



ITA No.3979/Mum/2013  
M/s.Kapishek Films Pvt.Ltd.  
Assessment Year-2003-04

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

श्री शक्तिजीत दे, न्यायिक सदस्य एवं  
श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।  
**BEFORE SHRI SAKTIJIT DEY, JM AND**  
**SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ I.T.A. No.3979/Mum/2013  
(निर्धारण वर्ष / Assessment Year: 2003-04)

<b>M/s. Kapishek Films Pvt. Ltd.</b> C/o M/s. J.J. Mehra & Co. Chartered Accountants 11, Laxmi, Building, 2 <sup>nd</sup> Floor Off Turner Road, Bandra(W) Mumbai-400 050.	<b>बनाम/</b> Vs	<b>Income Tax Officer</b> Ward-11 (1)(2) Aaykar Bhavan Mumbai.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No		<b>AABCK-9351-N</b>
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से/ Appellant by	:	S/Shri Tanmaye Phadke & Satendra Pandey - Ld.ARs
प्रत्यर्थी की ओर से/ Respondent by	:	M.Rajan- Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	05/03/2019
घोषणा की तारीख / Date of Pronouncement	:	08/03/2019

**आदेश / ORDER**

**Per Manoj Kumar Aggarwal (Accountant Member):-**

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as 'AY'] 2003-04 is a recalled matter since the appeal was dismissed ex-



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*parte qua* the assessee vide order dated 24/11/2017. However, the order has subsequently been recalled vide MA No. 496/Mum/2018 upon assessee's miscellaneous application.

2. By way of aforesaid appeal, the assessee contest levy of penalty u/s 271(1)(c) for Rs.11.85 Lacs as imposed by Ld. Assessing Officer vide order dated 29/03/2010 and as confirmed by Ld. Commissioner of Income-Tax (Appeals)-3, Mumbai, [CIT(A)] vide impugned order dated 06/02/2012.

3. Upon perusal of quantum assessment order u/s 143(3) dated 27/03/2006, it transpires that the assessee has been saddled with quantum disallowance of Rs.32.26 Lacs u/s 69C, being difference in cost of production as reflected in the Profit & Loss Account and as reflected in Schedule-8 of the accounts. Resultantly, penalty proceedings were initiated u/s 271(1)(c) in the quantum assessment order against this disallowance. The penalty was finally levied by Ld. AO on 29/03/2010 which was confirmed by Ld. first appellate authority and the same is under challenge before us. It has been submitted that the quantum disallowance has already attained finality.

4. Although the assessee, in the original grounds of appeal, has agitated the penalty on merits, however, vide letter dated 29/01/2019, an additional ground of appeal has been raised which contest the validity of penalty proceedings on the strength of certain judicial pronouncements. Since, additional ground goes to the root of the matter and contest the jurisdiction of Ld. AO in imposing the penalty, we take up the same first. This additional ground of appeal does not require appreciation of new facts and hence



taken on record in terms of judgment of Hon'ble Apex Court rendered in *National Thermal Power Co. Vs. CIT [1998] 229 ITR 383*. The additional ground reads as under: -

1. *The penalty notice dated 27.03.2006 issued u/s 271(1)(C) r.w.s 274 of the Act is bad in law since no proper satisfaction was ever recorded by the learned assessing officer in the assessment proceedings with regard to the initiation of the penalty proceeding whether the same was initiated for furnishing inaccurate particulars or concealment of income.*
2. *The penalty notice dated 27.03.2006 issued u/s 274 r.w.s 271 of the Act is void ab initio as the said notice does not specify whether the penalty proceedings were initiated for concealment of income or furnishing inaccurate particulars of income.*
3. *The penalty order dated 29.03.2010 passed u/s 271(l)(c) of the Act is bad in law as the penalty was levied by the learned assessing officer on both the limbs (i.e. furnishing inaccurate particulars as well as concealment of income) which is not permissible in the law as per the provisions of section 271(l)(c) of the Act.*

5. The Ld. Authorized Representative for Assessee [AR], *Shri Tanmay Phadke*, drawing our attention to the quantum assessment order, show-casue notice issued by Ld. AO during penalty proceedings and penalty order submitted that the proceedings stood vitiated for want of proper satisfaction as envisaged by law and therefore, the impugned penalty could not be sustained. The same has been controverted by Ld. DR who submitted the wrong claim made by assessee has rightly entailed imposition of penalty.

6. We have carefully considered the same. The perusal of quantum order reveal that penalty has been initiated by Ld. AO by making following observations: -

*"Penalty proceedings u/s 271(1)(c) is being initiated separately."*



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Pursuant to the same, the assessee was issued notice u/s 274 read with Section 271 of the Income Tax Act on 27/03/2006, the perusal of which reveal that Ld. AO has failed to mark the appropriate limb i.e. *concealed the particulars of your income or furnished inaccurate particulars of income* for which the penalty was being initiated against the assessee. Finally, the penalty has been levied by Ld. AO in the penalty order by making following observation: -

*“In view of the above facts its clearly established that assessee company furnished inaccurate particulars of income and concealed the income, therefore, penalty u/s 271(1)(c) is leviable in this case under consideration.”*

Upon combined reading of three events, it transpires that Ld. AO has failed to frame a specific charge against the assessee. The terms *furnishing of inaccurate particulars of ncome* and *concealment of income*, as per settled legal proposition, carry different connotations and therefore, failure to specify the same violate the right of the assessee to defend the same. Our conclusion is duly supported by the cited decision of this Tribunal rendered in *Mrs. Indrani Sunil Pillai Vs ACIT [ITA No.1339/Mum/2016]* dated 19/01/2018, wherein in identical situation, the matter, after due deliberations, was decided in assessee's favor by making following observations: -

*5. We have heard rival contentions and perused material on record in the light of the decisions relied upon. A reading of the impugned assessment order makes it clear that the Assessing Officer has initiated penalty proceedings under section 271(1)(c) without*



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recording any satisfaction as to whether the assessee has furnished inaccurate particulars of income or concealed particulars of income. He has simply mentioned "the penalty proceedings u/s 271(1)(c) are initiated". There is not even an allegation by the Assessing Officer anywhere in the assessment order that the assessee has either concealed the particulars of income or furnish inaccurate particulars of income. In the first show cause notice dated 12th March 2013, issued under section 274 r/w section 271(1)(c) which is in a standard printed format, the Assessing Officer has not specified the specific limb of section 271(1)(c) for violation of which he intends to impose penalty by striking-off the inappropriate words. Even, in subsequent show cause notice dated 2nd September 2013, the Assessing Officer has not mentioned the specific charge for which penalty under section 271(1)(c) was to be imposed, though, in the order passed imposing penalty under section 271(1)(c) the Assessing Officer has alleged that the assessee has furnished inaccurate particulars of income. Thus, from the aforesaid facts, it is very much clear that the Assessing Officer has failed to record satisfaction with regard to the exact nature of offence committed by the assessee in terms of section 271(1)(c). Further, not striking-off the inappropriate words in the show cause notice issued under section 274 of the Act by not mentioning the exact charge for which he intends to impose penalty under section 271( ) (c), the assessee was deprived of a fair and reasonable opportunity to effectively deal with the issue of imposition of penalty. Therefore, in our considered opinion, imposition of penalty in the present case cannot be supported. In this context, we would like to rely upon the decision of the Co-ordinate Bench in case of Vidhyavardhini v/s ACIT, ITA no.3730/Mum./2014, order dated 10th November 2017. Relevant observations of the Bench on the issue are extracted hereunder for better clarity:-

"7. We have heard rival contentions and perused the material available on record in the light of the decisions relied upon. A perusal of the impugned assessment order would reveal that the Assessing Officer nowhere in the assessment order has recorded any satisfaction that the assessee has either furnished inaccurate particulars of income or concealed the particulars of income in respect of any specific addition made by him. He has initiated the penalty proceeding under section 271(1)(c) of the Act mentioning as under:-

"Penalty proceedings under section 271(1)(c) of the Income-tax Act, 1961 are initiated."

8. Thus, while initiating penalty proceedings under section 271(1)(c) of the Act, the Assessing Officer has not recorded any satisfaction in absolute terms whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income. In fact, the recording of satisfaction with regard to the actual offence committed by the assessee is not discernible from the assessment order. While dealing with the issue relating to directions of the Assessing Officer for initiation of penalty proceedings and recording of satisfaction the Hon'ble Karnataka High Court in CIT v/s Manjunatha Cotton and Ginning Factory, [2013] 359 ITR 565 (Kar.) has held as under:-



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“50. A reading of Section clearly indicates that the assessment order should contain a direction for initiation of penalty proceedings. The meaning of the word direction is of importance. Merely saying that penalty proceedings are being initiated will not satisfy the requirement. The direction to initiate proceedings should be clear and not be ambiguous. It is well settled law that fiscal statutes are to be construed strictly and more so the deeming provisions by way of legal fiction are to be construed more strictly. They have to be interpreted only for the said issue for which it has deemed and the manner in which the deeming has been contemplated to be restricted in the manner sought to be deemed. As the words used in the legal fiction or the deeming provisions of Section 271(1B) is Direction, it is imperative that the assessment order contains a direction. Use of the phrases like (a) penalty proceedings are being initiated separately and (b) penalty proceedings under Section 271(1)(c) are initiated separately, do not comply with the meaning of the word direction as contemplated even in the amended provisions of law. The direction should be clear and without any ambiguity. The word „direction” has been interpreted by the decision of the Apex Court in the case of RAJENDRANATH reported in 120 ITR pg.14, where it has been held that in any event whatever else it may amount to, on its very terms the observation that the ITO is free to take action, to assess the excess in the hand of the coowners cannot be described as a direction. A direction by a statutory authority is in the nature of an order requiring positive compliance. When it is left to the option and discretion of the ITO whether or not take action, it cannot be described as a direction.

51. Therefore it is settled law that in the absence of the existence of these conditions in the assessment order penalty proceedings could not be proceeded with. The proceedings which are initiated contrary to the said legal position are liable to be set aside.”

9. As could be seen from the aforesaid observations of the Hon'ble Court, use of phrase like “penalty proceedings under section 271(1)(c) are initiated” cannot be construed as a direction for initiation of penalty proceedings. As far as the contention of the Learned Departmental Representative that in terms of sub-section (1B) of section 271(1)(c), the Assessing Officer has recorded a satisfaction is concerned, we must observe, the aforesaid aspect was also considered by the Hon'ble Karnataka High Court in the case referred to above and the Hon'ble Court referring to a decision of Hon'ble Delhi High Court in Madhushree Gupta & Anr. v/s Union of India & Anr., [2009] 317 ITR 107 (Del.), held that even after introduction of sub-section (1B) of section 271(1)(c) of the Act, there is not much difference and the satisfaction is required to be arrived at in the course of assessment proceedings and should be discernible in the assessment order. The Hon'ble Court observed, the satisfaction should be that the assessee has concealed particulars of income or furnished inaccurate particulars of such income and even in the absence of those express words or finding recorded in the assessment



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proceedings, if a direction as aforesaid is mentioned, it constitute satisfaction of the Assessing Officer. Further, while dealing with the scope and intent of sub-section (1B) of section 271(1)(c), the Hon'ble Court held as under:–

“52. Sub-section (1)(B) only deals with satisfaction of the Assessing Officer. However, under the scheme of Section 271, the persons who are authorised to compute income as well as initiate the proceedings or the Assessing Officer or the Commissioner of Appeals or Commissioner in the course of revisional jurisdiction, Explanation 1 applies to all these three Officers whereas the deeming provision (1)(B) refers only to the Assessing Officer. Therefore, if an order of assessment is passed by Commissioner of Appeals or Commissioner in the course of the said proceedings, if they are satisfied that there is any concealment of particulars of his income or he has furnished inaccurate particular of income the said satisfaction must be expressly stated in the said order. If tha is not stated, at least, the order should state what is mentioned in Explanation 1. It is only if those facts are set out in the order, then the deeming provision in Explanation 1 applies and the concealment of income could be presumed and then they are entitled to initiate penalty proceedings under Section 271. If the said order do not disclose the facts set out in Explanation 1, they are not entitled to the benefit of deeming provision contained in provision (1)(B). The said deeming provision is confined only to the Assessing Officer.

10. The Hon'ble Court after dealing with all the aspects ultimately concluded as under:–

“63. In the light of what is stated above, what emerges is as under:

- a) Penalty under Section 271(1)(c) is a civil liability.
- b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- c) Willful concealment is not an essential ingredient for attracting civil liability.
- d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.
- e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.
- f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine



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- qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).*
- h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*
- i) The imposition of penalty is not automatic.*
- j) Imposition of penalty even if the tax liability is admitted is not automatic.*
- k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.*
- l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.*
- m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*
- n) The direction referred to in Explanation 1B to Section 271 of the Act should be clear and without any ambiguity.*
- o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.*
- (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.*
- s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.*
- t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*
- u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the*



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*assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.*

11. *In case of Dilip N. Shroff v/s JCIT, [2007] 291 ITR 519 (SC), the Hon'ble Supreme Court observed, while issuing the notice under section 274 r/w section 271 of the Act in standard format, the Assessing Officer should delete the inappropriate words or paragraphs, otherwise, it may indicate that the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income. This, according to the Hon'ble Supreme Court, deprives the assessee a fair opportunity to explain its stand, thereby, violating the principle of natural justice. As held by the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts Pvt. Ltd., [2010] 322 ITR 158 (SC). The aforesaid principle laid down in case of Dilip N. Shroff (supra) still holds good in spite of the decision of the Hon'ble Supreme Court in Union of India v/s Dharmendra Textile Processors, [2008] 306 ITR 277 (SC). Even in case of CIT v/s Kaushalya & Ors. [1995] 261 ITR 660, on which the Learned Departmental Representative relied upon the Hon'ble Jurisdictional High Court has observed that notice issued under section 274 of the Act must reveal application of mind by the Assessing Officer and the assessee must be made aware of the exact charge on which he had to file his explanation. The Court observed, vagueness and ambiguity in the notice deprives the assessee of reasonable opportunity as he is unaware of the exact charge he has to face*

12. *Reverting back to the facts of the present case, it is seen that in the assessment order the Assessing Officer has not recorded any satisfaction whether the initiation of penalty proceedings under section 271(1)(c) of the Act is for furnishing of inaccurate particulars of income or for concealing the particulars of income or for both. Even, in the notice issued under section 274 r/w 271(1)(c) of the Act dated 2nd May 2008, which is in standard printed format, the Assessing Officer has not specified which limb of the provision contained under section 271(1)(c) of the Act he intends to invoke for imposing penalty on the assessee. The Assessing Officer has not struck off inappropriate words in the said notice. Thus, cumulative effect of the aforesaid facts if examined in the touch stone of the ratio laid down in the decisions referred to above, it becomes absolutely clear that the Assessing Officer has not recorded any satisfaction regarding the exact nature of offence committed by the assessee for initiating proceedings for imposition of penalty under section 271(1)(c) of the Act. Therefore, the basic conditions of the said penalty provision has not been complied with. Thus, on overall consideration of the facts and material on record and keeping in view the ratio laid down in the judicial precedents cited before us, we are of the considered opinion that the impugned penalty order passed in case*



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*of the assessee is invalid due to lack of recording of satisfaction by the Assessing Officer with regard to the nature of offence committed by the assessee. Hence, we have no hesitation in deleting the penalty imposed."*

6. *The ratio laid down in the aforesaid decision squarely applies to the facts of the present case. As far as the judgment of the Hon'ble Jurisdictional High Court in Maharaj Garage (supra) relied upon by the learned Departmental Representative, on a careful reading of the said judgment, we are of the view that it will have no application to the facts of the case. As could be seen, the basic issue arising out of the reference application which fell for consideration of the Hon'ble Jurisdictional High Court was, while granting previous approval by Inspecting Assistant Commissioner of Income-tax as per provisions of section 271(1)(c)(iii) of the Act whether the assessee was required to be given an opportunity of being heard. While considering this issue, the Hon'ble Jurisdictional High Court observed that provisions of section 271(1)(c)(iii) does not attract rule of presumption of mens rea as the penalty imposable under the said provision is for the breach of civil obligation. The observations of the Hon'ble Court against issuance of show cause notice appears to be in the context of quantum of penalty proposed to be imposed and not with reference to the doing away with the issuance of show cause notice as contemplated under section 274 of the Act. Therefore, the judgment of the Hon'ble Court cannot be read out of context or in a manner to mean that there is no need for mentioning the specific limb of section 271(1)(c) of the Act for which the penalty was intended to be imposed, as such issue never came up for consideration before the Hon'ble High Court. That being the case, the aforesaid decision cannot be applied for rebutting the proposition that in the absence of recording of satisfaction regarding the exact nature of offence, no penalty under section 271(1)(c) can be imposed. In view of the aforesaid, we delete the penalty imposed.*

7. *In view of our decision above, there is no need to adjudicate the grounds raised on merit."*

In view of the same the impugned penalty could not be sustained on legal ground. We order so. The adjudication of grounds on merit would become academic in nature and hence not been delved upon.

7. Resultantly, the appeal stands allowed in terms of our above order.

*Order pronounced in the open court on 08<sup>th</sup> March, 2019.*

**Sd/-**

**(Saktijit Dey)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**



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मुंबई Mumbai; दिनांक Dated : 08/03/2019  
Sr.PS:-Jaisy Varghese

**आदेश की प्रतिलिपि प्रेषित/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- concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

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