IN THE INCOME TAX APPELLATE TRIBUNAL
AGRA BENCH: AGRA

BEFORE SHRI A. D. JAIN, JUDICIAL MEMBER AND
DR. MITHA LAL MEENA, ACCOUNTANT MEMBER

I.T.A No. 192/Agra/2017
(ASSESSMENT YEAR- 2012-13)

Zila Sahkari Bank Ltd., Civil Lines Jhansi PAN No.AAALZ0007C **(Assessee)**		DCIT, -2(3) (1), Jhansi. **(Revenue)**

I.T.A No. 193/Agra/2017
(ASSESSMENT YEAR- 2013-14)

Zila Sahkari Bank Ltd., Civil Lines Jhansi PAN No.AAALZ0007C **(Assessee)**		ACIT, -Circle-6, Jhansi. **(Revenue)**

Assessee by	**Shri R.C. Tomar, AR**
Revenue by	**Shri Inderjit Singh, CIT. DR.**

Date of Hearing	**04.06.2018**
Date of Pronouncement	**07.08.2018**

ORDER

I.T.A No. 192/Agra/2017

This is assessee's appeal for assessment year 2012-13, taking the following grounds:

"1. Because the Ld. CIT(A) has wrongly, illegally and arbitrarily confirmed the penalty of Rs. 12,50,000/- made by the learned DCIT/Jhansi.

2. Because the Ld. C1T(A) has erred in saw and on facts in rejecting the appellant's submission that the mistake was an unintentional mistake in computation of income as all the particulars of income and expenditures were disclosed in the books of accounts. It is mere an error in computation of Income by the assessee while filing the return.

3. Because the Ld. CT1'(A) has erred both in law and on facts in rejecting the appellant's submission that the mistake was an unintentional mistake which was also not pointed out by the Ld. AO in the assessment done u/s 143(3) for the A.Y 2011-12. The case was also supported by the decisions of the Hon'ble apex court which was not considered by the Ld. CIT (A).

4. Because under the facts and circumstances of the case the assessee has explained that the error was not intentional and was prevented by circumstances beyond his control.

5. That the appellant craves to add. amend, alter, modify or delete any or all of the grounds of appeal before oral the time of hearing."

2. The issue of validity or otherwise of the penalty imposed u/s 271(1)(c) of the I.T. Act, in facts and circumstances similar to those attending this appeal has been discussed by the Division Bench of the Agra ITAT, while disposing of ITA No. 118/Agra/2015, in the case of 'Sachin Arora vs. ITO' for A.Y. 2008-09 and other appeals.

3. Therein, it has been observed, inter alia, as follows:

> *"2. Facts, for convenience, are being taken from ITA No. 118/Agra/2015, the assessee's appeal for A.Y. 2008-09 against the CIT(A)'s order confirming penalty of Rs.98,000/- imposed on the assessee u/s 271(1)(c) of the IT Act. AIR information was received in respect of the assessee, as per which, cash deposits amounting to Rs.6541003/- in the saving bank account no.027401506700 of the assessee maintained with the ICICI Bank was reported. During the assessment proceedings, on being asked to explain these deposits, the assessee gave explanation pertaining to his trading activities. The assessee also stated that the record in respect of its trading activities was lost, for which, an FIR was also lodged with the police authorities at Mathura. When confronted by the AO that the claim of the assessee was not duly substantiated, the assessee, vide order sheet entry dated 30.07.2010 as recorded by the AO, agreed to determining of its profit u/s 44AF @ 5% of the amount in the said bank account. As the assessee had admitted the undisclosed income appearing from its trading transactions in the said bank account, the AO initiated penalty proceedings u/s 271(1)(c) of the Act and levied the penalty of Rs*

98000/- for concealment, vide order passed u/s 271(1) (c) on 25.02.2011. The CIT(A) confirmed the penalty.

3. The ld. Counsel for the assessee has contended that the penalty order dated 25.02.2011, as sustained by the ld. CIT(A), is void ab initio, as the notice issued u/s 274 r.w.s 271(1)(c) of the Act, on 11.08.2010 was not in conformity with the law. His arguments in this regard shall be presently discussed.

4. As per the ld. DR, however, the notice is entirely as per law. His arguments will also be considered in due course

5. The aforesaid notice (APB page 7) reads as follows:

> *"Sub: Penalty notice u/s 274 read with section 271(1)(c) of the I.T. Act, 1961 - A.Y. 2008 -09 – Reg:-*
>
> *Whereas in the course of the proceedings before me for the assessment year 2008-09 it appears to me that you;-*
>
> *** have concealed the particulars of your income or have furnished inaccurate particulars of such income.*
>
> *You are hereby requested to appear before me at 11.00 AM on 14.09.2010 and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) of the income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through an 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(l)(c).

Sd/-
(Yuvraj Malik)
Income Tax Officer-3(4)
Mathura."

6. So, as per the notice, the assessee had concealed the particulars of his income, or had furnished inaccurate particulars thereof.

7. In the assessment order (APB-149-150), dated 11.08.2010, the notice is stated to be issued qua concealed income. In the penalty order dated 25.02.2011, the expression used for levy of penalty is 'Chhipaye Gaye Tatthayon Ke Liye', which expression, and the parties are also ad idem on this, means 'concealment'.

8. According to the ld. Counsel for the assessee, the notice, not being specific about the charge against the assessee, is void. He has relied on the following decisions:

(i) "CIT vs. Manjunath Cotton and Ginning Factory", 359 ITR 565 (Kar).

(ii) "CIT vs. M/s Veerabhadrappa Sangappa & Co", ITA No. 5020/2009 (Kar).

(iii) "CIT vs. SSA Emerrald Meadows", in ITA No. 380/2015 (Kar).

(iv) "Dilip N. Shroff Vs. JCIT", 291 ITR 519 (SC).

(v) "Ashok Pai vs. CIT", 292 ITR 11 (SC).

(vi) "CIT vs. Reliance Petroproducts (P) Ltd.", 322 ITR 158 (SC).

(vii) "Uma Shankar Agarwal vs. DCIT", ITA No. 1831 to 1835/Kol/2015.

(viii) "Suvaprasanan Bhatacharya vs. ACIT", ITA No. 1303/Kol/2010. (Kol).

(ix) "SLK Properties vs. ITO", ITA No. 140/PN/2014.

(x) "ACIT vs. Deepesh M. Panjwani" ITA No.6330/Mum/2012 & 5878/Mum/2012. (ITAT, Mum).

(xi) "CIT vs. Shri Chandrashekhran", ITA No.61/2009 (Kar).

(xii)"Sarita Milind Davare vs. ACIT", ITA No. 2187/Mum/2014.

(xiii)"Meherjee Cassinath Holdings P. Ltd. vs. ACIT", ITA No.2555/Mum/2012.

(xiv) "Rajeev Kumar Gupta vs. CIT", 123 ITR 907, Allahabad, (HC).

(xv) "Ajay Kumar vs. ITO", ITA No. 53/Agra/2015.

(xvi) "N.N. Subramania Iyer vs. UOI", 97 ITR 228 (Ker).

9. Per contra, the ld. DR has relied on:

(a) "CIT vs. S.V. Angidi Chettiar", 44 ITR 739 (SC).

(b) "Mak Data (P) Ltd. vs. CIT", Civil Appeal No.9772/2013 (SC).

(c) "Gujarat State Financial Services Ltd. vs. ACIT", in ITA No.2078/Ahd/2006 & 2526/Ahd 206.

(d) "M/s K.P. Madhusudan vs. CIT", Civil Appeal No. 6465/2000 (SC).

(e) "CIT vs. Zoom Communications Pvt. Ltd.", ITA No.07/2010(Del) (H.C.)

(f) "Shyam Biri Works", 259 ITR 625 (All. H.C.).

(g) "Sangam Enterprises vs. CIT", 288 ITR 396 (All).

(h) "Harish Hosiery Mart", ITAT, Ahmedabad.

(i) "Arcotech", (Del) (H.C.).

(j) "B.A. Balasubramanian & Bros.", 20 Taxman 215 (Mad).

(k) "Earthmoving Equipment Service Corporation vs. DCIT" ITA No.6617/Mum/2014.

10. The case of "S.V. Angidi Chettiar" (supra) is not applicable to the facts of the case. In the referred case, the issue under consideration pertained to a firm which had got dissolved. The contention of the assessee was that the ITO could not, in exercise of

the power under section 28(1), impose penalty. The Hon'ble High Court accepted the plea of the assessee. However, the Hon'ble Supreme Court reversed the Judgment of the Hon'ble High Court by holding that assessment proceedings are liable to be continued against the firm as if it has not been dissolved. The Hon'ble Supreme Court found error in the High Court Judgment and concluded by holding that "in our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1) (c) upon the firm M/s S.V. Veerappan Chettiar & Co. after its dissolution". In the present case, however, the assessee is an individual and has raised no such plea as was raised therein.

11. Regarding 'Sanjay Kumar' & 'Ajay Kumar' (supra), as per the assessee, in both the referred cases, the ITAT, Agra Bench had quashed the penalty orders in ITA Nos. 53 & 54/Agra/2015 vide consolidated order dated 19.05.2017, following the judgment of 'Manjunatha Cotton' (supra) and after distinguishing the cases relied on by the Revenue namely, 'Mak Data (P) Ltd.' (supra), 'K.P. Madhusudhanan' (supra), 'Zoom Communication Pvt. Ltd.' (supra) & 'S.V. Angidi Chettiar' (supra). This is not disputed. Thus, no aid is available to the Department from these orders.

12. In "Mak Data (P) Ltd." (supra), the Hon'ble Supreme Court has held that the AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or to reduce it into writing. In the case before us, the assessee

has not raised the issue of satisfaction and, therefore, reliance on "Mak Data" (supra) by the Department is misplaced.

13. In "Gujarat State Finance Services Ltd. Vs ACIT- Circle-IV, Ahmedabad", in ITA No. 2078/Ahd/2006, the ground raised by the assessee for adjudication was as under:

> *"The learned Commissioner of Income-tax (Appeals) erred in not appreciating the fact that there was no satisfaction as regards concealment of income or furnishing of any inaccurate particulars while passing the assessment order. It is submitted that in absence of such satisfaction penalty u/s 271(l)(c) cannot be levied. It is submitted that it be so held now."*

14. This, again, is not the issue before us.

15. The brief facts of "K.P. Madhusudan" (supra) were that during the course of assessment proceedings, the Assessing Officer noted that the demand draft and a telegraphic transfer were not entered by the assessee in its cash book on the dates on which the same were purchased and made These are nowhere the facts of the present case.

16. In "Zoom Communication Pvt. Ltd." (supra), the facts of the case are that during assessment, it was noticed by the AO that in Schedule 9, relating to Administrative and other Expenses, forming part of the Profit & Loss Account, a sum of Rs. 1,21,49,861/- had been debited under the head "Equipment Written Off ". It was stated by the assessee that due to oversight, this amount was not added back in the Computation of Income and the same ought to have been adjusted in the Block of Assets. The aforesaid amount was added bank to the

income of the assessee, with its consent. It was further noticed that another sum of Rs. 1 Lakh had been paid under the head "Income Tax Paid", in the above referred Schedule relating to Administrative and other Expenses. The assessee claimed that due to oversight, this amount was not added back in the Computation of Income. Hence, the Assessing Officer added this amount also to the Income of the assessee. Penalty Proceedings were also initiated against the assessee. In appeal, it was held by the Hon'ble High Court that the assessee did not explain, either to the Income Tax Authorities, or to the Income Tax Appellate Tribunal, as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this case were not added, while computing the income of the assessee company. The Hon'ble High Court further held that it could not lose sight of the fact that the assessee was a Company, which must be having professional assistance in computation of its income, and its accounts were compulsorily subjected to audit. It was observed that in the absence of any details from the assessee, such deductions could not have been left out while computing the income of the assessee Company and it could also not have escaped the attention of the auditors of the Company. Thus, this case pertains to the explanation tendered by the assessee and the bonafides of such explanation. As such, again, this matter does not further the cause of the Department.

17. In the case of "CIT Vs. Societex" (supra), the Hon'ble Delhi High Court has explained the scope of the judgement in the case of 'Zoom Communications' (supra) observing that the same is premised

on the footing that even if inadvertently particulars are not given, if the authority finds that the explanation given is not bona fide, penalty u/s. 271 would be warranted.

18. In "HCIL Kalindee Arsspl" (supra), penalty under section 271(l)(c) imposed on disallowance made under section 80IA, which was deleted by the ITAT on the ground that the claim raised under section 80IA, as was disallowed in quantum proceedings, was certified to be correct by the Chartered Accountant, who furnished the prescribed certificate in Form No.10CCB. The Hon ble High Court held that mere filing of Form issued by the Chartered Accountant in order to comply with a statutory procedural requirement will not absolve the assessee of its liability, if the act of claiming deduction is not bonafide. On the other hand, in the case under consideration, the assessee has not filed any such certificate, claimed no such deduction under section 80IA and seeks no such advantage. Therefore, the case is distinguishable on facts.

19. In the case of "Shyam Biri" (supra), the Hon'ble High Court has observed that though the AO must have satisfaction as required under section 273, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act. The case of the assessee before us, however, is not on the ground of non recording of satisfaction, but is on the ground of absence of clear charge/default mentioned in the penalty notice. The assessee's case is that on account of absence of a clear

charge having been spelt out in the penalty notice, the notice is rendered void ab initio in view of section 274 of the Act.

20. In "Sangam Enterprises" (supra) pertains to the applicability of Explanation 1 to section 271(1)(c). The Hon'ble High Court has held that the judgment of "CIT vs. Anwar Ali", 76 ITR 696 (S.C.) is no longer applicable. It has further been observed that after the insertion of Explanation 1 to section 271(1)(c) by the Taxation law amendment Act 1975, if the explanation offered by the assessee regarding the additions is either found to be false and remained unsubstantiated, the additions so made are deemed to be concealed income, and therefore, the penalty provisions are attracted. The case has no application to the points and controversy under question.

21. In the case of "Balasubramaniam" (supra), no issue of validity of penalty notice was under consideration.

22. In the case of Earthmoving Equipment Service Corporation (supra) penalty order was sustained by the ITAT on the ground that the AO therein has levied penalty after due application of mind, in as much as in the assessment order it was mentioned that penalty proceedings are initiated for furnishing of inaccurate particular of income and the penalty was finally levied on the same ground.

23. Further the ITAT found, that mere non marking of the relevant clause in the Notice is a curable defect, and the action of the revenue is rescued by the provisions of section 292BB of the Act, which cures minor defects in the various notices issued provided such notice in substance and effect was in conformity with the intent and purpose of

the Act. Thus, the Bench in Para-6 concluded that penalty cannot be deleted on this ground.

24. Now, the question for consideration of the Hon'ble Bench is in view of the fact that whether for the reason that in the assessment order it is mentioned that penalty is initiated for a specific charge, the Notice accompanying the Assessment Order, issued under section 274, read with section 271(1)(c), by which initiation is formally and legally conveyed, which mentions both of the two charges, can penalty be sustained. And whether such a Penalty Notice can be said to defective, defect being minor in nature, curable under section 292BB of the Act and also whether the Notice as has been issued to the appellant is in accordance with the Act.

25. First of all, it needs due appreciation that for ascertaining the validity of satisfaction for initiation of penalty the mirror is the assessment order, and for a step thereafter for initiation of Penalty, the mirror is the Penalty Notice. Therefore, merely because, in the assessment order penalty has been initiated mentioning a specific charge and soon thereafter, in the accompanying Notice issued at the same time on the same day, assessee is called upon to furnish his explanation in respect of both the charges goes to advance the submission of the assessee that the Notice suffers from non-application of mind in as much the AO, while passing assessment order was alive that assessee has committed the default liable for penalty on the ground of 'a' particular charge, however immediately

thereafter he issues a show cause Notice mentioning both the charges. This certainly is a case of non-application of mind.

26. Similar situation was dealt with by the Mumbai Bench in the case of 'Mehrjee Cassinath Holding (P) Limited' (supra) wherein the revenue on the face of the Judgement in the case of 'Manjunatha Cotton' (supra) after placing reliance upon the Judgment of Hon'ble Bombay High Court in the case of 'Smt. Kaushlaya & Ors.' 216 ITR 660 countered the assessee submission of non application of mind by submitting before the Bench that in the assessment order the Assessing Officer has recorded that penalty was initiated for furnishing of inaccurate particulars of income. It was therefore, contended that Penalty Notice cannot be solely examined to see whether the AO has applied his mind or not. The Bench vide Para-10, addressing to this argument of the revenue has held that this argument in the light of Hon'ble Supreme Court Judgment in the case of Dilip N. Shroff approving that factum of non striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. The Bench further held that such proposition has been considered by the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). In Para-13 of the Judgment the Hon'ble Bench again dealt with this argument of the DR has held that the observation of the AO in the assessment order and non-striking off the irrelevant clause in the notice clearly brings out the diffidence on part of the AO and there is no clear and crystallized charge being conveyed to the assessee u/s 271(1)(c) which has to be met by him.

Therefore, considering the observation of the AO in the assessment order alongside his action of non striking off the irrelevant clause in the notice renders the notice non complying with the principles of natural justice and thus deleted the penalty.

27. Again similar issue came up for consideration before the Mumbai Bench in the case of 'Dr. Sarita Milind Davare Vs ACIT' in ITA No. 2187/Mum/2014 wherein the DR vide Para-7, submitted before the Bench that in the assessment order the AO has clerly specified that penalty is initiated for concealment of income and placing reliance upon the Hon'ble Bombay High Court in the case of 'CIT Vs Kaushlaya Devi' 216 ITR 660, submitted that mere mistake in the language used or mere non-striking off the inaccurate portion cannot by itself invalidate the Notice

28. The argument tendered by the Revenue was not accepted by the ITAT who in Para-12 after due discussion of the Judgment delivered in the case of 'CIT Vs Kaushlaya Devi' (supra) has held that a combined reading of the decision rendered by Hon'ble Bombay High Court in the case of 'Smt B. Kaushlaya & Ors' (supra) and the decision rendered by the 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.

29. The illegality in the Notice cannot be saved by recourse to section 292BB of the Act, as was held by the ITAT, Mumbai Bench in the case of 'Dr. Sarita Milind Davare Vs ACIT' in ITA No.

2187/Mum/2014 wherein in Para-7 of the order this plea was taken by the revenue before the ITAT to counter the ratio of Manjunatha referring to the order passed by the Bangalore Bench in the case of Shri K. Prakash Shetty wherein it was held that section 292BB would not come to the rescue of the revenue when the Notice was not in substance and in conformity with or according to the intent of the Act. Therefore, it cannot be said that section 292BB can validly be pressed into service in respect of such a jurisdictional mistake

30. Now coming to the question as to whether such a notice can be held to be accordance with the Act. In the case of 'CIT Vs Manjunath Cotton & Ginning Factory' (supra) (APB 8 to 33). "Notice under section 274 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. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law.

31. In the case of 'Rajeev Kumar Gupta Vs CIT' (1980) 123 ITR 907 (All). (Para-4) (APB-191-195) "A notice which does not intimate the assessee of the particular facts on the basis of which the order is proposed to be passed would not comply with the requirements of s. 274."

32. In this regard, it is submitted that such an argument, on the face of the Judgment of the Hon'ble Karnataka High Court and Jurisdictional High Court cannot be sustained.

33. In "CIT vs. Manjunath Cotton and Ginning Factory", 359 ITR 565 (Kar). "Notice under section 274 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. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law. The assessee should know the grounds which he has to meet specifically. Otherwise, principle of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. [Para 63].

34. In "CIT vs. M/s Veerabhadrappa Sangappa & Co", ITA No. 5020/2009 (SC).

35. In "CIT vs. SSA Emerrald Meadows", in ITA No. 380/2015 (Kar) has held that: "It is to be kept in mind that section 271(1)(c) is a penal provision and such a provision has to be strictly constructed. Unless the case falls within the four corners of the said provision, penalty cannot be imposed." (Para-12).

36. In "Dilip N. Shroff Vs. JCIT", 291 ITR 519 (SC). Section 271(1)(c) of the Act is in two parts. Whereas the first part refers to concealment of income, the second part refers to furnishing of inaccurate particulars thereof. (Para-31) 'Concealment of income' and 'furnishing of inaccurate particulars' are different. Both concealment and furnishing inaccurate particulars refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars. (Para 67)

37. In "Ashok Pai vs. CIT", 292 ITR 11 (SC) has held; 'Concealment of income' and 'furnishing of inaccurate particulars' carry different connotations. Concealment refers to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. (Para 22).

38. In "CIT vs. Reliance Petroproducts (P) Ltd.", 322 ITR 158 (SC). "8. ..... It was only on the point of mens rea that the judgment in 'Dilip N. Shroff v. Joint CIT' was upset. In Union of India v. 'Dharmendra Textile Processors' after quoting from section 271 extensively and also considering section 271(1) (c), the Court came to the conclusion that since sect on 271(1) (c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was not necessity of mens rea ..... The basic reason why decision in 'Dilip N Shroff v. Joint CIT' was overruled by this Court in 'Union of India v. Dharmendra Textile Processors' was that according to this Court the effect and difference between section 271(1) (c) and section 276C of the Act was lost sight of in the case of 'Dilip N Shroff v. Joint CIT'. However, it must be pointed out that in 'Union of India v. Dharmendra Textile processors', no fault was found with the reasoning in the decision in 'Dilip N. Shroff v. Joint CIT', where the court explained the meaning of the terms conceal and

inaccurate. It was only the ultimate inference in 'Dilip N. Shroff v. Joint CIT' to the effect that mens rea was an essential ingredient for the penalty under section 271(1) (c) that the decision in 'Dilip N. Shroff v. Joint CIT' was overruled." (emphasis nine)

39. In "Uma Shankar Agarwal vs. DCIT", ITA No. 1831 to 1835/Kol/2015. wherein assessee therein challenged the legality of Penalty Order on the ground of "No satisfaction" and "Show cause Notice without specific charge", the Bench vide Order dated 20.01.2016 and after due consideration of MAK Data (P) Ltd which was relied upon by the Departmental Representative as discussed in Para-7, held penalty unsustainable in law for the reasons as elaborately discussed in Para-9 to 10 of the said Order. Xerox copy of the Hon'ble ITAT order is enclosed. (APB-79-92)

40. In "Suvaprasanan Bhatacharya vs. ACIT", ITA No. 1303/Kol/2010. (Kol) vide Order dated 06-11-2015 deleted penalty levied under section 271(1)(c) on the ground of "No Satisfaction" recorded in the assessment order and Notice being issued on both the charges wi hout specifying the exact charge. Submission raised by the assessee is duly noted in Para- 4 , Revenue's submission refereeing and relying on MAK Data is noted in Para 4.2, rebuttal of the assessee is noted in Para 4.3 and finding over the issue by the Hon'ble Bench are noted in Para 8 of the ITAT Order. Xerox copy of the ITAT order is enclosed. (APB-93-112).

41. In "SLK Properties vs. ITO", ITA No. 140/PN/2014 wherein vide Order dated 18.03.2016 after due consideration of the Judgment of MAK Data (P) Ltd. held penalty order to be unsustainable in law

placing reliance to Judgment of 'Manjunath Cotton' (supra). The assessee raised Additional Ground before the ITAT. On merits submission of the assessee is noted in Para- 11 to 13 rebuttal thereon by the Revenue referring and relying upon Judgment of 'MAK Data' (supra) is noted in Para 17 & 17.1 and finding by the ITAT are noted in Para 19 to 24 of the Order. Xerox copy of the ITAT order is enclosed. (APB-113-127).

42. In "ACIT vs. Deepesh M. Panjwani" ITA No.6330/Mum/2012 & 5878/Mum/2012. (ITAT, Mum). while examining the validity of Penalty order in the light of objection raised by the assessee regarding the validity of Penalty Notice issued on the basis of both the charges vide Order dated 18.03.2016 placing reliance to the Judgments in the cases of 'Manjunath Cotton & Ginning Factory' (supra) held penalty to be unsustainable in law. Xerox copy of the ITAT order is enclosed (APB-128-137).

43. In "CIT vs. Shri Chandrashekhran", ITA No.61/2009 (Kar) held that "……Infact, the order imposing penalty is contrary to law, declared by this court in the case of Commissioner of Income-Tax and Another v. Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (Karn), in as much as, it is clear from the order that there is no direction to initiate penalty proceedings. In the aforesaid judgment, it was held that it is imperative that the assessment order contains a direction. The use of 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. 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 Income tax Officer whether or not take action, it cannot be described as a direction. 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. Therefore, the appellate Authority was justified in setting aside the order imposing penalty Accordingly, the substantial question of law is answered in favour of the assessee and against the revenue. We do not find any merit in this appeal. Accordingly, the appeal is dismissed.

44. In "Sarita Milind Davare vs. ACIT", ITA No. 2187/Mum/2014 the Bench had the occasion o deal with identical objection of the Revenue as noted in Para-7 of the Hon'ble ITAT order that, assessee was given an opportunity as required u/s 274; she has availed that opportunity by participating; deficiency if any is made good relying on section 292B/292BB; AO has specified in the assessment order that he is initiating penalty for concealing the income and placed reliance to Hon'ble Mumbai 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.

45. In "Meherjee Cassinath Holdings P. Ltd. vs. ACIT", ITA No.2555/Mum/2012. wherein vide Order dated 28.04.2017 the plea taken by the Revenue as noted in Para-7 of the ITAT Order, that irrespective of the Notice issued under section 271(1)(c) mentioning both the charges, the Assessment Order in the case therein in Para-4 has recorded clearly that the penalty under section 271(1)(c) of the Act initiated for furnishing of inaccurate particulars of income.

46. In "Rajeev Kumar Gupta vs. CIT", 123 ITR 907 Allahabad, (HC). "Now, s. 274 requires that no order imposing a penalty shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard. Reasonable opportunity postulates that the facts, on the basis of which the penalty is proposed to be imposed, should be intimated so that the assessee may have a chance of showing cause against the proposed penalty.

47. A notice which does not intimate the assessee of the particular facts on the basis of which the order is proposed to be passed would not comply with the requirements of s. 274. The Tribunal has upheld the Department s plea that the penalty order was not vitiated on account of the fact that the assessee knew that the penalty was being imposed on the basis of the rectified assessment. We are, however, of the view that, as s. 274 requires a reasonable opportunity to be given to the assessee of being heard which can be done only in case a proper notice is issued, mere knowledge on the part of the assessee of the basis on which the penalty was proposed to be imposed would not meet the requirements of s. 274.

48. In "Ajay Kumar vs. ITO", ITA No. 53/Agra/2015. vide order dated 19.05.2017deleted penalty under identical circumstances. Copy of the Order passed by the Bench is enclosed herewith. (APB-196-203).

49. In "N.N. Subramania Iyer vs. UOI", 97 ITR 228 (Ker). "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"

50. Therefore, in view of the above, particularly following 'Manjunatha' (supra), we hold that the notice under challenge is not in confirmity w th the law and it is void ab initio. Accordingly, the said notice and all proceedings based thereon, culminating in impugned order, are quashed."

I.T.A No. 193/Agra/2017

4. This is assessee's appeal for assessment year 2013-14, taking the following grounds:

"1. Because the Ld. CIT (A) has wrongly, illegally and arbitrarily confirmed the penalty of Rs. 1,60,00,000/- made by the learned DCIT, Jhansi.

2. Because the Ld. CIT(A) has erred in law and on facts in rejecting the appellant's submission that the mistake was an unintentional mistake in computation of income as all the particulars of income and expenditures were disclosed in the books of accounts. It is mere an error in computation of Income by the assessee while filing the return.

3. Because the Ld. CIT(A) has erred both in law and on facts in rejecting the appellant's submission that the mistake was an unintentional mistake which was also not pointed out by the Ld. AO in the assessment done u/s 143(3) for the A.Y. 2011-12. The ease was also supported by the decisions of the Hon'ble apex court which was not considered by the Ld. CIT(A).

4. Because under the facts and circumstances of the case the assessee has explained that the error was not intentional and was prevented by circumstances beyond his control."

5. As evident, both the above cases are squarely covered by the order of the Division Bench decision of the ITAT, Agra, in 'Sachin Arora vs. ITO' in ITA No.

118/Agra/2015 for A.Y. 2008-09 and other connected cases. Therefore, the said observations of the Division Bench, Agra are, mutatis mutandis, applicable squarely to both these cases also and the penalty levied in these cases are, thus, cancelled.

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

Order pronounced in the open court on 07/08/2018.

Sd/- Sd/-

(DR. MITHA LAL MEENA) **(A.D. JAIN)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

AKV
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR