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Direct Tax

Tax Alert -

Show-cause notice
imposing penalty u/s
271(1)(c) - shouldn't be a
cryptic one

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SHOW-CAUSE NOTICE IMPOSING PENALTY U/S 271(1)(C) SHOULDN'T BE A CRYPTIC ONE

Principles of natural justice and giving of a reasonable opportunity of being heard are inherent in a statute, especially when it involves levy of penalty. Chapters XXI of Income-tax Act, 1961, broadly contain various provisions empowering Income-tax Authorities to levy penalties on defaulting taxpayers. One such penalty is penalty under Section 271(1)(c) of the Act. Section 271(1)(c) provides for levy of penalty 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 has concealed the particulars of his income or furnished inaccurate particulars of such income.

The satisfaction of the concerned tax authority to the effect that the assessee has either concealed the particulars of income or furnished inaccurate particulars of income is a pre-condition for levy of penalty under this Section and forms the basis and foundation of such levy and such satisfaction must be arrived at during the course of the proceedings referred to therein. When additions to income are made in assessment, the Assessing Officer normally records a statement in the assessment order for initiation of penalty proceedings under Section 271(1)(c). This *prima facie*, records the satisfaction of the Assessing Officer on the necessity of initiating penalty. Now in such cases, Section 274 of the Act requires that an assessee be given an opportunity of being heard before any order levying penalty is passed, is to ensure that the basic requirement of natural justice and fair play is fulfilled. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty and affording him to show-cause as to why such penalty should not be levied.

The standard format of the statutory Notice under Section 274 is not prescribed under the Act or the Rules. However, when a notice under Section 274 is issued with respect to penalty under Section 271(1)(c), it involves mentioning whether penalty is proposed to be levied for concealing the particulars of income or furnishing inaccurate particulars of income, by striking off the irrelevant portion of the two.

Over the years this procedure of striking-off one of the two limbs has become a rigid formula and often non-striking off of the irrelevant clause in the notice, makes it open to challenge before judiciary.. Therefore, the question that arises before the courts is that whether the plea of the assessee is acceptable that by reason of the Assessing Officer not striking out inappropriate portions of the notice issued under section 274, the notice issued is rendered invalid or for that matter, the order levying penalty is to be quashed.

The High Court of Andhra Pradesh in *CIT vs. Chandulal* [1985] 48 CTR 23 (AP) once held that “The rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice has been caused to the party concerned by the procedure followed. ...we are unable to agree that the mere non-striking of the inappropriate portions in a notice renders the notice automatically invalid, unless in a further enquiry in the matter it is shown that by reason of the notice not properly conveying the gist of offence to the assessee, prejudice is caused to him. We cannot accept as a general proposition of law that in every case, a notice is rendered invalid just because inappropriate portions in the notice are not struck off.” However, it is a matter of fact that in the instant case, both the offences of concealing the particulars of income and furnishing inaccurate particulars of income were involved and therefore, it was not necessary for the ITO to strike out any portion of the notice issued to the assessee.

The Apex court in the case of *T. Ashok Pai v. CIT* [2007] 292 ITR 11 (SC) has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. Concealment refers to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppression or suggestion of falsity.

On the contrary, in many cases the judiciary have quashed penalties and held that there was absence of reasonable opportunity of hearing because the show-cause notices were ambiguous and defeated the very purpose of giving reasonable opportunity of hearing as contemplated under section 274. The assessee has to be fully aware of the exact charge of the department against him. Non-striking off of the irrelevant clause in the notice demonstrate non-application of mind on the part of the assessing officer.

The Hon'ble Karnataka High Court in the case of *CIT v. Manjunatha Cotton & Ginning Factory* [2013] 359 ITR 565 held that notice under section 274 of the Act should specifically state as to whether penalty is being proposed to be imposed for concealment of particulars of income or for furnishing inaccurate particulars of income. The Hon'ble High Court has further laid down that certain printed form where all the grounds given in section 271 are given would not satisfy the requirement of law and that initiating penalty proceedings on one limb and find the assessee guilty in another limb is bad in law.

The Apex Court dismissed the Special Leave Petition holding that there was no merit in SLP filed by revenue in *CIT v. SSA's Emerald Meadows* [2016] 73 Taxmann.com 248 (SC), where Tribunal, relying on a decision of Karnataka High Court, allowed appeal of assessee holding that notice issued under section 274 read with section 271(1)(c) was bad in law, as it did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated and High Court, on appeal, held that there was no substantial question of law arising for determination.

Similar view was taken by the Gujarat High Court in the case of *CIT v. Manu Engineering Works* in [\[1980\] 122 ITR 306 \(Guj\)](#) and the Delhi High Court in the case of *CIT v. Virgo Marketing P. Ltd.* in [\[2008\] 171 Taxman 156 \(Delhi\)](#), by various Tribunals such as in *H. Lakshminarayana v. Income-tax Officer* [2015] 61 taxmann.com 373 (Bangalore - Trib.), *ShambhuDayal v. ACIT* ITA No. 3391/Del/2013, *Suvaprasanna Bhattacharya v. ACIT* ITA No. 1303/Kol/2010, *Meherjee Cassinath Holdings Pvt. Ltd vs. ACIT (ITAT Mumbai)* ITA NO. 2555/MUM/2012, *Bhubaneswar Development Authority Vs. DCIT*(ITA No.419/CTK/2016).

These judicial precedents can ofcourse be relied upon by the assessee to challenge one such 'defective' notice, however, the judiciary may test, on the facts and circumstances of each case as to whether mere non-striking of the relevant limb has caused prejudice to the right of the assessee of an opportunity of being heard as contemplated under section 274 so as to render the whole proceedings initiated as invalid. It is also noteworthy to mention that section 292B interalia provides that no notice issued in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to 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 or according to the intent and purpose of this Act. Further, Section 292BB provides that where an assessee has appeared in any proceeding, it shall be deemed that any notice required to be served upon him under any provision of this Act, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was interalia served upon him in an improper manner. Therefore, the Judiciary may also have to consider as to whether the defect in the notice is curable under the provisions of Section 292B/292BB of the Act.

Sometimes, even the offence can be two-fold; involving both concealment of income and furnishing of inaccurate particulars of income and in such cases of overlapping of the two offences, the initiation of penalty proceedings is also for both the offences. However, initiating penalty proceedings for one offence and finding the assessee guilty of another offence may not be sustainable in law. As rightly pointed out by the Hon'ble Karnataka High Court in *Manjunatha Cotton's* case "...satisfaction of the existence of the grounds mentioned in section 271(1)(c) when it is a sine qua non for initiation of 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".