IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA Nos.998 to 1002 & 1144/Bang/2023
Assessment Years: 2011-12, 2012-13, 2014-15, 2015-16, 2017-18 & 2013-14 respectively

Shri Anand No.67, Kanakapura Main Road Vasudevapura Taralu (PO) Bangalore 560 062 Karnataka **PAN NO.AHNPA2455K**	**Vs.**	ITO Ward 3(2)(4) Bangalore
ASSESSEE		**RESPONDENT**

Assessee by	:	Shri R. Chandrashekar, A.R.
Revenue by	:	Shri Subramanian S., D.R.

Date of Hearing	:	17.01.2024
Date of Pronouncement	:	17.01.2024

O R D E R

PER BENCH:

ITA Nos.998/Bang/2023 to 1001/Bang/2023 and ITA No.1144/Bang/2023 are emanated from the different orders of CIT(A) for the assessment years 2011-12 to 2015-16, wherein NFAC has confirmed the levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961 (in short "The Act").

2. The assessee has raised common grounds in all these appeals with regard to levy of penalty u/s 271(1)(c) of the Act at 100% tax sought to be evaded on the amount of income said to be concealed.

2.1 The assessee has also raised grounds in ground No.7 that notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 27.12.2018 is

not in accordance with law since it did not specify with regard to the default whether it is concealment of income or furnishing of inaccurate particulars of income. First, we deal with the validity of notice issued u/s 274 of the Act, wherein irrelevant portion of the notice has not been struck off.

3. Common facts of the case except figures are that the assessee is an individual. In this case the assessment was completed u/s 144 r.w.s 147 of the Act. Enquiries into the assessee's banking transaction revealed that assessee had generated income out of business chargeable to tax but no return of income was filed. Hence, the case was reopened u/s 147 of the Act and notice u/s 148 was issued. The assessee did not comply with the notice. With no return filed, the information brought on record by the Investigation Unit being the statement recorded u/s 131 was relied upon wherein the assessee had admitted undisclosed gross receipts of Rs.39,24,520/- on which total income offered to tax for A.Y.2013-14 was quantified at Rs.4,65,688/- and assessment completed ex-parte. However, penalty proceedings were initiated u/s 271(1)(c) of the Act for concealment of income and a penalty of Rs.2,87,800/-was imposed. Against this assessee went in appeal before ld. CIT(A) who has confirmed the order of ld. AO. Against this assessee is in appeal before us. Similar is the facts in other assessment years also.

4. We have heard the rival submissions and perused the materials available on record. We have given a careful consideration to the rival submissions. The argument of the learned counsel for the Assessee was that the show cause notice u/s.274 of the Act which is in a printed form and the AO has indicated in the said notice as to whether the penalty is sought to be levied on the assessee for "furnishing inaccurate particulars of income" or "concealing particulars of such income" by striking off the irrelevant portion of the printed show cause notice. On this aspect we find that in the show cause notice u/s.274 of the Act the AO has not struck out the irrelevant part. It is not spelt out as to whether the penalty

proceedings are sought to be levied for "furnishing inaccurate particulars of income" or "concealing particulars of such income".

4.1 The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and finding the assessee guilty in another limb is bad in law. It was submitted that in the present case, the aforesaid decision will squarely apply and the orders imposing penalty have to be held as bad in law and liable to be quashed.

4.2 The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory (supra) has laid down the following principles to be followed in the matter of imposing penalty u/s.271(1)(c) of the Act.

> *"NOTICE UNDER SECTION 274*
>
> *59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then 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 the Section 274 makes it clear that 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 farm where all the ground mentioned in*

Section 271 are mentioned would not satisfy 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% to 300% 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, 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.

60. Clause (c) deals with two specific offences, that is to say, concealing particulars of income or furnishing inaccurate particulars of income. No doubt, the facts of some cases may attract both the offences and in some cases there may be overlapping of the two offences but in such cases the initiation of the penalty proceedings also must be for both the offences. But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law. It is needless to point out satisfaction of the existence of the grounds mentioned in Section 271(1)(c) when it is a sine qua non for initiation or proceedings, the penalty proceedings should be confined only to those grounds and the said grounds have to be specifically stated so that the assessee would have the opportunity to meet those grounds. After, he places his version and tries to substantiate his claim, if at all, penalty is to be imposed, it should be imposed only on the grounds on which he is called upon to answer. It is not open to the authority, at the time of imposing penalty to impose penalty on the grounds other than what assessee was called upon to meet. Otherwise though the initiation of penalty proceedings may be valid and legal, the final order imposing penalty would offend principles of natural justice and cannot be sustained. Thus once the proceedings are initiated on one ground, the penalty should also be imposed on the same ground. Where the basis of the initiation of penalty proceedings is not identical with the ground on which the penalty was imposed, the imposition of penalty is not valid. The validity of the order of penalty must be determined with reference to the information, facts and materials in the hands of the authority imposing the penalty at the time the order was passed and further discovery of facts subsequent to the imposition of penalty cannot validate the order of penalty which, when passed, was not sustainable.

61. The Assessing Officer is empowered under the Act to initiate penalty proceedings once he is satisfied in the course of any proceedings that there is concealment of income or furnishing of inaccurate particulars of total income under clause (c). Concealment, furnishing inaccurate particulars of income are different. Thus the Assessing Officer while issuing notice has to come to the conclusion that whether is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujarat High Court in the case of MANU ENGINEERING reported in 122 ITR 306 and the Delhi High Court in the

case of VIRGO MARKETING reported in 171 Taxman 156, has held that levy of penalty has to be clear as to the limb for which it is levied and the position being unclear penalty is not sustainable. Therefore, when the Assessing Officer proposes to invoke the first limb being concealment, then the notice has to be appropriately marked. Similar is the case for furnishing inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind."

The final conclusion of the Hon'ble Court was as follows:-

"63. In the light of what is stated above, what emerges is as under:

a) *Penalty under Section 271(1)(c) is a civil liability.*

b) *Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.*

c) *Willful concealment is not an essential ingredient for attracting civil liability.*

d) *Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.*

e) *The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.*

f) *Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.*

g) *Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).*

h) *The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*

i) *The imposition of penalty is not automatic.*

j) *Imposition of penalty even if the tax liability is admitted is not automatic.*

k) *Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the*

assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.

l) *Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.*

m) *If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*

n) *The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*

o) *If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*

p) *Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income*

q) *Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*

r) *The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.*

s) *Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.*

t) *The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*

4.3 The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is

open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."

4.4 It is clear from the aforesaid decision that on the facts of the present case that the show cause notice u/s. 274 of the Act is defective as it does not spell out the grounds on which the penalty is sought to be imposed. Following the decision of the Hon'ble Karnataka High Court, we hold that the orders imposing penalty in all the assessment years have to be held as invalid and consequently penalty imposed is cancelled.

4.5 We may also add that the provision of section 292B of the Act cannot cure the basic defect in assumption of jurisdiction and only cure the mistake, defect or omission in return of income, assessment, notice or the proceeding is in substance and effect in conformity with or according to intent and purpose of the Act. As we have already seen that the Hon'ble Karnataka High Court in the decision referred to earlier view the show cause notice and the reasons mentioned in the show cause notice are part of the process of the natural justice and the defect in such notice cannot be overlooked. In view of the aforesaid decision, we do not find any infirmity in the arguments advanced by the learned AR before us.

4.6 The contention of the Ld. DR is that the assessee has participated in the penalty proceedings and hence the error, if any that has occurred would be cured in view of the provisions of sec. 292B/292BB of the Act. Opposing the said contention, reliance was placed on the decision rendered by the Bangalore Bench of the Tribunal in the case of Shri K. Prakash Shetty vs. ACIT (ITA Nos. 265 to 267/Bang/2014 dt. 05/06/2014) wherein it was held that the provisions of sec.292BB would not come to the rescue of the revenue,

when the notice was not in substance and effect in conformity with or according to the intent and purpose of the Act. In our view, the notice issued by the Assessing Officer was not in substance, and effect in conformity with or according to the intent and purpose of the Act, since the Assessing Officer did not specify the charge for which penalty proceedings were initiated and further there was non-application of mind on the part of the Assessing Officer.

4.7. For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. Accordingly, we quash the penalty order in all these cases. Since we have quashed the penalty orders itself, we refrain from going into the merit in sustaining the penalty by NFAC. Accordingly, appeals of the assessee in ITA Nos.998 to 1001 & 1144/Bang/2023 are allowed.

ITA No.1002/Bang/2023 (AY 2017-18):

5. Facts of the issue are that Assessee is a dealer in construction materials like Sand, Jelly, and Mud etc. Assessee in order to purchase the materials goes to Lorry Yards, where the materials filled Lorries are stationed. After purchasing the materials are sent to the customer's places either in the same vehicle is sometimes in a different vehicles generally individual constructer. The nature of the business or that the assessee is in business is also accepted in the earlier assessments.

5.1. Assessee has account with HDFC and wherein the assessee has deposited cash amounting to Rs. 11,94,500/-and other deposits are Rs.48,17,614/- during demonetization period. In all there are deposits to the tune of Rs. 60,12,114/- which the learned AO has presumed as the assessee's income and proceeded to issue notice u/s. 142(1) of the Act for the assessment year 2017-18 on 31-03-2018. Assessee could not file the return or to participate in the proceedings on account of pandemic and the office of the tax consultant was not functioning and was not available and assessee could not get bank statement on account of

pandemic, which was ultimately lead to an order of ex-party assessment on 14-10-2019.

5.2 The Assessee has submitted the returns filed for earlier years which are also concluded u/s. 143(3) of the Act on 12-12-2018 accepting that the assessee is carrying on business and assessee opted provisions of section 44AD of the Act. Assessee since unable to trace the orders of earlier years, the same were not placed on record. Some of the deposits are withdrawn from other bank and re-deposited in order to honour cheques or amounts which could not be paid to the supplier for availability of the person.

5.3 Assessee is in appeal against the ex-party order of assessment dated 14-10-2019 for the assessment year 2017-18 determining the income at Rs.60,12,114/- and subjecting the income to tax for special rates applying the provisions of section 115BBE of the Act.

5.4 Assessee went in appeal before NFAC and the NFAC observed that assessee was asked to file written submissions on 10.3.2023, 31.8.2023 & 20.9.2023 in support of his claim. However, it was noted that submission filed by assessee was not supported by any documentary evidence. Hence, he confirmed the order of the ld. AO. Against this assessee is in appeal before us.

6. After hearing both the parties, we are of the opinion that the assessee though filed written submissions before the NFAC, it is not supported by any evidence. Hence, the appeal of the assessee has been dismissed. Before us, ld. A.R. pleaded that assessment order is ex-parte and also no evidence has been filed in support of sources of deposit into bank account before NFAC and pleaded to given an opportunity of hearing before the ld. AO. We accede to the request of the ld. A.R. Accordingly, we remit the entire issue in dispute to the file of ld. AO for fresh consideration in accordance with law. The assessee shall cooperate

with the department and file necessary supporting documents explaining the sources of deposit into assessee's bank account.

7. In the result, appeal of the assessee in ITA No.1002/Bang/2023 is partly allowed for statistical purposes.

Order pronounced in the open court on 17th Jan, 2024

Sd/-	**Sd/-**
(George George K.)	**(Chandra Poojari)**
Vice President	**Accountant Member**

Bangalore,
Dated 17th Jan, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.