

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' B '**

**BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

I.T. A. Nos.1079 & 1080/Bang/2014
(Assessment Years : 2006-07 & 2008-09)

Joint Commissioner of Income Tax, LTU,
Bangalore.

.... Appellant.

Vs.

M/s. State Bank of Mysore,
Head Office, Finance & Accounts Department,
K.G. Road, Bangalore.

.... Respondent.

ITA Nos.1160 to 1162/Bang/2014
(Assessment Years : 2006-07 to 2008-09)
(By Assessee)

Assessee By : Shri K.R. Vasudevan, Advocate.
Respondent By : Shri E.S. Nagendra Prasad, CIT (D.R)

Date of Hearing : 10.8.2015.
Date of Pronouncement : 14.9.2015.

O R D E R

Per Bench :

These are five appeals, three by the assessee and two by revenue, directed against the order of the Commissioner of Income Tax (Appeals), LTU, Bangalore dt.27.6.2014 substantially confirming the levy of penalty under Section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') by the Assessing Officer for Assessment Years 2006-07 to 2008-09, with partial relief to the assessee. The assessee is in appeal on the issues on which the levy of penalty is

confirmed for all the three assessment years and the revenue is in appeal on those issues on which the penalty was cancelled for Assessment Years 2006-07 and 2008-09.

2. The facts of the case, briefly, are as under :-

2.1 The assessee, a public sector bank, is a subsidiary of SBI and governed by the State Bank of India (Subsidiary Banks) Act, 1959. The assessee's returns of income for the relevant assessment years 2006-07 to 2008-09 were taken up for scrutiny and the assessments were completed under Section 143(3) of the Act; wherein the total income was computed by making various additions/disallowances to the income returned. The Assessing Officer also initiated penalty proceedings under Section 271(1)(c) of the Act in the orders of assessment by issue of notices under Section 274 rws 271 of the Act for the three assessment years under consideration.

2.2 The assessee preferred appeals against the orders of assessment before the CIT (Appeals), who disposed off the appeals allowing the assessee partial relief. Both Revenue and the assessee are in appeal before the Tribunal (ITAT) against the orders of the CIT (Appeals) and those appeals are pending before this Tribunal.

2.3 Before the disposal of these appeals before the Tribunal, against the orders of assessment, the Assessing Officer who had initiated penalty proceedings in the order of assessment by issue of notices under Section 274 rws 271 of the Act, proceeded to levy penalty under Section 271(1)(c) of the Act for the three assessment years 2006-07 to 2008-09 under consideration.

2.4 Aggrieved by the orders levying penalty under Section 271(1)(c) of the Act for Assessment Years 2006-07 to 2008-09, the assessee preferred appeals before the CIT (Appeals), LTU, Bangalore. The learned CIT (Appeals) vide the impugned order dt.27.6.2014 passed a common order for the aforesaid three assessment years, confirming the levy of penalty on certain issues and deleting the penalty on certain other issues.

2.5 Aggrieved by the order of the CIT (Appeals), LTU, Bangalore dt.27.6.2014 for Assessment Years 2006-07 to 2008-09, both the assessee and Revenue are in appeal before us raising various grounds. The gist of the details of the issues in the appeals filed by the assessee and Revenue are as under :-

2.6.1 **Appeals by the assessee.**

| S.No. | Issue | A.Y 2006-07 Rs. | A. Y. 2007- 08 Rs. | A. Y. 2008- 09 Rs. |
|-------|--|--------------------|-----------------------|-----------------------|
| 1. | Ground No.1 : Validity of proceedings u/s.271(1)(c) of the Act | | | |
| 2. | Ground No.2 : Levy of penalty on claiming deduction u/s.36(1)(viiia) of the Act for provision for standard assets. | 7,33,92,000 | 14,32,90,620 | 7,50,87,309 |
| 3. | Ground No.3 : Levy of penalty for claiming capital expenditure as revenue expenditure. | 6,89,404 | 67,546 | 70,046 |

2.6.2 **Appeals by Revenue**

| S.No. | Issue | Penalty levied u/s.271(1)(c). Rs. | |
|-------|---|-----------------------------------|--------------|
| | | A.Y. 2006-07 | A.Y. 2008-09 |
| 1. | Delay in remittance and non-deduction of TDS | 18,26,077 | --- |
| 2. | Provision for LFC/HTC, Silver Jubilee Awards and Resettlement Expenses. | ---- | 2,12,85,488 |

3. In the course of appellate proceedings, the assessee vide letter dt.13.7.2015 has raised an identical additional ground for Assessment Years 2006-07 to 2008-09 which is as under :-

"Ground No.4 : Penalty proceedings null and void-ab-initio.

- a. The penalty proceedings initiated were null and void, ab-initio, as the notice issued initiating the penalty proceedings suffered from incurable defect, vitiating the penalty proceedings.
- b. The initiation of penalty proceedings does not satisfy the requirement of assuming jurisdiction to initiate the proceedings."

3.1 The learned Authorised Representative was heard on the additional ground raised in the appeals for Assessment Years 2006-07 to 2008-09. Before us, the learned Authorised Representative for the assessee placed before the Bench a copy of the decision of the co-ordinate bench of this Tribunal in the case of M/s. Roadlinks India Pvt. Ltd. in ITA No.1485/Bang/2013 dt.27.2.2015 wherein the Tribunal, on the same issue and in similar circumstances, has admitted the additional ground and disposed off the appeal on the legal grounds so raised. The learned Authorised Representative also furnished a copy of the decision of another co-ordinate bench of this Tribunal in the case of M/s. Lion Estates and Properties in ITA No.5/Bang/2014 dt.31.7.2014 and the decision of the Hon'ble High Court of Karnataka confirming the decision of the co-ordinate bench in this case in ITA No.518 of 2014 dt.6.3.2015. The learned Authorised Representative also placed before the Bench, for our perusal the original notices issued under Section 274 rws 271 of the Act for Assessment Years 2006-07 to 2008-09 for initiating penalty under Section 271(1)(c) of the Act and placed copies of the same on record.

3.2 The learned Departmental Representative submitted that since the additional ground on the validity of the defective penalty notices is being raised for the first time before the

Tribunal, the matter may be remanded back to the authorities below for verification and adjudication. In support of this contention, the learned Authorised Representative placed reliance on the decision of the Hon'ble High Court of Madhya Pradesh in the case of CIT V. Tolaram Hassomal (2008) 298 ITR 22 (M.P.).

3.3 In a rejoinder to the contentions raised by the learned Departmental Representative, the learned Authorised Representative for the assessee submitted that the decision of the Hon'ble jurisdictional High Court in the case of Sankeshwar Printers Pvt. Ltd. (2013) 218 Taxman 360 has laid down the law in this regard. It was also submitted that the Hon'ble Apex Court in the case of NTPC Ltd. reported in 229 ITR 383 (SC) has held that any question of law arising from the facts on record should be allowed to be raised. It was submitted that the additional ground raised is in line with the decision of the Hon'ble Apex Court (supra), Hon'ble High Court of Karnataka (supra) and decisions of the co-ordinate benches of this Tribunal (supra) in the above cases referred and should therefore be admitted and adjudicated upon by the Tribunal.

3.4.1 We have heard both parties on the additional ground raised by the assessee in the appeals for Assessment Years 2006-07, 2007-08 and 2008-09, perused and carefully considered the material on record; including the judicial decisions cited and placed reliance upon. We find that, on exactly similar circumstances, the co-ordinate bench of this Tribunal in the case of Roadlinks India Pvt. Ltd. (supra) has held that the additional ground raised is a purely legal ground and since it goes to the very root of the matter relating to the levy of penalty under Section 271(1)(c) of the Act, it was admitted for consideration and adjudication. The relevant portion of the said order at para 5.1 thereof is extracted hereunder :-

" 5.1 We have heard both parties and perused and carefully considered the material on record. We find that the additional ground raised by the assessee is a purely legal ground and since the same goes to the very root of the matter relating to levy of interest under Section 271(1)(c) of the Act, we therefore admit the same for consideration and adjudication in this appeal."

3.4.2 Further, the Hon'ble High Court of Karnataka in the case of Sankeshwar Printers Pvt. Ltd. (supra) has held that a legal question can be raised at the stage of appeal and such a question need not be raised as a ground. The Hon'ble High Court further held that when a legal question is raised, the Tribunal has to consider the same in accordance with law and cannot refuse to entertain the same.

3.4.3 As regards the decision cited by the learned Departmental Representative CIT V Tolaram Hassomal (298 ITR 22) (MP), the co-ordinate bench of this Tribunal in the case of Smt. K.R. Prabhavati in M.P. No.5/Bang/2014 (in ITA No.234/Bang/2011) had occasion to examine the said decision. The co-ordinate bench in its order dt.10.4.2015 observed that the cited decision is not the decision of the jurisdictional High Court by the Hon'ble High Court of Karnataka and is also contrary to the law laid down by the Hon'ble Apex Court in the case of NTPC Ltd. in 229 ITR 383 (SC). The relevant portion of the order of the co-ordinate bench at para 10 thereof reads as under :-

" 10. As far as the decision of the Hon'ble Madhya Pradesh High Court in Tolaram Hassomal (supra) is concerned, it is not the decision of the jurisdictional High Court and is contrary to the law laid down by the jurisdictional High Court viz. Hon'ble High Court of Karnataka in the case of Sankeshwar Printers Pvt. Ltd. (supra) and is also contrary to the decision of the law laid down by the Hon'ble Supreme Court in the case of NTPC Ltd. (supra)....."

3.4.4 In fact, the Hon'ble Madhya Pradesh High Court itself has not followed the decision of Tolaram Hassomal (supra) in its subsequent decisions. The Hon'ble Madhya Pradesh High Court

has analysed the powers of the Tribunals on admissibility of additional grounds in the case of Torquoise Investment & Finance Ltd., in 299 ITR 143 dt.28.3.2006 wherein the Hon'ble Court relying on the decision of the Hon'ble Apex Court in the case of PVAL Kulandagan Chettiar (267 ITR 654) held that the Tribunal could not be precluded from considering the question of law arising in an assessment proceeding and not raised earlier. It was held that the Tribunal was justified in law in recording a finding on an issue which was not raised by the assessee either before the Assessing Officer or the learned CIT (Appeals) but was raised for the first time before the Tribunal. The said order has been affirmed by the Hon'ble Apex Court in 168 Taxmann 107.

3.4.5 The Indore Bench of the Tribunal in the case of Basantilal Jain in IT(SS)A No.64/Ind/2007 has examined both the aforesaid decisions of the Hon'ble Madhya Pradesh High Court and at para 4 of its order held that :-

“ 4.....Hon'ble High Court of Madhya Pradesh in 11 the case of Either Motors reported in 293 ITR 464 have held that additional grounds can be raised before the ITAT even if not raised before the Assessing Officer or the learned Commissioner of Income tax (Appeals). Accordingly, the Tribunal was justified in permitting the assessee to raise additional grounds of appeal even through the issue was not raised before the Assessing Officer or the learned Commissioner of Income tax (Appeals). Similarly, Hon'ble Madhya Pradesh High Court in the case of Steel Ingots; 135 CTR 379 held that additional ground requiring no appreciation of facts, Tribunal should have permitted the assessee to raise the question. It was observed that eventual destination of every litigation is justice and as such technicality should not be 12 permitted to prevail as a speed breaker in the case of dispensation of justice. Similar view has been taken by the Hon'ble High Court of Madhya Pradesh in the case of Bhopal Sugar Mills Limited; 233 ITR 429 wherein it was held that there is no prohibition on the power of the Tribunal to entertain an additional ground which according to the Tribunal arises in the matter and for just decision of the case. In view of the above discussion and decision of the Hon'ble Supreme Court in the case of National Thermal Power (supra) and the latest decision of the Hon'ble jurisdictional High Court in the case of Turquoise Investment & Finance Limited (supra), which was after the date of decision cited by the learned CIT DR in the case of Tolaram Hassomal (supra), we 13 are inclined to follow the latest decision of the Hon'ble jurisdictional High Court decided after considering the decision of Hon'ble Supreme Court reported at 267 ITR 654. As all the facts relating the additional legal grounds taken before us are

already on record, we are inclined to entertain the additional grounds which are purely legal in nature and accordingly proceed to decide the same.”

From the above discussion, it is clear that when a legal question is raised, the Tribunal cannot be precluded from admitting the same and considering it in accordance with law and cannot refuse to entertain the same.

3.5.1 Now coming to the issue on hand in the case of the assessee, we find that the legal questions raised go to the root of the matter and therefore require to be addressed first. The legal question is whether the notices issued under Section 274 rws 271 of the Act for initiation of penalty proceedings under Section 271(1)(c) of the Act for the three assessment years 2006-07 to 2008-09 in the case on hand were valid. In this regard, we have to examine whether the mandatory conditions for initiating the penalty proceedings were complied with or not. One of the mandatory conditions is that the notice under Section 274 rws 271 of the Act must be a valid notice. We, therefore, proceed to examine, consider and adjudicate this ground.

3.5.2 We find that this very issue has been adjudicated by the co-ordinate bench of this Tribunal in the case of Lions Estates & Properties Ltd. (supra) relied upon by the assessee. The relevant portion dealing with the issue at hand at paras 4.3.2 to 4.3.4 thereof are extracted hereunder :-

“ 4.3.2 As seen from the impugned notice issued under section 274 r.w.s. 271 of the Act dt.31.12.2009 (a copy of which has been placed at pages 7 & 8 of the learned Authorised Representative's paper book submitted on 10.4.2014) it is in the prescribed form with the blank spaces to be filled up with relevant information and also at the bottom of page 2 of the notice, it is mentioned that inappropriate words and paragraphs are to be deleted. We, however, find that the Assessing Officer except for mentioning the assessment year and striking off para 2 on page 1 of the notice has neither filled up any of the blanks nor struck off any other inappropriate words or portions or paragraphs. Para 4 of the notice on page 2 thereof mentions both concealment of particulars of income as well as furnishing of

inaccurate particulars of such income. The Assessing Officer has not specified as to which of the conditions for initiating the impugned penalty has been fulfilled. The Hon'ble Karnataka High Court in the case of CIT V Manjunatha Cotton & Ginning Factory (supra) at paras 59 to 91 of the order has considered this issue at length and has held that the clause (c) (viz. para 4 on page 2 of the notice) of the printed form of notice under section 274 of the Act deals with two satisfactions; i.e. concealment of particulars of income or furnishing of inaccurate particulars of income. The Hon'ble Court has held that both these conditions are distinct and different, though at times they may overlap with each other. It was held by their Lordships that the Assessing Officer while issuing notice under section 274 r.w.s. 271 of the Act has to come to the conclusion as to whether it is a case of concealment of income or whether it is a case of furnishing of inaccurate particulars of income and if the standard proforma of the notice is issued without deleting the relevant clauses, it leads to an inference of non-application of mind by the Assessing Officer. The relevant portion of the Hon'ble Court's order at paras 59 to 91 at pages 93 to 98 are extracted hereunder :-

" 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 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 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."

4.3.3 We find that in the case before us also, the Assessing Officer has not specified the relevant portion of the clause (c) of the notice under section 274 r.w.s. 271 of the Act for initiating penalty proceedings under section 271(1)(c) of the Act and therefore, as held by the Hon'ble High Court in the case of Manjunatha Cotton & Ginning Factory (supra), the assessee could not have rebutted the initial presumption for initiation of penalty proceedings, which is serious in nature. Respectfully following the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra), we hold that the notice issued under section 274 r.w.s. 271 of the Act dt.31.12.2009 for initiating penalty proceedings under section 271(1)(c) of the Act, in the case on hand, is invalid. The contention of the learned Departmental Representative that it is only a curable defect is also not acceptable since the Assessing Officer gets jurisdiction to levy the impugned penalty only by issuance of a valid notice and therefore when jurisdiction is not validly invoked, then the consequent proceedings are also not valid. Further, it cannot be that the Assessing Officer intended to initiate penalty proceedings for both concealment of particulars of income and furnishing of inaccurate particulars of income as the word used in the notice is "OR" and not "and". In this view of the matter, the defect in issuing the notice under section 274 r.w.s. 271 of the Act dt.31.12.2009 cannot be considered, a curable defect or procedural irregularity as contended by the learned Departmental Representative.

4.3.4 In view of our holding that the notice under section 274 r.w.s. 271 of the Act dt.31.12.2009, issued in the case on hand is invalid, we cancel the impugned orders of the learned CIT (Appeals) and quash the order of Assessing Officer dt.30.6.2010 levying penalty under section 271(1)(c) of the Act for Assessment Year 2007-08. In view of this, we do not see any reason to adjudicate on the other arguments put forth regarding the merits of the impugned penalty. Since the legal issue raised has been decided in favour of the assessee, adjudication on the other issues raised would only be an academic exercise."

3.5.3 In the case on hand before us, the factual matrix is exactly similar. The Assessing Officer has not specified the relevant portion of the clause (c) of the notice under Section 274 rws 271 of the Act for initiating penalty proceedings under Section 271(1)(c) of the Act for Assessment Years 2006-07 to 2008-09. We are therefore of the view that the decision of the co-ordinate bench of this Tribunal in the case of Lions Estates & Properties (supra) is squarely applicable to the facts of the case on hand. Therefore, respectfully following the decision of the Hon'ble High Court of Karnataka in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (supra) and the aforesaid decision of the co-ordinate bench in the case of Lions Estates &

Properties (supra), we hold that the notices issued under Section 274 rws 271 of the Act in the case on hand for Assessment Years 2006-07 to 2008-09 are invalid. We, therefore, cancel the impugned orders of the authorities below levying penalty under Section 271(1)(c) of the Act for all the three assessment years involved. Since the legal issue raised by way of the additional ground has been decided in favour of the assessee, we do not consider it necessary to adjudicate on the other grounds/issues raised which would only be an academic exercise.

4. In the result, the assessee's appeals for Assessment Years 2006-07 to 2008-09 are allowed and Revenue's appeals for Assessment Years 2006-07 and 2008-09 are dismissed.

Order pronounced in the open court on 14th Sept., 2015.

Sd/-
(GEORGE GEORGE K)
Judicial Member

Sd/-
(JASON P BOAZ)
Accountant Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy)

By Order

Asst. Registrar, ITAT, Bangalore