आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE

SHRI R.K. PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA No.644/Hyd/2018		
Assessment Year: 2011-12		
Hindupur Bio-energy Private Limited, Hyderabad. PAN : AABCH0124J.	Vs.	The Deputy Commissioner of Income Tax, Circle 2(2), Hyderabad.
(Appellant)		(Respondent / Cross-Appellant)
ITA No.1243/Hyd/2016		
Assessment Year: 2011-12		
The Deputy Commissioner of Income Tax, Circle 2(2), Hyderabad.		Hindupur Bio-energy Private Limited, Hyderabad. PAN : AABCH0124J.
(Appellant)		(Respondent / Cross-Appellant)
Assessee by:	Shri M. Chandramouleswara Rao, C.A.	
Revenue by:	Shri L.V. Bhaskara Reddy, CIT-DR	
Date of hearing:	11.12.2023	
Date of pronouncement:	21.12.2023	

O R D E R

SRI LALIET KUMAR, J.M.:

These cross appeals filed by the assessee and Revenue are directed against the common order of Commissioner of Income Tax (Appeals), Kurnool dated 20.06.2016 passed u/s 271(1)(c) of the Income Tax Act, 1961 (in short 'Act') for the assessment year 2011-12. For the sake of convenience, both the appeals were heard together and are being disposed of by this common order.

2. The captioned appeal was filed by the director of the assessee namely, K. Daniel Suresh Raju with a delay of 593 days along with an application for condonation of delay stating therein the reasons for belated filing of appeal. The relevant portion of the said application reads as under :

> *"......*
>
> *8. Appeal of the assessee has been allowed and the penalty levied u/s 271(1)(c) cancelled. Therefore, the appellant did not consider it necessary to file an appeal.*
>
> *9. However, department has filed appeal against the order of ld.CIT(A). Appeal hearing has been originally fixed for hearing on 26.12.2016 as seen by the notice dt.13.10.2016 of the office of the ITAT.*
>
> *10. The company has been advised by the Counsel Sri V. Raghavendra Rao that a cross-appeal should be filed, although the ld.CIT(A) allowed our appeal and it is the Department only that is aggrieved by the order of CIT(A). The advice has been communicated over the phone through the office of our Authorized Representative on 31.03.2018. Learned counsel has been requested to prepare the appeal papers.*
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> *11. The appeal papers prepared by the counsel have sent through e-mail on 05.04.2018. The collection and compilation of*

appeal papers could be completed on 05.04.2018 at the end of the office hours.

12. The delay of 593 days in filing the appeal has occurred in the above facts and circumstances.

13. The reasons for the delay are bonafide and not on account of intention or gross neglect"

2.1. On the other hand, ld.DR reported no objection.

2.2 We have heard both the parties on this preliminary issue. There is no dispute that under section 253(5) of the Act, the Tribunal may admit an appeal filed beyond the period of limitation where it is satisfied that there exists a sufficient cause on the part of the assessee for not presenting the appeal within the prescribed time. The moot point is as to whether such a long delay deserves condonation. At this stage, it is relevant to note the judgment of the Hon'ble Bombay High Court in Vijay Vishin Meghani Vs. DCIT & Anr (2017) 398 ITR 250 (Bom) holding that none should be deprived of an adjudication on merits unless it is found that the litigant deliberately delayed the filing of appeal. Having regard to the reasons given in the application, we do not find any reason to conclude that the assessee deliberately delayed the filing of appeal. Hence, respectfully, following the above said decision, we condone the delay and admit the appeal for hearing.

3. The brief facts of the case are that assessee is a company engaged in the business of construction and development of electricity power plants, filed its return of income for A.Y. 2011-12 on 30.09.2011 admitting total income of Rs.61,86,203/-. Subsequently, the case was selected for scrutiny. Notices u/s 143(2) and 142(1) of the Act were issued

and served on the assessee. In response, assessee filed the information as called for. During the year a survey operation u/s 133A was conducted on 16.09.2023. The assessee received Rs.11.29 crore as share application money from 15 companies during the year. During the post survey operations a sworn statement of Mr. K. Vijay Kumar, Director of M/s. KVK Group has been recorded on 18.09.2013 u/s 131 of the Act. In response, he expressed his inability to organize confirmation letters and agreed for the addition. Accordingly, the Assessing Officer added the said amount of Rs.11.29 crores as unexplained income u/s 68 of the Act and Rs.31,80,822/- u/s 14A of the Act. Thus, Assessing Officer completed the assessment u/s 143(3) of the Act.

3.1 With regard to the above additions, penalty proceedings u/s 271(1)(c) was initiated vide notice u/s 274 r.w.s. 271 of the Act dt.27.03.2014. As there was no reply to the penalty notice from the assessee, Assessing Officer satisfied that the assessee has furnished inaccurate particulars of income and does not have any explanation to offer in this regard, and finally levied penalty of Rs.3,82,60,188/-.

3.2. Aggrieved with such assessment order, the assessee preferred appeal before the ld.CIT(A) wherein the ld.CIT(A) has granted relief to the assessee. Against the order of ld.CIT(A), the Revenue is in appeal before us. The assessee has also preferred the appeal after a period of 593 days on the technical ground that show cause notice issued by the Assessing Officer was non-specific.

4. Now the assessee and Revenue are in appeal before us and raised the grounds hereinbelow.

4.1. The grounds raised by the assessee reads as under :

> *"1. Learned CIT(A) ought to have also held that the notice issued u/s. 271(1)(c) is not legally valid for the reason that the notice does not specify whether, the charge against the assessee is concealment of income or whether it is furnishing of inaccurate particulars of income and that therefore penalty levied is invalid, in law.*
>
> *2. Learned CIT(A) ought to have applied the judgment of Karnataka High Court in the case of CIT Vs. Manjunatha Cotton and Ginning Factory [2013] 359 ITR 565 read with judgment of jurisdictional A.P High Court in the case of State of Andhra Pradesh vs. Commercial Tax Officer, Kurnool (169 ITR 564, 570-2) and held the penalty proceedings to be invalid in law."*

4.2. The grounds raised by the Revenue reads as under :

> *"1. The CIT(A) has erred both on facts and law.*
>
> *2. The ld.CIT(A) is not correct in fact and in law in cancelling the penalty u/s.271(1)(c) of the I.T. Act when the assessee itself accepted the quantum additions made by the Assessing Officer on account of unexplained credits which tantamount to furnishing in accurate particulars/ concealment of particulars of income by the assessee ?*
>
> *3) The ld. CIT(A) ought to have appreciated the facts that the assessee did not come forward for the disclosure voluntarily. It was possible only when findings of search conducted by DIT(Inv), Kolkata in the case of Mr. Praveen Agarwal and other information which were in the department's possession were put before the assessee.*
>
> *4) The ld. CIT(A) ought to have appreciated that the facts of the case under the appeal are different and distinguishable to that of the judicial decisions relied upon by the assessee in the cases of CIT vs. Reliance Petro Products (2010)(SC), Dilip N Shroff vs. JCIT & Anr (2007) and T. Ashok Pai vs. CIT (2007)(SC) and the ratio of these decisions ought not have applied to the facts of the assessee's case.*
>
> *5) The ld. CIT(A) erred in not appreciating the ratio laid down by the Apex court in the case of MAK Data Pvt. Ltd. Vs. CIT.*

6) The ld. CIT(A) failed to appreciate the fact that Shri K. Vijay Kumar was a share holder of M/s. Hindupur Bio Energy Pvt. Ltd to the extent of 52% till 12.03.2011; so he is accountable for the transaction made by the company for the A.Y 2011-12. The statement given by the then director for the impugned A. Y i.e ., A.Y 2011-12 is valid and binding on the company.

7) The ld. CIT(A) erred in not appreciating the fact that the assessee company never rejected the sworn statement given by Mr. Vijay Kumar before the Assessing Officer during assessment proceedings."

5. Before us, ld.AR has raised the following contentions :

i) That the Assessing Officer while passing the assessment order has not recorded any satisfaction for levy of penalty other than mentioning at the end that penalty proceedings u/s 271(1)(c) of the Act were initiated separately.

ii) The notice issued u/s 274 for initiation of penalty proceedings u/s 271(1)(c) of the Act does not specify the limb under which the penalty is being levied and the Assessing Officer has not stricken off any of the limbs in the said notice.

iii) For the above said purposes, ld.AR has drawn our attention to page 27 of the paper book wherein the notice issued u/s 274 was placed. The above said notice reads as under :

- Left intentionally -

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

Office of the
Deputy Commissioner of Income Tax,
Circle-2(2), Room No. 826, 'B' Block 8th Floor,
I T Towers, A C Guards, Hyderabad

PAN: AABCH0124J

Date. 27.03.2014

To
The Principal Officer,
M/s Hindupur Bio-Energy P Ltd,
6-3-1109/A/1, 3rd Floor, Navabharat Chambers,
Rajbavan Road,
Hyderabad-500 082.

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 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 under section 22(4) / 23(2) of the Indian Income Tax Act, 1922 or under section 142(1) / 143(2) of the Income tax Act, 1961. No. ____________________ dated ________

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

You are hereby requested to appear before me at 11:00 A.M on 21.04.2014 and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) 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 on or before the said date which will be considered before any such order is made under section 271(1)(c).

Seal

(T.MADHAN)
Deputy Commissioner of Income Tax
Circle-2(2), Hyderabad

iv) The addition was made primarily based on the statement of Mr. Vijay Kumar, Managing Director of M/s. K.V.K Energy and Infrastructure, one of the beneficial shareholders in the assessee company. The ld.AR further contended that the order of the Assessing Officer is silent on the admission made by one of the directors of the assessee company.

v). Therefore, in the absence of any admission by any of the directors of the assessee company, the addition made by the Assessing Officer has to be deleted though addition was made by the Assessing Officer in the body of the assessment order and called for levy of penalty u/s 271(1)(c) of the Act. Ld.AR further contended that penalty proceedings are different from assessment proceedings and the assessee can always make fresh arguments for cancellation of penalty.

6. Per contra, ld.DR has drawn our attention to the order passed by ld.CIT(A) wherein it was held as under :

5.2. The only ground that requires to be adjudicated here is with reference to the Ground No.3.

I find from the above sworn deposition that the statement was recorded from Mr. K. Vijaya Kumar, S/o. K. Balarama Raju, Managing Director of M/s.KVK Energy and Infrastructure. He is not a Director of the appellant company and he has no legal standing vis-a-vis the appellant company to make a disclosure statement. Notably, this sworn deposition was not recorded at the survey premises on the date of survey, but later at a subsequent date i.e. On 18.9.2013 and it was recorded at M/s.KVK Energy

and Infrastructure. Therefore, the so called disclosure that the Assessing Officer is harping on suffers from the germane issue of accountability of the person who has made disclosure statement as he is not in the management and control of the appellant-Company and has not been an authorised signatory of the appellant-Company.

5.3 Next, I dwell on the nature of disclosure what is stated to be surrendered as additional income is the investments made by 17 companies highlighted in Para 2.1 of' the penalty order. The Assessing Officer has not established in the penalty order, any bogus nexus between the appellant-Company and the several Kolkatan companies which invested money in the appellant-Company listed out by him in the impugned order. The Assessing Officer has not established any 'mens rea' in the transaction,_ on the part of the appellant-Company to have deliberately concealed the income.

5.4. The Assessing Officer in Para 2.4.3 of the penalty order observes that the assessee could not produce the confirmation letters from the above' mentioned parties' with reference to share application money, even after the passage of 6 months during the penalty proceedings, I have called for the assessment records as well as the record to the penalty proceedings from the AO & after examination of the records, my observations are as follows:

*5.4.1***. The Assessing Officer after having obtained a disclosure from a totally unconnected and unrelated person (not in responsibility to make a statement) and after having recorded the said statement not during the survey u/s 133A, but subsequently** *later at a place other than the place where the appellant company is registered, has not carried out any meaningful enquiry, consequent to the survey. No correspondence has been initiated to enquire into the modus operandi of the money trial into the appellant books. No details of bank statements have been obtained to conduct a trial of money that flowed into the appellant's books from the Kolkata Companies, so as to conclusively establish the non-genuuinenty of such fund flow in the from of share capital.* ***The Assessing Officer has not examined any of the responsible persons of the appellant company to prove that the money obtained through banking channels has been obtained from non-existing companies.***

7. The ld.DR submitted that the finding recorded by the ld.CIT(A) is contrary to the record as the statement of the director of the assessee company was recorded by the Revenue which is at page 51 of the paper book and in the said statement the director Mr. Sudhakar in response to Question No.3 had admitted as under :

> *"Q.No.3 I am showing a statement recorded from Mr. K. Vijay Kumar, S/o. Balaram Raju, M.D. of M/s. KVK Energy and Infrastructure Pvt Ltd., u/s 131 of I.T. Act, 1961 before Dy. Commissioner of Income Tax, Circle – 2(1), Hyd at room no.825, 8th floor, B-Block, IT Towers, AC Guards, Hyderabad on 18.09.2013, please go through the Q.No.9 of the statement and state whether you agree with the additional income of Rs.15,29,00,000/- offered in the hands of M/s. Hindupur Bio Energy Pvt. Ltd.*
>
> *Ans: Yes, I have gone through the statement recorded from Mr. K. Vijay Kumar, S/o. Balaram Raju, M.D. of M/s. KVK Energy and Infrastructure Pvt Ltd., u/s 131 of I.T. Act, 1961 before Dy. Commissioner of Income Tax, Circle – 2(1), Hyd at room no.825, 8th floor, B-Block, IT Towers, AC Guards, Hyderabad on 18.09.2013. I agree with the disclosure made by Sri K. Vijay Kumar of Rs.15,29,00,000/- as additional income in the hands of M/s. Hindupur Bio Energy Pvt. Ltd for various assessment years."*

7.1. Based on the above, the evidence available in the assessment record, the ld.DR submitted that the order of ld.CIT(A) is perverse as the ld.CIT(A) had failed to take cognizance of the statement recorded by the Revenue which forms part of the assessment record. The ld.DR submitted that once the assessee admitted the addition in the statement and thereafter, at the time of assessment proceedings, therefore, no fresh evidence was required to be brought on record in the penalty proceedings.

7.2. The ld.DR relied upon the decision of Moola Padmaja Vs. ACIT (ITA No.234/Hyd/2022 dt.22.02.2023) to that effect. The relevant portion of said order reads as under :

> *"28. In this view of the matter, we are of the considered opinion that merely for non-specifying in the notice as to under which limb the penalty is levied i.e., for concealment of income or furnishing inaccurate particular of income thereof, the penalty cannot be cancelled especially when the assessee who is a non-filer was put to notice which he has understood and has replied to such notice issued by the AO. In the light of the above discussion, we uphold the order of the ld.CIT(A) in sustaining the penalty levied by the AO. The grounds raised by the assessee are accordingly dismissed."*

7.3. The ld.DR had also filed the written submissions in support of the Revenue as against the appeal of assessee. The relevant portion of the written submissions is to the following effect :

> *"4. Regarding the Departmental appeal, it is humbly submitted that the order of learned CIT(A) ignores the vital facts on record. The assessee is a concern in the KVK group of companies and shares registered office with the other companies of the group includihg M/s KVK Energy & Infrastructure Pvt Ltd at 3rd Floor, Navabharat Chambers, Raj Bhavan Road, Hyderabad. Shri K Vijay Kumar Raju holds majority share holding in the assessee and the most important person of the group. It is an undisputed fact that during survey operation on 16/09/2013 at the premises of the assessee and its sister concerns, incriminating evidence in the form of statements of Praveen Agarwal and Pramod Ramdin Sharma recorded u/s 132(4) at Kolkata along with list of companies run by them were shown to Shri K. Vijay Kumar, who is the key person of the group. The statements clearly indicated that the group companies of Praveen Agarwal group (which allegedly invested share application money/share capital in the assessee) are in the business of providing accommodation entries. Mr Vijay Kumar admitted unaccounted income on this issue because the assessee was not in a position to substantiate the sources for introduction of share application money/share capital. On 18/09/2013, the fact was again confirmed by Shri Vijay Kumar in a statement u/s 131. Copy of the statement is available at paper book filed by the Department at pages 44 to 50. On 19/09/2013, the statement of Shri Vijay Kumar recorded*

on 18/09/2013 was shown to Mr K. Sudhakar, Director of the assessee and a statement u/s 131 was recorded from him. Copy of the statement is available at pages 51 & 52 of the paper book filed by the Department. In response to question no: 3, the said director admitted undisclosed income of Rs 15.29 Cr on the above issue. The statements of Shri Vijay Kumar and Shri K. Sudhakar were not questioned by the assessee in the assessment proceedings and appeal is also not filed against the assessment order. It is therefore submitted it was not open to the assessee to question the veracity of the Statements in the appellate proceedings against the penalty order, as they are part of undisputed facts on record.

5. The CIT(A) misconceived the whole issue and stated in his order that the statement of Shri K. Vijay Kumar has not legal standing. The CIT(A) ignored the statement of Shri K. Sudhakar, Director of the assessee, who fully concurred with the statement of Shri K. Vijay Kumar. The CIT(A) also ignored the fact that the additions in the assessment were based on the statements and in the hearings, the assessee did not question the statements. On the other hand, the additions were accepted by the assessee.

6. The CIT(A) also misconceived the nature of addition. Once incriminating evidence in the form of statements of Praveen Agarwal and Pramod Ramdin Sharma along with the list of companies run by them for entry business were shown, the assessee admitted that he is unable to prove the transactions of receipt of share application money/share capital. Therefore, the primary onus u/s 68 regarding nature and source of the credit entries was not discharged by the assessee. That is why, the assessee disclosed unaccounted income. When the primary onus u/s 68 is itself is not discharged, there is no need for the Department to conduct further probe. In fact, but for the evidence shown by the Department in the survey, the unaccounted income could not have been disclosed by the assessee. This is a clear cut case of the Department confronting specific evidence to the assessee. Therefore, the observations of the CIT(A) that the trial of money needs to be established through bank accounts, the concerned persons (investors) were not examined, it was not established that money was obtained from non-existing companies etc are out of context and irrelevant in a case where even the primary onus is not discharged by the assessee. While the onus lies on the assessee, the CIT(A) cannot demand that the AO has to discharge the onus, more so when the concealment is admitted and not challenged in the assessment proceedings. Therefore, it is submitted that the order of CIT(A) is based on misconceived notion.

7. It is also submitted that in the penalty proceedings, adequate opportunity was available to the assessee to produce

proof regarding the bona fide nature of the transactions, if any. Even in the penalty proceedings, the assessee did not challenge the statement of Shri Vijay Kumar. On the other hand, it was stated that Mr Vijay Kumar, Managing Director of KVK Group Companies voluntarily surrendered the income as it was difficult to prove the genuineness and creditworthiness with a request to not to impose penalty. Therefore, the order of CIT(A) is contrary to facts on record. There was clear concealment of particulars by the assessee about the alleged investments and but for the survey operation, the concealment could not have been detected. The admission of unaccounted income was also solely on account of the fact that incriminating evidence in the form of statements of Praveen Agarwal and Pramod Ramdin Sharma along with the lists of companies run by them were confronted to the assessee. Hence, there is no ground to state that all the particulars were furnished correctly and none of the particulars were concealed.

*8. In the case of Om Prakash Harbans Lal ([2009] 177 Taxman 291 (Punjab & Haryana)), the Hon'ble High Court of Punjab and Haryana held that in a case where the assessee was called on to prove the source and genuineness of the credits and no information to that effect was furnished by the assessee, penalty is correctly levied. In a recent case of Sundaram Finance Ltd (259 Taxman 220 (SC)), the Hon'ble Supreme Court dismissed SLP 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. The fact that even voluntary disclosure does not release the assessee from mischief of penal proceedings u/s 271(1)(c) as held by the Hon'ble*Supreme Court in the case of Mak Data P. Ltd (358 ITR 593 (SC)). In light of the above, the order of CIT(A) may kindly be set aside and the appeal of the Department may be allowed."*

8. We have heard the rival submissions and perused the material on record. In the present case, the Assessing Officer had issued show cause notice reproduced hereinabove which clearly mentions for what purposes the penalty notice was issued i.e., concealing the particulars of income. The Assessing Officer has ticked the applicable reason for imposing the penalty. In fact, the assessee had filed the reply to the said show cause notice treating the show cause notice as a notice for concealment of particulars of income. In our view, the case of the assessee is not covered by the judgment of the Karnataka High Court in the

case of CIT Vs. Manjunatha Cotton & Ginning Factory as the notice issued to the assessee in the instant case was specific in highlighting the reason for issuing notice for imposing the penalty by putting a tick mark (✓). In view of the above, the argument of the assessee that the notice issued by the Assessing Officer did not specifically mention the limb on which the penalty was issued lacks any merit.

8.1. The second argument raised by the ld.AR for the assessee is that the Assessing Officer has not recorded any finding for issuance of penalty notice while passing the order for imposition of penalty. The perusal of the order passed by the Assessing Officer clearly shows that the Assessing Officer has mentioned penalty proceedings u/s 271(1)(c) are initiated separately. The last line of the assessment order records as under :

> *"The demand notice and challan enclosed herewith. Penalty proceedings u/s 271(1)(c) are initiated separately."*

9. On the date of passing of the order, the Assessing Officer had also issued notice imposing the penalty for concealment of income, which is reproduced hereinabove. In our considered opinion, once the Assessing Officer has mentioned the issuance of notice for imposition of penalty in the assessment order itself, then there is a sufficient compliance of law, and no separate satisfaction is required to be recorded in the assessment order. Even otherwise, there is no specific proforma provided in law for recording of satisfaction for imposition of penalty. Once the Assessing Officer has categorically mentioned for initiation of

penalty proceedings u/s 271(1)(c) of the Act, then the Assessing Officer is satisfied for issuing the notice for initiation of penalty. In the light of the above, the objection raised by the assessee is without any basis.

10. The next ground raised by the assessee before us is that the penalty was imposed merely based on the statement of K. Vijay Kumar who happens to be associated with the assessee company. Infact, the above said statement of K. Vijay Kumar was subsequently confirmed by the Director K. Sudhakar in his statement dt.19.09.2013, wherein he, in response to question no.3 reproduced hereinabove had clearly admitted to the disclosure made by Mr. K. Vijay Kumar for an amount of Rs.15,29,00,000/- as additional income. During the assessment proceedings, the Assessing Officer at para 3 had reproduced the statement of Mr. K. Vijay Kumar and thereafter, the authorised representative has confirmed and admitted the additional income of Rs.11.29 crores for A.Y. 2011-12. Thus, it is clear that the additions were not made merely on the statement of K. Vijay Kumar but was also based on the statement of Director namely, K. Sudhakar recorded by the Revenue. Further, the assessee in the assessment proceedings, through its ld.AR had admitted the income of Rs.11.29 crores. In our view, the findings recorded by the ld.CIT(A) whereby he vide 5.4.1. had concluded that the penalty imposed was on the basis of disclosure obtained from the unconnected - unrelated person was incorrect and contrary to record as the addition was made not only based on the statement of Shri Vijay Kumar but also based on the statement of Director namely, Mr. K. Sudhakar. In view of the above, we do

not find any reason to agree with the contentions of the assessee. In fact, in our view, the issue is squarely covered against the assessee by our decision in the case of Moola Padmaja wherein we have held as under :

> *"22. We have considered the rival arguments made by the both the sides, perused the orders of the AO and the ld.CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case was a non-filer of income tax return for the impugned assessment year and on the basis of notice issued u/s. 148 of the Act, the assessee filed the return of income on 03.10.2019 declaring total income of Rs. 1,84,41,136/- which was accepted by the AO. We find subsequently the AO initiated penalty proceedings u/s. 271(1)(c) of the I.T.Act and levied penalty of Rs.37,61,793/- being 100% of the tax sought to be evaded u/s. 271(1)(c) of the I.T.Act which has been upheld by the ld.CIT(A). It is the submission of the ld.counsel for the assessee that the returned income has been accepted by the AO and therefore, there is neither concealment of income nor furnishing of inaccurate particulars of income and therefore, penalty could not have been levied u/s. 271(1)(c) of the I.T.Act. The alternate argument of the ld.counsel for the assessee is that since according to the notice issued by the AO, the assessee has concealed the particulars of income and furnished inaccurate particulars of such income, therefore, such penalty cannot be levied for both the limbs and since the AO has not levied for any particular limb as per provisions of section 271(1)(c) of the I.T.Act, therefore, such penalty so levied being not in accordance with law has to be cancelled.*
>
> *23. We do not find any force in the above argument of the ld.counsel for the assessee. We find Explanation 3 to section 271(1)(c) reads as under:*
>
> > *"Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish u/s 139 in respect of any A.Y commencing on or after 1st of April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause(i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the CIT(A) is satisfied that in respect of such A.Y such person has taxable income, then such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such A.Y, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice u/s 148".*

24. A perusal of the assessment order as well as penalty order clearly shows that the assessee was a non-filer and only on the basis of issue of notice u/s. 148 of the Act, the assessee filed the return of income declaring income of Rs.1,84,41,136/- which has been accepted by the AO. In our opinion, had the AO not issued notice u/s. 148, the assessee would not have filed the return of income, especially considering the past conduct of the assessee and therefore, it is a clear case of concealment of income as per Explanation 3 to section 271(1)(c) of the I.T. Act. Therefore, penalty in our opinion was rightly levied by the AO and sustained by the ld.CIT(A).

25. So far as the argument of the ld.cousnel for the assessee that the AO has levied penalty for both concealment of income and furnishing of inaccurate particulars of income which he could not have done and therefore, the notice being defective such penalty should be cancelled is concerned, we find the argument of the ld.counsel for the assessee ought to be rejected outright. We find the Hon'ble AP High Court in the case of CIT vs. Chandulal (supra) while deciding an identical issue at para no. 8 and 9 of the order has observed as under:-

> *8. We are unable to subscribe to the view that by reason of the ITO not striking out inappropriate portions of the notice issued under s. 274, the notice issued was rendered invalid. In the first place, it has to be borne in mind that the notice issued under s. 274 is not prescribed under the rules. It is a notice administratively devised for the purpose of putting the assessee in the knowledge of the fact that the ITO initiated proceedings for levy of penalty in order to enable him to show cause why penalty should not be levied. So long as the object of putting the assessee in the awareness and knowledge of the initiation of the penalty proceedings is accomplished by the issuance of a notice, the question of invalidity does not arise on account of either inappropriate language in the notice or on account of any inappropriate portions of the notice not being stuck off. There was no offence to any of the rules prescribed in as much as the notice is given to secure the assessee's explanation to fulfil the requirement of natural justice. It is not in dispute that the assessee did not entertain any doubt in his mind when he received the notice issued by the ITO under s. 274. If the assessee was under a mistaken view about the real intent and effect of the notice issued, he could have asked the ITO to clarify whether the penalty proceedings were initiated for concealment of income or for furnishing inaccurate particulars of such income. In the present case, it is not denied that in the explanation given to the ITO in response to the notice issued under s. 274, the assessee did not raise any objection on the ground that the notice did not convey the nature of offence committed by*

him. No objection was also taken regarding the validity of the notice on that ground. It is, therefore, clear that the assessee was not under any misapprehension about the offence alleged against him. There was proper understanding and indeed, in the explanation filed, the assessee dealt with the reasons for contending that no penalty could be levied under s. 271(1)(c). It was not shown to us that any prejudice was caused to the assessee on account of the assesseee not being put in the knowledge of the nature of offence committed by him. The contention regarding the validity of the notice was urged only during the course of the appeal before the Tribunal and it seems to us that the explanation was only an after-thought. The assessee certainly understood the offence alleged against him and showed cause to the ITO by pointing of s. 274 would apply not only to concealment of income but also for furnishing inaccurate particulars of such income and where the offence is two-fold, there is no need on the part of the ITO to strike off any inappropriate portions. In the present case, the offence alleged against the assessee is that there is concealment of income and furnishing of inaccurate particulars of such income. It is not, therefore, necessary for the ITO to strike out any portion of the notice issued to him.

9. The principle of natural justice contained in s. 274 which requires that an assessee shall be heard before levying penalty under s. 271 is to ensure that the basic requirement of fair play in action is fulfilled. The rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice has been caused to the party concerned by the procedure followed. We have already mentioned above that the assessee has not shown that any such prejudice has been caused to him. Attention may be invited in this connection to the decision of the Supreme Court in Tripathi v. State Bank of India, . We have perused the judgment of the Kerala High Court in Subramania Iyer v. Union of India [1974] 97 ITR 228, on which the assessee has relied. With great respect, we are unable to agree that the mere non-striking off of the inappropriate portions in a notice renders the notice automatically invalid unless in a further enquiry in the matter it is shown that by reason of the notice not properly conveying the gist of the offence to the assessee, prejudice is caused to him. We cannot accept as a general proposition of law that in every

26. We find following the above decision, the Hon'ble AP High court in the case of Srinivasa Pitty & sons vs CIT (supra) at para 3 of the order has observed as under:-

> *3. The Revenue filed an appeal before the Tribunal. The Tribunal accepted the Revenue's contention that there was no defect in the show-cause notice. Consequently, it directed the Appellate Assistant Commissioner to consider the question regarding merits. Aggrieved by the aforesaid order, the matter has been carried to this court by the assessee. Looking at the notice under section 274 dated March 12, 1974, we are inclined to accept the assessee's contention that the notice was defective, because the relevant portion in the notice concerning the levy of penalty for concealment of income and giving inadequate particulars of income was struck off. Fortunately, for the Revenue, however, the assessee understood the notice as one for the levy of penalty under section 271(1) (C) of the Income-tax Act. Accordingly, he sent a reply. The assessee's reply was considered and penalty was levied. We, therefore, think that no prejudice is caused to the assessee by the defective nature of the notice as he has had full opportunity before the Income-tax Officer to set out his defence against the levy of penalty under section 271(1) (C) of the Act. In that view, we consider that the order of the Income-tax Officer levying penalty under section 271(1) (C) of the Act does not suffer from want of jurisdiction. Support for this view can be found in a decision of this court in CIT v. Chandulal .*

27. Though the learned Counsel for the assessee cited a few decisions of the Hon'ble AP High Court, cancelling the penalty for not specifying in the notice as to whether such penalty is for concealment of particulars of income or furnishing of inaccurate particulars thereof, we find the Hon'ble High court in the later decisions have not considered the earlier decisions of the High Court since these were not brought to the notice of their lordships and therefore, cannot be followed especially when the earlier decisions are not reversed by the Apex Court and therefore, still holds good.

28. In this view of the matter, we are of the considered opinion that merely for non-specifying in the notice as to under which limb the penalty is levied i.e., for concealment of income or furnishing inaccurate particular of income thereof, the penalty cannot be cancelled especially when the assessee who is a non-filer was put to notice which he has understood and has replied to such notice issued by the AO. In the light of the above discussion, we uphold the order of the ld.CIT(A) in sustaining the penalty levied

by the AO. The grounds raised by the assessee are accordingly dismissed."

11. In view of the above, respectfully following the decision of the co-ordinate Bench of the Tribunal in the case of Moola Padmaja (supra), we do not find any merit in the appeal of the assessee. Accordingly, the appeal of the assessee is dismissed, and the appeal filed by the Revenue is allowed and the order of the Assessing Officer imposing the penalty is restored.

12. In the result, the appeal of the assessee is dismissed, and the appeal of Revenue is allowed.

Order pronounced in the Open Court on 21st December, 2023.

Sd/-	**Sd/-**
(R.K. PANDA) **VICE PRESIDENT**	**(LALIET KUMAR)** **JUDICIAL MEMBER**

Hyderabad, dated 21st December, 2023.
TYNM/sps

Copy to:

S.No	Addresses
1	Hindupur Bio-energy Private Limited, 6-3-1109/A/1, 3rd Floor, Navabharat Chambers, Somajiguda, Rajbhavan Road, Hyderabad – 500082.
2	The Deputy Commissioner of Income Tax, Circle 2(2), Hyderabad.
3	The Pr.CIT, Kurnool.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order