

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. Nos. 1105, 1049, 401, 882/KOL/2009
Assessment Years:2001-02, 2002-03, 2003-04 & 2005-06**

**Deputy Commissioner of Income Tax,.....Appellant
Central Circle-XXI, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001**

-Vs.-

**Shri Subhas Shastri,.....Respondent
Flat No. 1B,
2, Rup Chand Mukherjee Lane,
Kolkata-700 025
[PAN : ANOPS 0619 L]**

&

**I.T.A. Nos. 818, 278, 667 & 668/KOL/2009
Assessment Years:2002-03, 2003-04, 2004-05 & 2005-06**

**Shri Subhas Shastri,.....Appellant
Flat No. 1B,
2, Rup Chand Mukherjee Lane,
Kolkata-700 025
[PAN : ANOPS 0619 L]**

-Vs.-

**Assistant Commissioner of Income Tax,.....Respondent
Central Circle-XXI, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001**

Appearances by:

**Shri David Z. Chawngthu, ACIT, D.R., for the Department
Shri A.K. Tibrewal, FCA and Shri Amit Agarwal, Advocate, for the assessee**

Date of concluding the hearing : January 12, 2016

Date of pronouncing the order : February 24, 2016

O R D E R

Per Shri P.M. Jagtap :-

Out of these eight appeals, one appeal being ITA No. 1105/KOL/2009 is the appeal of the Revenue for assessment year 2001-

02, other appeal being ITA No. 667/KOL/2009 is the appeal of the assessee for A.Y. 2004-05 while the remaining six appeals being ITA No. 818/KOL/2009 (assessee's appeal) and ITA No. 1049/KOL/2009 (Revenue's appeal), ITA No. 278/KOL/2009 (assessee's appeal) and ITA No. 401/KOL/2009 (Revenue's appeal) as well as ITA No. 668/KOL/2009 (assessee's appeal) and ITA No. 882/KOL/2009 (Revenue's appeal) are the cross appeals for A.Y.2002-03, 2003-04 and 2005-06 respectively. Since all these appeals involve a common issue relating to imposition of penalty under section 271(1)(c), the same have been heard together and are being disposed of by this single consolidated order.

2. The assessee in the present case is an individual, who is an Astrologer by profession and derives from his professional activities and investment. A search and seizure action under section 132 was conducted in his case on 24.01.2006. During the course of said action, undisclosed National Savings Certificates, Kishan Vikash Patras, Bank Fixed Deposits and Bank accounts in the name of the assessee were found besides cash as well as other incriminating documents. Consequently notices under section 153A were issued by the Assessing Officer, in response to which the returns of income for the years under consideration were filed by the assessee declaring the income as under:-

Assessment Year	Income
2001-2002	Rs.20,86,600/-
2002-2003	Rs.14,74,410/-
2003-2004	Rs.15,27,500/-
2004-2005	Rs. 2,88,080/-
2005-2006	Rs. 7,26,740/-

In the income offered by the assessee as above, investments etc. found to be made during the course of search were offered by the assessee to tax. In the assessments completed under section 153A read with section 143(3), the income as returned by the assessee for A.Y. 2001-02 was

accepted by the Assessing Officer while in other years i.e. A.Y. 2002-03, 2003-04 & 2005-06, he made further additions over and above the income returned by the assessee on the basis of findings of the search action. He also initiated penalty proceedings under section 271(1)(c) for all the five years under consideration and since the explanation offered by the assessee in response to the penalty notices issued by him was not found satisfactory, the Assessing Officer imposed penalties under section 271(1)(c) in respect of additional income offered by the assessee in the returns filed in response to notices under section 153A as well as further additions made by him to the income of the assessee in the assessments completed under section 153A read with section 143(3) as under:-

Assessment Year	Income
2001-2002	Rs. 6,63,390/-
2002-2003	Rs. 5,56,865/-
2003-2004	Rs. 6,04,485/-
2004-2005	Rs.26,14,026/-
2005-2006	Rs.11,24,214/-

3. The penalties imposed by the Assessing Officer under section 271(1)(c) for all the five years under consideration were challenged by the assessee in the appeals filed before the Id. CIT(Appeals) and after considering the submissions made on behalf of the assessee as well as material available on record, the Id. CIT(Appeals) cancelled the penalty imposed by the Assessing Officer under section 271(1)(c) for A.Y. 2001-02 vide his appellate order dated 24.03.2009, while the penalties imposed by the Assessing Officer for A.Ys. 2002-03, 2003-04, 2004-05 & 2005-06 were partly sustained by the Id. CIT(Appeals) vide his appellate orders dated 24.03.2009, 29.12.2008, 17.02.2009 and 17.02.2009 respectively. Aggrieved by the orders of the Id. CIT(Appeals), the assessee and revenue both have preferred their appeals before the Tribunal for the relevant years under consideration as mentioned in paragraph no. 1 of this order.

4. At the time of hearing before us, the Id. Counsel for the assessee, at the outset, has pointed out that the tax effect involved in all the appeals of the Revenue for A.Ys. 2001-02, 2002-03, 2003-04 & 2005-06 is less than the revised monetary limit recently fixed by the CBDT vide Circular No. 21/2015 dated 10th December, 2015 at Rs.10,00,000/- for filing the appeal by the Revenue before the Tribunal and this position clearly evident from the grounds raised by the Revenue in this appeal is not disputed even by the Id. D.R. In Circular No. 21/2015 (supra) recently issued by the CBDT, the monetary limit for filing the appeals by the Revenue before the Tribunal has been increased to Rs.10,00,000/- and as clarified in the said Circular, the said monetary limit is applicable retrospectively even to the appeals pending before the Tribunal. The CBDT has also instructed that such pending appeals below this specified tax limit of Rs.10,00,000/- may be withdrawn/ not pressed. Keeping in view the instruction given by the CBDT vide Circular No. 21/2015 dated 10.12.2015, which is squarely applicable in the present case, the four appeals filed by the Revenue for A.Ys. 2001-02, 2002-03, 2003-04 & 2005-06 are treated as withdrawn/not pressed and dismissed accordingly.

5. As regards the common issue involved in all the four appeals of the assessee relating to the sustenance by the Id. CIT(Appeals) of the penalties imposed by the Assessing Officer under section 271(1)(c) partly for A.Y. 2002-03, 2003-04, 2004-05 and 2005-06, the Id. Counsel for the assessee has raised a preliminary issue challenging the validity of penalty orders passed by the Assessing Officer on the ground that in the absence of any specific mention in the show-cause notices issued under section 274 of the Act for all the four years under consideration by the Assessing Officer as to whether the assessee is guilty of having "furnished inaccurate particulars of income" or of having "concealed particulars of such income", the initiation of penalty proceedings itself was bad in law and the penalty orders passed in pursuance thereof are liable to be quashed being invalid. He has invited our attention to the show-cause

notices issued by the Assessing Officer for all the four years under consideration under section 274 in the printed form to point out that the irrelevant portion, viz. "furnished inaccurate particulars of income" or "concealed particulars of such income" was not struck off by the Assessing Officer. Although the Id. D.R. has contended in this regard that the relevant portion in the penalty notices having been ticked by the Assessing Officer, it is clear that the other charge was not invoked by him and there was thus no infirmity in the notices issued by the Assessing Officer under section 274 as alleged by the Id. Counsel for the assessee, it is observed that the Coordinate Bench of this Tribunal in the case of Suvaprasanna Bhattacharya -vs.- ACIT (in ITA No. 1303/KOL/2010) cited by the Id. Counsel for the assessee had an occasion to consider a similar issue in the identical fact situation and the order passed by the Assessing Officer imposing penalty under section 271(1)(c) was held to be invalid by the Tribunal relying on the decision of the Hon'ble Karnataka High Court in the case of CIT & Another -vs.- Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 after discussing the proposition laid down therein in great detail in paragraph no. 8 to 8.2 of its order dated 06.11.2015, which read as under:-

"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 spelt out as to whether the penalty proceedings are sought to be levied for "furnishing inaccurate particulars of income" or "concealing particulars of such income".

8.1 The Hon'ble Karnataka High Court in the case of CIT & Anr. v. Manjunatha Cotton and Ginning Factory, 359 ITR 565 (Karn), has held that notice u/s. 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law. The Court has also held that initiating penalty proceedings on one limb and 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.

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

"NOTICE UNDER SECTION 274

59. As the provision stands, the penalty proceedings can be initiated on various ground set out therein. If the order passed by the Authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under Section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation-1 or in Explanation-1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in Section 271 should be made known about the grounds on which they intend imposing penalty on him as the Section 274 makes it clear that assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in Section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed 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 it is 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".

6. In our opinion, the decision of the Coordinate Bench of this Tribunal rendered in the case of Suvaprasanna Bhattacharya -vs- ACIT rendered vide its order dated 06.11.2015 in ITA No. 1303/KOL/2010 by relying on the decision of the Hon'ble Karnataka High Court in the case of CIT & Another -vs- Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 is clearly applicable in the present case and respectfully following the same, we hold that the show-cause notices issued by the Assessing Officer under section 274 for all the four years under consideration not being in accordance with law, the penalty orders passed by the Assessing Officer in pursuance thereof are liable to be cancelled being invalid. We accordingly cancel the orders passed by the Assessing Officer imposing penalties under section 271(1)(c) for A.Ys. 2002-03, 2003-04, 2004-05 & 2005-06 and allow the appeals of the assessee for the said years.

7. In the result, all the four appeals of the assessee are allowed, whereas all the four appeals of the Revenue are dismissed.

Order pronounced in the open Court on February 24, 2016.

Sd/-
(S.S. Viswanethra Ravi)
Judicial Member

Sd/-
(P.M. Jagtap)
Accountant Member

Kolkata, the 24th day of February, 2016

Copies to :

- (1) Deputy Commissioner of Income Tax,
Central Circle-XXI, Kolkata,
Poddar Court,
18, Rabindra Sarani,
Kolkata-700 001*
- (2) Shri Subhas Shastri,
Flat No. 1B,
2, Rup Chand Mukherjee Lane,
Kolkata-700 025*
- (3) Commissioner of Income-tax (Appeals), Central-II, Kolkata*
- (4) Commissioner of Income Tax, Kolkata*
- (5) The Departmental Representative*
- (6) Guard File*

By order
Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.