IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM

ITA Nos. 3001 to 3007/Mum/2015
(**निर्धारण वर्ष** / Assessment Year: 2002-03 to 2008-09)

Shushil S. Jhujhunwala (HUF) Flat No. 41/42, 4th Floor, Meghna Apt, S.V. Road, Santacruz (W), Mumbai-400 054	**बनाम**/ Vs.	Income Tax Officer-19(1)(4) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN No. AAJHS5267C		
(अपीलार्थी /**Appellant)**	**:**	**(**प्रत्यर्थी / Respondent**)**

अपीलार्थी की ओर से / **Assessee by**	:	Shri Ajay R. Singh, A.R
प्रत्यर्थी की ओर से**/Revenue by**	:	Shri Rajesh Kumar Yadav, D.R

सुनवाई की तारीख / **Date of Hearing**	**:**	12.03.2018
घोषणा की तारीख **/** **Date of Pronouncement**	**:**	21.03.2018

आदेश / **O R D E R**

PER RAVISH SOOD, JUDICIAL MEMBER:

The present set of appeals filed by the assessee for A.Ys 2002-03 to 2008-09 are directed against the respective orders passed by the CIT(A)-34, Mumbai, each dated 02.02.2015, which in itself arises from the respective penalty orders passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 19.03.2012. That the Tribunal had earlier for the failure on the part of

the assessee appellant to put up an appearance at the time of hearing of the appeal, proceeded with and dismissed the aforementioned appeals, vide its consolidate exparte order dated 26.07.2016. However, the Tribunal finding favour with the Miscellaneous applications filed by the assessee had recalled the ex-parte order, vide its order dated 26.09.2017, passed in M.A. Nos. 174 to 180/Mum/2017. That as common issues are involved in the aforementioned appeals, therefore, the same are being taken up together and are being disposed off by way of a consolidate order. We shall first advert to the appeal of the assessee for A.Y 2002-03. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.7466/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.7466/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

The assessee had further raised before us the following additional ground of appeal:

> *"The ld. CIT(A) erred in confirming the order of Assessing officer imposing penalty under Sec.271(1)(c) without appreciating that the penalty notice dated 14.12.2009 is defective."*

2. Briefly stated, the facts of the case are that the assessee is engaged in the business of purchase and sale of textiles goods. Search and survey proceedings under Sec. 132 and 133A of the Act were carried out on 13.03.2008 in the case of Shri Sudhir Jhunjhunwala Group and its associate concerns by the ADIT (Inv.), Unit-IX(3), Mumbai, in the course of which the residential and office premises of the directors and other members of the group were also searched. That pursuant to the aforesaid proceedings a notice under Sec. 153A was issued to the assessee on 03.11.2008. The assessee in response to

the aforementioned notice filed his return of income under Sec 153A on 10.09.2009, declaring income of Rs.64,044/-. The case of the assessee was thereafter taken up for scrutiny assessment under Sec. 143(2) of the Act.

4. During the course of the assessment proceedings the A.O on the basis of the documents seized from the premises of Jhunjhunwala Distributors Pvt. Ltd. at F/20, Ansa Industrial Estate, Saki Vihar Powai, Mumbai on 14.03.2008, i.e Annexure A1 (70 Pages), Annexure A2 (99 pages), Annexure A4 (15 Pages) and Annexure A6 (64 Pages), as well as taking cognizance of the revelations made by Mr. Ramakant Tiwari, employee of the director, i.e Shri Sudhir Jhunjhunwala (brother of the assessee) in his statement recorded under Sec. 131 on 29.05.2008, observed that the unaccounted cash receipts in the hands of the M/s Siddhivinayak Synthetic Pvt. Ltd. and the other concerns of Shri Sudhir Jhunjhunwala could safely be taken at 37.2%. The A.O on the basis of the aforesaid facts observed that Jhunjhunwala Group (including the assessee) were indulging in cash purchases and sales. That on the basis of his aforesaid observations, the A.O taking cognizance of the fact that the assessee had shown purchases of Rs.1,87,774/- and sales of Rs.2,29,350/-, called upon the assessee to produce the purchase and sale bills/invoices. The assessee in his reply submitted before the A.O that as he in the course of his small scale business of trading in second quality textile goods was making the purchases from the small time seasonal traders/hawkers of the unorganized Bhiwandi market, therefore, the said purchase transactions were only supported by vouchers. The A.O being of the view that as the assessee had not produced any documentary evidence in support of the purchase and sale transactions, therefore, taking support of the cash transactions as had

emerged from the documents seized in the course of the Search & seizure proceedings conducted on Jhunjhunwala Group, thus concluded that the respective purchases aggregating to Rs.1,87,774/- made by the assessee during the year under consideration were in excess of Rs.20,000/- and had been made in cash. The A.O on the basis of his aforesaid conviction disallowed 20% of the purchase of Rs.1,87,774/- by invoking the provisions of Sec. 40A(3) and made a consequential addition of Rs.37,553/- in the hands of the assessee.

5. The assessee being aggrieved with the order passed by the A.O, carried the matter in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions of the assessee dismissed the appeal. That as the assessee did not carry the matter any further in appeal before the Tribunal, therefore, the order of the CIT(A) attained finality.

6. The A.O while culminating the assessment proceedings initiated penalty under Sec.271(1)(c) and issued a 'Show cause' notice (for short 'SCN'), dated 14.12.2009 to the assessee. The submissions which were advanced by the assessee before the A.O in the course of the penalty proceedings did not find favour with him. The A.O being of the view that as the assessee had furnished inaccurate particulars of income leading to concealment of income as envisaged in Sec. 271(1)(c) of the Act, therefore, vide his order dated 19.03.2012 imposed a penalty of Rs.7,466/- in the hands of the assessee. The assessee assailed the levy of penalty by the A.O under Sec. 271(1)(c) before the CIT(A). However, as the assessee failed to put up an appearance before the CIT(A) on the date fixed for hearing of the appeal on various occasions, therefore, the said appellate authority being of the view that the assessee appellant was not interested to pursue the appeal filed before

him, dismissed the appeal and concurred with the observations recorded by the A.O.

7. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the penalty under Sec. 271(1)(c) was based on a disallowance made by the A.O under Sec. 40A(3) on an estimate basis in the hands of the assessee. It was submitted by the ld. A.R that not only the revenue had failed to place on record any material which could go to substantiate that the assessee had made any purchases in contravention of the provisions of Sec. 40A(3), but rather, as a matter of fact the adverse inferences were drawn in his case on the basis of the documents seized from the premises of M/s Jhunjhunwala Distributors Pvt. Ltd. and the statement of Shri Ramakant Pandey, an employee of the director, i.e his brother Shri Sudhir Jhunjhunwala. It was submitted by the ld. A.R that both the assessee and his brother Shri. Sudhir Jhunjhunwala were carrying on the business activities separately, and the assessee had neither anything to do with M/s Jhunjhunwala Distributors Pvt. Ltd., nor the business affairs of his brother Sudhir Jhunjhunwala who was a director in M/s Siddhyvinayak Synthetics Pvt. Ltd. and was engaged in separate business activities. It was submitted by the ld. A.R that the lower authorities had dislodged the claim of the assessee that it had not made any cash purchases in excess of Rs. 20,000/- without placing on record any documentary evidence which would prove to the contrary. The ld. A.R submitted that adverse inferences as regards making of cash purchases in contravention of the provisions of Sec.40A(3) had been drawn in the hands of the assessee only on the basis of assumptions. The ld. A.R in

order to fortify his aforesaid contentions submitted that in the absence of any material being referred or placed on record by the A.O evidencing making of payment in cash by the assessee in excess of the limits contemplated under Sec. 40A(3), the adverse inferences drawn by the A.O on the basis of the documents seized from the premises of the concerns owned by his brother Shri. Sudhir Jhunjhunwala and by taking cognizance of the statement of the latters employee, viz. Shri Ramakant Pandey could not have been validly drawn. The ld. A.R averred that in the absence of any irrefutable evidence which would prove to the hilt that the assessee had defaulted the provisions of Sec. 40A(3), no penalty under Sec. 271(1)(c) was liable to be imposed in the hands of the assessee. Alternatively, the ld. A.R drawing our attention to the copy of the 'Show cause' notice issued under Sec. 274 r.w.Sec. 271(1)(c) of the Act (Page 22) of his 'Paper book' (for short 'APB'), submitted that as the A.O had failed to strike off the irrelevant default in the SCN, therefore, the assessee remained unaware of the default for which it was called upon to explain as to why penalty under Sec. 271(1)(c) may not be imposed on him. The ld. A.R submitted that in the backdrop of the aforesaid facts as they so remained, the assessee had remained divested of an opportunity to defend his case and explain before the A.O that no penalty under Sec. 271(1)(c) was liable to be imposed in his case. Per contra, the ld. Departmental representative (for short 'D.R') relied on the orders of the lower authorities.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We shall first advert to the merits of the penalty imposed by the A.O under Sec.271(1)(c), which had been sustained by the CIT(A). We find from a perusal of the orders of the lower

authorities and the material available before us that the disallowance under Sec. 40A(3) in respect of the total purchases of Rs.1,87,774/- made by the assessee in the course of his business of trading in record quality textile goods during the year under consideration, was made by referring to documents, viz. Annexure A1, Annexure A2, Annexure A4 and Annexure A6 which were seized from the premises of M/s Jhunjhunwala Distributors Pvt. Ltd at F/20, Ansa Industrial Estimate Saki Vihar Road, Powai, Mumbai, a concern in which the brother of the assessee Shri Sudhir Jhunjhunwala was a director, as well as on the basis of revelations made by Mr. Ramakant Tiwari, who was an employee of the brother of the assessee, i.e Shri Sudhir Jhunjhunawala in his statement recorded under Sec. 131 of the Act. We find that neither the A.O had referred to any material which would irrefutably prove that the assessee had made cash purchases in contravention of Sec. 40A(3), nor the ld. D.R during the course of the hearing of the appeal had placed on record or even referred to any such fact which would conclusively evidence the same. We have deliberated on the issue at length and are of the considered view that though the failure on the part of the assessee to produce the bills/invoices supporting the purchases made by him during the year under consideration would have justified making of disallowance by the A.O under Sec. 40A(3) in the course of the assessment proceedings, but however, in the absence of any concrete material which could disprove and dislodge the claim of the assessee that he had not made any payments in excess of Rs.20,000/- for making of purchases in contravention of the provisions of Sec. 40A(3), no penalty under Sec. 271(1)(c) could validly be imposed in his hands. We find that our aforesaid observation is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Upendra V. Mithani (ITA (L) No. 1860 of 2009), dated 05.08.2009**, wherein the

Hon'ble High Court being of the view that unless the claim of the assessee is disproved, no penalty under Sec. 271(1)(c) could be imposed, had held as under:

> *"The issue involved in the appeal revolves around deletion of penalty under Section 271(1)(c) of the I.T. Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs."*

We thus in the backdrop of our aforesaid observations are of the considered view that the penalty of Rs.7,466/- imposed by the A.O under Sec.271(1)(c) of the Act in respect of the disallowance made under Sec.40A(3), which thereafter had been upheld by the CIT(A) cannot be sustained on merits and is liable to be vacated.

9. We shall now take up the additional ground of appeal raised by the assessee as regards the validity of the penalty proceedings, which had been assailed by the assessee before us for the reason that as the A.O had failed to strike off the irrelevant default in the 'Show cause' notice dated 14.12.2009, therefore, he had wrongly assumed jurisdiction and imposed penalty under Sec. 271(1)(c) in the hands of the assessee. We find that as the additional ground of appeal raised by the assessee before us involves purely a question of law based on the facts already available on record, therefore, the same merits admission. We have deliberated on the facts available on record and after perusing the copy of the 'Show cause' notice (Page 22 of 'APB') find that it remains as a matter of fact that the A.O had failed to strike

off the irrelevant default in the SCN issued under Sec. 274 r.w. Sec. 271 of the Act, dated 14.12.2009.

10. We would now test the validity of the aforesaid notice and the jurisdiction emerging therefrom in the backdrop of the aforesaid facts as they so remain. We are not oblivious of the fact that the A.O. is vested with the powers to levy penalty under Sec. 271(1)(c) of the Act, if in the course of the proceedings he is satisfied that the assessee had either 'concealed his income' or 'furnished inaccurate particulars of his income'. We are of the considered view that both of the defaults contemplated in Sec. 271(1)(c) operate in their exclusive independent fields and are neither interchangeable nor overlapping in nature. We are of a strong conviction that as penalty proceedings are in the nature of *quasi criminal* proceedings, therefore, the assessee as a matter of a statutory right is supposed to know the exact charge he had to face. The non striking off the irrelevant charge in the 'Show cause' notice not only reflects the non application of mind by the A.O, but rather, the same seriously defeats the very purpose of giving reasonable opportunity of hearing to the assessee as contemplated under Sec. 274. We find that the fine distinction between the said two defaults contemplated in Sec. 271(1)(c), viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' had been appreciated at length by the **Hon'ble Supreme Court** in its judgments passed in the case of **Dilip & Shroff Vs. Jt. CIT (2007) 210 CTR (SC) 228** and **T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC),** wherein the **Hon'ble Apex Court** had concluded that the two expressions, namely 'concealment of particulars of income' and 'furnishing of inaccurate of particulars of income' have different connotation. The **Hon'ble Apex Court** being of the view that the non-striking off the

irrelevant limb in the notice clearly reveals a non-application of mind by the A.O, had held as under:-

> *"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he has furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing reliance on the order of assessment laid emphasis that he had dealt with both the situations.*
>
> *84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice [See Malabar Industrial Co. Ltd. Vs. CIT (2000) 2 SCC 718].*

We are of the considered view that such non-striking off the irrelevant charge in the notice cannot be characterised as merely a technical default, as the same clearly divesting the assessee of the statutory right of an opportunity of being heard and defend his case would thus have a material bearing on the validity of the jurisdiction assumed by the A.O for imposing penalty in the hands of the assessee.

11. We have given a thoughtful consideration to the issue before us and are of the considered view that a similar proposition had came up before the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar),** wherein the **Hon'ble High Court** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar)** had held that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings had been initiated, i.e whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', the same had to be held as bad in law. The **'Special Leave Petition'** (for short 'SLP') filed by the revenue against the aforesaid order of the **Hon'ble Karnataka High Court** had been dismissed by the **Hon'ble Supreme Court** in **CIT Vs. SSA's Emerald Meadows (2016) 73**

taxmann.com 248 (SC). We further find that a similar view had also been taken by the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017)(Bom).**

12. We find that as averred by the ld. A.R. the issue involved in the present case is squarely covered by the order of a coordinate bench of the Tribunal, i.e ITAT "B" Bench, Mumbai in the case of **Meherjee Cassinath Holdings Private Limited Vs. ACIT, Circle-4(2), Mumbai [ITA No. 2555/Mum/2012; dated. 28.04.2017**, wherein the Tribunal after deliberating at length on the issue under consideration in the backdrop of various judicial pronouncements had concluded that the non striking off the irrelevant charge in the notice clearly reflects the non application of mind by the A.O and would resultantly render the order passed under Sec. 271(1)(c) in the backdrop of the said serious infirmity as invalid and *void ab initio.* The Tribunal in its aforesaid order in the case of **Meherjee Cassinath Holdimgs Pvt. Ltd.(supra)** had observed as under:-

> *"8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist, It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case T. Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions namely 'concealment of the particulars of income and furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made*

aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of ***Hon'ble Supreme Court*** *in the case of* ***Dilip N. Shroff (supra):-***

> *"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the some postulates that inappropriate words and paragraphs were to be deleted, but the some had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.*
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> *84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"*

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of 0/lip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the Id. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated

u/s27)4(c) of the Act for furnishing of inaccurate particulars of income in our considered opinion, the attempt of the Id. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the Id. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097& 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstance being bad, has been approved.

11. Apart from the aforesaid, the Id. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Born.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the Id. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Santa Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Honble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharnendra Textile Processors, 306 ITR 277 (SC) deduced as under:-

"12 A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AG at the time of issuing notice. In the case of Lakhdir Laiji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon 'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AG did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AG, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the

notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

> *"The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."*

In the instant case also, we are of the view that the AG has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AG has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the ***Hon'ble Supreme Court*** *in the case of* ***Dilip N. Shroff (supra****) is to prevail. Following the decision of our coordinate Bench in the case of* ***Dr. Santa Milind Davare (supra****), we hereby reject the aforesaid argument of the Id. CIT-DR.*

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the ***Hon'ble Supreme Court*** *in the case of* ***Dilip N. Shroff (supra),*** *the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec.*

271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non- application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the ***Hon'ble Bombay High Court*** *in the case of* ***Shri Samson Perinchery (supra****). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with".*

We are of the considered view that as the issue involved in the present case is squarely covered by the aforesaid order of the coordinate bench of the Tribunal in the case of *Meherjee Cassinath Pvt. Ltd.(supra)*, and still further is no more *res integra* in light of the aforesaid judicial pronouncements, therefore, respectfully follow the same. We thus in the backdrop of illegal assumption of jurisdiction on the part of the A.O as regards penalty imposed on the assessee under Sec. 271(1)(c) without putting it to notice as regards the default for which it was called upon to explain as to why no such penalty was liable to be imposed in its hands, therefore, on the said count also quash the penalty of Rs.7,466/- imposed in the hands of the assessee under Sec. 271(1)(c).

13. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 7,466/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3002/Mum/2015
A.Y 2003-04

14. We shall now take up the appeal of the assessee for A.Y 2003-04. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.6496/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.6496/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

15. Briefly stated, the facts of the case are that the assessee in response to notice issued under Sec. 153A had filed his return of income on 10.09.2009, declaring total income of Rs.60,271/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs.40,665/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore, the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs.6,496/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A(3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

16. Aggrieved, the assessee had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposing the present appeal of the assessee for A.Y 2003-04 in ITA No. 3002/Mum/2015.

17. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 6,496/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3003/Mum/2015

A.Y 2004-05

18. We shall now take up the appeal of the assessee for A.Y 2004-05. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.19,430/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.19,430/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

19. Briefly stated, the facts of the case are that the assessee in response to notice issued under Sec. 153A had filed his return of income on 10.09.2009, declaring total income of Rs.1,18,220/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs. 79,880/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore, the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs.19,430/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A (3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

20. Aggrieved, the assessee had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposal of the present appeal of the assessee for A.Y 2004-05 in ITA No. 3003/Mum/2015.

21. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 19,430/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3004/Mum/2015
A.Y 2005-06

22. We shall now take up the appeal of the assessee for A.Y 2005-06. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.21,185/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.21,185/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

23. Briefly stated, the facts of the case are that the assessee in response to notice issued under Sec. 153A had filed his return of income on 10.09.2009, declaring total income of Rs.1,19,710/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs.40,665/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore,

the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs. 21,185/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A (3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

24. Aggrieved, the assessee had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposing of the present appeal of the assessee for A.Y 2005-06 in ITA No. 3004/Mum/2015.

25. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 21,185/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3005/Mum/2015

A.Y 2006-07

26. We shall now take up the appeal of the assessee for A.Y 2006-07. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.11,495/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.11,495/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

27. Briefly stated, the facts of the case are that the assessee in response to notice issued under Sec. 153A had filed his return of

income on 10.09.2009, declaring total income of Rs.97,567/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs.40,665/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore, the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs.11,495/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A (3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

28. Aggrieved, the assessee had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposing the present appeal of the assessee for A.Y 2006-07 in ITA No. 3005/Mum/2015.

29. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 11,495/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3006/Mum/2015
A.Y 2007-08

30. We shall now take up the appeal of the assessee for A.Y 2007-08. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

"*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.10,575/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.10,575/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*

The appellant craves to add or amend or alter the grounds of appeal."

31. Briefly stated, the facts of the case are that the assessee in response to notice issued under Sec. 153A had filed his return of income on 10.09.2009, declaring total income of Rs.93,056/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs.83,782/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore, the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs.10,575/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A(3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

32. Aggrieved, the assessee carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposing of the present appeal of the assessee for A.Y 2007-08 in ITA No. 3006/Mum/2015.

33. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding

the penalty of Rs. 10,575/- imposed by the A.O under Sec.271(1)(c) is set aside.

ITA No. 3007/Mum/2015

A.Y 2008-09

34. We shall now take up the appeal of the assessee for A.Y 2008-09. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:

> "*On facts & Circumstances of the case and law on subject the Assessing officer erred in levying Penalty of Rs.8,986/- u/s. 271(1)(c) of the Income Tax Act 1961. On facts & Circumstances of the case & law on the subject the CIT(A) erred in upholding the penalty of Rs.8,986/- On facts & circumstances of the case & law on the subject the levied penalty be deleted.*
>
> *The appellant craves to add or amend or alter the grounds of appeal."*

35. Briefly stated, the facts of the case are that the assessee in response to notice under Sec. 153A had filed his return of income on 10.09.2009, declaring total income of Rs.93,188/-. The A.O while framing the assessment made a disallowance under Sec. 40A(3) of Rs. 80,430/- pertaining to cash purchases, which as per him were made by the assessee during the year under consideration. The appeal filed by the assessee before the CIT(A) was dismissed and as the assessee did not carry the same any further in appeal, therefore, the said order attained finality. The A.O after the culmination of the assessment proceedings imposed penalty of Rs.8,986/- under Sec. 271(1)(c) in respect of the disallowance made in the hands of the assessee under Sec.40A(3). The appeal filed by the assessee against the aforesaid order of the A.O imposing penalty under Sec. 271(1)(c) was dismissed by the CIT(A).

36. Aggrieved, the assessee had carried the matter in appeal before us. We find that as the facts and the issue involved in the present appeal are the same as were involved in the appeal of the assessee for

A.Y 2002-03 in ITA No. 3001/Mum/2015, therefore, our order passed in the aforementioned appeal shall apply *mutatis mutandis* for disposal of the present appeal of the assessee for A.Y 2008-09 in ITA No. 3007/Mum/2015.

37. The appeal filed by the assessee is allowed in terms of our aforesaid observations and the order passed by the CIT(A) upholding the penalty of Rs. 8,986/- imposed by the A.O under Sec. 271(1)(c) is set aside.

38. The appeals of the assessee for AYs 2002-03 to 2008-09, viz. marked as ITA Nos. 3001/Mum/2015 to 3007/Mum/2015 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 21.03.2018

Sd/-	Sd/-
(G.S. Pannu)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 21.03.2018
Ps. Rohit Kumar

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**