IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 913/Coch/2022
(Assessment Year: 2016-17)

Yoonus Kadavath Peedikayil M/s. Modern Enterprises Kakkad Road Kannur 670005 [PAN:CCWPK6415P] **(Appellant)**	vs.	The Income Tax Officer Ward – 1 & TPS Aayakar Bhavan Kannothumchal Chovva P.O., Kannur 670006 **(Respondent)**

Appellant by: Shri R. Krishnan, CA
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 03.07.2023
Date of Pronouncement: 25.09.2023

O R D E R

Per: Sanjay Arora, AM

This is an Appeal by the Assessee agitating the confirmation of penalty levied under section 271(1)(c) of the Income-tax Act, 1961 ('the Act') by the assessing authority for Assessment Year (AY) 2016-17 per order dated 19.03.2019, by the National Faceless Appeal Centre (NFAC), Delhi [CIT(A)] vide its order dated 05.08.2022.

2. The brief facts of the case are that the assessee, an individual in the retail business of electronic goods per a proprietary concern, M/s. Modern Enterprises, Kakkad, filed his return of income for the relevant year on 22.3.2018 at an income of Rs.4,87,905. In assessment, it was found that his income was, in the absence of audit, liable to be assessed u/s.44AD of the Act, i.e., at 8% of the turnover, being, at Rs.97.58 lacs, less than Rs.1 crore. Assessment was accordingly made, i.e., as

against the returned income @ 5%, at Rs.7,80,650, vide order u/s. 143(3) dated 20.11.2018, and proceedings for levy of penalty u/s. 271(1)(c) of the Act initiated by the simultaneous issue of notice u/s.274. Penalty was levied and, further, confirmed in appeal, in the absence of any explanation by the assessee, at the minimum rate of 100% of the tax sought to be evaded. Aggrieved, the assessee is in second appeal.

3.1 Before us, the assessee's case was two-fold. Firstly, notice u/s.274 of the Act, inasmuch as it does not strike out one of the two limbs of section 271(1)(c), for which penalty there-under stands to be levied, i.e., concealment of particulars of income <u>or</u> furnishing inaccurate particulars of income, is bad in law, as held in *CIT v. Manjunatha Cotton & Ginning Factory* [2013] 359 ITR 565 (Kar), which is being regularly followed by the Cochin Bench of the Tribunal, as in *Dy. CIT vs. R.R. Holdings Pvt. Ltd.* (in ITA No. 513/Coch/2019, dated 06.11.2019). In fact, special leave petition (SLP) stands dismissed by the Hon'ble Apex Court, declining to interfere with the decision by the Hon'ble Karnataka High Court in *SSA's Emralds Meadows*, rendered following it's earlier decision in *Manjunatha Cotton & Ginning Factory*(supra). On merits, firstly, no penalty could be levied where the income stands assessed purely on the basis of an estimate. It was explained that the assessee's net profit for the preceding two years was at 4.04% and 2.03%, i.e., for AY 2015-16 and AY 2014-15 respectively. and toward which Sh. Krishnan, the learned counsel for the assessee, would take us to the tax audit report for AY 2015-16 appended to the argument notes furnished by the assessee on 17.5.2023. The assessee, it was explained, thus had a valid ground for reporting income in a lower sum than that prescribed u/s. 44AD of the Act.

3.2 Smt. Jamuna Devi, the ld. Sr. D.R., on the other hand, relying on the orders by the authorities below, would submit that none of these explanations had in fact been advanced in the penalty proceedings. No infirmity in the impugned order, as

indeed in the penalty order, has been pointed out by the assessee, and on which the Revenue places reliance. As regards the non-strike off of one of the two defaults for which the penalty u/s. 271(1)(c) is levied, the notice u/s. 274 only seeks to provide an opportunity for being heard *qua* the proposed penalty on grounds which find reflection in the Assessing Officer's satisfaction expressed in the assessment or other proceedings, with in fact the said notice being a common notice *qua* penalty under several provisions.

4. We have heard the parties, and perused the material on record.

4.1 We shall take up each of the objections raised by Sh. Krishnan, inseriatim. The law, per *Explanation 1* to s. 271(1)(c), shifts the onus on the assessee to satisfactorily explain his conduct in returning a lower income, as indeed his *bona fides*, failing which he is deemed to have concealed particulars of his income. The assessee failing to furnish any explanation, either before the authority levying penalty, before whom it is in law to be, or even the first appellate authority, as to why he did not, in the absence of audit of his accounts, return income, as statutorily mandated, at a net profit rate of 8 percent of the turnover, or, in the alternative, got them audited, returning income on the basis of the audited accounts, on which either side his case on facts would ordinarily lie, it is not open for him – on facts, to contend that the notice did not specify the 'default', which essentially is the under-reporting of income w.r.t. to the amount that the law deems as his income in case of non-audit of books of account in a given set of facts. The provision being unambiguously clear, the explanation boils down to, as is generally the case, explaining the facts and circumstances leading to, given the law in the matter, returning a lesser income on account of (say) claim of expenditure, or income, or deductions there-from, etc.

We find no explanation in the penalty proceedings. We observe none in the assessment proceedings as well. We say so as the same, if any, could validly be relied upon in the absence of any further explanation in the penalty proceedings.

Even as it is doubtful if it is available in law as an explanation, the assessee having got his accounts for the preceding years audited, cannot claim ignorance of the legal requirement as to audit, as well as the import thereof, also clarified by the fact of his returning income, in preference to his accounts, at a flat rate of 5% of the turnover. Further, even as he charges the Revenue – which is only following the mandate of law, for estimating his income, the assessee himself does not rely on his accounts, and returns income *de hors* the same at a presumed rate.

Audit of accounts, of which requirement the assessee is well aware, cannot be regarded as a mere formality, even as sought to be explained by the Hon'ble jurisdictional High Court, as in *Peroorkkada Service Cooperative Bank Ltd. vs. ITO* [2020] 114 taxmann.com 18 (Ker), and in the context of s. 271B of the Act; the law thereby allowing due credence to the expert opinion of the Auditor, places reliance on the assessee's accounts. An assessee choosing not to get his accounts audited, cannot avoid the legal consequence/s thereof, and does so only at his own peril. Penalty u/s. 271(1)(c) is one such consequence, saved of course u/s. 273B on proving a reasonable cause, which is a reiteration of the principle that though a strict civil liability, penalty is yet not automatic and gets excluded where the assessee-defaulter was constrained to act in the manner he does, i.e., in the facts and circumstances of his case, the onus to prove which, raising the said plea, is though only on him. No such plea has been made in the instant case.

4.2 We, next, consider the argument as to non-strike off of the appropriate limb of the notice u/s.274, a legal argument, which could therefore be advanced at any stage of the proceedings inasmuch as it *goes to the root of the matter*. Section 274, in its relevant part, reads as under:

'(1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.'

The argument is seriously flawed, and from several angles. Inasmuch as notice u/s. 274 is not a jurisdictional notice, but only a device to extend opportunity of

hearing to the assessee, it is clearly wrong to say that it goes to the root of the matter, particularly considering that there is no claim, and at any stage, of absence/lack of opportunity. *In other words, the argument is a non-starter*. Why, even in case of established non-grant of opportunity, the proceedings would go to the stage where the said irregularity intervened (*Suptd. Central Excise v. Pratap Rai* [1978] 114 ITR 231 (SC); *Guduthur Bros. v. ITO* [1960] 40 ITR 298 (SC)).

On merits, the argument that the exact default, i.e., concealment of particulars of income or furnishing inaccurate particulars of income, becomes largely irrelevant in the given facts and circumstances of the case where, as afore-noted, the income assessed is per the statutory mandate. There is no charge of unreported turnover, and the addition in assessment is by applying the prescribed profit rate on the reported turnover. All these facts are undisputed and within the knowledge of the assessee. *How, one may ask, would it matter as to whether the said under-reported income is on account of concealment or furnishing inaccurate particulars of income*? That, in any case – a pure matter of fact, is something which only the assessee, in the intimate know of his affairs, could tell; there being even otherwise no examination of his accounts by the AO, who merely adopted the statutory profit rate. Why, again, one may ask, being rather only another manner of stating the same thing, could it not possibly be that the under-reported income, i.e., w.r.t. that statutorily presumed, is on account of both, i.e., concealment <u>and</u> furnishing inaccurate particulars of income, and which could in fact obtain in any given case, pointing to the fundamental flaw in the argument advanced, predicated on the presumption that it would necessarily be a case of either, which – a matter of fact, may not be so, and neither is there any legal basis for such presumption. We shall refer to this aspect later in the order.

Coming back to the facts of the case, as stated at para 2 above, the assessee's explanation in the given set of facts and circumstances could and, rather, ought to have, centred around the reason/s for the non-audit of his accounts

for the relevant year which would have, where found reasonable, and despite the application of the statutorily presumed profit rate of 8% of the turnover in assessment, saved penalty. It may here also be relevant to state that the assessee's return was even not accompanied by a statement to the effect that income from his business was being disclosed at lower than the said rate, i.e., based on his unaudited accounts, also stating the reason/s for the same.

Continuing further, the argument is even otherwise misconceived. This is as whether a case of concealment of particulars of income or furnishing inaccurate particulars thereof, the same, on an unsatisfactory explanation, is deemed to be concealment of particulars of income [*Explanation 1* to section 271(1)(c)]. *Where, then, one may as ask, is the scope of such argument as being advanced*? Reference in this context may also be drawn to *Explanation 5/5A* of s. 271(1)(c), where the charge or the default, on the conditions stated therein being met, is of concealment of particulars of income or furnishing inaccurate particulars of income, establishing, so to speak, that the two limbs of the penalty are in *parimateria*, coalescing into a single charge inasmuch as the law, on a failure to satisfactorily explain his conduct by the assessee in respect of facts material to the computation of his income, presumes deliberateness on his part, so that irrespective of whether it is apparently a case of commission or omission, the two lead to the same default of concealment of income chargeable to tax. *Explanation 1* to section 271(1)(c), as apparent from its reading and, further, well settled, shifts the burden of proof on the assessee to satisfactorily explain his conduct in relation to facts material to the computation of his income upon being called upon to through a notice u/s 274, which seeks to extend an opportunity to him to do so. *How, one may ask, would it then matter whether it is a case of concealment of particulars of income or their inaccurate furnishing; the two representing acts of commission and omission respectively, inasmuch as the two are treated by law at par and, further, lead to the same default being deemed by law, i.e., of concealment of particulars of*

income? Why, in many a case the two may overlap or the difference a thin line, often blurred, as observed in *A.M. Shah v. CIT* [1999] 238 ITR 415 (Guj), to though no legal effect inasmuch as *Explanation 1* to s. 271(1)(c), as is trite law, clarified by the Apex Court, as in *Dilip Shroff v. Jt. CIT* [2007] 291 ITR 519 (SC), is applicable to both limbs of the provision. Again, even as observed by the Bench during hearing, penalty u/s. 271(1)(c) may be initiated on more than one adjustment to the returned income in assessment, i.e., include instances of both concealment and furnishing inaccurate particulars of income – a common incidence. *What default, then, one may ask, is the AO to specify in the s. 274 notice*? Does the law contemplate issue of multiple notices, one for each default *qua* which the penalty proceedings are being initiated, and for which the assessee's explanation is therefore being sought to determine if the same is, in law, exigible or not –to no answer by Sri. Krishnan, or possibly be. The argument advanced becomes even more rudderless when considered in the context of the fact that the AO, prior to the issue of notice u/s. 274, records his satisfaction *qua* each default separately, i.e., that the assessee is, for the reasons mentioned therein, liable to penalty u/s. 271(1)(c), so that the assessee, whose conduct is being called into question, is thus aware of the reason/s for initiation of penalty proceedings against him. It is this for this and like reasons that the Hon'ble Court in *Maharaj Garage & Co. v. CIT* [2018] 400 ITR 292 (Bom) observed that that there was no basis for challenge where the assessee stands supplied the findings recorded in the order of assessment, passed on the same date on which the notice u/s. 271(1)(c) r/w s. 274 was issued for initiating the proceedings for imposing the penalty. The requirement of section 274 of granting reasonable opportunity of being heard in the matter, it explained, could not be stretched to the extent of framing a specific charge. As explained earlier in *CIT v. Manu Engineering Works*[1980] 122 ITR 306 (Guj), the use of the words 'and/or', i.e., between the two charges, being 'concealment of particulars of income' <u>and</u> 'furnishing inaccurate particulars of

income', may be proper while issuing the notice for penalty in-as-much as the said satisfaction is only *prima facie* or tentative. It is only subsequently, while imposing penalty, that this charge has to be specific, i.e., after hearing the assessee in the matter, concluding that the penalty is, in the facts of the case, imposable. As a reading of the said decision would show, the prescription that the penalty order should finally convey the default is again on the basis of it being a quasi-criminal levy, which is not the case as clarified by the larger bench decision by the Apex Court in *Dharmendra Textile Processors v. UoI* [2008] 306 ITR 277 (SC). There should though, without doubt, be a finding/s in the order to the effect that the elements of *Explanation 1* (i.e., where the same stands applied), so that there is a statutory presumption as to deemed concealment, are satisfied. We are in agreement with the AO that the assessee's accounts for the earlier years having been subject to audit, their non-audit for the current year is intentional. In fact, the income returned at 5% (of the turnover) is not as per the accounts, but at a flat rate. The assessee is thus aware of both, i.e., the statutory obligation for audit, as indeed the profit rate that would otherwise hold. In other words, it is equally permissible in law for the assessing authority to hold it to be a case of concealment of particulars of income or furnishing inaccurate particulars thereof, as indeed expressed by the Hon'ble Court in *Sivagaminatha Moopanar & Sons v. CIT* [1964] 52 ITR 591 (Mad), so that nothing turns on the non-identification of the specific charge, much less in the show cause notice u/s. 274.

The said notice, as afore-stated, is not a jurisdictional notice, but only a device to provide an opportunity of hearing in the matter to the assessee, and being a non-statutory notice, it would suffice where all it mentions is that in the facts and circumstances of the case, being already recorded in the course of assessment or other proceedings, why penalty u/s.271(1)(c) be not levied in respect of the adjustments to the returned income in the assessment; the same, as afore-noted, only following recording his satisfaction by the assessing or any other authority

imposing penalty, and only on the strength of which he is empowered to issue notice, formally initiating the penalty proceedings. In other words, the question of strike off of one of the two limbs, and thus not conveying the charge, which is separate and distinct for each adjustment to the returned income, and for which satisfaction is recorded, is wholly presumptuous.

A perusal of the said notice, however, reveals the AO *to have show caused the assessee for furnishing inaccurate particulars of income* (PB pg. 4), invalidating the assessee's reliance on the decision in *Manjunatha Cotton & Ginning Factory* (supra), itself without reference to the judicial precedents. *What, pray, then, is the assessee's grievance*; the argument advanced being contrary to the facts on record, which is unfortunate indeed, as is the fact of it having not been brought to our notice during hearing – which necessarily implies correct statement of facts by the parties, duly represented by counsels, who act as the officers of the court and, thus, obliged to assist it in arriving at the correct decision. A reference to the Argument Note furnished by the assessee, reveals it to, while admitting so, stating that it was therefore wrong on the part of the AO to state, at para 4 of the penalty order, that penalty proceedings for concealment of income were initiated by issue of notice u/s. 271(1)(c) on 20.11.2018. That is, the assessee is not aggrieved by the notice as issued, or by the levy of penalty *per se*, but by it being described differently in the impugned order, implying that it has no cause of grievance if, instead, the penalty order stated of penalty having been levied for furnishing inaccurate particulars of income, and which he does not dispute. Or, alternatively, that penalty ought to have been levied for furnishing inaccurate particulars of income, inasmuch as that was the default *qua* which he was questioned, and his explanation – not furnished, was sought, and that it would fail in view of it having been stated differently in the penalty order. This is as ludicrous as it can get, particularly considering non-furnishing of any explanation, and the legal position that the penalty u/s.271(1)(c) r/w *Explanation 1* thereto is

only for concealment of particulars of income; encompassing both the elements. This is as the presumption of deliberateness on the part of the assessee in not disclosing the correct state of affairs, or otherwise explaining it's conduct, i.e., w.r.t. it's return of income, gets thus validated. *As a corollary, is it, one may ask, open in law for the assessee to state that though he has concealed particulars of his income, he is not liable to penalty u/s. 271(1)(c) as he has not furnished inaccurate particulars thereof, or vice versa*? If that is not available as an argument in law, what grievance, one wonders, can be projected on its basis?

4.3 We may for the sake of completeness of our order, continue further. The Hon'ble Apex Court in *Vankata Narayana & Sons vs. ITO(First Addl.)* [1967] 63 ITR 638 (SC) in the context of a jurisdictional notice u/s. 148 (sec.34 of the 1922 Act), clarified that the specification of an incorrect limb of the provision, is of no moment. The legal position clarified, even in the context of a s. 274 notice, per several decisions by the Hon'ble Courts, none of which were referred to in *Manjunatha* (supra), is that a defect in notice, assuming so, would not invalidate proceedings, but only make it irregular *Vankata Narayana & Sons* (supra);*T.A. Abdul Khader v. CWT* [2008] 296 ITR 20 (Ker); *CIT vs. Maharaj Krishna* [2000] 246 ITR 327 (Del); *CIT vs. Mithila Motors (P.) Ltd*. [1984] 149 ITR 751 (Pat); *Hajarilal Kishorilal v. CIT* [1967] 64 ITR 563 (MP).

The nature of the notice u/s. 274, and in the specific context of non-strike off of a limb under which the assessee's case falls and, thus, not conveying the charge, stands in fact examined per several decisions viz. *Manu Engineering Works*(supra); *Mithila Motors (P.) Ltd*. (supra); *CIT v. Chandulal* [1985] 152 ITR 238 (AP); *CIT vs. Smt. Kaushalya & Ors*. [1995] 216 ITR 660 (Bom); *Maharaj Garage & Co*. (supra), all rendered without noticing each other. To a unanimous and clear verdict that the said notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should be not done. A mistake or a mere non-strike off of the inapplicable

portion would not invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. These decisions, it would be seen, are consistent with the law as explained, *inter alia*, in *Vankata Narayana & Sons* (supra); *T.A. Abdul Khader* (supra); *Maharaj Krishna* (supra); and *Hajarilal Kishorilal* (supra); all, save the first, being only in the context of a penalty notice, while that by the Apex Court was in respect of notice u/s. 148, a jurisdictional notice, while that u/s. 274 is admittedly not. And, further, validates the analysis carried out at para 4.1 of this order.

5. In view of the fore-going, we find no merit in the assessee's case, for which we have extended the same to include the arguments advanced, even as, save to the extent purely legal, the same could not be raised before us for the first time. We, accordingly, find no reason for interference. We decide accordingly.

6. In the result, the appeal by the assessee is dismissed.

Order pronounced on September 25, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: September 25, 2023

<u>Copy to:</u>

1. The Appellant
2. The Respondent
3. The CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin

n.p.