

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

**BEFORE SHRI VIJAYPAL RAO, JUDICIAL MEMBER AND  
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

I.T. A. No.668/Bang/2015  
(Assessment Year : 2004-05)

Shri Moorsavirappa, C. Batli  
Bendigeri Oni, Hubli.  
PAN AHPPB 3943F

.... Appellant.

Vs.

Income Tax Officer,  
Ward 1(3), Hubli.

..... Respondent.

Appellant By : Shri S. Venkatesan, C.A.

Respondent By : Shri Sunil Kumar Agarwal, JCIT (D.R)

Date of Hearing : 18.01.2016.

Date of Pronouncement : 10.02.2016.

**O R D E R**

**Per Shri Vijaypal Rao, J.M. :**

This appeal by the assessee is directed against the order dt. 29.1.2015 of Commissioner of Income Tax (Appeals) arising from the penalty order under Section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') for the Assessment Year 2004-05.

2. The assessee has raised the following grounds :

*“1. The orders of the authorities below in so far as levying penalty under Section 271(1)(c) of the Act against the appellant are opposed to law, equity, weight of evidence, probabilities, facts and circumstances of the case.*

*2. The learned CIT (Appeals) is not justified in upholding the penalty under Section 271(1)(c) of the Act in respect of the following disallowances/additions :*

*a) Difference in the opening stock : Rs.2,67,186.*

*b) Difference in the opening balance of capital account : Rs.2,96,158.*

*3. The authorities below failed to appreciate that the appellant has neither concealed any income nor furnished inaccurate particulars of income to warrant levy of penalty and therefore, the penalty levied under Section 271(1)(c) of the Act requires to be cancelled.*

*4. Without prejudice to the above, the penalty levied is highly excessive and liable to be reduced substantially.*

*5. For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered and the appellant may be awarded costs in prosecuting the appeal and also order for the refund of the institution fees as part of the costs.”*

*3. The assessee has also additional grounds which are as under :*

*“1. The order levying penalty under Section 271(1)(c) of the Act, is bad in law in as much as, the learned Assessing Officer has neither reached any satisfaction nor has such satisfaction been recorded in the assessment order and consequently, the very initiation of proceedings under Section 271(1)(c) of the Act, is not in accordance with the requirements of section 271(1) of the Act and consequently, the order of penalty founded on the invalid initiation of penalty proceedings is liable to be cancelled.*

*2. The order of penalty passed under Section 271(1)(c) of the Act is bad in law as the notice issued under Section 274 rws 271 of the Act is not discernable whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant’s case.*

3. *For the above and other grounds that may be urged at the time of hearing of the appeal, your appellant humbly prays that the appeal may be allowed and justice rendered."*

4. The brief facts leading to the levy of penalty are that the assessee is an individual and engaged in the business of purchase and sale of food-grains at APMC, Hubli. The assessee filed its return of income declaring total income of Rs.35,920. During the course of assessment proceedings and scrutiny of books of accounts as well as bank accounts, the Assessing Officer found that the assessee has shown the opening balances as under :

1. Maize Account	Rs.56,308/-
2. Kardi Account	Rs.16,628/-
3. Rice Account	Rs.1,94,250/-
Total :	Rs.2,67,186/-

The Assessing Officer noted that there was no closing balance as on 31.3.2004 whereas the assessee has shown opening balances amounting to Rs.2,67,186. When the assessee was asked to explain the discrepancy and the differences of the closing balance as on the last date of earlier year and opening balance of this year, the assessee offered the said difference amount of Rs.2,67,186 to tax. Similarly, the Assessing Officer has noted that the assessee has shown the opening balance in the capital account. Similarly on examination of the capital account of the assessee, the Assessing Officer found that the assessee has taken the opening balance at Rs.7,87,441 as against Rs.4,91,283 being the closing balance. Thus there is a difference of Rs.2,96,158. The assessee was asked to explain the above difference. The Assessing Officer has recorded in the assessment order that no explanation was offered by the assessee and

accepted the mistake. Hence the difference of Rs.2,96,158 was also added to the total income of the assessee. Subsequently, the Assessing Officer initiated the penalty under Section 271(1)(c) of the Act and levied the penalty of Rs.1,72,383 being 100% of tax sought to be evaded on the concealed income of Rs.5,63,344 which comprising the difference in the closing and opening balance of stock as well as difference in the capital account. The assessee challenged the action of the Assessing Officer before the CIT (Appeals) and submitted that when the Assessing Officer has made the addition on account of difference in opening stock as well as the opening balance of the capital account, then it should have been telescoping effect and despite the assessee admitted the said amount to tax, the penalty cannot be levied on such addition. It was further submitted that the mistakes were not intentional and there was no intention to furnish inaccurate particulars of income. The difference was on account of difference of opinion between the Accountant and previous tax practitioner and the assessee has been made to suffer. It was further contended that the mistake, if any, it relates to the Assessment Year 2003-04 and not for the Assessment Year under consideration and therefore the Assessing Officer should have considered the above additions for the Assessment Year 2003-04. Accordingly, the assessee pleaded that the penalty is not justified on the addition which was accepted by the assessee though the same pertains to the earlier assessment year. The CIT (Appeals) did not accept the contention of the assessee and upheld the levy of penalty under Section 271(1)(c) of the Act.

5. Before us, the learned Authorised Representative has reiterated its contentions on the merits of the levy of penalty by arguing that the mistake

and difference in the closing stock and opening stock pertains to the Assessment Year 2003-04 and not for the Assessment Year 2004-05 and further when there is a difference in the capital account, at the same time, then the telescoping effect should have been given by the Assessing Officer. The learned Authorised Representative has further submitted that since the assessee accepted the mistake and offered the amount for tax would not ipso facto lead to the conclusion that the assessee has furnished inaccurate particulars or concealed the particulars of income when the actual mistake pertains to the earlier assessment year. Apart from the above arguments the learned Authorised Representative of the assessee has also raised an additional ground regarding the validity of notice issued under Section 274 r.w.s. 271 and thus he has submitted that this issue is purely legal in nature and does not require any fresh investigation. The learned Authorised Representative has filed the copy of notice issued under Section 274 and submitted that the Assessing Officer has neither specified the fault of the assessee being concealment of particulars of income or furnishing inaccurate particulars of income nor deleted the irrelevant portion of the notice and therefore in view of the judgment of Hon'ble jurisdictional High Court in case of **CIT Vs. Manjunatha Cotton & Ginning Factory** 359 ITR 365, the notice issued under Section 274 is invalid and consequently the penalty levied under Section 271(1)(c) is not sustainable. In support of his contention, he has relied upon the decision of co-ordinate bench of this Tribunal dt.1.10.2015 in case of **Sri Raghunath H Baddi Vs. ITO** in ITA No.669/Bang/2015 and submitted that on an identical facts the Tribunal while following the jurisdictional High Court in the case of **Manjunatha Cotton & Ginning Factory** (supra) has decided the

issue in favour of the assessee holding that show cause notice under Section 274 of the Act is defective and therefore the consequential order under Section 271(1)(c) of the Act is not sustainable.

6. On the other hand, the learned Departmental Representative has submitted that as far as the merits of the case are concerned, the assessee has accepted the difference amount being the income of the assessee which was offered to tax in the assessment proceedings, therefore this issue cannot be raised at this stage when the assessee has not raised in the assessment proceedings. Further it is a case of enhancement of opening stock of this year and therefore the mistake which is accepted by the assessee during the assessment proceedings cannot be now shifted to the earlier assessment year when there was no such issue arises either for the Assessing Officer for this year or in the earlier assessment year. Therefore in the absence of any record to establish that the mistake actually occurred in the earlier assessment year, the contention of the assessee is without any substance. As regards the objection of the assessee on the validity of the notice issued under Section 274, the learned Departmental Representative has submitted that the Assessing Officer has mentioned both the default on the part of the assessee being concealment of particulars of income as well as furnishing of inaccurate particulars of such income therefore the case of the assessee falls under both the defaults committed by the assessee. He has relied upon the orders of the authorities below.

7. We have heard the rival submissions as well as the relevant material on record. First we take up the legal and technical objections raised by the assessee in the additional grounds regarding the validity of notice issued

under Section 274 of the Act. We find that this plea is purely legal in nature and does not require any investigation of facts. Therefore in view of the decision of the Hon'ble Supreme Court in the case of NTPC Vs. CIT reported in 229 ITR 383, an additional plea can be raised in the appellate proceedings if for deciding such additional plea the matter does not require any fresh investigation of facts. Accordingly, we admit the additional ground raised by the assessee regarding the validity of show cause notice issued 274 of the Act being defective and consequential penalty is not sustainable. From the notice show cause notice issued 274 r.w.s. 271(1)(c) of the Act we find that the Assessing Officer did not specify the default on the part of assessee for concealment of particulars of income or furnishing of inaccurate particulars of such income. The Assessing Officer has even not deleted the irrelevant part of these defaults and left the ambiguity about either of the defaults in the show cause notice without specifying the initiation of penalty proceedings for which of the defaults committed by the assessee. An identical issue has been considered by the co-ordinate bench of this Tribunal in the case of **Sri Raghunath H. Baddi (supra)** in para 9 to 11 as under :-

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

“NOTICE UNDER SECTION 274”

59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the

said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation- 1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed 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 proforma without striking of the relevant clauses will lead to an inference as to nonapplication of mind.”

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

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

- a) Penalty under Section 271(1)(c) is a civil liability.
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- c) Willful concealment is not an essential ingredient for attracting civil liability.
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

- f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.
- i) The imposition of penalty is not automatic.
- j) Imposition of penalty even if the tax liability is admitted is not automatic.
- k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.
- l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.
- m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.
- n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.
- o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.
- p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income
- q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

- r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.
- s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.
- t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.
- 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."

11. 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. The other issues raised by the Assessee in the grounds of appeal are not adjudicated, in view of the conclusion on the additional ground of appeal."

Thus it is clear that the co-ordinate bench of this Tribunal has followed the jurisdictional High Court in the case of **Manjunatha Cotton & Ginning Factory** (supra). The facts in the case are identical as in the case of **Manjunatha Cotton & Ginning Factory** (supra) as well as in the case of **Sri Raghunath H Baddi** (supra). Therefore following the judgment of Hon'ble jurisdictional High Court and the decision of the co-ordinate bench of this Tribunal, we hold that show cause notice issued by the Assessing Officer for levy of penalty under Section 274 r.w.s. 271 is defective as the Assessing Officer has not specified the grounds on which the penalty sought to be levied.

Consequently, the penalty levied under Section 271(1)(c) is not sustainable and the same is deleted. Since we have deleted the penalty on the technical ground of defect in the notice under Section 274 therefore we do not propose to go into merits of the issue on levy of penalty.

8. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 10-02-2016.

Sd/-  
**(INTURI RAMA RAO)**  
Accountant Member

Sd/-  
**(VIJAYPAL RAO)**  
Judicial 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