

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 5122/DEL/2017
[A.Y 2007-08]

M/s Avee Medi Surgicals Pvt Ltd
C - 30, Panchsheel Enclave
New Delhi

Vs. The A.C.I.T
Central Circle - 06
New Delhi

PAN: AAGCA 0815 N

[Appellant]

[Respondent]

Date of Hearing : 01.11.2021
Date of Pronouncement : 08.11.2021

Assessee by : Shri P.C. Yadav, Adv

Revenue by : Shri Jigar Rawal, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the
Commissioner of Income Tax [Appeals]-24, New Delhi dated 29.06.2017
pertaining to Assessment Year 2007-08.

2. The grievances of the assessee read as under:

- “1) That the ld. CIT(A) has erred in upholding the penalty of Rs. 7,24,195/- imposed by the Assessing Officer invoking the provisions of section 271(1)(c) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].*
- 2) That the ld. CIT(A) has erred in upholding the penalty of Rs. 7,24,195/- without considering the facts and circumstances of the case and relying on irrelevant judicial pronouncements.”*

3. Vide letter dated 01.04.2021, the assessee sought permission to raise additional ground of appeal as per Rule 11 of the Income Tax Rules. The additional ground of appeal reads as under:

“On the facts and in the circumstances of the case, the penalty levied u/s 271(1)(c) of the Act is void as the notice u/s 274 r.w.s. 271 is bad and defective as it is issued without deleting the appropriate clause under which the penalty is proposed to be imposed is either for filing of inaccurate particulars of income or for concealment of particulars of income and as such, notice is not sustainable and not curable.”

4. We have carefully considered the application for admission of additional ground. In light of the ratio laid down by the Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd Vs. CIT 229 ITR 383, the additional ground is admitted.

5. The impugned notice is as under:

"NOTICE U/S 274 R.W.S 271(1)(C OF THE INCOME TAX ACT 1961

Date 20/06/2014

Whereas in the course of proceedings before me for the Assessment Year 2007-08, it appears to me that you have

....* have concealed the particulars of your income or furnished inaccurate particulars of such income

You are hereby requested to appear before me at Room No. 364, 3rd Floor, ARA Centre, Jhandewalan Extension, New Delhi at 11 A.M. /P.M. On 23/07/2014 and show cause why an order imposing a penalty on you should not be made u/s 271 of the Income-tax Act, 1961. If you do not wish to avail yourself of this opportunity, or being heard in person or through authorised person, you may show cause in writing on or before the said date which will be considered before any/earched order is made u/s 271(1)(c)."

D.C.I.T. C.C.-11, New Delhi

Dy. Commissioner of Income Tax
Central Circle-11, New Delhi-55

6. The ld. DR vehemently stated that in the assessment order itself, the Assessing Officer has made it clear that additions have made which amount to concealment of income and, therefore, the intention was clear. Hence, notice is not defective. It is the say of the ld. DR that the notice has to be taken into consideration alongwith the findings made in the assessment order.

7. Per contra, the ld. counsel for the assessee drew our attention to the decisions of this Tribunal in assessee's own case in A.Y 2012-13 in ITA No. 5127/DEL/2017 order dated 08.07.2021 and ITA Nos. 5123/ to 5126/DEL/2017 for A.Ys 2008-09 to 2011-12 order dated 02.09.2021 and stated that on identical set of facts, this Tribunal has considered the additional ground and has decided the appeal in favour of the assessee and against the Revenue.

8. We have given thoughtful consideration to the orders of the authorities below and have carefully considered the decisions of this Tribunal [supra]. We find force in the contention of the ld. counsel for the assessee. On identical set of facts, this Tribunal, after considering the additional ground has decided the issue in favour of the assessee

and against the Revenue. In ITA No. 5127/DEL/2017, this issue has been considered as under:

"6. We have gone through the record in the light of the submissions made on either side. It is an undisputed fact that the notice issued to the assessee does not specify the charge under which the penalty was proposed to be levied by the Assessing Officer.

9. 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. In *Commissioner of Income Tax v. SSA's Emerald Meadows* (2016) 73 taxman.com 241 (Kar) the Hon'ble Karnataka High Court Considered the question of law as to,-

"Whether, omission if assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of

inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?"

11. And the Hon'be High Court answered the same in favour of the assessee observing that:

"The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of COMMISSIONER OF INCOME TAX -VS- MANJUNATHA COTTON AND GINNING FACTORY (2013) 359 ITR 565. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed."

12. The Special Leave Petition filed by the Revenue challenging the aforesaid judgement of the High Court was dismissed by the Hon'ble Supreme Court holding:

"We do not find any merit in this petition. The special leave petition is, accordingly, dismissed."

13. In PCIT vs. Sahara India Life Insurance Company Limited case ITA No 475/2019 and batch order dated 02/08/2019, Hon'ble Delhi High Court, upheld the view taken by the Tribunal basing on the decision of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) and SSA's Emerald Meadows (supra) wherein it was held that the notice issued by the learned Assessing Officer would be bad in law if it did not specify under which limb of section 271(1)(c) of the Act the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or for furnishing of inaccurate particulars thereof. Relevant observations of the Hon'ble High Court read that,-

"21. The Respondent had challenging the upholding of the penalty imposed under section 271(1)(c) of the Act, which was accepted by the ITAT. It followed the decision of Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1)(c) the penalty proceedings had been initiated under i.e. whether for concealment of

particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgement in the subsequent order in Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 taxman.com 241 (Kar), the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.

22. On this issue again this court is unable to find any error having been committed by the ITAT."

14. It is, therefore, clear that for the AO to assume jurisdiction u/s 271(1)(c), proper notice is necessary and the defect in notice u/s 274 of the Act vitiates the assumption of jurisdiction by the learned Assessing Officer to levy any penalty. In this case, facts stated supra, clearly establish that the notice issued under section 274 read with 271 of the Act is defective and, therefore, we find it difficult to hold that the learned AO rightly assumed jurisdiction to pass the order levying the penalty. As a consequence of our findings above, we direct the Assessing Officer to delete the penalty in question."

9. On finding parity, respectfully following the decision of this Tribunal [supra], we direct the Assessing Officer to delete the penalty levied u/s 271(1)(c) of the Act.

10. In the result, the appeal filed by the assessee in ITA No. 5122/DEL/2017 is allowed.

The order is pronounced in the open court on 08.11.2021.

Sd/-

[SUCHITRA KAMBLE]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 08th November, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	