IN THE INCOME TAX APPELATE TRIBUNAL

DELHI BENCH "E": NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER
AND
SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA Nos. 2639, 2640, 2641, 2642 & 2643/Del/2017
A.Yrs. : 2005-06, 2006-07 & 2008-09 to 2010-11

MRS. MANJEET KAUR SRAN, 527B, 5TH FLOOR, HBN OFFICE, D-MALL, PLOT-D, DISTT. CENTRE, PASCHIM VIHAR, NEW DELHI – 87 (PAN: AVCPS8638P) **(Appellant)**	vs.	DCIT, CC-29, NEW DELHI **(Respondent)**

Assessee by : Ms. Ashisha Mittal, CA
Department by : Ms. Rakhi Verma, Sr. DR.

O R D E R

PER BENCH

These 05 appeals filed by the Assessee are directed against the respective Orders of the Ld. Commissioner of Income Tax (Appeals)-30, New Delhi pertaining to assessment years 2005-06, 2006-07 & 2008-09 to 2010-11 respectively.

2. The grounds of appeal raised in all the aforesaid 05 appeals are similar and identical, except the difference in figure, hence, the appeals were heard together and are being disposed by this common order by only dealing with ITA No. 2639/Del/2017 (AY 2005-06) and reproducing the grounds thereof as under:-

> *1. Under the facts and the circumstances of the case, penalty order passed u/s. 271(1)© of the Act by the AO*

and confirmed by the Ld. CIT(A) is invalid and bad in law as from the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act it is not discernable as to whether the penalty proceedings were initiated for furnishing of inaccurate particulars of income or concealment of income and therefore, the impugned penalty order passed deserves to be quashed.

2. Under the facts and circumstances of the case, the Ld. CIT(A) has grossly erred in passing the appellate order without affording adequate opportunity of being heard to the appellant.

3. Under the facts and circumstances of the case, the Ld. First Appellate Authority has grossly upholding the action of Assessing Authority imposing the penalty of Rs. 74,908/- u/s. 271(1)© of the I.T. Act, 1961 which is highly injudicious, unwarranted, against the facts of the case and bad at law.

4. The appellant prays for leave to add, amend, alter or withdraw any grounds of appeal.

3. Facts narrated by the revenue authorities are not disputed by both the parties, hence, the same are not repeated here for the sake of brevity.

4. At the time of hearing, Ld. Counsel of the Assessee has stated that no specific allegation as to the concealment of particulars of income or furnishing of inaccurate particulars has been levied by the AO in the notice dated 28.12.2011 issued by him u/s. 271(1)© of the Act placed on file which clearly shows that the same is the standard format of the notice and AO has just ticked on the option of concealment of income or furnishing inaccurate particulars of such income. He further stated that the penalty imposed is liable to be quashed on legal grounds as the issue is squarely covered by the following decisions including the decision dated 12.3.2018 passed in assessee’s own case in the assessment year 2007-08 passed in ITA No. 4034/Del/2017.

- ITAT, Delhi decision in the case of ABR Auto Pvt. Ltd. vs. ACIT in ITA No. 6236/Del/2015 dated 4.12.2017.

- ITAT, 'A' Bench, New Delhi decision dated 05.12.2017 in the case of Ashok Kumar Chordia vs. DCIT passed in ITA No. 5788 to 5790/Del/2014.

- Hon'ble Karnataka High Court decision in the case of CIT & Ors. Vs. M/s Manjunatha Cotton and Ginnig Factory & Ors. (2013) 359 ITR 565

- Apex Court decision in the case of CIT & Anr. Vs. M/s SSA's Emerald Meadows in CC No. 11485/2016 dated 05.8.2016.

5. On the contrary, Ld. DR relied upon the orders of the authorities below. She has also filed the written submission, which reproduced as under:-

"Sub: Written Submission in the above case– reg.

In the above case, it is humbly submitted that the following factual points and Decisions with regard to striking off of correct limb in the notice for levying of penalty u/s 271(1)(c) of the Act may kindly be considered -

❖ *In the Assessment Order, penalty u/s 271(1) (c) of the Act has been **specifically initiated for "assessee has concealed the particular of her income"** (Para 3 of Assessment order) w.r.t. the addition of unexplained income.*

❖ *Further, in the Penalty Order, penalty has been **imposed as Assessing Officer held "assessee in default for concealing her income by furnishing inaccurate particular at her income"** (Para 10 of Penalty order). Thus, there is no inconsistency in the stand taken by Assessing Officer in the assessment proceedings and penalty proceedings ; that **the penalty is initiated as well as imposed for concealment of income.***

- *Thus, there was application of mind by the Assessing Officer and hence mere non-striking of correct limb in the notice cannot be taken as fatal error.*

- *On facts, it can be safely concluded that even assuming that there was a defect in the notice, it has caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice were followed.*

- *In the assessment order penalty has specifically been initiated for concealment of income therefore there was no reason/occasion for the assessee's interest getting jeopardised due to non specification of limb of penalty u/s 271(1)(c)of the I T Act in the penalty notice. Moreover,* ***assessee could also not establish that his interest were jeopardised because assessee has not produced any evidence that this issue was raised by the assessee before Assessing Officer during penalty proceedings. Had there been any prejudice to the assessee due to non striking of the limb in the penalty notice, the same should have been brought to the knowledge of the Assessing Officer, thus giving him/her an opportunity to clarify/rectify the issue.***

- *Further, following decisions may kindly be considered with regard to levy of penalty u/s 271(1)(c) in light of decision of Karnataka High Court in CIT V. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Para 4) and Hon'ble Supreme Court in case of CIT Vs SSA's Emerald Meadows [2016] 73 Taxmann.com 248 (SC)/[2016] 242 Taxman 180 (SC)*

1. Sundaram Finance Ltd. Vs CIT [2018] 99 taxmann.com 152 (SC)

SLP dismissed against High Court ruling that where assessee claimed depreciation on non-existent assets, penalty under section 271(1)(c) was to be levied for filing inaccurate particulars of income

2. ***Sundaram Finance Ltd. Vs CIT [2018] 93 taxmann.com 250 (Madras)/[2018] 403 ITR 407 (Madras)***

where Hon'ble Madras High Court held that where notice did not show nature of default, it was a question of fact. The assessee had understood purport and import of notice, and hence, no prejudice was caused to the assessee. It considered decision of Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565/218 Taxman 423/35 taxmann.com 250 (Kar.).

Relevant part of the order is reproduced below:

"15. *Before us, the assessee seeks to contend that the notices issued under Section 274 r/w. Section 271 of the Act are vitiated since it did not specifically state the grounds mentioned in Section 271(1)(c) of the Act.*

16. *We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural*

justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage.

17. *Thus, for the above reasons, Substantial Questions of law Nos. 1 and 2 are answered against the assessee and in favour of the revenue. The additional substantial question of law, which was framed is rejected on the ground that on facts the said question does not arise for consideration as well as for the reasons set out by us in the preceding paragraphs.*

In the result, Tax Case Appeals are dismissed. No costs."

3. ***CIT Vs Smt. Kaushalya [1994] 75 Taxman 549 (Bombay)/[1995] 216 ITR 660 (Bombay)***

In the above case, IAC had issued show-cause notice dated 28-3-1972 under section 274(2). Assessee had no knowledge of exact charge against him. Not only word 'or' had been used between two groups of charges but there was use of word 'deliberately' also. IAC imposed penalty of Rs. 13,000 for assessment year 1967-68 and ITO imposed penalty of Rs. 22,000 and Rs. 10,000 for assessment years 1968-69 and 1969-70, respectively. Tribunal quashed penalties and held that there was absence of reasonable opportunity of hearing because three show-cause notices were ambiguous and defeated very purpose of giving reasonable opportunity of hearing as contemplated under section 274 and two orders of ITO were without jurisdiction. It was held that mere mistake in language used or mere non-striking off of inaccurate portion cannot by itself invalidate notice under section 274. Penalty orders passed by ITO for assessment years 1968-69 to 1969-70 were perfectly valid and there was no justification for quashing same on ground of absence of jurisdiction.

4. ***New Holland Tractors (India) (P.) Ltd. Vs CIT [2014] 49 taxmann.com 573 (Delhi)/[2015] 228 Taxman 66 (Delhi)/[2015] 275 CTR 291 (Delhi)***

where Hon'ble Delhi High Court held as follows:

"Coming to the question of penalty imposed under section 271(1)(c), it was held in quantum proceedings that the

assessee was wrong in not offering the whole or entire amount of the technical fee for tax in the year of receipt. But, it does not follow that penalty for concealment must be imposed as the quantum appeal is decided against the assessee. the findings in the assessment proceedings cannot be considered as conclusive and final for the purpose of imposition of penalty under section 271(1)(c).

In assessment proceedings, one is primarily concerned with the assessment of income, i.e., quantification and computation of total income as per the provisions a whereas in penalty proceedings the Court is concerned with the conduct of the assessee. Penalty is imposed not because addition is made but because there is concealment or furnishing of inaccurate particulars by the assessee. This is apparent from language of section 271(1)(c) and Explanation 1. [Para 25]

The word 'conceal' inherently and pre se refers to an element of mens rea, albeit the expression 'furnishing of inaccurate particulars' is much wider in scope. The word 'conceal' implies intention to hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other. The word 'conceal' means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word 'concelare' which implies 'con' & 'celare' to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. The word 'inaccurate' in Webster's Dictionary has been defined as 'not accurate; not exact or correct; not according to truth; erroneous; as inaccurate statement, copy or transcript'. The word 'particular' means detail or details of a claim or separate items of an account. Thus, the words 'furnished inaccurate particulars' is broader and would refer to inaccuracy which would cause under-declaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of accounts etc. Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that ad hoc addition per se without other or corroborating circumstances may not reflect 'furnished inaccurate particulars' ***. Lastly, at times and it is fairly***

common, the charge of concealment and 'furnishing of inaccurate particulars' may overlap. *[Para 26]"*

5. ***Trimurti Engineering Works Vs ITO [2012] 25 taxmann.com 363 (Delhi)/[2012] 138 ITD 189 (Delhi)/[2012] 150 TTJ 195 (Delhi)***

   where Hon'ble ITAT Delhi held that it was apparent from combined reading of notice and assessment order that impugned notice had been issued in respect of concealment of particulars of income.

   Relevant part of the order is reproduced below:

   "5.2 *It is also submitted that the notice is vague. We have already seen that in the notice one of the alternatives, i.e., concealment of particulars of income or furnishing of inaccurate particulars of income has not struck off. In the case of Gujarat Credit Corpn. Ltd. v. Asstt. CIT [2008] 113 ITD 133 (Ahd.) (SB), relied upon by the ld. Counsel, the AO had initiated penalty proceedings for disallowance of loss as capital loss. This ground was not accepted by the CIT (Appeals) as correct. It was held that in view of the finding of the CIT (Appeals), the foundation on which penalty was initiated has fallen down. Therefore, the penalty on that ground cannot fructify. The CIT (Appeals), however, upheld the disallowance on a totally different ground. In such a situation, the penalty could have been initiated by the CIT (Appeals) but that will not give jurisdiction to the AO to levy the penalty. We have given serious consideration to this issue also. This decision may have some implication on the levy of penalty in respect of first addition regarding the cash shortage. At the same time, it is also true that the assessee must be appraised of the charge in the notice for which he is sought to be penalized. The whole issue has to be decided on the basis of the facts of each case. When we go through the assessment order, it is seen that the AO has examined the cash book in a great detail and various entries therein between 01.07.2004 to 31.3.2005 have been reproduced on page nos. 14 to 27. Similarly, the receipts by way of*

advances from Trimurti Engineering Works, having implication on the second addition, have been reproduced in the assessment order on page nos. 27 to 29. The finding of the AO in respect of the first addition is that cash flow statement filed by the assessee is nothing but an afterthought and a colourable devise to avoid tax. This cash flow statement was sought to be supported by cash flow statement in respect of two partners, Shri N.S. Panwar and Shri Y.S. Panwar. These statements were also examined and various defects were noticed. Coming to advances for job work, it is inter-alia mentioned that most of the entries are above Rs. 20,000/-, but in the reconciliation statement the entries have been bifurcated so that each one of them is less than Rs. 20,000/-, which seems to have been done to avoid penalties under sections 271D and 271E of the Act. The assessee has not done any job work and no income has been shown although an amount of Rs. 16.25 lakh is stated to have been taken from a single party on a number of occasions. Finally, it has been recorded in respect of both the additions that the amount is treated as income from undisclosed sources. All these observations made by the AO show that it was his case that particulars of income have been concealed. It is not a case where any disallowance has been made but a case where the assessee was found in possession of certain unaccounted money which was utilized in the course of business without paying tax thereon. Therefore, when we see the notice and the contents of assessment order, it is clear that the notice was issued for concealing particulars of income. The notice is not a stand alone document. It is based on the assessment order. Without finding regarding one or the other charge, the notice cannot be issued. However, if two are read together, it is clear that the notice has been issued in respect of concealment of particulars of income. In view of these observations, it is held that the notice is not vague."

6. Further,Following points may also kindly be considered in this case:

1. The jurisdictional condition for imposition of penalty u/s 271(1)(c) is satisfaction of the A.O./CIT during the course of the proceedings.

In this regard, it is useful to refer to the language used in the Act. For convenience the section is being quoted as under:-

***271.** (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—*

(a) [***]

(b) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits," (emphasis supplied)

From a perusal of the above, it is apparent that the A.O. assumes jurisdiction to initiate the penalty proceedings the moment he is satisfied that the necessary conditions have been satisfied for initiation of the proceedings. Hence, the source of jurisdiction is the satisfaction recorded in the assessment order and not in issuance of notice u/s 274. This principle has been laid down by the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax vs. S. V. Angidi Chettiar 1962 44 ITR 739 SC*** *as under:-*

"The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or

(c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction.” ***[Para 11]***

Since, the jurisdictional fact is existence of satisfaction and not issuance of the notice u/s 274, any defect in such a notice would not invalidate the penalty proceedings. Any procedural defect can at worst make the proceedings irregular and such an irregularity can be cured.

2. The requirement of issuing a notice u/s 274 is merely to give effect to the principles of natural justice and not a jurisdictional necessity.

The provisions of section 274 are being quoted as under:-

Procedure.

274. *(1) "No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard."*

The heading of the section makes it clear that the notice u/s 274 is just a part of the procedure for executing the penalty proceedings and not a jurisdictional matter. Section 274 merely requires that the assessee should be given an opportunity of being heard and there is no prescription about the manner in which such opportunity is to be granted. The section also does not provide any particular format for the notice to be issued to the assessee for providing the opportunity of being heard. Thus, section 274 is merely a declaration of the fundamental principal of natural justice, namely, Audi Alteram Partem. Even if section 274 was not on

statute, the assessee would be required to be given an opportunity of being heard in view of the principle of Audi Alteram Partem. Hence, section 274 is a redundant provision and there would be no effect if the same is deleted. Thus, there is no reason to hold the notice under section 274 to be a jurisdictional necessity.

If section 274 is not a jurisdictional necessity, any defect or irregularity in its implementation cannot make the proceedings void-ab-initio.

3. A distinction has to be made between a case of no notice and a case of improper notice.

In this regard, we may refer to the decision of the Hon'ble Supreme Court in the case of ***State Bank of Patiala & Ors vs. S.K. Sharma 1996 AIR 1669****. Specifically we may quote the following portion of this decision*

"In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate - take a case where the person is dismissed from service without hearing him altogether [as in Ridge v. Baldwin]. It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression [Calvin v.Carr]. But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report [Managing Director, E.C.I.L. v.B.Karunkar] or without affording him a due opportunity of cross-examining a witness [K.L.Tripathi] it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the

order has to be tested on the touch-stone of prejudice, i.e., whether, all in all, the person concerned did nor did not have a fair hearing. It would not be correct - in the light of The above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in B.Karunkar should govern all cases where the complaint is not that there was no hearing [no notice, no opportunity and no hearing] but one of not affording a proper hearing [i.e., adequate or a full hearing] or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touch-stone of prejudice as aforesaid."

"In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudicate, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for."

On the basis of the above, it is clear that a distinction has to be made between no notice/no opportunity/no hearing and improper notice. In the former case, the proceedings would be void and in

case of the latter, the proceedings would merely be irregular. In case of such irregular proceedings the test of prejudice has to be employed. In the present case, if the AO did not strike out the irrelevant charge in the notice, we can, at the worst, presume that there was some irregularity. However, it is not the assessee's case that such an irregularity has caused some prejudice.

4. Test of prejudice

As laid down in the ***State Bank of Patiala & Ors vs. S.K. Sharma (supra)*** *violation of any and every procedural provision cannot be said to automatically vitiate the proceedings or the order. The consequences for violation of the procedural provisions would be as under:-*

A- *In case of no notice, no opportunity or no hearing, there is obviously a violation of the principles of natural justice and hence the order would get vitiated.*

B- *In other cases the test of prejudice has to be applied. In case the assessee has not suffered any prejudice on account of the procedural irregularity, nothing needs to be done. However, if some prejudice is caused, the same needs to be remedied by curing the irregularity.*

5. In the Manjunatha Cotton case the Hon'ble Karnataka High Court has failed to take note of the decisions of other High Courts already given on the same issue.

The issue of a mistake in the language of the notice issued u/s 274 or not striking off the inapplicable phrase was already decided by the Hon'ble Bombay High Court in the case of ***CIT vs. Smt. Kaushalya and Athers 216 ITR 660*** *wherein the following was held:-*

"9. We will first take up the show-cause notice dated March 29, 1972, pertaining to the assessment years

1968-69 and 1969-70. The assessment orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In this background, it could not be said that either there was non-application of mind by the Income-tax Officer or the so-called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, 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 entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of CIT v. Mithila Motor's (P.) Ltd. [1984] 149 ITR 751 (Patna) (headnote) :

"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." ***[Para 9]***

It is unfortunate that the Hon'ble Karnataka High Court have not taken cognizance of the aforesaid decision of the Bombay High Court.

6. Participation by the assessee during the course of the proceedings cures the procedural irregularity if any.

The proceedings are vitiated only when the procedural irregularity in question causes some prejudices to the assessee. However, if the assessee participates in the proceeding he becomes aware about the nature of charges for which the proceedings were initiated. Hence, in such a situation there can be no reason for any prejudice to the assessee. Hence, the alleged procedural irregularity gets cured by virtue of assessee's participation.

In this regard, we may refer to the decision of Hon'ble Patna High Court given in the case of ***CIT vs. Mithila Motors (P.) Limited 149 ITR 751*** *as under:-*

"With regard to both the assessment years in question, the learned senior standing counsel for the Department has contended that, even if the notice under Section 274 read with Section 273(b) of the Act was a bad one, wrong labelling of the section by some mistake in the charge framed in the notice did not prejudice the assessee, as the assessee was given an opportunity of being heard. The assessee, in fact, gave a written reply, after having understood correctly the charges that he was to meet. The learned senior standing counsel for the Department contended that the assessee did give the reply to his satisfaction understanding the charges that he was to meet." ***[Para 11]***

"The contention of the learned senior standing counsel for the Department seems to me to be right as, in the instant case, the ITO had not only given the assessee an opportunity of being heard but the assessee did, in fact, give a written reply also and was quite aware of the charges which he was

*required to meet in the course of the hearing. Under Section 274 of the Act, 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 and, in such circumstances, in view of the explanation given by the assessee in the course of hearing, it is obvious that the assessee was fully aware of the charges that he had to meet. Therefore, the notices cannot be said to be void ab initio." **[Para 12]***

*Similarly, in a recent decision, Hon'ble High Court of Madras in the case of **Sundaram Finance Ltd. v. Assistant Commissioner of Income-tax [2018] 93 taxmann.com 250 (Madras)** after noting the decision given by the Karnataka High Court in the case of Manjunatha Cotton Mills held as under:-*

*"Apart from that, the assessee had at no earlier point of time raised the plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the first Appellate Authority or before the Tribunal or before this Court when the Tax Case Appeals were filed and it was only after 10 years, when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under Section 274 r/w, Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage." **[Para 16]***

7. If the charge is discernible from the assessment order, it is immaterial whether the notice issued u/s 274 fails to mentioned the correct charge.

The satisfaction for initiating the penalty proceedings is recorded by the A.O. in the assessment order which specifies whether the proceeding are being initiated for concealment of income or for furnishing of inaccurate particulars of income. The notice which is issued u/s 274 is merely to allow the assessee an opportunity of being heard. It is not mandatory to specify the nature of charges in such a notice. It must be kept in mind that no statutory form has been prescribed for the notice.

In this regard, we may refer to the decision of the Hon'ble Bombay High Court (Nagpur Bench) as given in the case of ***M/s. Maharaj Garage & Company, vs. The Commissioner of Income Tax Income Tax Reference No. 21 of 2008 [2018] 400 ITR 292 (Bombay)***

"The requirement of Section 274 of the Income Tax Act for granting reasonable opportunity of being heard in the matter cannot be stretched to the extent of framing a specific charge or asking the assessee an explanation in respect of the quantum of penalty proposed to be imposed, as has been urged. The assessee was supplied with the findings recorded in the order of re-assessment, which was passed on the same date on which the notice under Section 271(1)(c) was issued, initiating the proceedings of imposing the penalty. The assessee had sufficient notice of the action of imposing penalty. We, therefore, do not find either any jurisdictional error or unjust exercise of power by the authority." ***[Para 15]***

The same principle was laid down (even after referring to the Manjunatha Cotton case) by the Hon'ble ITAT Bangalore in the case of ***Jaysons Infrastructure India P Ltd vs. Income Tax Officer ITA No. 997/Bang/2015 [TS-5873-***

ITAT-2017 (BANGALORE)-O] *wherein Hon'ble Judicial Member was the author. The relevant portion is quoted as under:-*

"Even otherwise, in our view, once the assessment order clearly mentioned that the "assessee has furnished inaccurate particulars of income", mere mentioning in the notice "for concealing the particulars of Income" or "furnished inaccurate particulars of income" would not cause any prejudice to the assessee. The assessee was already having the benefit of going through the assessment order wherein it is clearly mentioned that "the penalty proceedings are initiated for filing inaccurate particulars of income." There is no ambiguity in the impugned order of the AO for initiating the penalty proceedings against the assessee. Moreover, if the Assessee is of the view that there is some ambiguity, the said ambiguity can be sorted out by participating in the penalty proceedings and taking objection to the fact before AO. The assessee has not taken any objection before the AO in the penalty proceedings and for the first time, the said objection has been taken before CIT(A). In our view, the purpose of issuing the notice is to inform the assessee about the charges under which the assessee is liable for imposition of penalty. Once the charges are clearly known to the assessee which are duly mentioned in the assessment order as well as in the notice, there is no error in the notice issued by the AO for imposition of penalty. In view thereof also, we do not find any merit in the appeal. As a result, penalty proceedings are confirmed." ***[Para 7]***

8. Minor defects in the notice need to be ignored u/s 292B

Under the provisions of section 292B no notice issued under the Income Tax Act shall be invalid merely by reason of any mistake, defect or omission in such notice if such notice is in substance and effect in conformity with the intent and purpose of the Act. If the A.O. has not been vigilant enough to

strike off the inapplicable clauses, such a mistake would not invalidate the notice due to the provisions of section 292B.

In this regard, we may refer to the decision of the Hon'ble jurisdictional High Court of Allahabad as given in the case of ***Principal Commissioner of Income Tax, Kanpur vs Shri Sandeep Chandak [2018] 93 taxmann.com 405 (Allahabad)*** *wherein the Hon'ble High Court have affirmed the following finding of the CIT(A):-*

"The Ld. A.Rs have also challenged that the caption of the notice mentioned only Section 271 and not 271AAB. In this respect, the copy of notice has been produced by the Ld. A.R. before me. It is seen that the Ld. A.R. is correct in observing that the section of penalty has not been correctly mentioned by the AO in the caption. However, the AO will get the benefit of section 292BB of the Income Tax Act, 1961 because firstly, the assessee has raised no objection before the AO in this regard. Secondly, last line of the notice clearly mentions section 271AAB. Thirdly, the assessee has given reply to said notice which shows that the assessee fully comprehended the implication of the notice that it is for section 271AAB." ***[Para 27]***

It is also useful to refer to the observations made by Hon'ble Delhi High Court in the case of ***The CIT vs. M/s Sudev Industries Limited Income Tax Appeal No. 805/2005 [2018] [2018] 405 ITR 325 (Delhi)*** *as under:-*

"16. Section 292B was introduced by Taxation Laws (Amendment) Act, 1975 with effect from 1st October, 1975. The object and purpose of introducing the said section as explained in Commissioner of Income Tax versus M/s Jagat Novel Exhibitors Private Limited, [2013] 356 ITR 562 (Del) is as under:-
"28. The aforesaid provision has been enacted to curtail and negate technical pleas due to any defect, mistake or omission in a notice/summons/return.

The provision was enacted by Tax Laws (Amendment) Act, 1975 with effect from 1st October, 1975. It has a salutary purpose and ensures that technical objections, without substance and when there is effective compliance or compliance with intent and purpose, do not come in the way or affect the validity of the assessment proceedings. In the present case, as noticed above, the respondent took the plea before the Assessing Officer that they were never served with the notices under Section 148 of the Act......

29. Object and purpose behind Section 292-B is to ensure that technical pleas on the ground of mistake, defect or omission should not invalidate the assessment proceedings, when no confusion or prejudice is caused due to non-observance of technical formalities. The object and purpose of this Section is to ensure that procedural irregularity(ies) do not vitiate assessments. Notice/ summons may be defective or there may be omissions but this would not make the notice/summon a nullity. Validity of a summon/ notice has to be examined from the stand point whether in substance or in effect it is in conformity and in accordance with the intent and purpose of the Act. This is the purport of Section 292B. Notice/summons are issued for compliance and informing the person concerned, i.e. the assessee. Defective notice/summon if it serves the intent and purpose of the Act, i.e. to inform the assessee and when there is no confusion in his mind about initiation of proceedings under Section 147/148 of the Act, the defective notice is protected under Section 292B. In such circumstances, the defective notice/ summon is in substance and in accordance with the intent and purpose of the Act. The primary requirement is to go into and examine the question of whether any prejudice or confusion was caused to the assessee. If no prejudice/confusion was caused, then the assessment proceedings and their consequent orders cannot and should not be vitiated on the said ground of mistake, defect or omission in the summons/notice." ***[Para 16]***

9. As per the ratio of the Manjunatha Cotton case the need to mention the charge in the notice is necessitated only when the charge is not discernible from the assessment order

The Manjunatha Cotton case does not lay down that in each and every case the penalty notice should specify the correct charge. Only when the charge is not mentioned in the assessment order (owing to reliance upon the deeming provisions as contained in section 271(1B) etc.) it would be necessary to specify the charge in the notice. This is evident from the following:-

"59. As the provision stands, the penalty proceedings can be initiated on various ground 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 the Section 274 makes it clear that 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 ground mentioned in Section 271 are mentioned would not satisfy 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% to 300% 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, 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." **[Para 59]** (emphasis supplied)*

10. Rules of procedure are handmaid of justice to advance the cause of justice and not to obstruct it

*In this regard, we may refer to the following observations recorded by Hon'ble Delhi High Court in the case of **The CIT vs. M/s Sudev Industries Limited (supra)***

"It is often stated that rules of procedure are handmaid of justice for the objective of prescribing procedure is to advance the cause of justice and not to obstruct and give technical objections primacy and position to strike down orders, when no prejudice or harm is otherwise caused and suffered. In Uday Shankar Triyar versus Ram Kalewar Prasad Singh and Another, (2006) 1 SCC 75, it was observed:-"

"17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well-recognised exceptions to this principle are:

(i) where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

(ii) where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant." ***[Para 19]***

"Earlier in Rani Kusum versus Kanchan Devi and Others, (2005) 6 SCC 705, after referring to the ratio in Kailash versus Nanhku and Others, (2005) 4 SCC 480, it was observed:-

"10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice." ***[Para 20]***

It may kindly be noted that the assessee's case does not fall under any of the exceptions listed above.

11. The Manjunatha Cotton case cannot be considered to be a binding precedent

It is trite that obiter dicta, per incuriam, sub silentio (when a particular point of law involved in the decision is not perceived by the court or present to its mind, that is without argument, without reference to the rule and without citation of any authority) are the exceptions to the doctrine of binding precedents. Per incuriam are those decisions given in ignorance or forgetfulness of some statutory provisions or some authority binding on the court concerned.

In the Manjunatha Cotton case the Hon'ble High Court have decided multiple appeals having different issues. They have not laid down a specific law but written a sort of essay covering all the provisions. Unfortunately they have just given their opinion on various issues without referring to the other authorities on the same issues. The decision is kind of a monologue which does not refer to the arguments given by the revenue or the other parties. It also ignores that established principles laid down by the Hon'ble Apex Court with regard to the doctrine of prejudice. It also has not referred to the rules of an interpretation laid down by the Hon'ble Apex Court. Thus the decision is given sub silentio and is also per incuriam."

6. We have heard both the parties and perused the relevant records, especially the orders of the revenue authorities, Written submissions of the Ld. Sr. DR alongwith the provisions of law as well as the case laws cited by both the parties. We have also perused the Notice dated 28.12.2011 issued by the AO for initiation of penalty and directing the assessee to appear before him. For the sake of convenience, some of the contents of the penalty Notice dated 28.12.2011 are reproduced as under:-

".....it appears to me that you:-

****have without reasonable cause failed to comply with a notice under section 142(1)/143(2) of the Income Tax Act, 1961 dated.............***

√* have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1, 2, 3, 4, and 5/undisclosed income in the case of search….."

6.1 After perusing the aforesaid contents of the Notice dated 28.12.2011, we are of the view that the AO has initiated the penalty for concealment of particulars of income or furnishing of inaccurate particulars, which is contrary to the provisions of law. We are of the view that notice issued by the AO u/s. 271(1)© read with Section 274 of the Act is bad in law as it does not specify which limb of section 271(1)© of the Act, the penalty proceedings had been initiated i.e. whether for concealment of particulars of income or furnishing of inaccurate particulars. Therefore, the penalty in dispute is not sustainable in the eyes of law, hence, we cancel the penalty in dispute. The judicial decisions relied upon by the Ld. Sr. DR, have been duly considered. In our considered view, we do not find any parity in the facts of the decisions relied upon with the peculiar facts of the case in hand. Our aforesaid view is supported by the following decisions including the decision dated 12.3.2018 passed in assessee's own case in the assessment year 2007-08 passed in ITA No. 4034/Del/2017.

i) "CIT & Anr. Vs. M/s SSA's Emerald Meadows – 2015 (11) TMI 1620 – Karnataka High Court has held that Tribunal has correctly allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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) (7) TMI 620- Karanataka High Court. Thus 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 – decided in favour of assessee."

ii) CIT & Anr. Vs. M/s SSA's Emerald Meadows – Hon'ble Supreme Court of India – reported in 2016 (8) TMI 1145 – Supreme Court. The Apex Court held that High Court order confirmed (2015) (11) TMI 1620 (Supra) – Karnataka High Court. Notice issued by AO under section 274 read with section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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 – Decided in favour of assessee."

iii) ITAT, 'A' Bench, New Delhi decision dated 05.12.2017 in the case of Ashok Kumar Chordia vs. DCIT passed in ITA No. 5788 to 5790/Del/2014 wherein the Tribunal has observed as under:-

> *"7. We have heard both the parties and perused the orders passed by the Revenue Authorities alongwith the relevant records available with us. Firstly, we have perused the Notice dated 26.3.2013 issued by the AO for initiating the penalty and directing the assessee to appear before him at 11.30 AM on 26/04/2013 and issued a Show Cause to the assessee stating therein that* ***".....you have concealed the particulars of your income or furnished inaccurate particulars of such income…".*** *After perusing the notice dated 26.3.2013 issued by the AO to the assessee, we are of the view that the AO has initiated the penalty for furnishing inaccurate particulars of income or concealment of income as well as in the penalty order dated 30.9.2013 AO has stated that he is satisfied that the assessee has concealed particulars of his income, which is contrary to law. In view of above, the penalty is not sustainable in the eyes of law. Our aforesaid view is fortified by the following decisions:-*

i) "CIT & Anr. Vs. M/s SSA's Emerald Meadows – 2015 (11) TMI 1620 – Karnataka High Court has held that Tribunal has correctly allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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) (7) TMI 620- Karanataka High Court. Thus 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 – decided in favour of assessee."

ii) CIT & Anr. Vs. M/s SSA's Emerald Meadows – Hon'ble Supreme Court of India – reported in 2016 (8) TMI 1145 – Supreme Court. The Apex Court held that High Court order confirmed (2015) (11) TMI 1620 (Supra) – Karnataka High Court. Notice issued by AO under section 274 read with section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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 – Decided in favour of assessee."

8. In the background of the aforesaid discussions and respectfully following the precedents, we delete the penalty in dispute

and decide the issue in favor of the assessee and against the Revenue."

iv) *ITAT, 'D' Bench, New Delhi decision dated 26.5.2017 in the case of Rajender Jain vs. ACIT passed in ITA No. 6804/Del/2013 wherein the Tribunal has observed as under:-*

> *"7. We have heard both the parties and perused the orders passed by the Revenue Authorities alongwith the relevant records available with us. Firstly, we have perused the assessment order wherein the AO has recorded his satisfaction on the page 2, 2nd para viz. "I am satisfied that it is a fit case for initiation of penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income/concealment of income." We have also perused the notice dated 31.12.2007 issued by the AO for initiating the penalty and directing the assessee to appear before him at ---------AM/PM on --------200------ and issued a Show Cause to the assessee stating therein that why an order imposing the penalty of amount should not be made u/s. 271(1)(c) of the I.T. Act, 1961. After perusing the notice dated 31.12.2007 issued by the AO to the assessee, we are of the view that the AO has initiated the penalty for furnishing inaccurate particulars of income/concealment of income, but in the penalty order dated 06.11.2009 he has stated that he is satisfied that the assessee has furnished the inaccurate particulars of income.*
>
> *7.1 However, the Ld. CIT(A) has given clear finding regarding the furnishing of inaccurate particulars. For the sake of convenience, the relevant para no. 5.3.1 of the impugned order passed by the Ld. CIT(A) is reproduced as under:-*
>
> > *"5.3.1 The above findings of the Ld. CIT(A) clearly establishes that the appellant has concealed the income of*

> *Rs. 26,50,500/- and did not declare in the return of income inspite of admitting a disclosure of Rs. 40,00,000/- during survey. Thus, the appellant has furnished inaccurate particulars of his income. The facts of the case clearly reveal that the appellant tried to evade payment of taxes by furnishing inaccurate particulars of income. Therefore, I hold that the AO was fully justified in levying the penalty u/s. 271(1)(c) of the Act. The penalty levied by the AO is upheld. This ground of appeal is rejected."*

8. Keeping in view of the aforesaid finding of the Ld. CIT(A), we are of the considered view that the AO has passed the assessment order wherein the AO has recorded his satisfaction on the page 2, 2nd para viz. "I am satisfied that it is a fit case for initiation of penalty proceedings u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income/concealment of income." Further the AO vide his Notice dated 31.12.2007 for initiating the penalty and directed the assessee to appear before him at ---------AM/PM on --------200------ and issued a Show Cause to the assessee stating therein that why an order imposing the penalty of amount should not be made u/s. 271(1)(c) of the I.T. Act, 1961. After perusing the notice dated 31.12.2007 issued by the AO to the assessee, we are of the view that the AO has initiated the penalty for furnishing inaccurate particulars of income/concealment of income, but in the penalty order dated 06.11.2009 he has stated that he is satisfied that the assessee has furnished the inaccurate particulars of income. In our view the penalty in dispute is not sustainable in the eyes of law, because the AO has not recorded any clear finding whether the assessee was guilty of concealment of income or furnishing of inaccurate particulars of

income. Secondly, the notice u/s. 271(1)(c) has been issued to the assessee levying the penalty for furnishing of inaccurate particulars of income/concealment of income, whereas the penalty in dispute has been levied by the AO on account of furnishing of inaccurate particulars. In our view the penalty is not sustainable in the eyes of law. Our aforesaid view is fortified by the following decisions:-

i) "CIT & Anr. Vs. M/s SSA's Emerald Meadows – 2015 (11) TMI 1620 – Karnataka High Court has held that Tribunal has correctly allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) to be bad in law as it did not specify which limb of Section 271(1)© 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) (7) TMI 620- Karanataka High Court. Thus 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 – decided in favour of assessee."

ii) CIT & Anr. Vs. M/s SSA's Emerald Meadows – Hon'ble Supreme Court of India – reported in 2016 (8) TMI 1145 – Supreme Court. The Apex Court held that High Court order confirmed (2015) (11) TMI 1620 (Supra) – Karnataka High Court. Notice issued by AO under section 274 read with section 271(1)(c) to be bad in law as it did not specify which

limb of Section 271(1)© 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 – Decided in favour of assessee."

8.1 In the background of the aforesaid discussions and respectfully following the precedents, we delete the penalty in dispute and decide the issue in favor of the assessee and against the Revenue."

7. Keeping in view of the aforesaid discussions, we cancel the penalty in dispute by respectfully following the aforesaid decisions and allow the appeal of the assessee.

8. Following the consistent view taken in assessment year 2005-06, as aforesaid, the other 04 appeals relating to assessment years 2006-07, 2008-09 to 2010-11 also stand allowed.

9. In the result, all the 05 appeals filed by the Assessee stand allowed.

Order pronounced on 02/12/2019.

Sd/- **[R.K. PANDA]** **ACCOUNTANT MEMBER**	**Sd/-** **[H.S. SIDHU]** **JUDICIAL MEMBER**

Date: 02/12/2019

SRB

<u>Copy forwarded to: -</u>

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

Assistant Registrar, ITAT, Delhi Benches