

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

श्री आर. के. पांडा, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI R.K PANDA, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos. 2078 & 2079/PUN/2014

निर्धारण वर्ष / Assessment Years : 2007-08 & 2008-09

Vidyanath Urban Co-operative Bank Ltd.
Head Office, Parli (V),
Beed, Pin-431515
PAN : AAAAV0305N

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle-2, Aurangabad.

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos. 2139 & 2140/PUN/2014

निर्धारण वर्ष / Assessment Years : 2007-08 & 2008-09

Assistant Commissioner of Income Tax,
Circle-2, Aurangabad.

.....अपीलार्थी / Appellant

बनाम / V/s.

Vidyanath Urban Co-operative Bank Ltd.
Head Office, Parli (V),
Beed, Pin-431515
PAN : AAAAV0305N

.....प्रत्यर्थी / Respondent

Assessee by : Shri S.N Puranik

Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 16.03.2017

घोषणा की तारीख / Date of Pronouncement : 24 .03.2017

आदेश / ORDER

PER VIKAS AWASTHY, JM

These four appeals, two by the assessee and two by the Department are directed against the orders of Commissioner of Income Tax (Appeals), Aurangabad dated 17.09.2014 for assessment year 2007-08 and order of even date for assessment year 2008-09. These cross appeals by the assessee and the Department for the assessment year 2007-08 & 2008-09 are in respect of levy of penalty u/s 271 (1) (c) of the Income Tax Act, 1961 (hereinafter referred as 'the Act'). Since the issues in the appeals are arising from same set of facts, therefore, these appeals are taken up together for adjudication.

2. The brief facts of the case as emanating from the records are: The assessee is a Co-operative Bank. The assessee filed its return of income for assessment year 2007-08 on 31.10.2007 declaring income Rs. 1,75,14,480/-. Thereafter, the assessee filed revised return of income on 31.03.2009 declaring loss of Rs.89,73,850/-. The case of the assessee was selected for scrutiny. During course of scrutiny assessment, the Assessing Officer made additions on following grounds:

Sr. No	Head of addition	Amount
01	Interest pertain to prior periods prior to 31.03.2006 received during he year	2,65,68,325/-
02	Increase in statutory Reserve fund treated as income u/s 28	37,37,184/-
03	Deduction claimed on account of investment fluctuation fund	2,95,641/-
04	Provision for standard assets.	4,44,500/-
05	Amortization on premium on Govt. securities (HTM)	6,12,119/-
	Total	3,16,27,769/-

Penalty proceedings were initiated in respect of additions made during assessment. The Assessing Officer vide order dated 28.03.2013 levied penalty of Rs. 96,75,037/- u/s 271 (1) (c) of the Act.

For the assessment year 2008-09, the assessee filed return of income on 30.09.2008 declaring total income of Rs. 75,85,490/-. The Assessing Officer in scrutiny assessment made additions on following counts:

Sr. No	Head of addition	Amount
01	Interest pertain to prior period prior to 31.03.2006 receiving during the year	1,75,84,142/-
02.	Deduction claimed on account of investment fluctuation fund.	17,32,500/-
03	Amortization on premium on Govt. securities. (HTM)	6,12,119/-
04	Forfeited amount of dividend	40,02,265/-
05	Provisions of loss assets and contingencies.	15,83,000/-
06	Penal interest received directly credited to reserve fund	10,87,242/-
07	Loss of Sinhgad Urban Co operative Bank	16,16,187/-
08	Provisions for overdue interest reserve	17,40,000/-
09	Forfeited sundry Creditors amount directly credited to reserve fund	1,88,877/-
10	Provisions for Audit fees	1,19,277/-
11	Excess cash amount directly credited to reserve fund	20,547/-
12	Deduction claimed u/s 80P(2)	50,000/-
13	Service tax liability not paid before due date	653/-
	Total	3,03,36,809/-

In respect of the additions made during assessment, the Assessing Officer levied penalty of Rs. 80,84,867/- u/s 271 (1) (c) of the Act vide order dated 23.03.2013.

3. Against levy of penalty in both the assessment years, the assessee filed appeals before the Commissioner of Income Tax (Appeals). The

Commissioner of Income Tax(Appeals) vide impugned order for the assessment year 2007-08 deleted the levy of penalty in respect of all the additions except penalty levied in respect of addition of prior period interest.

Similarly, in the first appeal by assessee for assessment year 2008-09, the Commissioner of Income Tax (Appeals) deleted the levy of penalty in respect of all the additions except penalty levied on addition of prior period interest.

Now both, the assessee and the Department are in appeal before the Tribunal. The assessee in its appeals for both the assessment years, have assailed confirming the levy of penalty on prior period interest, whereas the Department in its appeals has impugned the deleting of penalty on other additions, by the Commissioner of Income Tax (Appeals). The Assessee has filed additional grounds of appeal for both the impugned assessment years challenging validity of notice issued u/s 274 r.w.s 271 (1) (c) of the Act.

4. Shri S.N Puranik appearing on behalf of the assessee submitted that the Assessing Officer, while recording satisfaction for levy of penalty during assessment proceedings for assessment year 2007-08 has observed that penalty proceedings u/s 271 (1) (c) of the Act are initiated for furnishing inaccurate particulars of income. Thereafter, while issuing notice u/s 274 r.w.s 271 (1) (c) of the Act, the Assessing Officer has not struck off irrelevant limb of charge for levy of penalty. Thus, the notice is ambiguous as far as the charge for levying penalty is concerned. At the time of passing order u/s 271 (1) (c) of the Act, the Assessing Officer in concluding paragraph of the order has observed that assessee has furnished inaccurate particulars of its income and has concealed it's income. The observations of

the Assessing Officer while recording satisfaction for initiating penalty proceedings and while levying penalty are inconsistent.

The Id. AR further submitted that while passing assessment order for assessment year 2008-09, the Assessing Officer at the time of making each and every addition has recorded satisfaction for levy of penalty u/s 271 (1) (c) of the Act by observing that, penalty proceedings u/s 271 (1) (c) of the Act are initiated for furnishing inaccurate particulars or concealment of its income. These remarks itself show that the Assessing Officer is not sure as to whether the penalty is to be levied for concealment of income or furnishing of inaccurate particulars of income. While issuing notice u/s 274 r.w.s 271 (1) (c) of the Act for the assessment year 2008-09, again the Assessing Officer has mentioned that penalty proceedings are for concealment of particulars of income or furnishing of inaccurate particulars of income. The Assessing Officer has not struck off irrelevant limb of charge in the proforma notice. At the time of passing of the order levying penalty u/s 271 (1) (c) of the Act for assessment year 2008-09, the Assessing Officer has levied penalty for furnishing inaccurate particulars of income and concealment of income.

4.1 The Id. AR submitted that concealment of income and furnishing of inaccurate particulars of income are two different expressions having different connotations. 'Concealment of income' and 'furnishing of inaccurate particulars of income' are two different offences. The Assessing Officer has to be consistent and specific in mentioning charge for levy of penalty at the time of recording satisfaction and at the time of passing of order levying penalty. The Id. AR pointed that even the notice issued u/s 274 r.w.s 271 (1) (c) for both assessment years is vague. The notice does

not specify the charge for levy of penalty. The ld. AR submitted that the Hon'ble Bombay High Court in the case of CIT V/s. Shri Samson Perinchery in ITA No. 1154 of 2014 decided on 05.01.2017 deleted levy of penalty where satisfaction was not properly recorded and notice u/s 274 r.w.s 271 (1) (c) mentioned both the charges for levying penalty. The ld. AR placed reliance on various decisions of the Tribunal wherein penalty levied u/s 271 (1) (c) of the Act was deleted under similar circumstances.

4.2 The ld. AR submitted that similar additions were made during assessment proceedings for the assessment year 2009-2010. Penalty proceedings were also initiated u/s 271 (1) (c) of the Act in respect of such additions. Subsequently, the Assessing Officer vide order dated 31.03.2014 dropped the penalty proceedings. The ld. AR placed on record copy of order passed by Assistant Commissioner of Income Tax dated 31.03.2014 dropping penalty proceeding, at page No. 43 of the paper book.

5. On the other hand, Shri Mukesh Jha representing the Department vehemently supported the findings of Assessing Officer in recording satisfaction for initiating penalty proceedings and the subsequent orders levying penalty u/s 271 (1) (c) of the Act. The ld. DR submitted that a perusal of the assessment order for the assessment year 2007-08 would show that Assessing Officer has recorded satisfaction for initiating penalty proceeding for furnishing inaccurate particulars of income. Thus, Assessing Officer has specified the charge for initiating penalty proceeding. Thereafter, while passing order levying penalty u/s 271 (1) (c) of the Act, the Assessing Officer has observed that assessee has furnished inaccurate particulars of income. Concealment of income is corollary to furnishing of inaccurate particulars of income. Thus, there is no ambiguity in recording satisfaction

and levying penalty. The ld. DR prayed for dismissing the appeals of the assessee.

6. Both sides heard. Orders of the authorities below have been perused. The assessee has primarily assailed levy of penalty on the ground that the charge mentioned while recording satisfaction at the time of passing of the assessment orders and at the time of passing of the penalty order are inconsistent. Further, Ld. AR of the assessee has pointed that notice issued for levy of penalty u/s 274 r.w.s 271 (1) (c) of the Act in both assessment years does not clearly specify the charge for the levy of penalty.

7. A perusal of the assessment order dated 24.12.09 for the assessment year 2007-08 show that the Assessing Officer has recorded satisfaction for initiating penalty proceeding u/s 271 (1) (c) of the Act for furnishing of 'inaccurate particulars of income'. At the time of passing of the order u/s 271 (1) (c) of the Act, the Assessing Officer observed as under

“ I am satisfied that the assessee bank has furnished inaccurate particulars of its income and it has concealed it's income and thereby made itself liable for levy of penalty under section 271 (1) (c) of the Act”

The Assessing Officer while framing the assessment for assessment year 2008-09 vide order dated 24.12.10 has recorded satisfaction for initiating penalty proceedings u/s 271 (1) (c) of the Act i.e for each and every addition. The Assessing Officer while recording satisfaction for levying penalty used stereotype expressions for each addition. The same reads as under :

“ Penalty proceedings u/s 271(1) (c) of the Act are separately initiated for furnishing inaccurate particulars or concealment of its income.”

While passing order of levy of penalty u/s 271 (1) (c) of the Act dated 28.03.2013, the Assessing Officer in the concluding paragraph of the order remarked :

“ I am satisfied that the assessee bank has furnished inaccurate particulars of its income and it has concealed its income and thereby made itself liable for levy of penalty under section 271 (1) (c) of the Act.”

A perusal of the satisfaction recorded by the Assessing Officer at the time of assessment and while passing penalty order for both the assessment years, makes it evident that the Assessing Officer is not sure about the charge for levy of penalty.

8. In the notice issued u/s 274 r.w.s 271 (1) (c) of the Act again the Assessing Officer has erred in mentioning both the charges for levy of penalty. It would be relevant to mention here that in the notice both the charges i.e ‘concealment of income’ and ‘furnishing inaccurate particulars of income’ are linked by conjunction **‘or’**. Thus, the notice does not clearly specify the charge for levy of penalty.

9. The Hon’ble Bombay High Court in the case of CIT Vs. Shri Samson Perinchery while deleting penalty under similar circumstances held :

“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 Manjunath 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 section 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 Manjunath Cotton & 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 Manjunath Cotton & Ginning Factory (supra)."

10. The Hon'ble Karnataka High Court in the case of CIT Vs. Manjunath Cotton & Ginning Factory (supra) reported in 359 ITR 565 has held:

"59. As the provision stands, the penalty proceedings can be initiated on various grounds set out therein. If the order passed by the authority categorically records a finding regarding the existence of any said grounds mentioned therein and then penalty proceedings is initiated, in the notice to be issued under section 274, they could conveniently refer to the said order which contains the satisfaction of the authority which has passed the order. However, if the existence of the conditions could not be discerned from the said order and if it is a case of relying on deeming provision contained in Explanation 1 or in Explanation 1(B), then though penalty proceedings are in the nature of civil liability, in fact, it is penal in nature. In either event, the person who is accused of the conditions mentioned in section 271 should be made known about the grounds on which they intend imposing penalty on him as section 274 makes it clear that the assessee has a right to contest such proceedings and should have full opportunity to meet the case of the Department and show that the conditions stipulated in section 271(1)(c) do not exist as such he is not liable to pay penalty. The practice of the Department sending a printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law when the consequences of the assessee not rebutting the initial presumption is serious in nature and he had to pay penalty from 100 per cent. to 300 per cent. of the tax liability. As the said provisions have to be held to be strictly construed, notice issued under section 274 should satisfy the grounds which he has to meet specifically. Otherwise, the principles of natural justice is offended if the show-cause notice is vague. On the basis of such proceedings, no penalty could be imposed on the assessee.

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 the 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 the 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 the 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.

61. 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 a 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 Works reported in [1980] 122 ITR 306 (Guj) and the Delhi High Court in the case of CIT v. Virgo Marketing P. Ltd. reported in [2008] 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."

11. Thus, in view of the facts of the case and judgments discussed above, we hold that the notice issued u/s 274 r.w.s 271 (1) (c) of the Act is bad in law and subsequent proceedings arising therefrom are vitiated.

12. On merits, the ld. AR has pointed that similar additions were made in assessment year 2009-10 and penalty proceedings u/s 271 (1)(c) were initiated. However, the penalty proceedings were subsequently dropped. This fact has not been controverted by the ld. DR. The assessee has also furnished copy of the order dated

31.03.2014 passed u/s 271 (1) (c) of the Act for assessment year 2009-10 dropping penalty proceedings. Under such circumstances, it would not be logical to uphold the penalty in assessment year under appeal.

13. In the result, appeals of the assessee are allowed whereas appeals of the department are dismissed.

Order pronounced on Friday, the 24th day of March, 2017.

Sd/- (आर. के. पांडा /R.K Panda) लेखा सदस्य/ACCOUNTANT MEMBER	Sd/- (विकास अवस्थी /Vikas Awasthy) न्यायिक सदस्य/JUDICIAL MEMBER
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पुणे / Pune; दिनांक / Dated : 24th March, 2017.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals), Aurangabad
4. The Pr. CIT-I, Aurangabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

सहायक पंजीकार /Assistant Registrar
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

