IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", MUMBAI

BEFORE SHRI P.K. BANSAL, VICE-PRESIDENT AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 1999/Mum/2014 (Assessment Year-2005-06)

ITA No. 2000/Mum/2014 (Assessment Year-2007-08)

Banggreen Holding Pvt. Ltd. Devidas Mansion, 4th Floor, Mereweather Road, Colaba, Mumbai-400039 **PAN: AAACB2093F**	**Vs.**	DCIT Range (30(1) , Mumbai.
(Appellant)		(Respondent)

Assessee by	:	Shri Yogesh A. Thar with Ms Ayushi Modani (AR)
Revenue by	:	Shri Suman Kumar (DR)
Date of hearing	:	31.05.2017
Date of Pronouncement	:	31.05.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. These two appeals by assessee under section 253 of the Income-tax Act (the Act) are directed against two different orders of ld. Commissioner of Income Tax-5, Mumbai [the CIT], Mumbai dated 27.12.2013 for Assessment Year (AY) 2005-06 & 2007-08. The ld Commissioner of Income Tax (Appeals) confirmed the order of penalty levied under section 271(1)(c) of the Act for both the assessment years. In both the appeals the assessee has raised the identical grounds of appeal facts are also similar, thus, both the appeals were heard together and are decided by consolidated order to avoid the conflicting decision. For appreciation of facts we are referring the facts in ITA No. 1999/Mum/2014 for AY-2005-06**.**

2. Brief facts of the case are that the assessee company filed return of income for relevant Ay on 31.10.2005 declaring total income of Rs. 11,40,310/-. The assessment order was completed on 16.11.2007 under section 143(3) of the Act. In the return of income the assessee has shown income from the house property of Rs.82,08,386/-, from two office premises let out to M/s. Oracle and Star India. The assessee claimed certain expenses on account of Security, Brokerage and other charges. The AO while framing the assessment order made the disallowance on account of Security, Brokerage and other charges of Rs. 12,00,240/-, under the head "Income from House Property". The AO levied the penalty on such disallowance. On appeal before the ld. CIT(A), the order of penalty was confirmed. Thus, further aggrieved by the order of ld. CIT(A), the present appeal is filed before us.

3. We have heard the ld. Authorized Representative (AR) of the assessee and ld. Departmental Representative (DR) for the Revenue perused the material available on record. The ld. AR of the assessee made his submissions by way of five alternative prepositions. In support of his first preposition, the ld. AR of the assessee argued that the notice of penalty issued by assessing officer under section 274 r.w.s. 271(1)(c) of the Act does not specified as to whether the penalty is to be levied for concealment of income or furnishing the inaccurate particular in income. In absence of specific charge, penalty cannot be levied. In support of his submission, the ld. AR of the assessee relied upon the following decision:

i. CIT vs. Manjunath Cotton and Ginning Factory (35 taxmann.com 250) (Kar HC).
ii. CIT vs. V.S. Lad & Sons (SLP (C) 1856 of 2004 (SC)
iii. CIT vs. Veerabhadrapa Sangappa & Co. (SLP) (TS-381-SC-2016)(SC).
iv. CIT vs. SSA's Emerald Meadows (SLP (C) 11485 of 2016 (SC)
v. CIT vs. Samson Perinchary (ITA No. 1154 of 20014 (Bombay HC)
vi. CIT vs. Samson Perinchary (ITA No. 4625/Mum/2013 (Mumbai Trib.)
vii. Dr. Sarita Milind Davare vs. ACIT (ITA No. 2187/Mum/2014 (Mumbai Trib.).

In support of second preposition, the ld. AR of the assessee argued that the Security Expenses are deductable expenses in computing Annual Letting Value (ALV) while computing the income under the head "Income from House Property" and relied on the decision of co-ordinate bench of Delhi Tribunal in Lek Raj Channa vs. ITO (37 TTJ 297) (Del Tribunal.). The brokerage payment is also deductible in computing the ALV while computing the income under the head "Income from House Property" and the same has been held in case of Govind S. Singhania Vs. ITO (ITA No. 4581/M/2006 (Mum Trib.). The ld. AR of the assessee argued that the Society Charges and Maintenance Expenses which are general in nature and has been held as deductible in computing the ALV while computing the income under the head "Income from House Property" in various decisions of tribunal. In support of his submission the ld AR for the assessee relied on the following decisions;

(i) Aloo Bejan Daver Vs. ITO (ITA Nos. 2381 & 2382/Mum/2010 (Mum.-Trib.).
(ii) CIT Vs. R.J. Wook (P.) Ltd. (20 taxmann.com 599) (Del.-HC).
(iii) Realty Finance & Leasing (P.) Ltd. Vs. ITO (5 SOT 348) (Mum.-Trib.)
(iv) Bombay Oil Industries Ltd. Vs. DCIT (82 ITD 626) 9Mum.-Trib.)

(v) Varma Family Trust Vs. ITO (7 ITD 392) (Mum.-Trib.)

(vi) Sharmila Tagore Vs. JCIT (150 Taxman 4) (Mum.-Trib.)

In support of his third preposition, the ld. AR of the assessee argued that the income from letting out is one of the sole objects of the assessee and accordingly rental income was assessable under the head "Business Income" and the corresponding expenses and depreciation are allowable. In support of submission that ld. AR of the assessee relied upon the decision of Hon'ble Apex Court in Chennai Properties and Investments Ltd. Vs. CIT (373 ITR 673) (SC). In fourth preposition, the ld. AR of the assessee argued that mere change of head of income, no penalty is leviable. In support of his submission, the ld. AR of the assessee relied upon the following decisions;

(i) CIT vs. Bennet Coleman & Co. Ltd. (33 taxmann.com 227) (Bom. HC),

(ii) ITO vs. Balkishen R. Mehra (ITA No. 3862/M/12 (Mum. Trib.),

(iii) ITO vs. Prolifice Consultancy (ITA No. 2732/M/13 (Mum. Trib.),

(iv) ACIT vs. Neerja Birla (ITA No. 3259/M/1997) (Mum. Trib.).

Again in fifth preposition, the ld. AR of the assessee argued that assessee has disclosed all particulars while filing the return of income. The AO disallowed certain deductions, there was no question of furnishing inaccurate particular or concealing the income and his case is squarely covered by the ratio of the decision of Hon'ble Supreme Court in CIT vs. Reliance Petroproducts Pvt. Ltd. (322 ITR 158)(SC). In Fifth and last preposition, the ld. AR of the assessee argued that the claim was exclusively made in the return of income and there was no question of concealment of income on the part of assessee. In support of his submission, the ld. AR of the assessee relied upon the decision of DIT vs. E. F. Dinshaw (35

taxmann.com 95 (Bombay HC), ITO vs. S.M. Constructions (60 taxmann.com 135) (Bombay HC) & Bennett Coleman & Co. Vs. (36 taxmann.com 75) (Mum.-Trib.). The ld. AR of the assessee finally argued that all preposition are in alternative and without prejudice to each other and can succeed in any one of the prepositions led before us. On the other hand, ld. DR for the Revenue strongly supported the order of authorities below. The ld. DR for the Revenue argued that assessee has not raised specific ground of appeal in support of his first preposition. The ld. DR for the Revenue further argued that unless the assessee raised specific ground of appeal, the assessee cannot be allowed to argue on such issue which was even not raised before the first appellate authorities.

4. We have considered the rival submissions of the parties and have gone through the orders of authorities below. Section 271(1)(c) of the Act provides that the AO is entitled to levy penalty in case during the assessment proceeding, the AO is satisfied that the assessee has concealed the particulars of income or furnished inaccurate particulars of income. The concealment of particulars of income and filing inaccurate particulars referred in section 271(1)(c) of the Act denote different connotations. This distinction was discussed by Hon'ble Apex Court in case of Dilip N. Shroff (161 Taxman 218(SC) and in case and in case of T. Ashok Pai (292 ITR 11(SC). Wherein the Hon'ble Apex Court held that, if two expression i.e. concealment of particular of income and furnishing of inaccurate particulars of income have to different connotations, it is imperative for the assessee, that assessee be made aware of as to which of one action is being initiated against him for levy of penalty u/s. 271(1)(c) of the Act. The assessee has

placed on record copy of notice u/s 274 r.w.s. 271(1)(c) of the Act dated 26.11.2007. The notice was issued by AO on a standard format, without striking out irrelevant clause therein. The said notice referred to both limbs of section 271(1)(c) of the Act. Thus, there was no clarity in mind of AO as to which charge is being proposed/initiated against the assessee. This infirmity in the notice was sought to be demonstrated as reflection of non-application of mind by ld. AR of the assessee. Recently the co-ordinate bench of this Tribunal in case of Meherjee Cassinath Holdings Pvt. Ltd. v/s ACIT (supra) after considering the various decisions of Hon'ble Apex Court, Bombay High Court , Karnataka High Court and the decisions of various Bench of Tribunal, some of which are also reiled by ld AR for assessee, held as under;

> "8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee- company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the

particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

> *"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.*
>
> *84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"*

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR

660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

> *"....The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."*

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the ld. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non- application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted."

5. Considering the decision of various Superior Courts, the Hon'ble Bombay High Court in case of Shri Samson Perinchary (supra), and respectfully following the decision of co-ordinate bench, we allow the ground of appeal raised by assessee and set-aside the order of penalty levied under section 271(1)(c) of the Act. Since, we have accepted the first preposition of ld. AR of the assessee and allowed the appeal of assessee, thus, his submission made in alternative preposition became academic. In the result, appeal of the assessee for AY 2005-06 is allowed.

ITA No. 2000/Mum/2014 AY-2007-08

6. The assessee has raised identical ground of appeal. The facts of the assessment year under consideration are almost similar. The penalty was levied on similar disallowance. As we have deleted the penalty for AY 2006-06 on identical ground of appeal. Thus, following the principle of consistency, the ground of appeal raised by assessee in this appeal is also allowed.

7. In the result, both the appeals of assessee are allowed.

Order pronounced in the open court on 31st day of May 2017.

Sd/-	Sd/-
P.K.BANSAL	**(PAWAN SINGH)**
(VICE-PRESIDENT)	**JUDICIAL MEMBER**

Mumbai; Dated 31/05/2017
S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai