**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND**
**SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA NO. 2555/MUM/2012** : **(A.Y : 2008-09)**

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| Meherjee Cassinath Holdings Private Limited<br>F-7, Laxmi Mill, Shakti Mill Lane,<br>Mahalaxmi, Mumbai 400 011.<br>**PAN : AACCM1568L** (Appellant) | Vs. | ACIT, Circle-4(2), Mumbai<br>(Respondent) |

**Appellant by : Shri Farrokh V. Irani**
**Respondent by : Shri N.P. Singh (CIT-DR)**

**Date of Hearing : 19/04/2017**
**Date of Pronouncement : 28/04/2017**

**O R D E R**

**PER G.S. PANNU, AM** :

The captioned appeal by the assessee is directed against the order of the CIT(A)-8, Mumbai dated 24.1.2012, pertaining to the Assessment Year 2008-09, which in turn has arisen from the order passed by the Assessing Officer dated 29.6.2011 under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, the solitary grievance of the assessee is with regard to imposition of penalty u/s 271(1)(c) of the Act.

3. In brief, the relevant facts are that the appellant is a company incorporated under the provisions of Companies Act, 1956 and for the assessment year under consideration it declared a total income of Rs.86,94,668/- in a return filed on 29.9.2008, which was subject to a scrutiny assessment u/s 143(3) of the Act and vide order dated 10.12.2010 the final income has been assessed at Rs.1,11,84,640/-. The relevant issue for our purpose is Long Term Capital Loss of Rs.18,19,34,011/- reported by the assessee in its return of income. The said loss was incurred by the assessee on account of redemption of Preference shares of a concern, namely Shri Santram Finance Ltd. In the assessment finalized u/s 143(3) of the Act, the Assessing Officer disallowed the entire Long Term Capital Loss on the ground that the transaction of redemption of Preference shares was a bogus transaction and further the Assessing Officer also denied the carry forward of said loss. Subsequently, the Assessing Officer vide order passed u/s 271(1)(c) of the Act dated 29.6.2011 held the assessee guilty of furnishing of inaccurate particulars of income *qua* the aforesaid issue within the meaning of Sec. 271(1)(c) of the Act. The Assessing Officer levied penalty u/s 271(1)(c) of the Act @ 100% of the tax sought to be evaded, which was computed at Rs.5,45,80,203/-. The CIT(A) has sustained the levy of penalty, but has allowed partial relief by correcting the computation of penalty and accordingly, the CIT(A) has scaled down the penalty to Rs.4,12,26,247/-. In this background, the rival counsels have made their submissions and the relevant material has been perused. Before we proceed to refer to the rival contentions, it would be appropriate to bring out the background in which the penalty u/s

271(1)(c) of the Act has been levied by the Assessing Officer. In the course of assessment proceedings, the Assessing Officer noted that assessee had reported Long Term Capital Loss of Rs.18,19,34,011/- on redemption of Preference shares of Shri Santram Finance Ltd., detailed as under :-

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| *Sale consideration* | | *191,711,723* |
| *Less : Indexed cost of acquisition* | | |
| *Convertible preference shares acquired in F.Y. 1997-98 (Rs.50,000,000/331*551)* | *83,232,628* | |
| *Convertible preference shares acquired in F.Y. 1998-99 (Rs.185,000,000/351*551)* | *290,413,105* | |
| | | *(373,645,734)* |
| *Long term capital loss* | | *(181,934,011)* |

4. On being asked to justify, assessee submitted that in the past financial years of 1997-98 and 1998-99, assessee had invested Rs.23,50,00,000/- towards Preference shares issued by Shri Santram Finance Ltd. and such investment was redeemed by the investee company during the year under consideration at a reduced redemption price. It was explained by the assessee-company that the loss in absolute terms was only Rs.4,32,88,277/- and that due to the indexation, the Long Term Capital Loss was determined at Rs.18,19,34,011/- as per the provisions of the Act. The relevant discussion in the assessment order reveals that assessee was also asked to produce the basis of valuation of shares and in response assessee furnished a copy of the financial statements of Shri Santram Finance Ltd. for the financial year ending 31.3.2008. From the discussion in the assessment order it is revealed that assessee explained that the

redemption value was agreed upon mutually between the parties and the investee company had incurred losses on its investments. The written submission dated 6.12.2010 of the appellant, which has been reproduced in the assessment order, reveals the assertion of the assessee that the incurrence of loss by the investee company was evidenced in the financial statements submitted. The Assessing Officer, however, disagreed with the assessee and treated the entire transaction of sale of shares as a sham transaction. According to the Assessing Officer, one R.K. Byramjee was a Director in both the concerns, i.e., assessee as well as the investee company and, therefore, it was a transaction between associate concerns. Secondly, as per the Assessing Officer, the basis of valuation of shares was not submitted by the assessee. Thirdly, the Assessing Officer observed that assessee has not been able to produce the details of the bank account through which the payment is effected. In the assessment order, the Assessing Officer further notes that mere reflection of the said investment in the Balance sheets at the time of purchase and sale is not sufficient proof of the genuineness of the transaction. In this background, the Assessing Officer disallowed the entire Long Term Capital Loss and also denied its carry forward.

5. At the time of hearing, the learned representative for the assessee pointed out that the quantum assessment proceedings have become final inasmuch as assessee has not gone in appeal against the action of the Assessing Officer. So however, it is sought to be pointed out that there is no justification for the levy of penalty u/s 271(1)(c) of the Act in the facts and circumstances of the case. The learned

representative emphasised that so far as the adequacy of disclosure is concerned, the return of income filed by the assessee itself contains a Note explaining the loss computed under the head 'Capital Gains on account of redemption of Preference shares of Shri Santram Finance Ltd.' during the year. In this context, he has referred to page 2 of the Paper Book wherein is placed a copy of the statement of computation of total income for the year under consideration. Apart therefrom, our attention has also been drawn to the various written statements made to the Assessing Officer in the course of the assessment proceedings, viz. written submissions dated 12.11.2010 (pages 4 to 17 of Paper Book), 22.11.2010 (page 18 of Paper Book), 25.11.2010 (pages 19 to 33 of Paper Book) and 6.12.2010 (pages 34 & 35 of Paper Book). On the basis of the aforesaid submissions made before the Assessing Officer, the learned representative has sought to demonstrate that not only assessee had furnished the complete details, but also explained the basis on which the redemption price was mutually agreed, and also justification for the same. In particular, the learned representative has emphasised that before the Assessing Officer, assessee has all along contended that in all probability, the impugned Capital Loss would not be utilized by the assessee and that the same would lapse. A reference has been made to the written submissions dated 25.11.2010 addressed to the Assessing Officer, wherein it was asserted that there is no financial benefit of carry forward of loss to the assessee-company since assessee had no business plans for earning Capital Gains in future to enable it to set-off the impugned loss against the future income and that assessee has been investing its funds in fixed deposits with bank. At the time of hearing, the learned representative for the assessee

made a statement at Bar that upto Assessment Year 2016-17 assessee has not taken advantage whatsoever from the impugned Capital Loss inasmuch as assessee had not earned any positive income on account of Capital Gains so as to set-off such Capital Loss. The learned representative pointed out that in all eventuality, the impugned Capital Loss will expire after the unused period of 8 years and, therefore, this clearly demonstrates that the entire transaction which resulted in the loss was entered on genuine grounds and not with any motive to deflate tax liability. Another pertinent point raised by the assessee was that the penalty notice issued u/s 274 r.w.s. 271 of the Act dated 10.12.2010, a copy of which has been placed on record, reveals non-application of mind by the Assessing Officer inasmuch as the irrelevant portion of the notice has not been struck off. It was, therefore, contended that the levy of penalty is illegal and deserves to be set-aside. In support of the aforesaid proposition, reliance has been placed on the following decisions :-

i) M/s. SSA's Emerald Meadows, ITA No. 380/2015 dated 23.11.2015 (Hon'ble Karnataka High Court);
ii) Manjunatha Cotton and Ginning Factory & Ors., 359 ITR 565 (Kar.);
iii) Dilip N. Shroff, 161 Taxman 218 (SC);
iv) Dr. Sarita Milind Davare, ITA No. 2187 & 1789/Mum/2014 dated 21.12.2016;
v) Shri Samson Perinchery, ITA No. 4625 to 4630/Mum/2013 dated 11.10.2013

6. The learned representative also pointed out that there was no furnishing of inaccurate particulars of income inasmuch as none of the particulars of the transaction or the loss have been found to be incorrect or false and that it was only a difference of opinion with regard to valuation of redemption price of shares which has formed the basis for the Assessing Officer to disallow the Long Term Capital Loss. On this aspect, it has been argued that a difference of opinion on the issue of valuation is a debatable issue and would not justify levy of penalty u/s 271(1)(c) of the Act; and, in particular, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)* in this regard.

7. On the other hand, the ld.CIT-DR appearing for the Revenue has defended the action of the income-tax authorities and pointed out that the loss was disallowed by the Assessing Officer noticing that the shares were purchased at a premium whereas the redemption price was agreed at a discount. The ld. CIT-DR contended that the basis for arriving at the redemption price has not been justified by the assessee and, therefore, the genuineness of the transaction was rejected by the income-tax authorities. It was, therefore, contended that under these circumstances the levy of penalty u/s 271(1)(c) of the Act is quite justified. With regard to the plea of assessee that notice issued u/s 274 r.w.s 271(1)(c) of the Act was legally untenable, the ld. CIT-DR pointed out that in the assessment order itself the Assessing Officer in para 4 has recorded that the penalty u/s 271(1)(c) of the Act was initiated for furnishing of inaccurate particulars of income. It was, therefore, contended that the assessment order itself shows due application of

mind by the Assessing Officer for initiation of proceedings u/s 271(1)(c) of the Act and that the notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 cannot be solely examined to see whether the Assessing Officer has duly applied his mind to the initiation of proceedings u/s 271(1)(c) of the Act. The ld. CIT-DR has also referred to the observations of the CIT(A) in para 2.12 of his order wherein the tenability and the *bona fide* of the explanation rendered by the assessee have been rejected. It was, therefore, contended that the penalty has been rightly levied u/s 271(1)(c) of the Act in the present case.

8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of *Dilip N. Shroff (supra)* but also in the case

of *T.Ashok Pai, 292 ITR 11 (SC)*. Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee-company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)*:-

> *"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished*

*inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.*

*84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"*

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)*, the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of *M/s. SSA's Emerald Meadows (supra)* and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in

the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of *Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra)* and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of *Smt. Kaushalya & Others, 216 ITR 660 (Bom.)* to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of *Dr. Sarita Milind Davare (supra)*. Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., *(supra)* as also the judgments of the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)* and *Dharmendra Textile Processors, 306 ITR 277 (SC)* deduced as under :-

> *"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be*

*application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-*

> *"....The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."*

*In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."*

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)* is to prevail. Following the decision of our coordinate Bench in the case of *Dr. Sarita Milind Davare (supra)*, we hereby reject the aforesaid argument of the ld. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)*, the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee *qua* Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings

suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non-application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of *Dilip N. Shroff (supra)* as well as the judgment of the Hon'ble Bombay High Court in the case of *Shri Samson Perinchery (supra).* Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with.

15. In the result, the appeal filed by the assessee is allowed, as above.

Order pronounced in the open court on 28th April, 2017.

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| Sd/- | Sd/- |
| **(PAWAN SINGH)** | **(G.S. PANNU)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai, Date : 28th April, 2017

*SSL*

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "B" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai