IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri B.R. Baskaran (AM)& Ramlal Negi (JM)

I.T.A. No. 2187/Mum/2014
(Assessment Year 2009-10)

Dr. Sarita Milind Davare Flat No. 501 Swapna Apartment Paranjpe Scheme B Vile Parle East Mumbai-400 057.	Vs.	ACIT CC-40 Room No. 653 6th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

I.T.A. No. 1789/Mum/2014
(Assessment Year 2009-10)

DCIT CC-40 Room No. 653 6th Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	Dr. Sarita Milind Davare Flat No. 501 Swapna Apartment Paranjpe Scheme B Vile Parle East Mumbai-400 057.
(Appellant)		(Respondent)

PAN No. AHVPD8632R

Assessee by	Shri Vijay Kothari
Department by	Shri B. Pruseth
Date of Hearing	6.10.2016
Date of Pronouncement	21.12.2016

O R D E R

Per B.R. Baskaran (AM) :-

These cross appeals are directed against the order dated 30-12-2013 passed by Ld CIT(A)-38, Mumbai for assessment year 2009-10 partially confirming the penalty levied by the AO u/s 271(1)(c) of the Act.

2. The facts relating to the case are set out in brief. The assessee is a practicing doctor specialised in pain and weight management. The assessee filed her return of income for the year under consideration declaring a total income of Rs.36,19,140/-. The revenue carried out search and seizure operations in the hands of the assessee u/s 132 of the Act on 12.1.2010.

Subsequently the assessee filed a revised return of income on 31.3.2010 declaring a total income of Rs.2,56,11,923/-.

3. Consequent to the search operations, the assessing officer issued notice u/s 153A of the Act to the assessee. In response to the notice, the assessee filed her return of income for the year under consideration declaring a total income of Rs.2,64,52,643/-.

4. During the course of search action, the search team found cash balance of Rs.7.95 crores at the residence of assessee's sister named Ms. Sangeeta Koyal. In the statement taken u/s 132(4) of the Act, Ms. Sangeeta Koyal stated that the above said cash balance belongs to the assessee herein. In the statement taken from the assessee, she also admitted that the above said cash balance belongs to her and the source there of was her professional receipts. The assessee also agreed to offer the above said amount as her income in the Assessment years 2009-10 and 2010-11 at Rs.1.95 crores and Rs.6.00 crores respectively. Accordingly the assessee offered the sum of Rs.1.95 crores in the return of income filed for AY 2009-10. The assessee also admitted a sum of Rs.30.00 lakhs towards the additional amount paid on purchase of a property at Shivanand CHS Ltd. The assessing officer assessed the aggregate amount of Rs.2.25 crores (1.95 + 0.30) on which penalty u/s 271(1)(c) of the Act was levied for concealment of particulars of income at 150% (wrongly stated as 300%) of the tax sought to be evaded, which worked out to Rs.1,11,71,360/-.

5. The Ld CIT(A) confirmed the view taken by the AO, but reduced the quantum of penalty to 100% of tax sought to be evaded as against 150% levied by the AO. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the penalty to the extent of 100% and the revenue is aggrieved in granting relief to the assessee.

6. The Ld A.R raised a preliminary issue first. He submitted that the assessing officer has not issued a proper notice to the assessee by specifying the charge u/s 271(1)(c) of the Act. He submitted that the notice issued by the AO is normally issued to call for a return of income from the assessee. He submitted that the AO has simply added a paragraph in that notice by stating that why an order imposing a penalty u/s 271(1)(c) of the Act should not be imposed on the assessee. He submitted that there is total non-application of mind on the part of the AO and

hence the impugned penalty order is vitiated. He submitted that the penalty is levied u/s 271(1)(c) of the Act under two different charge and the Courts have held that non-specification of the charge will vitiate the penalty proceedings, i.e., the assessee should be appraised of specific charge. In this regard, he placed reliance on the decision rendered by co-ordinate bench of Tribunal in the case of M/s M.G Contractors Pvt. Ltd Vs. DCIT (ITA No.7034 to 7038/Del/2014 dated 19-09-2016), wherein the Tribunal has followed the decision rendered by Hon'ble Karnataka High Court in the case of Manjunath Cotton Mills (359 ITR 565). He submitted that the AO, in the instant case, has not specified any charge in the impugned notice and thus has not apprised the assessee of any charge for which the penalty proceedings have been initiated.

7. The Ld D.R, on the contrary, submitted that the provisions of sec. 274 provides that the assessee should be given an opportunity before imposing penalty. He submitted that the assessee has been provided with an opportunity and she has also participated in the penalty proceedings. Accordingly he submitted that the deficiencies, if any, in the proceedings is automatically made good by the provisions of sec. 292B/292BB of the Act. He submitted that the AO has specified in the assessment order that he is initiating penalty proceedings u/s 271(1)(c) of the Act for concealing the income. He placed reliance on the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of CIT Vs. Smt. Kaushalya and others (216 ITR 660) and submitted that the Hon'ble Bombay High Court has held that mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice.

8. In the rejoinder, the ld A.R submitted that the AO, in the instant case, did not issue proper notice and he did not apprise the assessee about the charge for which the penalty proceedings were initiated. He submitted that this matter goes to the root of the matter and the same cannot be cured by the provisions of sec. 292B/292BB of the Act. In this regard, he placed reliance on the decision rendered by the co-ordinate bench in the case of Shri K Prakash Shetty Vs. ACIT (ITA Nos.265 to 267/Bang/2014 dated 05-06-2014), where in it was held as under:-

> *"16. 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. The show cause notice is also bad for the reason that in the A.Ys 2008-09 and 2009-10 the show cause notice refers to imposition of penalty u/s 271AAA, whereas the order imposing penalty has been*

passed u/s 271(1)(c) of the Act. In our view, the aforesaid defect cannot be said to be curable u/s 292BB of the Act, as the defect cannot be said to be a notice which in substance and effect in conformity with or according to the intent and purpose of the Act. 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."

9. We have heard the rival contentions on this legal issue and perused the record. We have gone through the notice issued by the AO for initiating the penalty proceedings. For the sake of convenience, the scanned copy of the notice is given below:-

"Whereas in the course of proceedings before me for the assessment year 2009-10 it appears to be that you :-

**have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under Section 139(1) or by a notice under Section 139(2)/148 of the Income-tax Act, 1961, No._____ dated_____ or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139(1)or by such notice.*

"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 Indian Income-tax Act,1961.No._____dated _____.

You are hereby requested to appear before me at 11.30 A.M. on 10.01.2012 and show cause why an order imposing a penalty on you should not be made under Section 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under Section 271(1)(c)."

A careful perusal of the notice would show that the contents of the notice are primarily meant to ask the assessee to furnish a return of income. However, the assessing officer appears to have modified the last paragraph by show causing the assessee to explain as to why an order imposing a penalty should not be made u/s 271(1)(c) of the Act. There should not be any doubt that the provisions of section 271(1)(c) prescribes two types of charge viz., (a) concealment of particulars of income and (b) furnishing of inaccurate particulars of income. However, in the above said notice the AO did not specify the type of charge for which the penalty proceedings have been initiated.

10. In this regard, it is pertinent to refer to the following observations made by Hon'ble Supreme Court in the case of Dilip N Shroff (291 ITR 519)(SC).

"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. Commissioner of Income Tax, Kerala State, (2000) 2 SCC 718]".

The Hon'ble Supreme Court has observed that the AO, while issuing a notice should apply his mind and make it clear as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars of income. The Hon'ble Supreme Court has clarified in the case of Reliance petro products (322 ITR 158) has clarified that the observations made by it in the case of Dilip N Shroff with regard to "mens rea" alone have been overruled in Dharmendra Textile processors (306 ITR 277), meaning thereby that the above said observations made by the Hon'ble Supreme Court in the case of Dilip N Shroff shall continue to prevail.

11. Hence, we are of the view that the application of mind on the part of the assessing officer at the time of issuing notice for initiation of penalty is a mandatory requirement and the non-application of mind would vitiate the penalty proceedings. We notice that the Hon'ble Bombay High Court has also expressed identical view in the case of Smt. Kaushalya and Others (supra), on which the revenue has placed heavy reliance. In that case also, it was contended that the AO has not indicated the appropriate charge for which the penalty proceedings were initiated. The Hon'ble Bombay High Court has expressed the following view:-

"The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and non one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of CIT Vs. Mithila Motors (P) Ltd (1984)(149 ITR 751)(Patna) (head note):

> *"Under section 274 of the Income tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings."*

The Hon'ble Bombay High Court, thereafter, considered various decisions relied upon by the parties and came to the conclusion that there should be application of mind on the part of assessing officer. For the sake of convenience, we extract below the relevant observations made by Hon'ble Bombay High Court.

"11. The case of CIT v. Lakhdhir Lalji [1972] 85 ITR 77 (Guj) is the other decision upon which the Tribunal has placed reliance. In that case a notice under section 274 was issued on the footing of concealment of income by suppression of sales whereas the penalty was levied on the footing that there was furnishing of inaccurate particulars of income since the stock at the closing of the year was undervalued. The penalty was quashed upon a view that the very basis for the penalty proceedings had disappeared when it was held that there was no suppression of income by the assessee. Thus, it would be seen that the ratio of that decision cannot be applied to this case.

12. The last decision relied upon is the case of N. N. Subramania Iyer v. Union of India [1974] 97 ITR 228 (Ker). The following passage from the said decision would demonstrate how entirely different the background of that case was and, therefore, the ratio of that decision also could not be applied (at page 231) :

> *"The penalty notice, exhibit P-2, is illegal on the face of it. It is in a printed form, which comprehends all possible grounds on which a penalty can be imposed under section 18(1) of the Wealth-tax Act. The notice has not struck off any one of those grounds; and there is no indication for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. Even in the counter-affidavit filed by the second respondent, he has not stated for what specific violation he issued it. It is not that it would have saved his action. Apparently, exhibit P-2 is a whimsical notice issued to an assessee without intending anything."*

*13. **No doubt, there can exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by the authority and/or ultimate prejudice to the right of opportunity of hearing contemplated under section 274.** Take for example; the notice dated March 28, 1972, for the assessment year 1967-68. This show-cause notice was issued even before the assessment order was made. The assessee had no knowledge of the exact charge of the Department against him. In the notice, not only there is use of the word "or" between the two groups of charges but there is use of the word "deliberately". The word "deliberately" did not exist in section 271(1)(c) when the notice was issued. It is worthwhile recalling that the said word was omitted by the Finance Act, 1964, with effect from April 1, 1964, and the Explanation was added. 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 charges he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."*

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.

13. The Ld D.R submitted that the assessee has participated in the penalty proceedings and hence the error, if any, that has occurred would be cured in view of the provisions of sec. 292B/292BB of the Act. Opposing the said contention, the Ld A.R placed reliance on the decision rendered by the Bangalore bench of Tribunal in the case of Shri K Prakash Shetty (supra), wherein it was held that the provisions of sec. 292BB would not come to the rescue of the revenue, when the notice was not in substance and effect in conformity with or according to the intent and purpose of the Act. In our view, the notice issued by the AO, which is extracted above, was not in substance and effect in conformity with or according to the intent and purpose of the Act, since the AO did not specify the charge for which penalty proceedings were initiated and further there was non-application of mind on the part of the AO.

14. In view of the foregoing discussions, we are of the view that assessee should succeed on this legal issue. Accordingly the penalty proceedings initiated by the AO without application of mind is liable to be set aside and we order accordingly.

15. On merits, the ld A.R contended that the Explanation 5A to sec. 271 will not be applicable to the assessee on the reason that the "Cash" found during the course of search will not fall in the category of "assets" specified in Explanation 5A, which reads as under:-

> *"(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been* ***acquired by him by utilizing (wholly or in part) his income*** *for any previous year"*

The Ld A.R submitted that the penal provisions should be construed strictly. He submitted that the expression "such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year" should be given proper meaning. The A.R submitted that "Cash" cannot be acquired by utilizing income of the assessee" and accordingly contended that the provisions of Explanation 5A would fail in the cases where "cash" is found during the course of search. The Ld A.R also placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Sheraton Apparels Vs. ACIT (2002)(256 ITR 20), wherein the Hon'ble High Court has explained the intention of introducing Explanation 5 (identical to Explanation 5A) under the head "Legislative intention". He submitted that the Explanation 5/5A has been introduced to curb the practice of explaining the sources of undisclosed assets as income of earlier years. He submitted that Explanation5/5A introduces legal fiction and hence they should be interpreted strictly. On the contrary, the Ld D.R submitted that the expression "money" used in Explanation 5A would refer to "Cash" only and he submitted that Explanation 5A should be given purposive interpretation.

16. The Ld A.R also contended that the cash balance found during the course of search would be normally assessable in AY 2010-11, since it was found on 12-01-2010. Had the assessee offered the same in AY 2010-11, she would have got immunity from penalty u/s 271AAA of the Act. He further submitted that the offer made in AY 2009-10 of Rs.1.95 crores out of cash balance was a voluntary offer. Further the Rs.30.00 lakhs offered by the assessee in respect of flat purchase was also a voluntary offer only. Accordingly he submitted that the penalty could not have been levied for the income voluntarily offered by the assessee.

17. Since we have held that the penalty proceedings are liable to be quashed on the reasoning that there was non-application of mind on the part of the AO while issuing notice to the assessee, we do not find it necessary to address the arguments urged on merits.

18. In view of the above, Revenue's appeal does not require consideration.

20. In the result, the appeal filed by the assessee is treated as allowed and the appeal of the Revenue is dismissed.

Order has been pronounced in the Court on 21.12.2016

Sd/-	Sd/-
(RAMLAL NEGI)	(B.R.BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 21/12/2016

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS/Jv.