IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH : KOLKATA

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A Nos. 914&915/Kol/2015

Assessment Years : 2004-05 & 2005-06

Tradelink Securities Ltd. [PAN: AAACT 9210 G] (Appellant)	-vs-	ITO, Ward-4(1), Kolkata (Respondent)

For the Appellant : Shri P. R. Kothari,

For the Respondent : Shri Arindam Bhattacharjee, Addl. CIT

Date of Hearing : 12.03.2018

Date of Pronouncement : 14.03.2018

ORDER

Per Bench:

1. These appeals by the Assessee arise out of the common orders of the Learned Commissioner of Income Tax(Appeals)-2, Kolkata [in short the ld CIT(A)] in Appeal No.312/CIT(A)-2/(04-05)/14-15 & 317/CIT(A)-2/KOL/(2005-06)/14-15 dated 20.02.2015 against the penalty order passed by the ITO, Ward-4(1), Kolkata [in short the ld AO] under section 271(1)(c) of the Income Tax Act, 1961 (in short "the Act") dated 21.06.2011 for the Assessment Years 2004-05 & 2005-06 respectively. Common issue taken up together for the sake of convenience.

2. The only common issue involved in these appeals is as to whether the ld CITA was justified in upholding the levy of penalty u/s 271(1)(c) of the Act in the facts and circumstances of the case. The facts of Asst Year 2004-05 are taken up for adjudication and the decision rendered thereon would apply with equal force to Asst Year 2005-06 also in view of identical facts except with variance in figures.

3. The Assessee is a Non-Banking Finance Company (NBFC) carrying on the business of financing and trading in shares and securities and was registered as such by the Reserve Bank of India. The assessee filed its return of income u/s 139(1) of the Act on 28.10.2004 declaring total income of Rs 53,650/- for the Asst Year 2004-05. The ld AO observed that the assessee had advanced Rs 95,00,000/- to one M/s ISG Traders Ltd and derived interest income for the period 1.4.2003 to 31.3.2004 amounting to Rs 19,00,000/-and since the same was not declared in the return, the case was reopened u/s 147 of the Act. The ld AO passed an order u/s 143(3) / 147 of the Act on 31.12.2010 wherein the interest income of Rs 19,00,000/- was added. The ld AO initiated penalty proceedings u/s 271 (1)(c) of the Act.

4. The explanation given by the assessee for the aforesaid addition was not accepted by the ld AO in the penalty proceedings and the ld AO imposed penalty u/s 271(1)(c) of the Act in the sum of Rs 9,97,500/-. The assessee stated that the non-recognition of interest income of Rs 19,00,000/- was in accordance with the prudential norms issued by RBI for income recognition, which is binding on the assessee , being a NBFC. The ld CITA however did not heed to the said argument of the assessee and reduced the levy of pena ty to Rs 6,65,000/- being 100% of the tax sought to be evaded as against 150% levied by the ld AO. Aggrieved, the assessee is in appeal before us on the following grounds:-

1. ***Against Imposition of penalty u/s 271(1)(c):***

a. *For that on the facts and in the circumstances of the case and in law, ld. Commissioner of Income Tax (Appeals) [CIT(A)] erred in sustaining the penalty imposed by ld. Assessing officer (A/O) u/s 271(1)(c) of the Income Tax Act, 1961 to the extent of Rs. 665000/-.*

b. *For that on the facts and in the circumstances of the case and in law, ld. CIT(A) erred in ignoring appellant's contention of applicability of clause(c) of Explanation-4 to section 271(1) of the Income Tax Act, 1961 in the instant case for computation of the quantum of tax allegedly sought to be evaded by*

the appellant while calculating penalty u/s 271(1)(c) of the Income Tax Act, 1961.

c. *For that on the facts and in the circumstances of the case and in law, Ld. CIT(A) ought to have held that in the instant case tax allegedly sought to be evaded by the appellant comes to NIL in view of clause (c) of Explanation- 4 to section 271(1) of the Income Tax Act, 1961.*

5. Before us, the ld AR placed on record a copy of the show cause notice issued u/'s 274 of the Act. A perusal of the same shows that the ld AO has not specified as to whether penalty proceedings are being initiated for concealing particulars of income or furnishing inaccurate particulars of income. The irrelevant portion in the show cause notice has not been struck out. The ld AR drew our attention to the decision of the Hon'ble Karnataka High Court in the case of CIT vs. SSA's Emerald Meadows in ITA No.380 of 2015 dated 23.11.2015 wherein the Hon'ble Karnataka High Court following its own decision in the case of CIT vs M njunatha Cotton and Ginning factory (2013) 359 ITR 565 took a view that imposing of penalty u/s 271(1)(c) of the Act is bad in law and invalid for the reason tha the show cause notice u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealment of particulars of income or furnishing of naccurate particulars of income. The ld AR further brought to our notice that as against the decision of the Hon'ble Karnataka High Court the revenue preferred an appeal in SLP in CC No.11485 of 2016 and the Hon'ble Supreme Court by its order dated 05.08.2016 dismissed the SLP preferred by the department. The ld AR also brought to our notice the decision of the Hon'ble Bombay High Court in the case of CIT vs Shri Samson Perinchery in ITA No.1154 of 2014 dated 05.01.2017 wherein the Hon'ble Bombay High Court following the decision of the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning factory (supra) came to the conclusion that imposition of penalty on defective show cause notice without specifying the charge against the assessee cannot be sustained. Our attention was also drawn to the decision of ITAT in the case of Suvaprasanna Bhattacharya vs ACIT in ITA

No.1303/Kol/2010 dated 06.11.2015 wherein identical proposition has been followed by the Tribunal.

6. The ld. DR submitted that it is not mandatory to specify the charge in the show cause notice u/s 274 of the Act. In this regard he placed reliance on certain judicial pronouncements.

7. We have considered the rival submissions. Similar submissions made by the ld. DR in the case of Shri Jeetmal Choraria vs ACIT in ITA No.956/Kol/2016 order dated 01.12.2017 and this tribunal dealt with this similar arguments of the ld. DR in the following paragraphs :

> *"7. The learned DR submitted that the Hon'ble Calcutta High Court in the case of Dr.Syamal Baran Mondal Vs. CIT (2011) 244 CTR 631 (Cal) has taken a view that Sec.271 does not mandate that the recording of satisfaction about concealment of income must be in specific terms and words and that satisfaction of AO must reflect from the orde either with expressed words recorded by the AO or by his overt act and action. In our view this decision is on the question of recording satisfaction and not in the context of specific charge in the mandatory show cause notice u/s.274 of the Act. Therefore reference to this decision, in our view is not of any help to the plea of the Revenue before us.*
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> *8. The learned DR relied on three decisions of Mumbai ITAT viz., (i) Dhanraj Mills Pvt. Ltd. Vs. ACIT ITA No.3830 & 3833/Mum/2009 dated 21.3.2017; (ii) Earthmoving Equipment Service Corporation Vs. DCIT 22(2), Mumbai, (2017) 84 taxmann.com 51 (iii) Mahesh M.Gandhi Vs. ACIT Vs. ACIT ITA No.2976/Mum/2016 dated 27.2.2017. Reliance was placed on two decisions of the Hon'ble Bombay High Court viz., (i) CIT Vs. Kaushalya 216 ITR 660(Bom) and (ii) M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017. This decision was referred to in the written note given by the learned DR. This is an unreported decision and a copy of the same was not furnished. However a gist of the ratio laid down in the decision has been given in the written note filed before us.*
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> *9. In the case of CIT Vs. Kaushalya (supra), the Hon'ble Bombay High Court held that section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of*

natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the Principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The ITAT Mumbai Bench in the case of Dhanraj Mills Pvt.Ltd. (supra) followed the decision rendered by the Jurisdictional Hon'ble Bombay High court in the case of Kaushalya (supra) and chose not to follow decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (supra). Reliance was also placed by the ITAT Mumbai in this decision on the decision of Hon'ble Patna High court in the case of CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna) wherein it was held that under section 274 of the Income-tax Act, 1961, all that is required is that the assessee should be given an opportunity to show cause. No statutory notice has been prescribed in this behalf. Hence, it is sufficient if the assessee was aware of the charges he had to meet and was given an opportunity of being heard. A mistake in the notice would not invalidate penalty proceedings.

10. In the case of Earthmoving Equipment Service Corporation (supra), the ITAT Mumbai did not follow the decision rendered in the case of Manjunatha Cotton & Ginning Factory (supra) for the reason that penalty in that case was deleted for so many reasons and not solely on the basis of defect in show cause notice u/s.274 of the Act. This is not factually correct. One of the parties before the group of Assessees before the Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) was an Assessee by name M/s.Veerabhadrappa Sangappa & Co., in ITA NO.5020 OF 2009 which was an appeal by the revenue. The Tribunal held that on perusal of the notice issued under Section 271(1)(c) of the Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non application of mind on the part of the Assessing authority. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. In the appeal, the said finding was set-aside. But addition was sustained on a new ground, that is under valuation of closing stock. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the

Appellate Authority, the initiated penal proceedings, no longer exists. If the Appellate Authority had initiated penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside by its order dated 9th April, 2009. Aggrieved by the said order, the revenue filed appeal before High Court. The Hon'ble High Court framed the following question of law in the said appeal viz., 1. Whether the notice issued under Section 271(1)(c) in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal? 2. Whether the proceedings initiated by the Assessing Authority was legal and valid? The Hon'ble Karnataka High Court held in the negative and against the revenue on both the questions. Therefore the decision rendered by the ITAT Mumbai in the case of Earthmoving Equipment Service Corporation (supra) is of no assistance to the plea of the revenue before us.

11. In the case of M/S.Maharaj Garage & Co. Vs. CIT dated 22.8.2017 referred to in the written note given by the learned DR, which is an unreported decision and a copy of the same was not furnished, the same proposition as was laid down by the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra) appears to have been reiterated, as is evident from the extracts furnished in the written note furnished by the learned DR before us.

12. In the case of Trishul Enterprises ITA No.384 & 385/Mum/2014, the Mumbai Bench of ITAT followed the decision of the Hon'ble Bombay High Court in the case of Smt.Kaushalya (supra).

13. In the case of Mahesh M.Gandhi (supra) the Mumbai ITAT the ITAT held that the decision of the Hon'ble Karnataka High Court in the case Manjunatha Cotton & Ginning (supra) will not be applicable to the facts of that case because the AO in the assessment order while initiating penalty proceedings has held that the Assessee had concealed particulars of income and merely because in the show cause notice u/s.274 of the Act, there is no mention whether the proceedings are for furnishing inaccurate particulars or concealing particulars of income, that will not vitiate the penalty proceedings. In the present case there is no whispher in the order of assessment on this aspect. We have pointed out this aspect in the earlier part of this order. Hence, this decision will not be of any assistance to the plea of the revenue before us. Even otherwise this decision does not follow the ratio laid down by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) in as much as the ratio laid down in the said case was only with reference to show cause notice u/s.274 of the Act. The Hon'ble Court did not lay

down a proposition that the defect in the show cause notice will stand cured if the intention of the charge u/s.271(1) (c) is discernible from a reading of the Assessment order in which the penalty was initiated.

14. From the aforesaid discussion it can be seen that the line of reasoning of the Hon'ble Bombay High Court and the Hon'ble Patna High Court is that issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the inaccurate portion cannot by itself invalidate the notice. The Tribunal Benches at Mumbai and Patna being subordinate to the Hon'ble Bombay High Court and Patna High Court are bound to follow the aforesaid view. The Tribunal Benchs at Bangalore have to follow the decision of the Hon'ble Karnataka High Court. As far as benches of Tribunal in other jurisdictions are concerned, there ar two views on the issue, one in favour of the Assessee rendered by the Hon ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra) and other of the Hon'ble Bombay High Court in the case of Smt.Kaushalya. It is settled legal position that where two views are available on an issue, the view favourable to the Assessee has to be followed. We therefore prefer to follow the view expressed by the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning (supra). "

8. We have already observed that the show cause notice issued in the present case u/s 274 of the Act does not specify the charge against the assessee as to whether it is for concealing particulars of income or furnishing inaccurate particulars of income. The show cause notice u/s 274 of the Act does not strike out the inappropriate words. In these circumstances we are of the view that imposition of penalty cannot be sustained. The plea of the ld AR which is based on the decisions referred to in the earlier part of this order has to be accepted. We therefore hold that imposition of penalty in the present case cannot be sustained and the same is directed to be cancelled.

9. The ld AR placed on record the decision of this tribunal in assessee's own case for the Asst Years 2004-05 and 2005-06 wherein the quantum addition has been deleted by this tribunal in ITA Nos. 426 & 427/Kol/2015 dated 26.12.2017 , wherein the quantum addition has been deleted by this tribunal by placing reliance on the decision of Hon'ble Delhi High Court in the case of CIT vs Vasisth Chay Vyapar reported in 330

ITR 440 (Del). We find that this decision of Hon'ble Delhi High Court has been recently approved by the Hon'ble Supreme Court in the very same case reported in (2018) 90 taxmann.com 365 (SC). Hence when the quantum is deleted, there cannot be any levy of penalty u/s 271(1)(c) of the Act. Hence the penalty levied by the ld AO deserves to be cancelled on all grounds. Accordingly, the grounds raised by the assessee are allowed.

10. In the result the appeals of the assessee are allowed.

Order pronounced in the Court on 14.03.2018

Sd/-	Sd/-
[A.T. Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 14 .03.2018

SB, Sr. PS

Copy of the order forwarded to:
1. Tradelink Securities Ltd., 23A, Netaji Subhash Road, (1st Floor), Kolkata-700001
2. ITO, ward-4(1), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
3. C.I.T(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches