IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G', NEW DELHI

Before Sh. N. K. Saini, AM and Sh. Kuldip Singh, JM

ITA No. 4875/Del/2016 : Asstt. Year : 2006-07
ITA No. 4876/Del/2016 : Asstt. Year : 2007-08

Star Wire (India) Ltd., 35, Link Road, 2nd Floor, Lajpat Nagar-III, New Delhi-110024	Vs	Asstt. Commissioner of Income Tax, Circle-24(2), New Delhi-110002
(APPELLANT)		**(RESPONDENT)**
PAN No. AAECS1124Q		

Assessee by : Sh. Ashwani Kumar, CA
Revenue by : Sh. S. S. Rana, CIT DR

Date of Hearing : 23.04.2018		**Date of Pronouncement : 09.07.2018**

ORDER

Per N. K. Saini, AM:

These appeals by the assessee are directed against the separate orders each dated 24.06.2016 of the ld. CIT(A)-3, Gurgaon for the assessment years 2006 07 and 2007-08.

2. Since, the issues involved are common in these appeals which were heard together, so, these are being disposed off by this common order for the sake of convenience and brevity.

3. The common grounds raised in these appeals read read as under:

"1. That the Learned Assessing Officer as well as Learned CIT(Appeal)-3, Gurgaon has failed to appreciate the facts of the case and has erred while imposing the penalty u/s 271(1)(c) of the Income Tax Act, 1961, inspite of the fact that there is no variation in the returned income (revised) viz a viz assessed income.

2. That the entire penalty order is arbitrary, illegal, unjust against the facts as well as against the law.

2. That the appellant prays to allow to admit the additional grounds of appeal at the time of hearing."

4. Facts of the case for the assessment year 2006-07 in brief are that the assessee filed the return of income on 24.11.2006 declaring total income of Rs.3,66,88,330/-. However, the assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) at an income of Rs.3,67,66,430/- on 11.08.2008. Thereafter, a search and seizure operation took place and the assessee in response to the notice u/s 153A of the Act filed the return of income initially at Rs.3,67,66,430/- on 11.08.2009. Subsequently, a revised return was filed on 08.10.2009 declaring an income of Rs.3,78,16,430/- and finally declaring a taxable income of Rs.3,79,58,650/-. The assessment was framed at an income of Rs.3,79,58,650/- vide order dated 30.12.2010. During the course of assessment proceedings u/s 153A of the Act, the AO found that the assessee had paid cash in the form of commission amounting to Rs.11,92,220/- to the purchasers and while recording the tatement u/s 132(4) of the Act, at the time of search operation, the assessee made a surrender of Rs.22 Crores in the group cases including Rs.7 crores in the case of the assessee company. The AO initiated the penalty proceedings in respect of an addition of Rs.11,92,220/- vide notice dated 30.12.2010. The assessee filed a reply vide letter dated 14.06.2011 stating therein as under:

"The assessment was completed on a total income of Rs.3,79,58,650/- vide order dated 30.12.2010 as against the declared income of Rs.3,78,16,430/- (revised return). The said declared income is inclusive of Rs.11,92,220/- being u/s 69C of the Act, on account of unaccounted for business expenditure. That the assessee company has made a declaration of Rs.70 Lacs on account of unaccounted business

expenditure in the course of search operation u/s 132(4) of I. T. Act, 1961. That the amount of Rs.11,92,220/- was ascertained only after inspection of the seized record (inspection of the relevant seized record made available only on 08,12.2010). Prior to this date the assessee company was not aware of the exact amount and the period thereof. However, the total amount likely to be declared was mentioned during the course of search operation u/s 132(4) of the Act. Thus impliedly the assessee company has declared the above amount u/s 132(4) and thus section 271(1)(c) is not applicable."

5. However, the AO did not find the reply of the assessee to be satisfactory for the following reasons:

"i) In the above reply letter assessee submitted that the assessment was completed on a total income of Rs.3,79,58,650/ as against the declared income of Rs.3,78,16,430/- (revised return). Here the above statement of the assessee is totally wrong because the original return in response to notice u/s 153A of the Act, was declared at Rs.3,67,66,430/- and not Rs.3,78,16,430/-. The revised return of income of Rs.3,78,16,430/- was filed only when the assessee was cornered while confronting the document annexure 'A-3' during the course of assessment proceedings.

ii) In its above reply assessee submitted that the company has made a declaration of Rs.70 Lacs on account of unaccounted business expenditure in the course of search operation u/s 132(4) of the I.T. Act, 1961. In this regard, it is pertinent to mention here that the said disclosure was made by the assessee in the financial year 2008-09 relevant to the A.Y.2009-10 not for the year under reference.

iii) If the disclosure was made of Rs.70 Lacs on account of unaccounted business expenditure then why he has not declared the same in the returns of the relevant assessment years.

iv) In the reply the assessee submitted that the amount of Rs.11,92,220/-was ascertained only after inspection of the seized record. Here is also necessary to mention that if no such data were available with the assessee then on what basis he made surrender of Rs.70 Lacs during search operation.

v) In the reply the assessee has wrongly mentioned that he was given the copy of annexure on 08.12.2010 whereas the copy of the said annexure 'A-3' was given to the assessee on 01.12.2010. If the copy of seized record was made available on 08.12.2010 then on what basis how the assessee has filed a letter dated 08.12.2010 making therein the quantification of income was filed.

vi) In its reply letter assessee submitted that the assessee company was not aware of the exact amount and the period thereof. From these facts it is evident that assessee knowingly did not disclose the accurate particulars of the taxable income in respect of the income which was duly disclosed by it during search operation but not disclosed in the returns of income."

Accordingly, the AO levied the penalty of Rs.4,01,300/- u/s 271(1)(c) of the Act.

6. Being aggrieved the assessee carried the matter to the ld. CIT(A) who sustained the penalty by observing in para 5 of the impugned order as under:

I have perused the penalty order and submissions of the appellant filed during appellate proceedings and following observations are made:-

(i) During the course of search proceedings, a document A-3 was seized from the business premises of the appellant.

(ii) On perusal of the document, it was found that the appellant had paid commission out of books in 4 years including Rs. 11,92,220/- paid during the year under consideration.

(iii) This amount was neither disclosed by the appellant in return filed u/s 139(1) and also return filed in response to notice u/s 153A.

(iv) This amount was included in the revised return filed by the appellant after being confronted with document during assessment proceedings.

(v) Thereafter, penalty of Rs. 4,01,300/- was imposed by the AO for concealing taxable income.

(vi) The case of the appellant is squarely covered by the judgment of Hon'ble Punjab & Haryana Court in the case of Prempal Gandhi vs. DCIT 335 ITD 23 wherein it was held as under:

"Held, dismissing the appeal, that the plausibility or otherwise of the explanation of the assessee was a pure question of fact. Admittedly the assessee concealed the transactions in the bank account and when the notice of reassessment was issued, finding no way out, the assessee surrendered income, to avoid penal consequences. In such a situation, it could not be held that the assessee worked to buy peace of mind and there was no evidence of concealment which called for penalty. This is not a case where the penalty has been imposed because the assessee disclosed higher income voluntarily but a case of clear concealment when the assessee having no other way out was forced to surrender the undisclosed income.

The plea of the appellant that the income was surrendered to buy peace of mind, penalty should not be levied is also untenable in view of the judgment of the Hon'ble Supreme Court in the case of Mac data Private Limited vs. CIT (2013) 358 ITR 593 (SC), whereby it has been held that the voluntary disclosure/surrender made in view of detection by the Assessing Officer in the search conducted does not relieve the assessee from the mischief of the penalty proceedings.

In view of the discussion above, and the judicial pronouncements relied upon which is applicable to the case of the appellant, penalty levied by the AO is confirmed."

7. Now the assessee is in appeal. The ld. Counsel for the assessee submitted that the AO initiated the penalty proceedings in respect of furnishing of inaccurate particulars of income. A reference was made to page no. 3 of the assessment order. It was further submitted that the penalty was levied for concealment of income, therefore, the penalty was initiated on different footings then levied u/s 271(1)(c) of the Act. It was further submitted that in the notice issued u/s 274 of the Act, the AO has not mentioned the specific charge under which the penalty proceedings were initiated. A reference was made to page no. 2 of the assesseeôs paper book

which is the copy of notice issued u/s 274 r.w.s. 271 of the Act. The reliance was placed on the following case laws:

- *CIT-II Vs Sh. Samson Perichery in ITA No. 1154 of 2014 order dated 05.01.2017 (Bom. HC)*
- *Filatex India Ltd. Vs DCIT, Circle-11(1), New Delhi in ITA Nos. 28 to 32/Del/20123 order dated 13.10.2017*
- *Sanraj Engineering Pvt. Ltd. Vs ITO, Ward-7(3), New Delhi in ITA No. 5988/Del/2016*

8. In his rival submissions, the ld. CIT DR submitted that both the charges i.e. concealment of income and furnishing of inaccurate particulars of income are the same. Therefore, the penalty was rightly levied by the AO u/s 271(1)(c) of the Act and the ld. CIT(A) was fully justified in conforming the same. The reliance was placed on the decision of the ITAT Delhi Bench óHô, New Delhi in the case of Trimurti Engineering Works Vs ITO, Ward-2(1), Muzaffarnagar (2012) 138 ITD 189.

9. We have considered the submissions of both the parties and perused the material available on the record In the present case, it is noticed that in the assessment order, the AO initiated the penalty proceedings for furnishing of inaccurate particulars of income which is evident for the notings of the AO which read as under:

> *"From the above facts of the case, it is established that assessee has not disclosed the above amount of Rs.11,92,220/- in its return of income filed u/s 153A of the Act, and the amount was disclosed only when he was cornered during the course of assessment proceedings. This amount of Rs.11,92,220/- is added back in the taxable income of the assessee. From the above facts of the case, it is found that the assessee furnished inaccurate particulars of income therefore, penalty proceedings u/s 271(1)(c) r.w. explanation 5-A of the I.T. Act, 1961 are initiated separately for the above default of the assessee."*
>
> *(Addition of Rs.11,90,220/-)'*

10. It is also noticed that the AO levied the penalty u/s 271(1)(c) of the Act on the different charge i.e. concealment of particulars of taxable income which is evident from the order dated 29.06.2011 passed u/s 271(1)(c) of the Act, the relevant portion read as under:

> *"From the above facts of the case, it has been established that the assessee has deliberately concealed the particulars of its taxable income. I am therefore satisfied that the assessee is liable for penalty u/s 271(1)(c) @ 100% of tax sought to be evaded. I therefore, impose a penalty of Rs.4,01,300/-."*

11. From the above facts, it is crystal clear that the AO initiated the penalty proceedings u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income while the penalty was levied u/s 271(1)(c) of the Act on account of concealment of taxable income.

12. It is also noticed that the AO in the notice u/s 274 of the Act has not mentioned the specific charge on which the penalty proceedings were initiated u/s 271(1)(c) of the Act. In the aforesaid notice, copy of which is placed at page no. 2 of the assesseeôs paper book, it s mentioned as under:

> *"Whereas in the course of proceedings before me for the assessment year 2006-07 it appears that you.*
>
> *----------*
> *----------*
>
> *"have concealed the particulars of your income or……furnished inaccurate particulars of such income."*

13. From the above notice dated 30.12.2010, it is crystal clear that no specific charge is mentioned while issuing the notice u/s 274 of the Act for levying the penalty u/s 271(1)(c) of the Act.

14. On a similar issue, the Hon'ble Bombay High Court in the case of CIT-II Vs Sh. Samson Perinchery in ITA No. 1154/2014 vide order dated 05.01.2017 (supra) by following the judgment of the Hon'ble Karnataka High Court in the case of CIT Vs Manjunatha Cotton & Ginning Factory reported at 359 ITR 565 deleted the penalty. The relevant observations by their Lordships in the order dated 05.01.2017 in paras 3 to 7 read as under:

"3. The impugned order of the Tribunal deleted the penalty imposed upon the Respondent-Assessee. This by holding that the initiation of penalty under Section 271 (1)(c) of the Act by Assessing Officer was for furnishing inaccurate particulars of income while the order imposing penalty is for concealment of income. The impugned order holds that the concealment of income and furnishing inaccurate particulars of income carry different connotations. Therefore, the Assessing Officer should be clear as to which of the two limbs under which penalty is imposable, has been contravened or indicate that both have been contravened while initiating penalty proceedings. It cannot be that the initiation would be only on one limb i.e. for furnishing inaccurate particulars of income while imposition of penalty on the other limb i.e. concealment of income. Further, the Tribunal also noted that notice issued under Section 274 of the Act is in a standard proforma without having striked out irrelevant clauses therein. This indicates non-application of mind on the part of the Assessing Officer while issuing the penalty notice.

4. The impugned order relied upon the following extract of Karnataka High Court's decision in CIT v/s. Manjunatha Cotton and Ginning Factory 359 ITR 565 to delete the penalty:

> *"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 as case of furnishing of inaccurate particulars. The apex court in the case of Ashok Pai reported in [2007] 292 ITR 11*

(SC) 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 P. Ltd., 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. Therefore, 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."

5. The grievance of the Revenue before us is that there is no difference between furnishing of inaccurate particulars of income and concealment of income. Thus, distinction drawn by the impugned order is between Tweedledum and Tweedledee In the above view, the deletion of the penalty, is unjustified.

6. The above submission on the part of the Revenue is in the face of the decision of the Supreme Court in Ashok Pai v/s. CIT 292 ITR 11 [relied upon in Manjunatha Cotton & Ginning Factory (supra)] – wherein it is observed that concealment of income and furnishing of inaccurate particulars of income in Section 271(1)(c) of the Act, carry different meanings/ connotations. Therefore, the satisfaction of the Assessing Officer with regard to only one of the two breaches mentioned under Sect on 271(1)(c) of the Act, for initiation of penalty proceedings will not warrant/ permit penalty being imposed for the other breach. This is more so, as an Assessee would respond to the ground on which the penalty has been initiated/notice issued. It must, therefore, follow that the order imposing penalty has to be made only on the ground of which the penalty proceedings has been initiated, and it cannot be on a fresh ground of which the Assessee has no notice.

7. Therefore, the issue herein stands concluded in favour of the Respondent-Assessee by the decision of the Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra). Nothing has been shown to us in the present facts which would warrant our

taking a view different from the Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra).”

15. In the present case also as we have already mentioned in the former part of this order that the initiation of penalty u/s 271(1)(c) of the Act was on the basis of one limb i.e. for furnishing of inaccurate particulars of income while the penalty was levied on another limb i.e. concealment of income and also the AO issued the notice u/s 274 of the Act in standard proforma without having striked out irrelevant clauses.

16. An identical issue has been decided by the ITAT Delhi Bench óGô, New Delhi in the case of Sanraj Engineering Pvt. Ltd. Vs ITO, Ward-7(3), New Delhi in ITA No. 5988/Del/2016 for the assessment year 2006-07 vide order dated 27.10.2017 (supra) wherein the relevant findings have been given in paras 8 to 10 which read as under:

“8. We have carefully gone through the contentions of either side and perused the material papers on record. Order dated 29.12.2008 passed u/s 143(3) of the Act reads that since the assessee company has concealed particulars of income, penalty proceedings u/s 271(1)(c) of the Act are being initiated Further the penalty order dated 26.04.2013 vide para 3.2 says that the AO is satisfied with the assessee company had furnished inaccurate particulars of its income to the extent of Rs.2,40,00,000/- and Rs.96,98,457/-, provisions u/s 271(1)(c) of the Act are clearly attracted and, therefore, penalty of Rs.81,68,920/- was levied. Impugned notice u/s 274 r.w. sec 271 of the Act is a printed form wherein the relevant portion relating to the limb of charge is as follows:

“……..

**have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1, 2, 3, 4 and 5.*

……"

9. It, therefore, is amply clear that the Assessing Officer has not specified whether the notice was issued for concealment of particulars of income or for furnishing of inaccurate particulars of income. We have carefully perused the material papers on record in the light of the statements made on behalf of the assessee including the judgment relied upon by him in the case of CIT vs Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar). Vide paragraph 60, the Hon'ble Karnataka High Court has held as follows :-

"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."

10. The Hon'ble Karnataka High Court n CIT vs SSA's Emerald Meadows, [2016] 73 taxmann.com 241 (Karnataka) has followed the Division Bench judgment in the case of CIT vs Manjunatha Cotton & Ginning Factory, 359 ITR 565 (Kar). Hon'ble Supreme Court in SSA's Emerald Meadows (supra) dismissed the SLA preferred against the decision of the Hon'ble Karnataka High Court in the case of CIT vs SSA s Emerald Meadows, [2016] 73 taxmann.com 241 (Karnataka). The principle laid down by these decisions is clear that 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 and the notice issued u/s 274 r.w.s. 271(1)(c) of the Act shall specify under which limb of Sec. 271(1)(c) of the Act the penalty proceedings were initiated, and in the absence of such clarity, the proceedings are bad in law. We, therefore, while respectfully following the judgements referred to above, hold that the impugned penalty proceedings are bad in law and cannot be sustained. We, therefore, while quashing the proceedings, allow the appeals. Since we propose to quash the proceedings on the question of law, we do not deem it necessary to delve deeper into merits of the case."

17. So, respectfully following the aforesaid referred to order, the penalty levied by the AO and sustained by the ld. CIT(A) u/s 271(1)(c) of the Act is deleted.

18. The facts related to the assessment year 2007-08 are identical to the facts involved in the assessment year 2006-07, therefore, our findings given in the former part of this order shall apply *mutatis mutandis* for both the assessment years under consideration.

19. In the result, the appeals of the assessee are allowed.

(Order Pronounced in the Court on 09/07/2018)

Sd/-	**Sd/-**
(Kuldip Singh)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 09/07/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR