

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

BEFORE SHRI.NARENDER KUMAR CHOUDHRY (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)

I.T.A. No.3015/Mum/2023
(Assessment year : 2009-10)

S.Amit & Co. 42, 4 th Floor, Garden View 45, August Kranti Marg Near Gowalia Tank Mumbai-400 036 PAN: AAGFS8553A	vs	Asst. Commissioner of Income- tax, Circle-19(3), Mumbai
APPLICANT		RESPONDENT

Present for the Assessee	Shri Ketan L Vajani – Ld. CA
Present for the Department	Shri Mahesh Parwani - Ld. SR DR

Date of hearing	12/12/2023
Date of pronouncement	20/12/2023

ORDER

Per N.K. Choudhry (JM):

This appeal has been preferred by the Assessee, against the order dated 07/06/2023 impugned herein passed by the National Faceless Appeal Centre, Delhi (in short 'NFAC') / Ld. Commissioner of Income-tax (in short, 'Ld. Commissioner') under section 250 of the Income-tax Act, 1961 (in short, 'the Act') for the A.Y. 2009-10.

2. In the instant case, the Assessee had declared its total income at Rs.84,22,620/- by e-filing its return of income on 31/08/2009 which was processed under section 143(1) of the Act. Subsequently, the assessment was reopened by issuing notice dated 30th March 2018 under section 148 of the act, on the basis of information obtained during search and seizure operations as well as survey operations in the group cases of one Mr. Bhanwarlal Jain, wherein it was found that Mr. Bhanwarlal Jain and his group concerns were engaged in the business of providing accommodation bills and entries. The Assessee had purchased goods worth aggregate value of Rs.2,72,19,575/- from three entities purportedly belonging to the Bhanwarlal Jain group M/s Mohit Enterprises, M/s Prime Star, and M/s Mayur Exports. The Assessing Officer called for explanation and evidence to prove the genuineness of the invoices, proofs of payments being made by account payee crossed cheques, and entries of goods purchased into the stock register, which were furnished by the Assessee. The Assessing Officer, however, found that the evidences filed by the Assessee cannot be held to be conclusive and therefore, the purchases were bogus transaction entered into by the Assessee to cover the grey market purchases made by him. The AO ultimately attributed an amount equal to 8% of such purchases as income that escaped assessment and the total income of the Assessee was increased and assessed at Rs.1,06,00,180/-.

3. On appeal, the Ld. Commissioner restricted the addition to the extent of 3% of the total purchase of Rs.2,72,19,275/-. The addition to assessed income was thus restricted to Rs.8,16,587/- as against the addition of Rs.21,77,566/-.

4. Subsequently, the Assessing Officer considering the fact that the Ld. Commissioner has given only a partial relief, initiated penalty proceedings under section 271(1)(c) and issued a notice dated 24/03/2015 under section 274 read with section 271(1)(c) of the Act. Subsequent to that another letter dated 28th February 2018 was also issued by the Assessing Officer requiring the Assessee to show cause why the penalty under section 271(1)(c) of the Act should not be levied. The Assessee explained that it had not concealed any part of income and had also not furnished inaccurate particulars of income. The Assessing Officer vide penalty order dated 31/03/2018 ultimately held the explanation of the Assessee as not tenable and levied a penalty **Rs, 2,52,325/-** i.e. equal to 100% of the tax sought to be evaded on **Rs.8,16,587/-** .

5. The Ld. Commissioner on appeal, more or less on the same reasoning as given by the Assessing Officer, affirmed the levy of penalty to the tune of Rs. **Rs, 2,52,325/-/-** . The Assessee being aggrieved is in appeal before us.

6. Heard the parties and perused the material available on record. At the outset, the Assessee challenged the validity of the notice dated 28/12/2016 issued under section 274 read with section 271(1)(c) of the Act. As the Assessee has raised the legal issue, therefore, before going into the other issues/merit of the case, we are inclined to adjudicate this legal issue first.

7. It was argued by the learned counsel for the Assessee that in the instant case the notice u/s 271(1)(c) issued on dated 24/03/2015 is vague, having not specified any particular limb of the penalty and, therefore, the penalty is not leviable. In support of said contention,

also relied on various judgments including by the Gujarat High Court in the case of CIT v. Whitelene Chemicals (2014) 360 ITR 385 (Guj) and by the Bombay high Court in the cases of Ganga Iron & Steel Trading Company Vs CIT (2022) 135 taxmann.com 244 (Bom) and Pr.CIT vs. Golden Peace Hotels & Resorts Pvt, Ltd (2021) 124 taxmann.com 248 (Bom) and by the Hon'ble Supreme Court in the case of Pr.CIT vs. Golden Peace Hotels & Resorts Pvt Ltd (2021) 124 taxmann.com 249 (SC) wherein SLP filed by the department against the judgment of Bombay High Court in the case of Pr.CIT vs. Golden Peace Hotels & Resorts Pvt, Ltd (supra) wherein identical issue was involved, has been dismissed.

8. On the contrary the Ld. DR supported the orders passed by the authorities below and submitted that impugned order specifically under challenge does, not suffer from any perversity, impropriety and/or illegality and hence needs no interference. Though the Ld. DR extensively argued on the merits of the case but not refuted the claim of the Assessee qua notice u/s 274 of the Act.

9. Heard the parties and perused the material available on record. In the instant case, the AO initiated penalty under section 271(1)(c) of the Act for concealment of particulars of income and furnishing inaccurate particulars of Income and thereafter issued the notice dated 24-03-2015 u/s 274 read with 271(1)(c) of the Act by indicting concealment of particulars of income **or** for furnishing inaccurate particulars of income, which reflects without specifying any particular limb of the penalty and finally imposed the penalty for furnishing inaccurate particulars of income.

9.1 The Hon'ble Apex Court in case of M/s. SSA's Emerald Meadows, (2016) 73 taxmann.com 248(SC) also dealt with the identical issue and dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by Hon'ble High Court of Karnataka whereby identical issue was decided in favour of the Assessee. Operative part of the judgment in case of M/s. SSA's Emerald Meadows (supra) decided by Hon'ble High Court of Karnataka is reproduced below:-

"2. This appeal has been filed raising the following substantial questions of law:

- (1) Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?*
- (2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the penalty notice under Section 274 r.w.s. 271(1)(c) is bad in law and invalid in spite of the amendment of Section 271(1) B) with retrospective effect and by virtue of the amendment, the assessing officer has initiated the penalty by properly recording the satisfaction for the same?*
- (2) Whether on the facts and in the circumstances of the case, the Tribunal was justified in deciding the appeals against the Revenue on the basis of notice issued, under Section 274 without taking into consideration the assessment order when the assessing officer has specified that the assessee has concealed particulars of income?*

3. The Tribunal has allowed the appeal filed by the Assessee holding the notice issued by the Assessing Officer under Section 274 read with 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 upon the decision of the Division Bench of this Court rendered In the case of COMMISSIONER or INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565.

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."

9.2 The Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar) observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per Hon'ble High Court, where the Assessing Officer proposed to invoke first limb being concealment, then the notice has to be appropriately marked. The Hon'ble High Court also held that the standard proforma of notice under section 274 of the Act without striking off the irrelevant clause would lead to an inference of non-application of mind by the Assessing Officer and levy of penalty would suffers from non-application of mind.

9.3 Even the Hon'ble jurisdictional High Court of Mumbai in Ganga Iron & Steel Trading Company's case, has specifically dealt with the issue "wherein the show cause notice under section 274 read with section 271(1)(c) of the Act was issued by indicting concealment of particulars of income **or** for furnishing inaccurate particulars of income and the Hon'ble High Court ultimately held as under:

“That since the show cause notice dated 12/02/2008 does not indicate whether there was concealment of particulars of income or furnishing of inaccurate particulars of income, the same would vitiate the penalty proceedings. Since it has been found that show cause notice dated 12/02/2008 was vague and penalty proceedings initiated on that basis were vitiated, an once it is found that show cause notice dated 12/02/2008 issued to the Assessee was not in accordance with law, the orders passed thereon would automatically cease to operate.”

9.4 The penalty provisions of section 271(1)(c) of the Act are attracted, where the Assessee has concealed the particulars of income or furnished inaccurate particulars of such income. It is also a well-accepted proposition that the aforesaid two limbs of section 271(1)(c) of the Act carry different meanings. Therefore, it is imperative for the Assessing Officer to specify the relevant limb, so as to make the Assessee aware 'as to what is the charge made against him' so that he can respond accordingly.

9.5 In the background of the aforesaid legal position and, having regard to the manner in which the Assessing Officer has issued the notice dated **24/03/2015** under section 274 r.w.s. 271(1)(c) of the Act without specifying the limb under which the penalty proceedings have been initiated and proceeded with, apparently goes to prove that notice in this case has been issued in a stereotyped manner without applying mind which is bad in law, hence can not be considered a valid notice sufficient to impose penalty u/s 271(1)(c) of the Act. It is also a fact that though Ld. DR extensively tried to support the penalty order on merit, but not refuted the notice u/s 274 of the Act. Hence, considering the peculiar facts and circumstances in totality, we have no hesitation to delete the penalty levied by the AO and affirmed by the Ld. Commissioner, on the basis of defective notice.

10 In the result, appeal filed by the Assessee is allowed.

Order pronounced in the open Court on 20/12/2023.

Sd/-

sd/-

(GAGAN GOYAL)	(NARENDER KUMAR CHOUDHRY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
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BY ORDER,

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Asstt. Registrar / Senior Private
Secretary

ITAT, Mumbai