

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 532/VIZ/2018
(Asst. Year : 2009-10)**

ACIT, Central Circle-1,
Visakhapatnam.

vs.

Sri Hari Prasad Bhararia,
B-101, VUDA Apartments,
Seethammadhara,
Visakhapatnam.

(Appellant)

PAN No. ABLPB 6853 A
(Respondent)

**C.O.No.43/VIZ/2019
(Arising out of ITA No. 532/VIZ/2018)
(Asst. Year : 2009-10)**

Sri Hari Prasad Bhararia,
B-101, VUDA Apartments,
Seethammadhara,
Visakhapatnam.

vs

ACIT, Central Circle-1,
Visakhapatnam.

PAN No. ABLPB 6853 A
(Appellant)

(Respondent)

Assessee by : Shri G.V.N. Hari – Advocate.
Department By : Shri D.K. Sonawal – Sr.DR

Date of hearing : 08/04/2019.
Date of pronouncement : 10/04/2019.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the Revenue and the cross objection by the assessee are directed against the order of Commissioner of

Income Tax (Appeals)-3, Visakhapatnam, dated 29/06/2018 for the Assessment Year 2009-10.

2. The Department has raised the followings grounds of appeal: -

- (i) *The CIT(A) ignored the provisions of sec.271(1B) of the I.T. Act.*
- (ii) *In the facts and circumstances, the CIT(A) erred in ignoring the fact that the assessee fully knew in detail the exact charge of the department against it and hence the so-called ambiguous wordings in the notice has not impaired or prejudiced the right of the assessee of reasonable opportunity of being heard.*
- (iii) *In the facts and circumstances, the CIT(A) erred in ignoring the fact that there is no prejudice or violation of principles of natural justice in the case of the assessee and the assessee was never denied the rights to contest penalty proceedings and had full opportunity to meet the case of Revenue so as to show that the conditions stipulated in section 271 (1)(c) do not exist and that it is not liable to pay penalty.*
- (iv) *The CIT(A) ought to have followed the decisions of Hon'ble High Court of Andhra Pradesh in the case of CIT Vs. Chandu al (1 52 ITR 238)(AP) and Srinivasa Pitty & Sons Vs.CIT (173 ITR 306)(AO).*
- (iv) *The CIT(A) ought to have held that the case of SSA's Emeralds Meadow Vs. CIT(2016) 73 taxmann.com 248 (SC) is not binding in view of the decision of Shanmugavel Nadar (263 ITR 658)(SC), as the same is merely a dismissal, where it was held that a rejection of SLP through a non-speaking order is not a binding precedent.*
- (vi) *The CIT(A) ought to have followed the ratio of Hon'ble Supreme Court's decision in the case of Skylight Hospitality LLP vs. ACIT, dated 06-04-2018 wherein it was held that "We are convinced that wrong name given in the notice was merely a clerical error which could be corrected under section 2928 of the Income Tax Act. The Special leave petition is dismissed."*
- (vii) *The CIT(A) ought to have considered the import of section 292B which came up for discussion in the case of CIT vs. Jagat Novel Exhibitions(P) Ltd.,(201 3)356 ITR 559(Del),wherein it was held that "The aforesaid provision (section 2928) has been enacted to curtail and negate*

technical pleas due to any defect, mistake or omission in a notice/summons/return. The provision was enacted by Tax Laws (Amendment) Act, 1975 with effect from 1st October, 1975. It has a salutary purpose and ensures that technical objections, without substance and when there is effective compliance or compliance with intent and purpose, do not come in the way or affect the validity of the assessment proceedings."

(viii) Any other ground that may be urged at the time of hearing."

3. The department has raised as many as grounds and also case laws, however, we find that the issue involved in this appeal is whether non-striking of irrelevant portion of the notice under section 274 r.w.s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'Act') i.e. for concealment of income or furnished inaccurate particulars of income, makes the notice invalid or not?

4. Facts of the case, in brief, are that the assessee is an individual deriving income from business of trading in shares, rental income and remuneration as Managing Director of M/s.Sampat Vinayaka Steel Pvt. Ltd. The assessee has filed a return of income for A.Y. 2009-10 by declaring total income of Rs.21,87,858/-. Subsequently, a search and seizure operation under section 132 of the Act was conducted in the residential premises of the assessee on 02/10/2010. Accordingly, a notice under section 153A was issued and in response to the notice, the assessee has filed his return of income by admitting total income

at Rs. 83,87,860/-. The Assessing Officer completed the assessment by making addition under section 2(22)(e) of Rs.69,17,660/- and unexplained investment of Rs. 11,42,500/- in M/s. Alakananda Vinimay Pvt. Ltd.

5. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A). The Id. CIT(A) directed the Assessing Officer to delete the addition made under section 2(22)(e) of the Act. As against the order of the Id. CIT(A), the Department carried the matter in appeal before the Tribunal and the ITAT, Visakhapatnam vide its order in ITA Nos.435 to 441/VIZ/2014, dated 09/09/2016, has dismissed the appeal filed by the Revenue. Subsequently, the Assessing Officer has communicated to the assessee regarding penalty proceedings initiated under section 271(1)(c) dated 28/09/2016. In response to the communication, the assessee has requested to drop the penalty. However, the Assessing Officer not accepted the explanation of the assessee and passed the penalty order under section 271(1)(c) of the Act on 31/03/2017 and levied penalty of Rs. 22,68,832/-. The assessee carried the matter in appeal before the Id. CIT(A) and raised an additional ground that non-striking of the irrelevant column, notice makes invalid and for that he relied on the decision of the Hon'ble Jurisdictional High Court in the case of *Pr.CIT vs.*

Smt. Baisetty Revathi in I.T.T.A.No.684/2016, dated 13/07/2017.

The Id. CIT(A) admitted the additional ground raised and held that the penalty order dated 31/03/2017 passed under section 271(1)(c) is invalid and consequently penalty of Rs. 22,68,932/- is also cancelled.

6. On being aggrieved, Revenue carried the matter in appeal before this Tribunal.

7. The Id. Departmental Representative relied on the grounds of appeal, whereas Id. counsel for the assessee has strongly supported the orders of the authorities below and placed reliance on the decision of the Jurisdictional High Court in the case of Smt. Baisetty Revathi (supra).

8. We have heard both the sides, perused the material available on record and orders of the authorities below.

9. The only issue involved in this appeal is whether notice issued dated 28/03/2013 by the Assessing Officer without striking the irrelevant portion is valid or not. The coordinate bench of the Visakhapatnam tribunal in the case of **Konchada Sreeram Vs. ITO** in ITA No. 388/VIZ/2015, by order dated 06/10/2017 has considered the validity of notice by following the judgment of the Hon'ble Jurisdictional High Court in the case of Smt. Baisetty Revathi (supra) and held that notice issued by the Assessing

Officer is not a valid notice and accordingly quashed. For the sake of convenience, the relevant portion of the order is extracted as under: -

6. We have heard both the parties and perused the material placed on record. In this case, the assessee has not filed the return of income. The department has conducted the survey u/s 133A and completed the assessment u/s 143(3) on total income of Rs.15,43,041/- and initiated penalty proceedings u/s 271(1)(c). The fact is that long term capital gains for sale of the property have come to the notice of the assessing officer because of the efforts made by the department. Therefore, the AO has initiated the penalty proceedings u/s 271(1)(c) and issued show cause notice in the printed proforma of penalty. The AO has issued the penalty notice which reads as under :

"WHEREAS in the course of the proceeding before me for the Asst. Year 2007-08 it appears to me that you have concealed the particulars of your some or furnished inaccurate particulars of such income."

6.1. From the notice issued by the AO, it is observed that the assessing officer had issued the notice for concealment of income or for furnishing of inaccurate particulars. As per the notice, the assessing officer was not sure of which limb of the offence he sought the explanation from the assessee whether it was for the concealment of income or for furnishing of inaccurate particulars. As per the decision of the Hon'ble Jurisdictional High Court cited, for starting the penalty proceedings, the condition precedent is that the assessing officer must be satisfied that a person has either concealed the particulars of his income or furnished inaccurate particulars of such income. The person who is accused of the conditions mentioned in Section 271 should be made aware of the grounds on which imposition of penalty is proposed as he has a right to contest such proceedings and should have the full opportunity to meet the case of the revenue so as to show that the conditions stipulated in Section 271(1)(c) do not exist and that he is not liable to pay the penalty. The Hon'ble High Court of Karnataka in the case law cited held that the practice of the revenue in sending the printed form where all the grounds mentioned in 271(1)(c) are mentioned would not satisfy the requirement of law when the consequence of the assessee not rebutting the initial presumption is serious in nature and has to pay the penalty ranging from 100% to 300% of the tax liability. As the provisions of section 271(1)(c) have to be strictly construed, the Hon'ble High court of Karnataka mandated that the notice issued should be set out the grounds which the assessee has to meet specifically, otherwise the principles of natural justice would be offended as the show cause notice would be vague. On the similar facts, Hon'ble Supreme Court dismissed the SLP in the case of SSA's Emerald Meadows (2016) 73 Taxman.com 248(SC). Ld. DR's argument that the case is distinguishable on facts is not acceptable since the Ld. DR relied on the passing observation of the

Hon'ble High Court of AP. In the assessee's case, the issue is the defective notice u/s 271(1)(c) but not the penalty order. Unless the notice issued u/s 271(1)(c) is valid the penalty order cannot be held to be valid. The assessing officer did not strike off the irrelevant column in the notice and made known the assessee whether the penalty was initiated for the concealment of income or for furnishing the inaccurate particulars. In the assessment order also the AO simply recorded that the penalty proceedings u/s 271(1)(c) are initiated separately. Neither in the assessment order nor in the penalty notice, the assessing officer has put the assessee on notice for which offence, the penalty u/s 271 was initiated. Therefore, the case is squarely covered by the decision of the Hon'ble Jurisdictional High Court of cited (supra) wherein the Hon'ble high court held as under:

"On principle, when penalty proceedings are sought to be initiated by the revenue under Section 271(1)(c) of the Act of 1961, the specific ground which forms the foundation therefore has to be spelt out in clear terms. Otherwise, an assessee would not have proper opportunity to put forth his defence. When the proceedings are penal in nature resulting in imposition of penalty ranging from 100% to 300% of the tax liability, the charge must be unequivocal and unambiguous. When the charge is either concealment of particulars of income or furnishing of inaccurate particulars thereof, the revenue must specify as to which one of the two is sought to be pressed into service and cannot be permitted to club both by interjecting an 'or' between the two, as in the present case. This ambiguity in the show-cause notice is further compounded presently by the confused finding of the Assessing Officer that he was satisfied that the assessee was guilty of both.

We are therefore of the opinion that the order under appeal does not brook interference on any ground. We find no question of law, much less a substantial one, arising for consideration warranting admission of this appeal."

6.2. On the similar facts, the Coordinate Bench of ITAT, Visakhapatnam in ITA No.229/Viz/2015 in the case of Narayana Reddy Enterprises, following the order of the Coordinate Bench in the case of Smt. Makina Annapurna Vs. ITO, Visakhapatnam in ITA Nos.604 & 605/Vizag/2014 dated 2.2.2017 held that non-striking of the irrelevant column renders the notice issued u/s 271 as invalid. Respectfully, following the decision of the Hon'ble AP High Court cited supra and the decision of this Tribunal cited (supra), we hold that the notice issued u/s 271 is invalid and consequent penalty imposed by the AO is cancelled. "

10. We find that the Id. CIT(A) by following the decision in the light of *Konchada Sreeram (supra)* and also the decision in the case of *Smt. Baisetty Revathi (supra)* has held that the penalty

order dated 31/03/2017 passed under section 271(1)(c) is invalid and accordingly penalty levied, is cancelled. For the sake of convenience, the relevant portion of the order is extracted as under: -

7.2) I have gone through the quantum assessment order, the penalty order and also the copy of the notice furnished for perusal. It is seen from the notice that the Assessing Officer has not struck off the portion which is not applicable while initiating the penalty proceedings. Therefore, this notice is to be considered as vague in the light of the decision of Jurisdictional High Court of Andhra Pradesh a Telangana. The Hon'ble High Court of Andhra Pradesh in the case of Smt. Baisetti Revathi in ITA No.684/2016 has held as under:

"On principle, when penalty proceedings are sought to be initiated by the revenue u/s.271(1)(c) of the Act of 1961, the specific ground which forms the foundation, therefore, has to be spelt-out in clear terms. Otherwise, an assessee would not have proper opportunity to put forth his defence. When the proceedings are penalty in nature resulting in imposition of penalty ranging from 100% to 300- of tax liability, the charge must be unequivocal and unambiguous. When the charge is either concealment of particulars of income or furnishing of inaccurate particulars thereof, the revenue must specify as to which one of the two is sought to be pressed into service and cannot be permitted to club both by interjecting an 'or' between the two as in the present case. This ambiguity in the show-cause notice is further compounded presently by the confused finding of the Assessing Officer that he was satisfied that the assessee of guilty of both.

We are therefore of the opinion that the order under appeal does not brook interference on any ground. We find no question of law, much less a substantial one, arising for consideration warranting admission of this appeal."

On the similar facts of vague notice, the Hon'ble ITAT, Visakhapatnam in the of Sri Konchada Sreeram in

ITA No.388/Vizag/2015, Smt. Makina Annapurna ITA Nos. 604 & 605/ITAT/Vizag, Narayana Reddy Enterprises in ITA No.229/Vizag/2015 have followed the ratio laid down by the Hon'ble High Court of Andhra Pradesh a Telangana in the case of Smt. Baisetti Revati and Hon'ble High Court of Karnataka in the case of Manjunatha Cotton and Ginning Factory 359 ITR 565 (Kw) wherein their lordships have cancelled the penalty order passed by the Assessing Officer.

Respectfully following the decision of Hon'ble High Court, Andhra Pradesh, the penalty order dt.31.03.2017 passed u/s.271(1)(c) of the Act is held as invalid and consequently the penalty levied of Rs.22,68,932/- is also cancelled."

11. In view of the above, we find no reason to interfere with the order passed by the Id. CIT(A). Thus, this appeal filed by the Revenue is dismissed.

12. So far as cross objection filed by the assessee is concerned, there is a delay of 67 days. The assessee has not explained the reasons for filing this C.O. with inordinate delay. Therefore, the cross objection filed by the assessee is dismissed in *limini*

13. In the result, appeal filed by the Revenue as well as C.O. filed by assessee is dismissed.

Order Pronounced in open Court on this 10th day of April, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated:10th April, 2019.

vr/-

Copy to:

1. *The Assessee - Sri Hari Prasad Bhararia, B-101, VUDA Apartments, Seethammadhara, Visakhapatnam.*
2. *The Revenue - ACIT, Central Circle-1, Visakhapatnam.*
3. *The Pr.CIT (Central), Visakhapatnam.*
4. *The CIT(A)-3, Visakhapatnam.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.

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