

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री भागचन्द, लेखा सदस्य एवं श्री कुल भारत, न्यायिक सदस्य के समक्ष
BEFORE: SHRI BHAGCHAND, AM AND SHRI KUL BHARAT, JM

आयकर अपील सं./ITA No. 1033/JP/2016
निर्धारण वर्ष/Assessment Year : 2012-13.

Narayana Heights & Towers, S-220, Time Square, Central Spine, Vidhyadhar Nagar, Jaipur	बनाम Vs.	ITO Ward-2-4 Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AAFFN8605H		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Vijay Goyal (CA)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl. CIT)

सुनवाई की तारीख / Date of Hearing : 07.02.2017.
घोषणा की तारीख / Date of Pronouncement : 20.02.2017.

आदेश / ORDER

PER SHRI KUL BHARAT, JM.

This appeal by the assessee is directed against the order of Id. CIT (A)-1, Jaipur dated 20/09/2016 pertaining to assessment year 2012-13. The assessee has raised the following grounds of appeal :

“ (1) On the facts and in the circumstances of the case and in law the Id. AO has erred in imposing the penalty u/s 271 (1)(C) of Income Tax Act, 196 without specifying the limb for reasons in the penalty notice to impose the penalty i.e. Whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income. Therefore the initiation and imposing of penalty proceedings is wrong, bad in law, in –valid and void ab-initio and Id. CIT(A) has not justified in confirming the levy of penalty u/s 271(1)(c) of Income Tax Act.

(2) Under the facts and in the circumstances of the case and in law the Id. Commissioner of Income-Tax (Appeals)-1, Jaipur has erred in confirming the penalty of Rs. 34,05,436/- imposed under section 271(1)(c) of I.T. Act, 1961 by Id. AO.

(3) The appellant prays or leave to add, to amend, to delete, to modify the all or any grounds of appeal on or before the hearing of appeal.”

2. Briefly stated the facts are that, the case of the assessee was picked up for scrutiny assessment and the assessment was completed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) vide order dated 25/03/2015. While framing the assessment, the Assessing Officer also directed penalty under Section 271(1)(c). Subsequently, the Assessing Officer imposed penalty vide order dated 30.09.2015 by observing that the assessee had not filed an appeal against the assessment order and it appears that the assessee is satisfied with the order passed by the Assessing Officer. Therefore, it appears that the assessee has nothing to say and has no objection regarding imposing the penalty under Section 271(1)(c) of the Act and proceeded to impose a penalty of Rs. 34,05,436/- on the concealed income. Aggrieved by this, the assessee preferred an appeal before the Ld. CIT(A) but after considering the submission dismissed the appeal. Now the assessee is in appeal before this Tribunal.

3. Apropos the ground nos. 1 and 2, the Id. Counsel for the assessee reiterated the submission as made in the written submission of synopses of argument. The submission as made are reproduced as under:-

“Submission of the assessee.

1. Initiation of penalty in Assessment Order:-

The Id. AO initiated the penalty proceeding u/s 271(1)(c) of Income Tax Act in the assessment order dated 25.03.2015 (**PB pg 10**). The Id AO initiated penalty by mentioning that:-

“As the assessee has concealed/furnished the inaccurate particulars of income therefore, penalty u/s 271(1)(c) is also initiated”.

Notice u/s 274

Further in the penalty notice u/s 274 read with section 271 of I.Tax Act dated 25.03.2015 (copy at PB pg 16), AO mentioned that:-

271(1)(c) Concealed particulars of income or furnished inaccurate particulars of income”

Penalty order:-

The penalty order was passed on 30/09/15 by holding that the assessee has concealed income. The relevant findings of ld AO (PB pg 23) is as under:-

“Therefore, I impose a penalty of equal to 100% o tax sought to be evaded on account of the above facts of the assessee of Rs. 34,05,436/- i.e. 100% tax evaded. Therefore, penalty u/s 271(1)(c) is imposed on the concealed income as per working given below.

CIT(A) on penalty

In Para (ix) at page 13 of CIT(A)’s order, ld CIT(A) mentioned that:-

“Therefore, in view of the above discussion, it is held that the appellant firm has furnished inaccurate particulars of income by adopting a unique method wherein sale consideration/compensation was not declared anywhere in its return of income....”

Thus the penalty proceedings were initiated without specifying the limb for reasons in the penalty notice to impose the penalty i.e. whether the penalty was initiated for concealment of particulars of income or for furnishing inaccurate particulars of income. Thereafter the penalty was levied by holding that the assessee has concealed the income. Ld CIT(A) took a different view and confirmed the penalty by holding that the assessee has furnished inaccurate particulars of income.

Therefore the initiation and imposing of penalty proceedings is wrong, bad in law, in valid and void ab initio.

2. The notice U/s 271 should be specific on imposing of penalty u/s 271(1)(c) of Income Tax Act, 1961 i.e. concealed particulars of income or furnishing inaccurate particulars of income. Reliance is placed on the decision in the case of **H. Lakshminarayana Vs. ITO, ITAT Bangalore Tribunal ITA Nos. 992 to 996/Ban/2014 order dated 3rd July, 2015** wherein the decision of Hon'ble Karnataka High Court in the case of **CIT & Anr. Vs Manjunatha Cotton and Ginning Factory** has been considered wherein it has been held that penalty proceeding is a 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 to 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. 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. 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. Therefore, in notice U/s 274 is to be marked appropriate on the basis of levy of penalty. The standard proforma without striking of the relevant item will lead to an inference as non-application of mind.

3. Hon'ble ITAT Jaipur Bench, Jaipur in its judgment in **ITA 878/JP/2013 dated 11.03.2016 in the case of Shankar Lal Khandelwal Vs DCIT** held that when assessing Officer has mentioned at the time of initiation of penalty proceeding under both the limbs i.e. concealed the particulars of income and furnished inaccurate particulars of income but at the time of notice U/s 274 he simply has ticked in prescribed proforma concealed particulars of income or furnished inaccurate particulars of income without deleting either limb of penalty even he has not put and in the notice itself between two limbs than the initiation of penalty proceedings cannot be considered as per law and Assessing Officer did not have any jurisdiction to impose penalty U/s 271(1)(c) of the Act. The findings of Hon'ble jurisdictional ITAT is as under:-

6. We have heard the rival contentions of both the parties and perused the material available on the record. In this case, the ld Assessing Officer initiated penalty proceedings for concealing of particulars of income and for furnishing inaccurate particulars of income vide order dated 31/12/2009. Notice U/s 274 read with Section 271-272 of the Act was issued on 30/12/2009 by ticking of the notice as under:-

“U/s 271(1)(c):- Concealed particulars of income or furnished inaccurate particulars of income”.

The ld Assessing Officer again gave notice during the course of penalty proceedings on 23/1/2012 wherein he gave show cause notice U/s 271(1)(c) for imposing of penalty without specifying the limb for reasons to impose the penalty, whether it is for concealed particulars of income or furnished inaccurate particulars of income. The ld CIT(A) has considered all the aspect and held that Explanation 5A to Section 271(1)(c) is applicable as in this case, a search was carried out after 01/6/2007 and the assessee has furnished return for A.Y. 2007-08 before search and additional income has been disclosed U/s 153A. Therefore, deeming provisions are applicable. It is undisputed fact that the assessee has disclosed additional income in return filed U/s 153A on the basis of incriminating document found during the course of search.

We have considered view that Explanation 5A is not required to be mentioned by the Assessing Officer specifically at the time of initiation or even in the show cause notice issued by the Assessing Officer, but basic defect we found that the ld Assessing Officer has mentioned at the time of initiation of penalty proceeding under both the limbs i.e. concealed the particulars of income and furnished inaccurate particulars of income but at the time of notice U/s 274 he simply has ticked in prescribed proforma concealed particulars of income or furnished inaccurate particulars of income without deleting either limb of penalty even he has not put and in the notice itself

between two limbs. The amended provisions of Sub-section (1B) of Section 271 has been considered by the Hon'ble Delhi High Court in the case of Madhu Shree Gupta vs. UOI, 317 ITR 107 wherein it has been held that at the stage of initiation of penalty proceedings, the order passed by the Assessing Officer need not reflect satisfaction vis a vis each and every item of addition or disallowance if the overall sense gathered from the order is that a further prognosis is called for. It would be sufficient compliance with the law that there is a prima facie evidence for concealment of particulars of income or furnishing inaccurate particulars of income. Even after this section, the Assessing Officer has to satisfy the particular limb of initiation of penalty imposed U/s 271(1)(c) of the Act at the time of assessment proceedings. The Hon'ble Karnataka High Court in the case of CIT vs. M/s Manjunatha Cotton & Ginning Factory & Ors.(2013) 359 ITR 565 (Karn) held that sending printed form where all the grounds mentioned in section 271 would not satisfy the requirement of law. The assessee should know the ground which he has to meet specifically, otherwise, the principle of natural justice is offended on the basis of such proceedings, no penalty could be imposed to the assessee. The Hon'ble Punjab & Haryana High Court in the case of Tej Bhan Cotton Ginning & Pressing Factory Vs. CIT, Rohtak (supra) has held that the Assessing Officer in assessment order has satisfied himself regarding initiation of penalty proceedings, which was tantamount to satisfaction have recorded to the fact on the basis of addition made by the Assessing Officer for concealed income in assessment order. The Hon'ble Court has confirmed the penalty even penalty proceedings initiated by the Assessing Officer by mentioning penalty proceeding for concealing/furnishing of inaccurate particulars of income. The Hon'ble Punjab & Haryana High Court has expressed different view on initiation of penalty proceedings even notice U/s 274 issued by putting oblique between concealing and furnishing of inaccurate particulars of income whereas the Hon'ble Karnataka High Court has held that the Assessing Officer has to satisfy at the time of initiation of penalty proceeding and issuing notice U/s 274 of the Act that whether penalty is for concealed particulars of income or furnishing of inaccurate particulars of income. There were two opinions of the Hon'ble Courts. The Hon'ble Supreme Court has held that in case of two views of the court, favourable view of the assessee would be taken as held in the case of CIT Vs Vegetable Products Ltd. (1973) 88 ITR 192 (SC) and a recent decision in the case of CIT Vs. Vatika Township P Ltd. (2014) 367 ITR 466 (SC). Therefore, we are of the considered view that initiation of penalty proceedings is not as per law and Assessing Officer did not have any jurisdiction to impose penalty U/s 271(1)(c) of the Act. As the matter has been decided on technical issue, we are not expressing any view on merit of the case. Accordingly, we delete the penalty confirmed by the ld CIT(A).

7. In the result, the appeal of the assessee is allowed.”

4. Hon'ble ITAT in its recent judgment in case of Shri Murari Lal Mittal ITA No. 334/JP/2015 order dated 09/11/16 has canceled the penalty on the same grounds following the decision of Shri Shanker Khandelwal. The findings of Hon'ble ITAT are as under:-

2.5 I have heard the rival contentions and perused the materials available on record. It is noted from the record that the assessee is an individual declaring income from house property and income from business or profession as proprietor of M/s. Mittal Enterprises. The return u/s 139(1) of the Act was filed on 25-10-2004 by the assessee declaring total income of Rs. 1,51,100/-. Search and seizure operations were carried out on 27-08-2008 on residential and business premises of the assessee. The return u/s 153 of the I.T. Act was filed on 31-03-2009 declaring total income of Rs. 5,85,090/- which included additional income surrender of Rs.4,53,819/-. The assessment was made by

the AO u/s 153A/143(3) of I.T. Act on total income of Rs. 6,18,980/- which included the addition of Rs. 33,892/- made by the AO on account of disallowance made from various expenses. In penalty proceedings, the AO imposed the penalty of Rs. 1,36,145/- being 100% of tax payable on additional income of Rs. 4,53,819/- declared by the assessee. The ld. CIT(A) has confirmed the action of the AO. It is noted from the record that the AO had initiated penalty proceedings for concealment of income or for furnishing inaccurate particulars of income. In the notice also, the AO has not specified for which specific reason the penalty proceedings has been initiated whether it is for concealment of income or for furnishing inaccurate particulars of income. Ultimately, the AO levied the penalty for concealment of income. The Hon'ble Karnataka High Court in the case of CIT & Anr vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 held as under:-

“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 section 274 makes it clear that the 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 form where all the grounds mentioned in section 271 are mentioned would not satisfy the 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 per cent. to 300 per cent. 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, the 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.”

It is also noted that similar type of issue was decided in favour of the assessee by ITAT Coordinate Bench in the case of Shankar Lal Khandelwal vs. DCIT, Central Circle- 1, Jaipur vide its order dated 11-03-2016 in ITA No. 878/JP/2013 for the assessment year 2007-08 by observing as under:-

6. We have heard the rival contentions of both the parties and perused the material available on the record. In this case, the ld Assessing Officer initiated penalty proceedings for concealing of particulars of income and for furnishing inaccurate particulars of income vide order dated 31/12/2009. Notice U/s 274 read with Section 271-272 of the Act was issued on 30/12/2009 by ticking of the notice as under:-

“U/s 271(1)(c):- Concealed particulars of income or furnished inaccurate particulars of income”.

The ld Assessing Officer again gave notice during the course of penalty proceedings on 23/1/2012 wherein he gave show cause notice U/s 271(1)(c) for imposing of penalty without specifying the limb for reasons to impose

the penalty, whether it is for concealed particulars of income or furnished inaccurate particulars of income. The Id CIT(A) has considered all the aspect and held that Explanation 5A to Section 271(1)(c) is applicable as in this case, a search was carried out after 01/6/2007 and the assessee has furnished return for A.Y. 2007-08 before search and additional income has been disclosed U/s 153A. Therefore, deeming provisions are applicable. It is undisputed fact that the assessee has disclosed additional income in return filed U/s 153A on the basis of incriminating document found during the course of search.

We have considered view that Explanation 5A is not required to be mentioned by the Assessing Officer specifically at the time of initiation or even in the show cause notice issued by the Assessing Officer, but basic defect we found that the Id Assessing Officer has mentioned at the time of initiation of penalty proceeding under both the limbs i.e. concealed the particulars of income and furnished inaccurate particulars of income but at the time of notice U/s 274 he simply has ticked in prescribed proforma concealed particulars of income or furnished inaccurate particulars of income without deleting either limb of penalty even he has not put and in the notice itself between two limbs. The amended provisions of Subsection (1B) of Section 271 has been considered by the Hon'ble Delhi High Court in the case of Madhu Shree Gupta vs. UOI, 317 ITR 107 wherein it has been held that at the stage of initiation of penalty proceedings, the order passed by the Assessing Officer need not reflect satisfaction vis a vis each and every item of addition or disallowance if the overall sense gathered from the order is that a further prognosis is called for. It would be sufficient compliance with the law that there is a prima facie evidence for concealment of particulars of income or furnishing inaccurate particulars of income. Even after this section, the Assessing Officer has to satisfy the particular limb of initiation of penalty imposed U/s 271(1)(c) of the Act at the time of assessment proceedings. The Hon'ble Karnataka High Court in the case of CIT vs. M/s Manjunatha Cotton & Ginning Factory & Ors.(2013) 359 ITR 565 (Karn) held that sending printed form where all the grounds mentioned in section 271 would not satisfy the requirement of law. The assessee should know the ground which he has to meet specifically, otherwise, the principle of natural justice is offended on the basis of such proceedings, no penalty could be imposed to the assessee. The Hon'ble Punjab & Haryana High Court in the case of Tej Bhan Cotton Ginning & Pressing Factory Vs. CIT, Rohtak (supra) has held that the Assessing Officer in assessment order has satisfied himself regarding initiation of penalty proceedings, which was tantamount to satisfaction have recorded to the fact on the basis of addition made by the Assessing Officer for concealed income in assessment order. The Hon'ble Court has confirmed the penalty even penalty proceedings initiated by the Assessing Officer by mentioning penalty proceeding for concealing/furnishing of inaccurate particulars of income. The Hon'ble Punjab & Haryana High Court has expressed different view on initiation of penalty proceedings even notice U/s 274 issued by putting oblique between concealing and furnishing of inaccurate particulars of income whereas the Hon'ble Karnataka High Court has held that the Assessing Officer has to satisfy at the time of initiation of penalty proceeding and issuing notice U/s 274 of the Act that whether penalty is for concealed particulars of income or furnishing of inaccurate particulars of income. There were two opinions of the Hon'ble Courts. The Hon'ble Supreme Court has held that in case of two views of the court, favourable

view of the assessee would be taken as held in the case of CIT Vs Vegetable Products Ltd. (1973) 88 ITR 192 (SC) and a recent decision in the case of CIT Vs. Vatika Township P Ltd. (2014) 367 ITR 466 (SC). Therefore, we are of the considered view that initiation of penalty proceedings is not as per law and Assessing Officer did not have any jurisdiction to impose penalty U/s 271(1)(c) of the Act. As the matter has been decided on technical issue, we are not expressing any view on merit of the case. Accordingly, we delete the penalty confirmed by the ld CIT(A).

7. In the result, the appeal of the assessee is allowed.’’

5. Hon’ble Kolkata ITAT in the case of Vaibhav Tulsyan Versus I.T.O Ward 29 (4) , Kolkata I.T.A Nos. 736 & 737/Kol/2013 Dated: 27May 2016 [2016 (11) TMI 1030] has cancelled the penalty on the same ground by holding that:-

“10. Heard the rival submissions and perused the material available on record. The question before us is as to whether the penalty order passed by the AO and confirmed by the CIT(A) falls for our consideration in pursuance of the Judgment of the Hon’ble Karnataka High Court supra. That on perusal of the said show cause notice dated 30-12-2010 issued u/s. 274 r.w.s. 271(1)(c) of the Act purportedly issued to show cause why the penalty shall not be imposed, We find that irrelevant portion of such notice was not struck out by the AO. Therefore, the said notice is not clear whether it was issued for furnishing of inaccurate particulars of income or concealment of particulars of such income. We find that the assessee as relied on the order dated 06-11-2015 in the case of Suvaprassanna Bhattacharya Vs. ACIT, Kolkata in ITA No. 1303/Kol/2010 for the AY 2006-07 is applicable to the case on hand. The relevant findings of the said tribunal order is reproduced herein below for better understanding:“

8. The next argument that the show cause notice u/s. 274 of the Act which is in a printed form does not strike out as to whether the penalty is sought to be levied on the for ”furnishing inaccurate particulars of income “ or concealing particulars of such income”. 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 therefore not spell out as to whether the penalty proceedings are sought to be levied for “furnishing inaccurate particulars of income “or “concealing particulars of such income”. 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 find 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 all the orders imposing penalty have to be held as bad in law and liable to be quashed.

5.1 *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 Explanation1 or in Explanation1(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 form 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 pro forma 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(1)(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 bona fide, an order imposing penalty could be passed.

m) If the explanation offered, even though not substantiated by the assessee, but is found to be bona fide 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.*

u) *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."
(emphasis supplied)

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.

For the reasons given above, we hold that levy of penalty in the present case cannot be sustained. We, therefore, cancel the orders imposing penalty on the Assessee and allow the appeal by the Assessee.

11. In the present case, as we noted above, the AO failed to strike out the irrelevant portion in the said show cause notice, Respectfully following the order above, we cancel the penalty levied u/s. 271(1) (c) of the Act by the Assessing Officer as confirmed by the CIT(A) for both the assessment years under consideration. Having held that the notice issued by the AO U/Sec 274 r/w Sec 271(1)(c) of the Act during the course of penalty proceedings is not in conformity with the relevant provisions of the Act, we are of the view that Section 292B can not come to the rescue of the Revenue and the reliance of the Ld.DR on the said provision is clearly misplaced. Therefore, preliminary issue as raised by the assessee by way of additional ground for both the assessment years 2006-07 & 200708 are allowed, in view of the same the other grounds raised requires no adjudication, therefore, all are dismissed.

12. In the result, the appeals of assessee are allowed.

Therefore, the concealment of income and furnishing inaccurate particulars of income, two are different defaults and they cannot be intermixed. Further, the CIT(A) has not confirmed the concealment of income but he took a different view by holding that the assessee has furnished inaccurate particulars of income. Therefore, the order of lower authorities deserves to be set aside and penalty levied by AO deserves to be cancelled."

3.1. On the contrary, Ld. Departmental representative opposed the submission and submitted that there is no infirmity into the order of the authorities below. Further, he submitted small procedural mistakes can not be the basis to hold the impugned order as bad in law.

3.2. We have heard the rival contention, perused the material available on record and gone through the orders of the authorities below. For the sake of clarity the relevant contents of the Assessment Order are reproduced as under:

"Penalty u/s 271(1)(c) is separately as assessee has concealed the income."

Relevant contents of the Penalty Order are reproduced as under:-

"As the assessee had not filed any appeal against order of the AO and it appears that the assessee is satisfied with the order passed by the AO. Therefore, it appears that the assessee has nothing to say and has no objection regarding imposing the penalty u/s 271(1)(c) of I.T. Act, 1961.

Therefore, I impose a penalty of equal to 100% of tax sought to be evaded on account of the above acts of the assessee of Rs. 34,05,436/- i.e. 100% tax evaded."

In the light of the above, we need to examine whether assessment order and the penalty order comply with the provisions of section 271(1)(c) of the Act. We find that on page 3 of the assessment order, the assessing order, AO observed as under:-

"As the assessee has concealed/furnished the inaccurate particulars of income therefore, penalty u/s 271(1)(C) is also initiated."

3.3. As per section 271 (1)(c), the assessing officer is empowered to impose penalty if in the course of any proceedings under this Act is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. From the above provision it is clear that there has to be a specific satisfaction by the Assessing Officer that the assessee is guilty of concealing the particulars of his income or furnishing inaccurate particulars of such incomes.

3.4. From the above, it is clear that the assessing officer should give a specific finding. In the present case, in the assessment order as noted above the assessing officer has stated that the assessee has concealed/furnished the inaccurate particulars of income. Therefore, the penalty under Section 271(1) (c) was also initiated, from this it can not be inferred whether there is specific charge of concealing the particulars of income or furnished the inaccurate particulars of such income. Law is well settled that the assessing officer has to come to a definite satisfaction whether the assessee has concealed the income of particulars or furnished the inaccurate particulars of income. The Hon'ble Karnataka High Court in the case of CIT and Another Vs. Manjunatha Cotton and Ginning Factory, 359 ITR 565(Kar.) has held that the notice u/s 274 of the Act should specifically state as to whether penalty is being proposed for concealment of particulars of income or inaccurate particulars of income. In the present case notice under section 274 dated 25/3/2015 enclosed at paper book page 16 reads as under:

"Penalty Notice Under Section 274, Read with Section 271 of the IT Act. 1961"

Whereas in the course of proceedings before me for the Assessment Year 2012-13. It appears to me that you have:-

Read With Section

271(1)(c) concealed particulars of income or furnished inaccurate particulars of income.”

Therefore, there is no specific charge by the Assessing Officer. Further, it is noted that the Assessing Officer in penalty order (as noted hereinabove) has proceeded on the basis of the assumption that the assessee is satisfied with the assessment order. Therefore, it appears that the assessee has nothing to say and has no objection regarding the imposing of the penalty under section 271(1)(c) of the Act. In our considered view, the assessing officer was not justified in imposing the penalty on this basis, the action of the assessing officer is contrary to the provision of law. The Id. CIT (A) without considering the binding precedents proceeded to hold that the penalty order can not be invalidated on account of any mistake or affect or omission if anywhere in view of the provision of section 292B of the Act. This finding of the Ld. CIT (A) is contrary to the judgment of the Hon'ble Karnataka High Court rendered in the case of CIT and Another Vs. Manjunatha Cotton and Ginning Factory, 359 ITR 565(Kar.) (supra). The Hon'ble Karnataka High Court has held as under:-

“ 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 the order of the appellate authority or the 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) and 1(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(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision contained in sub-section (1B).
- (h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Income-tax (Appeals) and the Commissioner.
- (i) The imposition of penalty is not automatic.
- (j) The 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 the 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 bona fide, an order imposing penalty could be passed.
- (m) If the explanation offered, even though not substantiated by the assessee, but is found to be bona fide 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 1(B) 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 grounds mentioned in section 271 are mentioned would not satisfy the requirement of law.

(r) The assessee should know the grounds which he has to meet specifically. Otherwise, the 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.

(u) 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 the 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."

In the light of the above judgment we are unable to affirm the action of the authorities below. As the initiation of penalty under section 271(1)(c) vide notice 274 of the Act is not in conformity with the requirement of the law. Thus, the Penalty order can not be sustained in the eyes of the law. Same deserves to be quashed. Hence, Ground no. 1 the assessee's appeal is allowed.

4. Ground no. 2 is on merit, the Id. Counsel for the assessee reiterated the submission as made in the written brief. The Id. Counsel for the assessee submitted that the penalty proceedings are separate from assessment proceedings and finding in the assessment proceedings does not lead to the conclusion that the assessee is guilty of concealing the income as submissions of submitted inaccurate particulars of

income. He submitted that the penalty under Section 271(1)(c) is not automatic. He submitted that there is no positive material to demonstrate that the assessee has made willful attempt to conceal the income and furnish the inaccurate particular of income. He submitted that there must be an independent finding to this effect as held by the Hon'ble Calcutta High Court, in the case of Durga Kamal Rice Mills Vs CIT (2004) 265 ITR 25(Cal.).

4.1. He submitted that in the assessment order the assessing officer made two additions one of Rs. 61,09,482/- applying the provisions of section 45(4) of the Income Tax Act, the other is of Rs. 49,11,349/- on account of short-term capital gain on land acquired by the NHAI these additions made represent to assessed income but not concealed income or income for which inaccurate particular were submitted.

4.2. He submitted that in respect of addition of Rs. 61,09,482/-, the assessee transfer its part of agriculture land (0.2300 hectares) to one of its partners shri Sitaram on redemption as part of capital redemption while sale deed dated 5/11/2011 for Rs. 1,81,95,000/- the cost of the land against the sale was Rs. 2,04,19,388/- the stamped authority adopted value for the purpose of stamp duty of Rs. 1,98,42,556/-. However, the assessing officer ignored the actual sale consideration at Rs. 1,81,95,000/- as well as the deemed consideration under Section 50C of the Act of Rs. 1,98,42,556/- but took the sale consideration of Rs. 2,65,28,870/- treating the same as fair market value on the basis of compensation paid by NHAI. He submitted that had the actual sale consideration and deem consideration under section 54C was taken then there have been no profit but loss. He submitted that this addition is patently wrong and it can not be considered as concealed income for which inaccurate particulars have been filed. He submitted

that even Section 45(4) of the Act can not be applied. He further submitted that the assessee was of the view that compulsory acquisition by NHAI would not attract the capital gain further in respect of addition of Rs. 49,11,349/- the assessee was under bonafide belief that the income was exempt from the tax on account of compulsory acquisition under section 10(37) of the Act. The Ld. Counsel relied on the decision of the coordinate bench rendered in the case of GTO Vs. Rajmata Shanti Devi(2001) 76 ITR 299 (Ahd) and also place reliance on the judgment of the Hon'ble Supreme Court rendered in the case of Price Waterhouse Coopers Pvt. Ltd. Vs. CIT and another 348 ITR 306 (SC). He further submitted that the assessment order under section 143(3) of the Act, was passed on the basis of information supplied by the assessee. So, it is not the case where the assessee has deliberately concealed the material particulars. In support of this Ld. Counsel for the assessee drew our attention to profit and loss account and the details on fixed assets as furnished during the course of assessment proceedings.

4.3. The Id. Departmental Representative opposed this submission and submitted that there is no illegality into the order of the authority below.

4.4. We have heard the rival contention and perused the material available on record, we find merit into the contention of the Id. Counsel for the assessee that out of two additions one addition of Rs. 61,09,482/- was wrongly made and the assessee has furnished all material facts before the Assessing Officer under these facts the assessing officer ought not to have levied the penalty. We find force into the contention of Ld. Counsel for the assessee that in the penalty proceeding the AO should consider the facts in right perspective. He should come to a specific finding

with regard to concealment of income. In the considered view, the explanation as given by the assessee ought to have been considered by the AO, The AO should not have passed penalty order in a mechanical way merely on the assumption that the assessee has accepted the charge of concealment of income. Ground no. 2 of appeal is allowed.

5. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 20/02/2017.

Sd/-
(भागचन्द)
(BHAGCHAND)

लेखा सदस्य / Accountant Member
Jaipur

Dated:- 20/02/2017

POOJA-

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- M/s Narayan Heights & Towers, Jaipur.
2. The Respondent – The Income Tax Officer, Ward 2(4), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1033/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar