



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF JANUARY, 2016

PRESENT

THE HON'BLE MR. JUSTICE N.K. PATIL

AND

THE HON'BLE MRS. JUSTICE S. SUJATHA

ITA No.240/2010

BETWEEN

M/s. Safina Hotels Private Limited
(Formerly M/s. Safina Hotels Ltd.)
No.84/85, Infantry Road
Bangalore-560 001.

....Appellant

(By Sri.K.K. Chythanya, Advocate)

AND

1. The Commissioner of Income-tax
Bangalore III
Commissionerate
C R Building
Queens Road
Bangalore-560 001.

2. The Deputy Commissioner of
Income-tax
Circle 12(3)
No.14/3-A, 3Rd Floor
Rashthrothana Bhavan
Nrupathunga Road
Bangalore-560 001.

...Respondents

(By Sri.Jeevan.J.Neeralgi, Advocate)

This Appeal is filed under Section 260-A of Income-tax Act 1961, to set aside the order passed by the ITAT, "A" Bench, Bangalore in ITA No.682/Bang/2009 dated 16.02.2010 in Annexure "A" and consequently set aside the order of the lower authority i.e. the order of the Assistant Commissioner of Income Tax, Central Circle 2(3), Bangalore dated 29.03.2007 in Annexure "E" and restore the order of the Commissioner (Appeals) in order No.ITA No.19ACIT,CC.

This Appeal having been heard and reserved for Judgment on 20th January 2016, coming on for pronouncement of Judgment this day, **S. Sujatha J.**, made the following

JUDGMENT

This appeal is directed against the order passed by the Income Tax Appellate Tribunal (ITAT), "A" Bench, Bangalore in ITA No.682/2009 dated 16.02.2010 for the assessment year 2001-02.

2. The matter was admitted on 29.10.2010 to consider 9 substantial questions of law raised by the appellant. Subsequently, the appellant has filed an application raising additional substantial questions of law which was allowed on 05.06.2015 and accordingly, additional substantial questions 10 and 11 were raised by the assessee for consideration before this Court. Now, the relevant

substantial questions of law which arises for consideration in this appeal reads thus:

1. Whether on the facts and in the circumstances of the case, the Honourable Tribunal was right in law in upholding the penalty levied under Section 271 (1) (c) although the notice was issued for levy of penalty under section 271 (1) (b)?

2. Whether on the facts and in the circumstances of the case, the Honourable Tribunal was right in law in upholding the penalty levied under section 271 (1) (c) when the Learned Second Respondent did not record the satisfaction for levy of penalty as per the mandate of section 271(1) read with section 271 (1B) of the IT Act?

3. Facts of the case in brief are:

- the appellant is a private limited company incorporated under the provisions of the Companies Act, 1956. The appellant filed the return of income for the assessment year 2001-02 disclosing income only under the head 'income from business' amounting to Rs.1,64,74,416/- Action was initiated under Section 132 of the Income Tax Act, 1961 (the 'Act' for short) and orders were passed under Section 143(3) read with Section 158(b)(c) of the Act. The appellant had claimed Rs.28,40,409/- as loss on 'sale of investment' under the financial charges as revenue

expenditure. The Assessing Officer held the above income to be in the nature of capital expenditure and disallowed the claim made by the assessee. Accordingly, assessments were concluded. The Assessing Officer also separately initiated penalty proceedings under Section 271(1)(c) of the Act. A show cause notice under Section 274 of the Act dated 11.09.2006 was served on the appellant seeking to show cause why penalty should not be imposed. The appellant filed suitable reply to the same. After considering the objections, the Assessing Officer passed an order under Section 271(1)(c) of the Act, levying penalty as proposed. Aggrieved by the same, the assessee filed an appeal before the Appellate Commissioner who allowed the appeal after hearing the parties. Being aggrieved, the revenue preferred an appeal before the ITAT which was allowed setting aside the order passed by the Appellate Commissioner and restoring the order of the Assessing Officer. Aggrieved by the same, the appellant is before this Court raising the substantial questions of law as stated above.

4. We have heard Sri A Chaitanya, learned counsel appearing for the appellant and Sri Jeevan J Neeralgi, Learned counsel appearing for the revenue.

5. The learned counsel appearing for the assessee placing reliance on the notice issued under Section 274 read with Section 271 of the Act dated 30.08.2006 would contend that the said notice proposes to levy penalty under Section 271(1)(b), the particulars of which reads thus, “have without reasonable cause failed to comply with a notice under Section 22(4)/23(2) of the Indian Income Tax Act, 1922 or under Section 142(1)/143(2) of the Income Tax Act, 1961”. The relevant portion which relates to Section 271(1)(c) of the Act has been deleted by the Assessing Officer which reads thus, “has concealed the particulars of his income or furnished inaccurate particulars of such income”. However the Assessing Officer though issued notice under Section 271(1)(b) of the Act proceeded to pass the order under Section 271(1)(c) of the Act. Further, it is submitted that Section 271(1B) of the Act contemplates recording of satisfaction for levy of penalty under Section 271(1)(c) of the

Act by the Assessing Officer. No iota of satisfaction is recorded by the Assessing Officer in the assessment order to impose penalty under Section 271(1)(C) of the Act. As such, the mandatory requirement of Section 271(1)(c) of the Act is not complied by the Assessing Officer, on this ground alone, the penalty levied under Section 271(1)(c) of the Act by the Assessing Officer requires to be set-aside. The ITAT failed to consider these aspects in the right perspective. In support of his contentions, learned counsel placed reliance on the following judgment:

(1) COMMISSIONER OF INCOME-TAX AND ANOTHER VS MANJUNATHA COTTON AND GINNING FACTORY AND ORS reported in ((2013) 350 ITR 565.

It is also further submitted that even on merits, the Assessing Officer had no reason to levy penalty under Section 271(1)(c) of the Act. According to him, the assessee has not concealed the particulars of his income or furnished inaccurate particulars of such income. It was made clear in the return submitted by the assessee that the assessee has claimed an amount of Rs.28,40,409/- as loss on investment under financial expenses. The Assessing Officer based on the declaration made in the return, held that expenditure

claimed by the assessee as revenue is capital in nature and therefore, disallowed the deduction while computing the income. In such situation, the Assessing Officer levying penalty under Section 271(1)(c) is contrary to the tenor of the provision which attracts only in cases of concealing of income or filing of inaccurate particulars.

5. On the other hand, Sri Jeevan J Neeralgi, learned counsel appearing for revenue submits that the Assessing Officer in the notice dated 30.08.2006 issued under Section 274 read with Section 271 of the Act has deleted only a portion of the contents of para relating to Section 271(1)(c), i.e., the deletion is made only with respect to, “have concealed the particulars of your income”, the remaining portion “furnished inaccurate particulars of such income”, remains intact. This clearly establishes the basis for the Assessing Officer to initiate proceedings under Section 271(1)(c) of the Act. Thus, he submits that there is no variance between the contents of the notice issued and the orders passed.

6. It is further contended that the assessee had wrongly claimed the capital expenditure as the revenue expenditure under the head 'financial expenses' in the return of income filed, Assessing Officer has disallowed the deduction towards the capital expenditure. In such circumstances, levying of penalty under Section 271(1)(c) of the Act is mandatory and authorities have no discretionary power to waive off the penalty, even if there is any technical error in issuing the notice, it cannot be turned down only on the technicalities. What could be inferred from the notice issued relates to the provision of Section 271(1)(c). Accordingly, the ITAT having found that the appellant has deliberately brought a capital expenditure as the revenue expenditure under the 'financial expenses' to evade the payment of tax, has upheld the penalty order passed by the Assessing Officer setting aside the order of the Appellate Commissioner in appeal . He seeks to confirm the order passed by the ITAT answering the questions of law in favour of the revenue and against the assessee.

7. Having heard the learned counsel appearing for the parties and perusing the material on record, it is clear that the assessee has filed the return of income claiming certain deductions as revenue expenditure disclosing the same under the head 'financial expenses' in the return of income filed by him. This return was taken for scrutiny and after adjudication, the Assessing Officer has held that the claim made by the assessee as revenue expenditure is capital in nature and allowed the deduction claimed by the assessee. Having held so, separate proceedings were initiated under Section 271(1)(c) of the Act to levy penalty for willful concealment of the particulars of income and for furnishing inaccurate particulars of such income. We have perused the notice, a printed proforma issued by the Assessing Officer under Section 274 read with Section 271 of the Act dated 30.08.2006 which clearly discloses that the Assessing Officer has deleted the paragraph relating to "have concealed the particulars of your income or furnished inaccurate particulars of such income" and has put a right mark(✓) on the printed form relating to the para "failure to comply with a notice under Section 22(4)/23(2) of the Indian

Income-tax Act, 1922 or under Section 142(1)/143(2) of the Income Tax Act, 1961” which corresponds to Section 271(1)(b) of the Act. Thus, it is clear that the notice is issued proposing to levy penalty under Section 271(1)(b) of the Act whereas the order is passed by the Assessing Officer under Section 271(1)(c) of the Act which clearly indicates that there was no application of mind by the Assessing Officer while issuing the notice under Section 274 of the Act. It is imperative from the order under Section 271(1)(c) of the Act that the Assessing Officer noticed that the assessee has declared the revenue expenditure in the financial expenses which was capital in nature. This is based on the verification of details of the return of income filed by the assessee. If so, there was no occasion for the Assessing Officer to come to a conclusion that there was concealment of the income by the assessee or the assessee has filed inaccurate particulars. The very particulars were available in the return of income.

8. Thus, it clearly indicates that the Assessing Officer had no jurisdiction to pass the penalty order under Section 271(1)(c) of the Act without issuing a proper notice as

required under law and moreover, when the particulars are disclosed in the return of income.

9. The Judgment of **Manjunath Cotton and Ginning's** case (supra) is squarely applicable to the facts of the present case wherein, it is held that the levy of penalty is not automatic concomitant of the assessment and the standard proforma without speaking of the relevant clauses lead to an inference to non-application of mind. In the conclusion part at para.63 of the said judgment, in clauses n,p,q,r, it is held thus:

“(n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

(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.”

10. As regards Section 271(1-B) of the Act, it clearly indicates that the assessment order should contain a direction for initiation of proceedings. Merely saying that the penalty proceedings have been initiated would not satisfy the requirement, a direction to initiate proceeding shall be clear and not be ambiguous.

11. In the light of the said judgment of the Co-ordinate Bench, we are of the considered view that the Assessing Officer has not applied his mind at the time of issuing notice under Section 274 R/W Section 271(1)(b) of the Act. This view is fortified by the order passed under Section 271(1)(c) of the Act. No direction is coming forth in the assessments order for levying penalty which is mandatory as per Section 271(1B) of the Act. Considering the relevant factors, appellate commissioner has rightly allowed the appeal of the assessee setting-aside the order passed by the Assessing Officer which has been reversed by the ITAT on the ground that the assessee deliberately evaded the payment of tax by declaring the capital expenditure as revenue expenditure in the 'financial expenses'. In our considered opinion, for the reasons stated above, the order passed by the ITAT is not

sustainable. Accordingly, we set aside the order of the ITAT and restore the order passed by the CIT(A) answering the substantial questions of law in favour of the assessee and against the revenue.

For the foregoing reasons, appeal is allowed. Ordered accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

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