

आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।  
IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

श्री जॉसन पीबोज , लेखा सदस्य एवं श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI JASON P. BOAZ, AM AND SHRI AMIT SHUKLA, JM

आयकर अपील सं./ITA No.1746/Mum/2011  
(निर्धारण वर्ष/Assessment Year: 2007-08)

Sanghavi Savla Commodity Brokers P. Ltd.  
1<sup>st</sup> Floor, Vesta B-90 Feet Road  
Pantnagar, Ghatkopar (E)  
Mumbai 400075

अपीलार्थी/Appellant

बनाम/ Vs.

ACIT, Circle 46  
Mumbai  
स्थायी लेखा सं./PAN - AATCS9836P

प्रत्यर्थी/Respondent

अपीलार्थी की ओर से / Appellant by: Shri Sunil M. Lala  
प्रत्यर्थी की ओर से/ Respondent by: Shri C.N. Angolkar

सुनवाई की तारीख /Date of Hearing : 16.12.2015  
घोषणा की तारीख/Date of Pronouncement : 22.12.2015

आदेश / O R D E R

PER JASON P. BOAZ , A.M.

This appeal by the assessee is directed against the order of CIT(A)-38, Mumbai dated 30.11.2010 confirming the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2007-08.

2. The facts of the case, briefly, are as under: -

2.1 The assessee, a company engaged in the business of trading and brokerage in commodity futures market with MCX, filed its return of income for A.Y. 2007-08 on 29.10.2007 declaring income of ₹,14,32,310/-. The case was taken up for scrutiny and the

assessment was completed under section 143(3) of the Act vide order dated 30.12.2009 wherein the income of the assessee was determined at ₹59,32,310/-, in view of an addition of ₹45,00,000/- to the returned income in view of a disclosure made by the assessee vide letter dated 28.04.2008. While completing the assessment, the Assessing Officer ('AO') simultaneously initiated penalty proceedings for concealment of particulars of income by issue of notice under section 274 r.w.s. 271(1)(c) of the Act. Subsequently the AO, vide order dated 28.06.2010, proceeded to levy penalty of ₹16,00,000/- on the assessee under section 271(1)(c) of the Act for concealment of particulars of income on the aforesaid amount of ₹45,00,000/-.

2.2 On appeal, the learned CIT(A)-38, Mumbai, vide order dated 30.11.2010, dismissed the assessee's appeal and confirmed the levy of penalty under section 271(1)(c) of the Act.

3. Aggrieved by the order of the CIT(A)-38, Mumbai dated 30.11.2010 confirming the levy of penalty of ₹16,00,000/- under section 271(1)(c) of the Act for A.Y. 2007-08, the assessee is now in appeal before us, raising the following grounds: -

*"1.1 The Assistant commissioner of Income Tax, Central circle-46, Mumbai erred in levying a penalty of Rs.16,00,000/- under section 271(1)(c) of Income Tax Act on the ground that appellant has not extended required co-operation to the department and relying on decision of UNION OF INDIA V/S DHARMENDRA TEXTILE PROCESSOR [2008] 174 TAXMAN 571 (SC) levied the penalty.*

*1.2 The said AO also erred in holding that "certain trade modification carried out by appellant given rise to setting off profit against losses leading to separation of profit arising on the transaction made on MCX", without any supporting evidence and only on the basis of conjecture and surmises.*

*1.3 The appellant submits that it has fully co-operated with the department and as per the advice of the appellant department only, appellant has declared additional*

*income of Rs. 45,00,000/- in order to buy peace and avoid penalty for modification of code carried out by its sub brokers.*

- 1.4 *The appellant further submits that the additional income declared by the appellant is neither supported by any evidence of tax avoidance nor department made any efforts to establish concealment of income and in that the situation no penalty u/s 271(1)(c) can be levied on appellant.*
- 1.5 *The appellant further submits that, the peculiar circumstances in which the additional income has been declared clearly shows that neither there is concealment of income, nor of any incorrect particulars of income has been filed and therefore laying of penalty for concealment is totally unjustified.*
- 2.1 *The appellant craves leave to add, amend or modify all or any of the above grounds of appeal."*

4. In the course of hearing on 16.12.2015, the learned A.R. for the assessee brought to the notice of the Bench that the assessee, vide letter dated 09.12.2015, had filed additional grounds of appeal. The additional ground raised reads as under: -

*"The order of penalty passed under section 271(1)(c) of the Act is bad in law as the notice issued under section 274 read with section 271 of the Act is not discernable as to whether the penalty proceedings is initiated for furnishing of inaccurate particulars of income or concealment of income under the facts and in the circumstances of the appellant's case and therefore, the impugned order passed deserves to be cancelled."*

4.1 The additional ground of appeal (supra) is raised challenging the validity of the notice issued under section 274 r.w.s. 271(1)(c) of the Act dated 30.12.2009, which is without any mention of the default of the assessee for which penalty proceedings are initiated (copy of the notice dated 30.12.209 is placed in assessee's paper book-2). The learned A.R. for the assessee also placed before us a copy of the decision of the Bangalore Bench of the Tribunal in the

case of Roadlinks India Pvt. Ltd. vs. ACIT in ITA No. 1485/Bang/2013 dated 27.02.2015, wherein the Bench in similar circumstances has admitted the additional ground and disposed off the assessee's appeal on the legal grounds so raised.

4.2 We have heard the rival contentions on the issue of admission of additional ground raised by the assessee (supra) and considered the material on record in this regard. We find that the additional ground raised by the assessee is a purely legal ground and since the same goes to the very root of the matter regarding the levy of penalty under section 271(1)(c) of the Act, we therefore admit the same for consideration and adjudication in this appeal.

4.3 Alongwith the application for admission of additional grounds, the assessee has also filed a copy of the notice issued under section 274 r.w.s. 271 of the Act dated 30.12.2009 for initiating of the penalty proceedings under section 271(1)(c) of the Act for A.Y. 2007-08. The learned A.R. for the assessee also placed before the Bench, for our perusal, the original notice issued by the AO. A perusal of the notice issued under section 274 r.w.s. 271 of the Act dated 20.12.2009 (copy placed at paper book-2) reveals that the AO has not deleted the inappropriate words and parts of the notice, whereby it is not clear as to the default committed by the assessee, i.e. whether it is concealment of particulars of income or furnishing of inaccurate particulars of income that the penalty under section 271(1)(c) of the Act is sought to be levied. In this regard, we find that the Hon'ble High Court of Karnataka in its order in the case of M/s Manjunatah Cotton & Ginning Factory in ITA No. 2546 of 2005 dated 13.12.2012, relied on by the assessee, has held that such a notice, as has also been issued in the case on hand, is invalid and the consequential penalty proceedings are also not valid. The relevant

portion of their Lordships judgement at paras 59 to 62 thereof are extracted hereunder for reference: -

*"59. As the provision stands, the penalty proceedings can be initiated on various ground set 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 where 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(1)(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 is it a case of concealment of income or is it a case of furnishing of inaccurate particulars. The Apex Court in the case of Ashok Pai reported in 292 ITR 11 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 reported in 171 Taxman 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. Thom, 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."*

The conclusion drawn therein by their Lordships at para 63 thereof and particularly at p) to s) thereof are as under: -

"63 .....

a) .....

*p) Notice under section 274 of the Act should specifically state the ground 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.*

*s) Taking up of penalty proceedings on the limb and finding the assessee guilty of another limb is bad in law."*

4.4 It may be mentioned that in this regard, no contrary decision of the Hon'ble Apex Court or the Hon'ble Bombay High Court has been brought to our notice or placed before us for consideration. Therefore, respectfully following the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory reported in (2013) 359 ITR 565 (Kar), we hold that the notice issued under section 274 r.w.s. 271 of the Act dated 30.12.2009 for A.Y. 2007-08 for initiating penalty proceedings under section 271(1)(c) of the Act in the case on hand is invalid and consequently, the penalty proceedings are also invalid. In this view of the matter, the additional ground raised by the assessee is allowed since the very basis for the levy of penalty under section 271(1)(c) of the Act has been held to be invalid, we are of the view that the other grounds of appeal at S.Nos. 1.1 to 2.1 (supra) raised by the assessee

against the merits of the levy of penalty under section 271(1)(c) of the Act require no adjudication at this stage.

5. In the result, assessee's appeal for A.Y. 2007-08 is allowed.

परिणामतः निर्धारिती की अपील स्वीकृत की जाती है।

Order pronounced in the open court on 22<sup>nd</sup> December, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22.10.2015 को की गई।

Sd/- (AMIT SHUKLA) लेखा सदस्य/JUDICIAL MEMBER	Sd/- (JASON P. BOAZ) न्यायिक सदस्य/ACCOUNTANT MEMBER
---	--

मुंबई Mumbai, दिनांक Dated 22<sup>nd</sup> December, 2015

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) - 38, Mumbai
4. आयकर आयुक्त / The CIT, Cental IV, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, "H" Bench ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ By Order

सत्यापित प्रति //True Copy//

सहायक पंजीकार /Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई/ITAT, Mumbai

n.p.