

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1154 OF 2014
WITH
INCOME TAX APPEAL NO.953 OF 2014
WITH
INCOME TAX APPEAL NO.1097 OF 2014
WITH
INCOME TAX APPEAL NO.1226 OF 2014

The Commissioner of Income Tax-11 .. Appellant.
v/s.
Shri Samson Perinchery .. Respondent.

Mr. Ashok Kotangle with Ms. Padma Divakar, for the Appellant in all the Appeals.

Mr. V. S. Hadade, for the Respondent in all the Appeals.

**CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.**

DATE : 5th JANUARY, 2017.

P.C:-

These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act), challenge a common order dated 11th October, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order deleted the penalty imposed upon the Respondent-Assessee for the Assessment Years 2003-04, 2004-05, 2005-06 and 2006-07.

2 All these appeals raises an identical question of law save the difference in the quantum, which read as under:-

“ Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the penalty levied under Section 271(1)(c) of the IT Act, 1961?”

3 The impugned order of the Tribunal deleted the penalty imposed upon the Respondent-Assessee. This by holding that the initiation of penalty under Section 271 (1)(c) of the Act by Assessing Officer was for furnishing inaccurate particulars of income while the order imposing penalty is for concealment of income. The impugned order holds that the concealment of income and furnishing inaccurate particulars of income carry different connotations. Therefore, the Assessing Officer should be clear as to which of the two limbs under which penalty is imposable, has been contravened or indicate that both have been contravened while initiating penalty proceedings. It cannot be that the initiation would be only on one limb i.e. for furnishing inaccurate particulars of income while imposition of penalty on the other limb i.e. concealment of income. Further, the Tribunal also noted that notice issued under Section 274 of the Act is in a standard proforma, without having striked out irrelevant clauses therein. This indicates non-application of mind on the part of the Assessing Officer while issuing the penalty notice.

4 The impugned order relied upon the following extract of Karnataka High Court's decision in *CIT v/s. Manjunath Cotton and Ginning Factory 359 ITR 565* to delete the penalty:-

“ 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 as case of furnishing of inaccurate particulars. The apex court in the case of *Ashok Pai* reported in [2007] 292 ITR 11 (SC) 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 P. Ltd.*, reported in 171 Taxmn 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 non-application of mind.”

5 The grievance of the Revenue before us is that there is no difference between furnishing of inaccurate particulars of income and concealment of income. Thus, distinction drawn by the impugned order is between Tweedledum and Tweedledee. In the above view, the deletion of the penalty, is unjustified.

6 The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in *Ashok Pai v/s. CIT 292 ITR 11* [relied upon in *Manjunath Cotton & Ginning Factory* (supra)] – wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Section 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This

is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice.

7 Therefore, the issue herein stands concluded in favour of the Respondent-Assessee by the decision of the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra). Nothing has been shown to us in the present facts which would warrant our taking a view different from the Karnataka High Court in the case of Manjunath Cotton and Ginning Factory (supra).

8 In view of the above, the question as framed do not give rise to any substantial question of law. Thus, not entertained.

9 Accordingly, all these **Appeals** are **dismissed**. No order as to costs.

(A.K.MENON,J.)

(M.S.SANKLECHA,J.)

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.4625/M/2013 (AY: **2003-2004**)

आयकर अपील सं./I.T.A. No.4626/M/2013 (AY: **2004-2005**)

आयकर अपील सं./I.T.A. No.4627/M/2013 (AY: **2005-2006**)

आयकर अपील सं./I.T.A. No.4628/M/2013 (AY: **2006-2007**)

आयकर अपील सं./I.T.A. No.4629/M/2013 (AY: **2007-2008**)

आयकर अपील सं./I.T.A. No.4630/M/2013 (AY: **2008-2009**)

Shri Samson Perinchery, Panchavati Bldg, 91-E, Fanaswadi, 1 st Floor, S.P. Marg, Mumbai – 400 002.	बनाम/ Vs.	ACIT-Central Circle-18 & 19, Aayakar Bhavan, M.K. Road, New Marine Lines, Mumbai-20.
स्थायी लेखा सं./PAN : ACWPP 0166 C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by :	Shri Rajeev Khandelwal & Mr. Neelkanth Khandelwal
प्रत्यर्थी की ओर से/ Respondent by :	Shri Girija Dayal, CIT-DR

सुनवाई की तारीख / Date of Hearing : 1.10.2013

घोषणा की तारीख /Date of Pronouncement : 11.10.2013

आदेश / O R D E R

PER BENCH:

There are 6 appeals under consideration. These appeals are filed by the assessee against the single order of CIT (A)-Mumbai, dated 14.2.2013 for the assessment years 2003-2004 to 2008-2009 respectively. Since, the issues raised in these six appeals are identical, for the sake of convenience; they are clubbed, heard combinedly and disposed of in this consolidated order. Appeal wise and ground wise adjudication is given in the following paragraphs.

2. For the sake of completeness and reference, the only effective ground raised by the assessee relevant for the AY 2003-2004, common to other AYs, is imported here and the same reads as under:

"1. *On the facts and in the circumstances of the case and in law, the CIT (A) has erred in confirming penalty levied u/s 271(1)(c) of the Income Tax Act, 61."*

3. Briefly stated relevant facts of the case are that the assessee is an individual and received income from brokerage. Assessee filed the return of income u/s 139(1) for the AY 2003-04 declaring the total income of Rs. 97,669/-. There was a search action u/s 132 of the Act on the assessee on 18.12.2008. In response to the notice issued u/s 153A of the Act, assessee filed return of income on 30.3.2009 declaring the total income of Rs. 30,26,460/-, which includes an additional income of Rs.29,28,791/-. The details of additional income for six AYs are tabulated as follows.

S.No.	A.Y.	Income declared as per regular return u/s 139(1)	Income admitted as per return u/s 153A	Additional Income
1	2003-04	97,699/-	30,26,460/-	29,28,761/-
2	2004-05	99,699/-	12,68,780/-	11,69,081/-
3	2005-06	1,01,460/-	28,25,260/-	27,23,800/-
4	2006-07	95,602/-	1,03,28,650/-	1,02,33,048/-
5	2007-08	1,09,800/-	1,42,70,966/-	1,41,61,166/-
6	2008-09	63,58,100/-	86,00,680	22,42,580/-
7	2009-10	1,03,91,270/-	-	1,03,91,270/-
Total				4,38,49,706/-

3.1. Assessment was completed u/s 143(3) of the Act on 29.12.2010 and the total income of the assessee was determined at Rs. 31,98,460/- for the AY 2003-2004 and the details of assessed income for other AYs are given in the table above. During the assessment proceedings, AO accepted the income returned u/s 153A of the Act. Accordingly, AO initiated penalty proceedings u/s 271(1)(c) of the Act by levying minimum penalty at 100% of tax i.e., Rs. 9,30,200/- and passed penalty order on 29.6.2011. The details of penalty imposed for 6 AYs are tabulated as under.

A.Y.	Penalty Imposed(Rs.)
2003-04	9,30,200
2004-05	3,91,500
2005-06	8,16,500
2006-07	31,49,000
2007-08	43,41,000
2008-09	7,52,300

3.2. Aggrieved with the action of the AO, assessee filed an appeal before the first appellate authority.

4. During the proceedings before the first appellate authority, CIT (A) dismissed the assessee's appeals for AYs and held that, though the sufficient and reasonable opportunities were given to the assessee to represent his case, nobody appeared on behalf of the assessee except seeking adjournments. In such circumstances, CIT (A) came to the conclusion that the assessee is not interested to pursue his case and therefore, dismissed the appeals for AYs under consideration for want of prosecution. Expectedly the CIT(A) has not adjudicated the penalty appeals on its merits. Aggrieved with the decision of the CIT (A), assessee filed the present appeals before the Tribunal by raising the above mentioned ground.

5. During the proceedings before us, Shri Rajeev Khandelwal, Ld Counsel for the assessee mentioned that these appeals can be disposed off without remanding them to the CIT(A) on the preliminary issue relating to satisfaction of the AO on the issue of initiation of penalty proceedings and without going into the merits of the penalty. In this regard, Ld Counsel brought our attention to **last paragraph of the assessment order** and mentioned that the penalty proceedings were initiated "**for furnishing inaccurate particulars of the income**". (para 6 of the assessment order is relevant in this regard). Similar language i.e., "**furnishing of the details**" was reiterated in the body of the assessment order also. There is no appeal by the assessee against the assessment order. Bringing our attention to para 2 of the **penalty order** u/s 271(1)(c) of the Act, Ld Counsel read out the following lines:

*"2. Since, the assessee, on his own, had **failed to furnish the true and correct particulars** in the original return filed, show cause notice was issued for initiating penalty proceedings u/s 271(1)(c) of the I.T. Act."*

6. Further, Ld Counsel mentioned that penalty was initiated for '*furnishing of inaccurate particulars*'. However, the penalty of was levied for '*concealment of income*' and para 4 of the penalty order is relevant in this regard.

6.1. Finally, Ld Counsel brought our attention to the notice I.T.N.S-29, the notice issued under section 274 read with section 271 of the Income Tax Act, 1961 dated 29.12.2010, copies of which are placed at page 1 to 6 of the paper book, and mentioned that the Assessing Officer has not specified if the notice was issued for "*concealment of the particulars of income*" or "*furnishing inaccurate particulars of such income*".

7. Thus, the Ld Counsel argued stating that the Assessing Officer is not clear, at the time of initiating the penalties whether the proceedings are initiated for 'concealment of particulars of income' or 'for furnishing the inaccurate particulars of such income'. Further, Ld Counsel mentioned that Assessing Officer **initiated** the penalties for "*furnishing inaccurate particulars of such income*" and however, he **levied** the penalty for "*concealment of the particulars of such income*". Thus, the *initiation* was done under one limb of the provisions of the Act and *penalties* were levied in another limb of the section 271(1)(c) of the Act. Further, he extended the arguments by stating that such penalty proceedings are not sustainable in law. For this proposition, Ld Counsel relied on the judgment of the Hon'ble **Karnataka High Court** in the case of CIT vs. **Manjunatha Cotton & Ginning Factory** [2013] 35 Taxmann.com 250 (Kar.) dated 13.12.2012. Bringing our attention to para 59 to 61 of the said High Court judgment, Ld Counsel mentioned that relying on the judgment of the Hon'ble Supreme Court in the case of **Ashok Pai** 292 ITR 11 and also the judgment of the Hon'ble Gujarat High Court in the case of **Manu Engineering** 122 ITR 306 together with Delhi High Court judgment in the case of **Virgo Marketing** 171 Taxmann 156, the levy of the penalty has to be clear as to the limb of which it is levied and the position being unclear, penalty is not sustainable.

8. On the other hand, Ld DR argued vehemently stating that on merits, this is the case of section 132 of the Act, where the assessee offered additional income by way of filing of return consequent to the notice u/s 153A of the Act. The additional income was not originally filed u/s 139(1) of the Act, therefore, on merits the penalty is sustainable. However, on the legal proposition enunciated by the

Karnataka High Court in the case of **Manjunatha Cotton & Ginning Factory** (supra), Id DR has nothing to offer.

9. We have heard both the parties and perused the orders of the Revenue Authorities as well as the judgments cited by the Ld Counsel. On the preliminary issue, we find that the Tribunal can adjudicate the appeals on the grounds of legal arguments without going into the merits of the penalties levied by the AO in all these years. Admittedly, this is the case, where there was an operation u/s 132 of the Act and the additional income was offered by the assessee and disclosed in the return in response to section 153A of the Act for all the assessment years under consideration. **Without going into the merits**, at the outset, we have under taken the assessee's legal propositions whether the penalty is sustainable on technicalities, considering the cited judgment of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra).

10. On the facts relating to the recording of the satisfaction for levy of penalty u/s 271(1)(c) of the Act, we have perused the relevant orders of the revenue and examined the last para of the assessment order which reads as under:

*"Assessed u/s 143(3) of the Income Tax Act, 1961 at a total income of Rs. 31,98,460/-. Charge interest u/s 234B & 234C as applicable. Give credit for taxes paid after due verification. Issue demand noticed and challan accordingly issue show cause notice for initiating penalty u/s 271(1)(c) of the IT Act, 1961 **for furnishing inaccurate particulars of the income**. This order is passed after getting approval from Addl. CIT, Range-4, Central Circle-II, Mumbai vide his letter No. Addl CIT C.R.4/Approval-153D/2010-11, dated 29.12.2010."*

11. From the above, the penalties were to be initiated either for "*furnishing inaccurate particulars of income*" and not for "*concealment of income*". However, the AO is under obligation to specify the same and should not leave the scope for imaginations and surmises. At the end, we find that the penalty was **actually levied** 'for concealment of (particulars) of income' which is evident from para 4 of the assessment order which reads as under:

*"4. From the above, I am satisfied that the assessee has **concealed the particulars of income** so as to evade tax and as such penalty u/s 271(1)(c) of the Act is leviable. The tax on the undisclosed income of Rs. 31,00,790/- (including foreign travel) works out to Rs. 9,30,200/-. Accordingly, I hereby levy a minimum penalty at 100% of tax i.e., Rs. 9,30,200/-."*

11.1. Further, we have also perused the notice issued u/s 274 of the Act and the relevant para reads as under:

*"have concealed the particulars of your income or _____
Furnished inaccurate particulars of such income"*

Knowingly or otherwise, the AO has not bothered to fill the blanks with appropriate limb of the provisions of section 271(1)(c) of the Act.

12. The above extracts reveal that the AO has not applied his mind to the fact for which reason of the penalty, the notices were issued. The above documents reveal that the penalty proceedings were initiated for **"failure to furnish inaccurate particulars of income and however, the penalty was levied for concealment of income"**.

12.1. In this regard, we have perused the said paras 59 to 61 of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra) and the same read as under:

"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 **'here 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(l)(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 Pal reported in 292 ITR 11 at page 19 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. The Gujrat 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 Taxmn 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 non-application of mind.”

13. From the above, it is clear that the penalty should be clear as to the limb for which it is levied and the position being unclear here the penalty is not sustainable. Therefore, considering the same, we are of the opinion that the ground raised by the assessee should be allowed on technical grounds Accordingly, adjudication of the penalties on merits become an academic exercise. Therefore, the grounds raised in all the six assessment years are **allowed.**

14. In the result, 6 appeals filed by the assessee are allowed.

Order pronounced in the open court on 11th October, 2013.

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 11.10.2013

व.नि.स./ OKK, Sr. PS

Sd/-

(D. KARUNAKARA RAO)
ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**