

Shah Virchand Govanji Jewellers Pvt. Ltd. v. ACIT-Valsad/I.T.A. No. 2631/Ahd/2014/A.Y. 10-11

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
**IN THE INCOME TAX APPELLATE TRIBUNAL
 SURAT BENCH, SURAT**

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
 AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No.2631/Ahd/2014

निर्धारण वर्ष/Assessment Year : 2010-11

Shah Virchand Govanji Jewellers Pvt. Ltd. V. G. House, Opp. Bhagini Samaj, Halar Road Valsad PAN: AADCS2930B	Vs.	ACIT- Valsad Circle, Valsad
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Nirmmit Mehta, CA
राजस्व की ओर से /Revenue by	Shri Anil Dhaka, Sr. D. R

सुनवाई की तारीख/ Date of hearing:	06.10.2017
उद्घोषणा की तारीख/Pronouncement on	26.10.2017

**आदेश /ORDER****PER O. P. MEENA, ACCOUNTANT MEMBER:**

1. This appeal filed by the assessee is directed against the order of learned Commissioner of Income-tax (Appeals)-Valsad[in short CIT(A)] dated 31.07.2014 pertaining to assessment year 2010-11, which in turn has arisen from the penalty order dated 20.09.2013 passed by the Assistant Commissioner of Income Tax-Valsad Circle, Valsad (in short "the AO") under section 271(1)(c) of Income Tax Act, 1961(in short 'the Act').

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2. Ground no. 1 states that on the facts and in the circumstances of the case, the Id. CIT (A) has erred in confirming the action of the AO in levying penalty of Rs. 1,32,190 u/s. 271(1)(c) on the additions of difference in valuation of stock and disallowance of computer expenses.

3. Briefly stated facts are that the assessee has filed return of income on 29.09.2010 declaring total income of Rs. 5,23,82,860, which was assessed on 01.03.2013 under section 143 (3) at Rs. 5,28,03,875 by making addition of Rs. 3,31,437 on account of difference in valuation of stock and Rs. 57,468 disallowance of computer expenses, on which penalty proceeding under section 271(1)(c) were initiated for filing inaccurate particulars of income. A show-cause notice under section 274 read with section 271(1)(c) was issued on 02.08.2013 (PB-5). In reply to show-cause notice under section 274 read with section 271(1)(c), the assessee furnished its reply vide letter dated 23.08.2013 which has been reproduced by the AO in his penalty order. It was explained by the assessee that the assessee had been following valuation method of average weighted cost method over the years, but during the year under consideration, the AO adopted cost of last purchase bill for lagdi item for valuation of closing stock, which resulted in difference of stock of Rs. 3,31,437 which does not amounts to conscious concealment of income and disallowance of computer expenses were claimed as the assessee has paid expenses for the period from 31.03.2010 to 30.03.2011 to D Soft Infotech Pvt. Ltd. therefore, expenses were available for deduction. However, the disallowance of the same was voluntarily agreed during assessment proceedings. Therefore, no penalty under section

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322(SC) in this regard. The Id. Counsel for the assessee further submitted that show-cause notice issued for the imposing penalty is vague and cryptic without making the assessee aware of specific charge, hence, penalty deserve to be cancelled. The Id. Counsel for the assessee took us the copy of show-cause notice (PB-5) under section 274 read with section 271 dtd. 02.08.2013, which is vague and cryptic notice inasmuch as in the said notice, non applicable clause was not struck off by the AO. The penalty notices under section 274 read with section 271(1) (c) were issued in the typed format without the striking off either of the two charges i.e. which is reproduced as under: **"have concealed the particulars of your income oror furnished inaccurate particulars of income"**. It was submitted by the learned counsel for the assessee that by not striking off the inapplicable clause, the Ld. AO has left the matter open for a complete guess work on the part of the appellant for presuming charges leveled against him and in such situation, it cannot be said that an effective opportunity of being heard was given to the appellant as contemplated under section 274 of the Act. Thus, the penalty proceedings were initiated without specifying any particulars or specific charge against the assessee in either the assessment order or even the penalty notice. On this proposition the Id. Counsel for the assessee relied in the case of CIT v. Manjunatha Cotton Ginning Factory [2013] 359 ITR 565 (Kar)/263 CTR 153/ 93 DTR 111 (Karn) [2012] 82 CCH 282 Kar HC, Meharjee Cassinath Holdings Pvt. Ltd. v. ACIT Circle 4(2) in I.T.A. No. 2555/ Mum/2012 order dtd. 28.04.2017 (copy filed) , New Sorathia Engineering Co. v. CIT [2006] 155 Taxman 513 (Guj) , ACIT v. Ritesh Agrawal (ITAT-Indore) [2014] 50



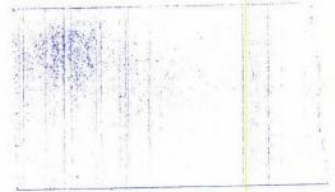
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taxmann.com 93 (Indore Tribunal) ITO v. Sadhu Singh & Sons [2000] 73 ITD 15 (Amritsar) CIT V. Union Electric Corporation [2006] 281 ITR 266 (Guj) relying on the judgement in the case of CIT v. SSA` s Emerald Meadows [2016] 242 Taxman 180 : [2016] 73 taxmann.com 248 (SC) [2016] 8 TMI 1145(SC) in support of his claim and other various case laws as referred to therein penalty us 271(1)(c) was for not ,given for specific charges in penalty show-cause notice issued us 274 read with section 271(1)(c) of the Act. The Id. Counsel for the assessee also stated that the standard preforma used by the AO in issuing a notice without deleting inappropriate words tantamount to non application of mind and thereby it is not in accordance with principle of natural justice. Therefore, it was submitted that the Ld. CIT (A) grossly erred in confirming the penalty levied under section 271(1) (c) in these cases, which may kindly be deleted.



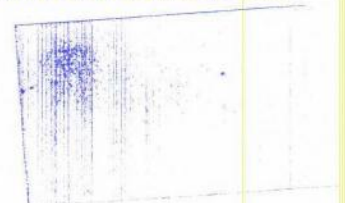
6. On the other hand, the Id. Sr. DR supported the orders of the lower authorities. The Id. Sr. DR also relied on the decision in the case of Mak Data (P.) Ltd. vs. CIT [2013] 358 ITR 593(SC) / [2013] 38 taxmann.com 448(SC) in support that the assessee had admitted the addition does not mean that there is no concealment of income. Therefore, it was urged upon us to uphold the order of Ld. CIT (A).

7. We have considered the facts, perused the material on record, and gone through the assessment order and penalty order and case laws relied by the parties. A perusal of the penalty order reveals that the AO has rejected the contentions of the assessee on the basis that the addition made on account of difference in valuation closing stock and wrong claim of expenses is amounts to furnishing of inaccurate



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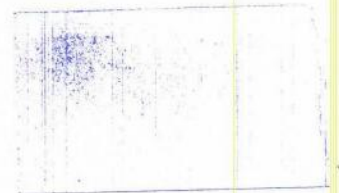
particulars of income. However, such difference on account of method of valuation does not lead that there was conscious or intention to conceal the income or furnishing of inaccurate particulars of income, when the assessee has offering income to the tune of Rs. 5.23 Crores. Therefore, we cannot assume that the assessee would indulge in furnishing of inaccurate particulars of income of Rs. 3.31 lacs. We find that the assessee has offered an explanation which is not found to be false and same has been substantiated, therefore, the case of the assessee is not covered by Explanation 1 to section 271(1)(c) of the Act, hence, we are of the considered opinion that penalty under section 271(1)(c) of the Act is not exigible in this case, we therefore, delete the same. We further find that the penalty notices under section 274 read with section 271(1)(c) were issued in the typed format without the striking off either of the two charges i.e. *** have concealed the particulars of your income oror "furnished inaccurate particulars of income"**. Thus, the penalty proceedings were initiated without specifying any particular or specific charge against the assessee in either the assessment order or even the penalty notice. It is important to point out that no charge either of "concealment of income" or "furnishing of inaccurate particulars" was made in the assessment orders in all these cases. Thus, we find that the charge against which the penalty is to be levied was not specific. It is now a settled proposition that when the charge itself is not a specific and is vague, penalty cannot be levied. The Hon`ble Supreme Court in the case of T. Ashok Pai v. CIT (2007) 292 ITR 11 (SC) has laid down that it is a settled proposition that concealment of income and furnishing inaccurate particulars of income carry different connotation.



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It is settled proposition that where the charge for levying penalty is not specific, the notice issued under section 271(1)(c) is bad in law as it does not specify by which limb of section 271(1)(c) of the Act under which it has been initiated. When the notice does not specify the charge for levy of penalty, it has been held that the penalty cannot be levied.

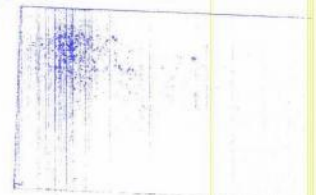
8. Further reliance in the case of CIT v. Manjunatha Cotton Ginning Factory [2013] 359 ITR 565 (Kar)/263 CTR 153/ 93 DTR 111(Karn)[2012] 82 CCH 282 Kar HC, wherein, it was observed in para 59 as under: *"the practice of the Department sending a printed form where all the ground mentioned in Section 271 are mentioned would not satisfy the requirement of law when the consequences of the assessee not rebutting the initiated presumption is serious in nature and he had to pay penalty from 100% to 300% of the tax liability. As the said provisions have to be held to be strictly construed, notices issued under section 274 should satisfy the grounds, which he has to meet specifically. Otherwise, principle of natural justice is offended if the show cause is vague. On the basis of such proceedings, no penalty could be imposed on the assessee."* This decision was further followed, by the Hon`ble Karnataka High Court, in the case of CIT v. SSA`S Emerald Meadows [I.T.A. No. 380/2015 dated 23rd November 2015] wherein the Hon`ble High Court has dismissed the appeal of the Revenue by observing that the Tribunal had allowed the appeal of the assessee holding that the notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of Income Tax Act,1961 was 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.



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whether for concealment of particulars of income or furnishing of inaccurate particulars. The Tribunal, while allowing the appeal of the assessee, had relied on the decision of the Division Bench of this Court rendered in the case of CIT V. Manjunatha Cotton Ginning Factory [2013] 359 ITR 565. It was further pointed out that SLP filed by the Department against this decision was dismissed by Hon'ble Supreme Court on 05-08-2016 reported as CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC). We may also draw support from the recent decision of coordinated bench Mumbai Tribunal in the case of Meharjee Cassinath Holdings Pvt. Ltd. v. ACIT Circle 4(2) in I.T.A. No. 2555/ Mum/2012 order dtd. 28.04.2017 has also held that the notice issued u/s. 274 by the AO is untenable as it suffers from the vices of non-application of mind. In this case though the AO recorded in the assessment order that penalty proceeding under section 271(1)(c) are to be initiated for furnishing of inaccurate particulars of income, however, in the notice u/s. 274 both the limbs of section 271(1)(c) were reproduced in the preforma notice and the relevant clauses were not struck off. Whereas in the case of the assessee no specific charges were levied in the assessment order as well as penalty show cause notice.

9. Considering above facts and circumstances and relying judicial precedents as discussed above, we are therefore, of the considered opinion that the show-cause notice under section 274 is not mere empty formality but it has a definite purpose to make the assessee aware of the exact charges against him and the case, which is required to meet out. A clear notice not only a statutory requirement but even for the purpose of principle of *audi alteram partem* which requires that no one should be



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condemned unheard, a notice in clear term specifying the clear charges against an assessee is required to be given by an Assessing Officer before imposing a penalty. In the light of above facts and circumstances, We hold that the penalty levied under section 271(1)(c) is not sustainable on facts as no positive concealment has been established and in law as no specific charge was levied in penalty show cause notice issued by the AO, hence, it is cancelled. Accordingly, the appeal of assessee is allowed.

10. In the result, the appeal of the assessee stands allowed.

11. The order pronounced in the open Court on 26.10.2017



Sd/-
(सी.एम.गर्ग)/(C.M. GARG)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(ओ.पी.मीना)/(O.P. MEENA)
लेखा सदस्य/ACCOUNTANT MEMBER

सुरत/ **Surat:** दिनांक /**Dated : 26 October 2017.OPM**

Copy of order forwarded to- Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR) / Guard file of Tribunal.

By order

Sd/-
Assistant: Registrar, Surat

सहायक पंजीकार
आयकर अपीलीय अधिकरण
सुरत न्यायपीठ, सुरत.