata Tribunal, in the case of ITO, Ward - 13(1), Kolkata, vs M/S. Ambey Retailers Pvt. Ltd., delivered on 5 September, 2018, the Hon'ble D-Bench of the Tribunal, in ITA No.2104/Kol/2017 for AY 2012-13, the Hon'ble Bench has discussed the entire gamut of citations relevant to the present question of law. They have not only discussed the various case laws that have supported the assessees, but have also discussed and distinguished the various citation cited by the appellant in that case. After this careful

analysis the Hon'ble Tribunal has come to the following conclusion:

" 15. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances, we are of the view that imposition of penalty cannot be sustained. The plea of the Id. Counsel for the assessee which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present case cannot be sustained and the same is directed to be cancelled."

In the present circumstances of the instant appeal, therefore, since it is undisputed that the AO did not mention the specific charge, viz, "concealment of the particulars of income" or "furnishing of inaccurate particulars "of such income", and did not strike out the inapplicable portion in the notice that he issued u/s 274 r w 271(1)c, it is clear that the ratios of the above mentioned decisions are squarely applicable here. The notice for the imposition of the penalty, being bad in law, automatically vitiates the order of the imposition of the said penalty. Therefore, respectfully relying upon the above discussed decisions, I cannot uphold the imposition of this penalty. The same is accordingly deleted."

6. Before us, Ld. Counsel invited the attention of the Bench to the notice issued u/s. 274 read with section 271(1)(c) of the Act, dated 31.03.2016, placed at page 1 of the paper book, to point out that no specific charge has been mentioned by the Ld. AO in the notice. The said notice is reproduced as under:

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

P.A.No.- AACCG2675E

Office of the D.C.I.T.
Central Circle-4(4)
Kolkata -107.

To

Date: 31.03.2016

The Principal Officer,
M/s Gallon Commodities Pvt Ltd,
8, Shantiniketan Building,
Camac Street, Kolkata-700017

Whereas in the course of proceedings before me for the assessment year 2011-12 it appears to me that you:-

* have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given u/s.22(1)/22(2)/34 of Indian Income Tax Act, 1922 of which you were required to furnish u/s.139(1) or by a notice given u/s.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 u/s.22(4)/23(2) of the Indian Income Tax Act, 1922 or u/s.142(1)/143(2) of the Income Tax 1961.

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

You are hereby requested to appear before me at **Aayakar Bhawan Poorva, 110, Shanti Pally, 5th Floor, Room No-509, Kolkata - 107, at 12.30 P.M. on 27.05.2016** and show cause why an order imposing a penalty on you should not be made u/s.271(1) (c) of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity or being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made u/s.271.

ASSESSING OFFICER

(Seal)



Name : **Abhijit Ghosh**
Designation: **D.C.I.T., C.C.-4(4), KOLKATA**

अभिजीत घोष
ABHIJIT GHOSH
रूप आयकर अधिकारी (केन्द्रीय) सर्कल-4(4), कोलकाता
By Commissioner of Income Tax
(Central) Circle-4(4), Kolkata

7. Ld. Counsel reiterated the submissions made before the Ld. CIT(A) which are not repeated for the sake of brevity.

8. Ld. Sr. DR relied on the order of Ld. AO.

9. We have heard the rival contentions and given our thoughtful consideration over the matter. Considering the facts on record and the position of law as dealt in by Ld. CIT(A) elaborately in his observation and findings reproduced above, we do not find any reason to interfere with the same and accordingly dismiss the appeal of the revenue.

10. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 24th February, 2023.

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 24th February, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT(A)-21, Kolkata
 4. The DCIT, Circle-4(4), Kolkata
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata