आयकर अपीलीय अधीकरण, न्यायपीठ – "B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
(समक्ष) **श्री जे. सुधाकर रेड्डी**, लेखा सदस्य **एवं श्री ऐ. टी. वर्की**, न्यायीक सदस्य)
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 573/Kol/2019
Assessment Year: 2008-09

M/s. Chanda More F. L. (on) Shop (PAN: AAEFC1893M)	Vs.	Income-tax Officer, Ward-1(3), Asansol
Appellant		Respondent

Date of virtual Hearing	16.12.2020
Date of Pronouncement	05.01.2021
For the Appellant	N o n e
For the Respondent	Smt. Ranu Biswas, Addl. CIT

ORDER

Per Shri A. T. Varkey, JM:

This appeal has been preferred by the assessee against the order of Ld. CIT(A), Asansol dated 21.01.2019 confirming the penalty imposed by the AO u/s. 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the "Act").

2. None appeared on behalf of the assessee. However, at the outset, we note from a perusal of the show cause notice dated 29.10.2010 issued by the ITO, Ward-1(3), Asansol u/s. 274 of the Act wherein he does not specify the fault/charge on which he proposed to levy penalty against the assessee u/s. 271(1)(c) of the Act. We note that the AO has not stricken down either of the limbs which are distinct faults /charge specified in Section 271(1)(c) of the Act i.e. '*concealed the particular of income*' **or** *'furnished inaccurate particulars of such income*'. Without striking out one of the limbs, the assessee is called upon by the AO to defend both the faults/charges and since both the faults/charges are discernible from the show cause notice, the show cause notice is bad in law for not specifying the fault for which the assessee is being proceeded against.

3. From the aforesaid discussion we note that the AO has not stricken out the irrelevant portion of the fault/charge which would have spelt out the specific fault/charge against the assessee. According to us, since the proposed show-cause notice itself is a defective, all subsequent proceedings are bad in law and the penalty imposed by the AO u/s. 271(1)(c) of the Act and confirmed by the Ld. CIT(A) should be cancelled. For taking such a decision we rely on 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 Manjunatha 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 that 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 inaccurate particulars of income. We also note 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. It is also noticed that 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. We also find that 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.

4. Ld. DR Smt. Ranu Biswas vehemently opposed our aforesaid suggestion of ours and has cited various case laws in support of imposition of penalty. We note that all the case laws cited before us by the Ld. DR has been dealt with elaborately by the Coordinate Bench of this Tribunal in the case of Jeetmal Choraria Vs. ACIT, ITA No. 956/Kol/2016 for AY 2010-11 dated 01.12.2017, wherein the Tribunal has noted as under:

> *"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 order 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.

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.

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 whisper 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 Benches 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 are 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).

15. 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. Counsel for the assessee 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."

5. Respectfully following the aforesaid order of the coordinate bench of this Tribunal, we note that the show cause notice issued by the AO dated 29.10.2010 was bad in law, therefore, hold that imposition of penalty in the present case cannot be sustained and the same is hereby cancelled. Therefore, the appeal of assessee is allowed.

6. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 05th January, 2021.

Sd/-	Sd/-
(J. S. Reddy)	(Aby. T. Varkey)
Accountant Member	Judicial Member

Dated : 5th January, 2021

JD(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Chanda More F.L. (on) Shop, C/o Swapan Kr. Roy, Hill View North, Near St. Joh Church, Asansol-713304
2. Respondent – ITO, Ward-1(3), Asansol
3. CIT(A)- Asansol
4. CIT- Asansol
5. DR, ITAT, Patna.

/True Copy, By order,

Assistant Registrar
ITAT, Kolkata.