

IN THE INCOME TAX APPELLATE TRIBUNAL ALLAHABAD “SMC”
BENCH, ALLAHABAD

BEFORE SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No.62/Alld/2023
(निर्धारण वर्ष / Assessment Year: 2008-09)

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आयकर अपील सं/ I.T.A. No.63/Alld/2023
(निर्धारण वर्ष / Assessment Year: 2010-11)

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आयकर अपील सं/ I.T.A. No.64/Alld/2023
(निर्धारण वर्ष / Assessment Year: 2011-12)

Bal Bharti Nursery School 13, Kamla Nehru Road, Civil Lines, Allahabad, Uttar Pradesh-211001.	बनाम/ Vs.	ITO (Exemption Allahabad) Central Revenue Building, M. G. Marg, Income tax Office, Allahabad-211001.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAATB6395D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Ashish Bansal	
Revenue by:	Shri Amlendu Nath Mishra (Sr. DR)	

सुनवाई की तारीख / Date of Hearing: 12/09/2023

घोषणा की तारीख /Date of Pronouncement: 06/10/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee against the order of the Ld. CIT(A)/NFAC, Delhi dated 30.03.2023 for AY. 2008-09, AY. 2010-11 & AY. 2011-12 confirming the penalty levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter “the Act”).

2. Since both parties agree that the penalty levied by the AO/Ld. CIT(A) are similar/identical in all the captioned assessment years, the decision of any one appeal would determine the fate of others. Therefore, appeal of AY. 2008-09 is taken as the lead case, (however,



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the contents/details of impugned notices for all the captioned years will be discussed separately *infra*).

3. At the outset, the Ld. AR of the assessee drawing my attention to ground no. 1 submitted that the assessee has challenged the action of the AO levying penalty u/s 271(1)(c) of the Act on the ground that the AO before levying of penalty has issued an *invalid* notice i.e, without specifying the fault/charge for which assessee was being proceeded against for levy of the purposed penalty u/s 271(1)(c) of the Act i.e. whether assessee “*had concealed the particulars of income*’ or ‘*for furnishing of inaccurate particulars of such income*”. Drawing my attention to the notice issued by the AO for levy of penalty on 18.03.2016 (AY 2008-09 & AY. 2010-11 and notice dated 08.01.2018 for A. 2011-12), he submitted that the AO have issued notice wherein the fault/charge cannot be discerned, since he have not spelled out as to what fault/charge, assessee had committed for which he was putting assessee on notice *viz* whether assessee have “*concealed the particulars of his income*” or has “*furnished inaccurate particulars of such income*”. From a perusal of the impugned notices, it is seen that in all notices referred (supra), it is noted that both the distinct faults/charge as specified u/s 271(1)(c) of the Act are stated in one sentence without the use of either of the conjunctions i.e. ‘and/or’; and thus have jumbled both the faults by stating “*have concealed the particulars of your income furnished inaccurate particulars of such income*”. Such an infirmity in the penalty notice, according to Ld AR, fails to convey to assessee as to which faults AO has in his mind to proceed against assessee for levy of penalty. According to the Ld. AR,



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due to the defective/invalid notice, the assessee was in the dark as to whether the assessee had to defend either the charge “*concealment of particulars of his income*” or “*furnished inaccurate particulars of such income*”. Therefore, according to him, since show-cause notice itself is vague, the penalty levied is vitiated. For such a proposition, he relied on the decision of the Full bench of the Hon’ble Bombay High Court in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bombay) dated 11.03.2021 wherein their Lordships has held that if the show cause notice issued prior to levy of penalty is found to be without specifying the fault/charge against which the assessee was being proceeded against, that would vitiate the penalty itself. And thus the Hon’ble Court upheld the view of the division bench order in the case of PCIT Vs. Goa Dourado Promotions (P.) Ltd. (Tax Appeal No.18 of 2019, dated 26.11.2019) and held that the contrary view taken by another division bench in the case of CIT Vs. Smt. Kaushalya (1995) 216 ITR 660 (Bom) does not lay down the correct proposition of law. Further, the Ld AR assailing the penalty levied by the AO on a different ground submitted that the penalty levied for “*concealment of particulars of income*” could not lie against assessee since the assessee had duly disclosed in the audit report [at the time of filing of return] that the proceedings for approval u/s 12A and Section 10(23C) of the Act were pending before different forums. Therefore, according to the Ld. AR, by making such a disclosure, the assessee has not *concealed any particulars of income*. According to Ld. AR, since the approval was pending before statutory/constitutional courts, assessee was of bonafide belief that it would be eligible for exemption u/s 12A of the Act, and has clearly disclosed about it along with return filed.



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Therefore, according to Ld AR, on this crucial fact itself, the assessee cannot be found to be at fault for concealment of particulars of income. According to him, from the facts submitted (supra), anyway assessee has made out “*reasonable cause*” for non-levy of penalty as contemplated u/s 273B of the Act. Thus according to Ld AR, looking from any angle, the penalty ought not to have been levied. Per-Contra, the Ld. DR defended the action of Ld. CIT(A)/AO and submitted that assessee was very well aware of the fault/charge and therefore no prejudice has been caused to the assessee; and referred to few Tribunal orders to justify the action of AO. But since the issue of invalid penalty notice raised by assessee as noted (supra) has been adjudicated at the level of Hon’ble High Courts and in a case departments SLP has been dismissed by Hon’ble Supreme Court (infra), the Tribunal decisions cited by Ld. DR is not discussed.

4. Having heard both the parties, it is found that the penalty notice issued by AO dated 18.03.2016 for AY. 2008-09 & AY. 2010-11 as well as notice dated 08.01.2018 for AY. 2011-12 did not put to notice the assessee the specific fault/charge against which the assessee was being proceeded against for the proposed penalty u/s 271(1)(c) of the Act. A perusal of the penalty notice reveals that AO have put assessee to notice for levy of penalty u/s 271(1)(c) of the Act viz “*have concealed the particulars of your income furnished inaccurate particulars of such income*”, which conveys neither faults clearly to assessee. In other words, AO through the penalty notice did not convey to the assessee for which specific fault/charge the assessee was being proceeded against for levy of penalty. As noted supra both the distinct



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faults/charge as specified u/s 271(1)(c) of the Act i.e, whether assessee “*had concealed the particulars of income*” or “*for furnishing of inaccurate particulars of such income*”, are stated in one sentence without the use of either of the conjunctions i.e. ‘and/or’. It should be borne in mind that ‘and’ is used to connect or join two or more phrases, words, sentences etc. ‘Or’ is used to connect two or more possibilities, options or alternatives. And a perusal of all the penalty notices would reveal that AO in the impugned notices has not used conjunctions namely ‘and/or’ between the two distinct faults/charges as specified u/s 271(1)(c) of the Act; and moreover, the AO failed to strike down the in-applicable portion of the fault/charge which would have in that event given the assessee an idea of what fault the AO intended to proceed against it for levy of penalty. This omission on the part of AO, vitiates the penalty notices issued by the AO. Resultantly, the show cause notice being vague is held to invalid, and therefore bad in law. For doing that I rely on the ratio of the decision of the Hon’ble Bombay High Court (FB) in Mohd. Farhan A. Shaikh (supra); and Hon’ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (Kar), and it is further noted that the Department’s SLP against the action of Hon’ble High Court has been dismissed by the Hon’ble Supreme Court. Further, it is noted that Hon’ble Karnataka High Court in the case of CIT Vs. SSA’s Emerald Meadows, reported in (2016) 73 taxmann.com 241 (Kar) endorsed the same view in Manjunatha Cotton and Ginning Factory (supra) and held as under:-

“3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with



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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 CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565/218 Taxman 423/35 taxmann.com 250(Kar).

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."

6. Having found that the penalty notices issued by AO dated 08.01.2018 for AY. 2011-12 and notice dated 18.03.2016 for AY. 2008-09 and AY. 2010-11 are vague and does not specify the fault for which AO proposed to proceed against assessee, are held to be invalid and bad in law, respectfully following the judicial precedents/ ratio of decisions cited (supra), I direct deletion of the penalty levied by the AO for all assessment years i.e. AY. 2008-09, AY. 2010-11 and AY. 2011-12. Therefore, other grounds raised by assessee against levy of penalty are left open being academic in the light of my action supra.

7. Before I part, it has been brought my notice that assessee by mistake has remitted appeal fees of Rs.10,000/- each while filing the captioned appeals; and according to assessee, the correct appeal fees as per law is only Rs.500/-. So, assessee prays for refund of excess fees remitted by it while filing the captioned penalty appeals. In this regard,



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it is noted that Section 253 of the Act, prescribes the appeal fees an assessee has to remit while filing an appeal before the Tribunal. The assessee's submission is that since the captioned appeals are penalty appeals, fees needs to be deposited as per sub-clause (d) of sub-section (6) of section 253 of the Act. As per sub-clause (d) of sub-section (6) of section 253 of the Act, while filing the penalty appeal before the Tribunal, the assessee need to have remitted Rs.500/- for each appeal. In the light of the aforesaid discussion, Registry is directed to forward copy of this order to Ld. CIT Allahabad/competent authority to look into grievance of the assessee on this issue of claim of excess deposit of appeal fee (Rs.10,000/- instead of Rs.500/-) and redress the grievance in accordance to law. Needless to say, assessee also can approach the competent authority for refund of fees and such an authority to pass orders/refund in accordance to law.

8. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on this 06/10/2023.

**Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER**

Allahabad दिनांक Dated : 06/10/2023.
Vijay Pal Singh, (Sr. PS)

Copy forwarded to:

1. Appellant –
2. Respondent –
3. CIT(A) , Allahabad
4. CIT
5. DR -

By order
Assistant Registrar