

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

I.T.T.A. NO.684 OF 2016

Between:

The Principal Commissioner of
Income-tax-I, Visakhapatnam

.. Appellant

and

Smt. Baisetty Revathi

.. Respondent

DATE OF THE JUDGMENT PRONOUNCED: 13.07.2017

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

1. Whether Reporters of Local newspapers
may be allowed to see the judgment? Yes/No
2. Whether the copies of judgment may be
marked to Law Reporters/Journals Yes/No
3. Whether Their Lordships wish to
see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

GUDISEVA SHYAM PRASAD, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

+ I.T.T.A.NO.684 OF 2016

% DATED 13th JULY, 2017

The Principal Commissioner of
Income-tax-I, Visakhapatnam .. Appellant

Vs.

\$ Smt. Baisetty Revathi .. Respondent

<Gist:

>Head Note:

! Counsel for the Appellant : Smt. M.Kiranmayee and
Sri J.V.Prasad

^Counsel for the Respondent : Sri R.Raghunandan and
Sri T.Bala Mohan Reddy

? CASES REFERRED:

1. [2013] 359ITR 565 (KAR)
2. [1980] 122ITR 306 (GUJ)
3. (2001) 6 SCC 665 = AIR 2001 SC 2704 =
2001 LawSuit(SC) 1093
4. (2014) 1 SCC 674 = 358 ITR 593

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

I.T.T.A.No.684 OF 2016

J U D G M E N T

(Per Sri Justice Sanjay Kumar)

This appeal by the revenue under Section 260A of the Income-tax Act, 1961 (for brevity, 'the Act of 1961'), relating to the assessment year 2010-11, seeks to raise the following substantial questions of law for consideration:

- '1. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in law in deleting the penalty levied u/s. 271(1)(c) of the Income-tax Act, 1961?
2. Whether, on the facts and in the circumstances of the case, the Tribunal is correct in deleting the penalty levied u/s. 271(1)(c) by the Assessing officer without taking into consideration provisions of Section 271(1B) of Income-tax Act, 1961 and judicial pronouncement of Hon'ble Supreme Court of India in the case of MAK Data Pvt. Ltd., Vs. CIT 358 ITR 593, wherein, it was specifically held that the A.O has to satisfy whether penalty proceedings be initiated or not during the assessment proceedings and the A.O is not required to record his satisfaction in a particular manner or reduce it into writing?'

Facts relevant for the purpose of this order are as under: The respondent-assessee derives income from house property apart from interest on bank deposits. She filed her tax return for the assessment year 2010-11 admitting a total loss of Rs.73,25,086/-. Assessment under Section 143(3) of the Act of 1961 was completed on 22.03.2013 making the following additions:

- (i) Disallowance of interest on borrowed capital:
Rs.54,74,678/-
- (ii) Addition u/s.68 towards unexplained cash credit deposit:
Rs.15,60,000/-

In the result, against the loss of Rs.73,25,086/- claimed by the assessee, the loss determined upon assessment stood at Rs.2,90,408/-. Under the head 'Income from House Property', the assessee had claimed interest on borrowed capital to the tune of Rs.1,69,62,265/-. The Assessing Officer found that the assessee had wrongly claimed higher deductions towards interest on borrowed capital without applying deduction on proportionate basis as was done by her in the preceding assessment year and as was agreed to by her for the assessment year 2006-07. Her interest claim of Rs.1,69,62,265/- was proportionately reduced and the disallowance worked out to Rs.53,14,278/-. It was also found that the assessee had claimed pre-construction interest of Rs.3,51,571/- and the same was also proportionately reduced. The total disallowance therefore worked out to Rs.54,74,678/-. Upon verification of the assessee's bank account, it was found that there was a deposit of Rs.15,60,000/- on 31.03.2010 for which the assessee failed to produce verifiable or credible evidence of a source. The same was therefore treated as unexplained credit/deemed income as per the provisions of Section 68 of the Act of 1961 and assessed as such.

In consequence, the assessee was visited with a penalty notice under Section 271(1)(c) of the Act of 1961 on 22.03.2013. The assessee submitted letter dated 17.09.2013 citing the following reasons in support of her plea to drop the penalty proceedings:

1. Disallowance with regard to interest on borrowed capital was on agreed basis.
2. Regarding unexplained cash credit deposit, she was not in a position to establish the source with strict proof of evidence.
3. There is no positive establishment of concealment and she had accepted the additions made for want of strict proof of

evidence and to buy peace with the department and also to avoid protracted litigation.

However, *vide* order dated 24.09.2013, the Deputy Commissioner of Income Tax, Circle-3(1), Visakhapatnam, rejected the assessee's explanation and held her liable to pay the minimum penalty of Rs.20,71,750/- under Section 271(1)(c) of the Act of 1961 as she had concealed/furnished inaccurate particulars of income.

In appeal, the Commissioner of Income-tax (Appeals), Visakhapatnam, confirmed the penalty order. The only grounds urged by the assessee before the Commissioner were: (1) the penalty order passed by the AO was bad-in-law, (2) the AO had passed the penalty order even though there was no positive establishment of concealment, (3) the AO had not followed consistency as penalties levied in the earlier years were deleted by the Appellate Authority, and (4) on the above grounds or any other grounds that may be presented during the course of personal hearing, the penalty levied may be deleted.

Perusal of the order reflects that the assessee did not raise the issue of invalidity of the penalty notice before the Commissioner. In her second appeal before the Income-tax Appellate Tribunal, Visakhapatnam Bench, Visakhapatnam, in ITA No.599/Vizag/2014, the assessee, for the first time, raised the issue that the show-cause notice under Section 271(1)(c) did not specify as to whether it was prompted by concealment of particulars of income or furnishing of inaccurate particulars of income. Dealing with this contention, the Tribunal placed reliance on the judgment of the Karnataka High Court in **THE COMMISSIONER OF INCOME TAX AND THE INCOME TAX OFFICER V/s. M/s.MANJUNATHA COTTON AND GINNING**

FACTORY¹ and opined that unless the show-cause notice is clear as to whether the penalty proposed to be imposed is for concealment of particulars of income or for furnishing inaccurate particulars of income, no penalty could be imposed, as such a notice would be defective. The Tribunal took note of the fact that in the penalty order; the Assessing Officer had not given a conclusive finding as to whether the penalty imposed was for concealment of particulars of income or for furnishing inaccurate particulars of income and accordingly held imposition of the penalty to be invalid.

Smt.M.Kiranmayee, learned counsel representing Sri J.V.Prasad, learned senior standing counsel for the revenue, would argue that the assessee never raised the issue as to ambiguity in the show-cause notice before any of the lower authorities and that this indicated she was fully aware as to what was the allegation leveled against her. Learned counsel would point out that in her reply to the show-cause notice, the assessee sought to explain the lapses on her part which evidenced her awareness as to the exact allegations made against her in the said show-cause notice. Learned counsel would therefore argue that raising the issue of lack of clarity in the show-cause notice for the first time before the Tribunal was an afterthought and that the Tribunal ought not to have given the assessee the benefit of doubt in this regard.

Per contra, Sri R.Raghunandan, learned senior counsel representing Sri T.Bala Mohan Reddy, learned counsel for the assessee, would rely upon the decisions of the Karnataka and Gujarat High Courts and assert that when penal proceedings are initiated under Section 271(1)(c) of the Act of 1961, an assessee must

¹ [2013] 359ITR 565 (KAR)

be made aware in no uncertain terms as to what is the specific allegation which forms the basis for the proposed penalty.

A copy of the proforma notice under Section 271 read with Section 274 of the Act of 1961 addressed to the assessee on 22.03.2013 is produced. Perusal thereof reflects that the irrelevant contents therein, which had no application to the assessee, were struck out leaving only one clause which reads as under:

‘Whereas in the course of proceedings before me for the Assessment Year 2010-11 it appears to me that you have concealed the particulars of your income or furnished inaccurate particulars of such income.’

It would be apposite at this stage to consider the judgment of the Karnataka High Court in **M/s.MANJUNATHA COTTON AND GINNING FACTORY¹**. Therein, a Division Bench of the Karnataka High Court observed that Section 271 of the Act of 1961 is a specific provision providing for imposition of penalties and is a complete code in itself regulating the procedure for such imposition. The Bench therefore held that penalty proceedings have to be conducted in accordance therewith, subject always to the rules of natural justice. It was pointed out that Section 271 makes appropriate provision for levying penalties on an assessee in different eventualities and one such eventuality is for concealment of income or furnishing of inaccurate particulars of such income. It was held that for starting the penalty proceedings, the condition precedent is that the Assessing Officer must be satisfied that a person has either concealed particulars of his income or furnished inaccurate particulars of such income. The person who is accused of the conditions mentioned in Section 271 should be made aware of the grounds on which imposition of penalty is proposed as he has a right to contest such

proceedings and should have a full opportunity to meet the case of the revenue so as to show that the conditions stipulated in Section 271(1)(c) do not exist and that he is not liable to pay the penalty. It was further held that the practice of the revenue in sending a printed form where all the grounds mentioned in Section 271 are mentioned would not satisfy the requirement of law when the consequence of the assessee not rebutting the initial presumption is serious in nature and he has to pay a penalty ranging from 100% to 300% of the tax liability. As the provisions of Section 271(1)(c) have to be strictly construed, the Bench mandated that the notice issued should set out the grounds which the assessee has to meet specifically, otherwise the principles of natural justice would be offended as the show-cause notice would be vague. Dealing with concealment of particulars of income or furnishing of inaccurate particulars of income, the Bench observed that some cases may attract both the offences and in some, there may be overlapping of both, but in such cases initiation of the penalty proceedings must be specifically for both the offences. Drawing up penalty proceedings for one offence and finding the assessee guilty of another or finding him guilty for either, the one or the other, was held to be unsustainable in law.

In **COMMISSIONER OF INCOME TAX, GUJARAT-III V/s. MANU ENGINEERING WORKS²**, a Division Bench of the Gujarat High Court observed that the Assessing Officer must give a positive finding as to whether there is concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. In the event there was no such clear-cut finding, the penalty order was held liable to be struck down.

² [1980] 122ITR 306 (GUJ)

Smt.Kiranmayee, learned counsel, placed reliance on the judgment of the Supreme Court in ***K.P.MADHUSUDHANAN V/s. COMMISSIONER OF INCOME TAX, COCHIN***³. Therein, the Supreme Court held that it is not necessary for the Assessing Officer, while issuing a notice under Section 271(1)(c), to expressly invoke Explanation 1(B) appended to the provision. It is however relevant to note that Explanation 1(B) merely adverts to a case of failure of an assessee to substantiate the explanation offered whereby the amount added or disallowed while computing the total income of such person for the purposes of the penalty provision shall be deemed to represent the income in respect of which particulars had been concealed. The Supreme Court observed that the statutory provision included the 'Explanation' and once the assessee was put on notice, no express invocation of the 'Explanation' is necessary.

This judgment has no application to the case on hand as what we are concerned with presently is whether the assessee is required to be put on notice as to whether she is to be penalized for concealment of particulars of income or for furnishing inaccurate particulars of income. These are two different acts. Concealment of income is an act of omission while furnishing of inaccurate particulars of income is an act of commission. The consequences of such acts, being penal in nature, an assessee has to be informed as to what exactly is the charge against him so that he may respond thereto.

No doubt, in the present case, the assessee seems to have submitted her explanation on merits without raising a doubt as to what was the precise allegation leveled against her. However, we are

³ (2001) 6 SCC 665 = AIR 2001 SC 2704 = 2001 LawSuit(SC) 1093

more concerned with the principle involved and not just the isolated case of its application against the assessee. Further, the penalty order demonstrates that the Assessing Officer was not even certain as to what was the finding on the strength of which he imposed the penalty. This is clear from the fact that the Assessing Officer recorded that he was satisfied that the assessee had concealed/furnished inaccurate particulars of income. In the absence of a clear finding by the Assessing Officer himself, the benefit of doubt cannot be given to the revenue merely because the assessee did not complain of vagueness in the show-cause notice earlier.

Reliance placed by the revenue upon **MAK DATA PRIVATE LIMITED V/s. COMMISSIONER OF INCOME TAX-II**⁴, is of no assistance as the Supreme Court merely observed therein that the Assessing Officer is not required to record his satisfaction in a particular manner while imposing the penalty or reduce it to writing. That is not the controversy in the case on hand.

On principle, when penalty proceedings are sought to be initiated by the revenue under Section 271(1)(c) of the Act of 1961, the specific ground which forms the foundation therefor has to be spelt out in clear terms. Otherwise, an assessee would not have proper opportunity to put forth his defence. When the proceedings are penal in nature, resulting in imposition of penalty ranging from 100% to 300% of the tax liability, the charge must be unequivocal and unambiguous. When the charge is either concealment of particulars of income or furnishing of inaccurate particulars thereof, the revenue must specify as to which one of the two is sought to be pressed into service and cannot be permitted to club both by

⁴ (2014) 1 SCC 674 = 358 ITR 593

interjecting an 'or' between the two, as in the present case. This ambiguity in the show-cause notice is further compounded presently by the confused finding of the Assessing Officer that he was satisfied that the assessee was guilty of both.

We are therefore of the opinion that the order under appeal does not brook interference on any ground. We find no question of law, much less a substantial one, arising for consideration warranting admission of this appeal.

The appeal is accordingly dismissed. No order as to costs.

SANJAY KUMAR,J

GUDISEVA SHYAM PRASAD,J

13th JULY, 2017

**Note: L.R.Copy to be marked.
(B/O) PGS**

