

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 4253/Mum/2018

(निर्धारण वर्ष / Assessment Year: 2008-09)

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| Ravi Goenka 15 Shirin Chambes, 348/50 Samuel Street Vadgadi, Mumbai-400003. | बनाम/ Vs. | ACIT-13(2) Room No.418, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACPG9107E | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Assessee by: | Ms. Renu Kapoor | |
| Revenue by: | Ms. Jothi Lakshmi Nayak (Sr AR) | |

सुनवाई की तारीख / Date of Hearing: 04/11/2019

घोषणा की तारीख /Date of Pronouncement: 20/11/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 05.04.2018 passed by the Commissioner of Income Tax (Appeals)-28, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2008-09 in which the penalty levied by the AO has been ordered to be confirmed.

2. The assessee has raised the following grounds: -

“1 The Ld. CIT(A) has erred in law and on the facts of the case in sustaining the penalty although the relevant clause whether there is concealment of income/furnishing of inaccurate particulars has not been deleted.



2. *The assessee craves leave to add, alter or amend the above ground of appeal.”*

3. The brief facts of the case are that the assessee filed his return of income on 24.09.2008 declaring total income to the tune of Rs.42,14,766/-. The return was processed u/s 143(1) of the Act. Thereafter, the case of the assessee was reopened on the basis of the information received from the DIT (I & CI), Delhi in which it was conveyed that the assessee was a beneficiary of accommodation entries given by M/s. Mahasagar Group which was engaged in fraudulent billing activities and was giving accommodation entries in order to enable the clients to declare speculation profit/loss, short term capital gain, Long Term Capital Gain, Profit/loss on account of commodity trading, introduce share application money in the form of Gifts. The assessee was having transaction amounting to Rs.6,81,500/- with the above group. Therefore, the case of the assessee was reopened u/s 148 of the Act. Thereafter, notices u/s 143(2) & 142(1) of the Act were also issued and served. The assessee had shown the Short Term Capital Gain of Rs.19,92,993/- which included one transaction for the purchase and sale of Jai Corporation Ltd shares detailed are as under: -

- a. *Purchase through Alliance Intermediaries & Network Pvt. Ltd. Rs. 3,41,314/-*
- b. *Sale through OTCEI Securities Ltd. Rs.21,35,962/-*
- c. *Resulting a gain of Rs.17,94,648/-*



The assessee realized the mistake that he was misled by the intermediary, offered the income under the head “Income from other Sources”. The assessee took the benefit in sum of Rs.17,94,648/- by showing the Short Term Capital Gain. The short term capital gain in sum of Rs.17,94,648/- and the commission @ 5% i.e. 89,732/- were declined and the said amount was treated as income of the assessee. The total income of the assessee was assessed to the tune of Rs.43,04,500/- and accordingly the penalty proceeding was initiated by issuance of notice. After the reply of the assessee, the penalty in sum of Rs.5,65,314/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the order, therefore, the assessee has filed the present appeal before us.

5. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the assessee has argued that the penalty notice nowhere speaks about specific limb to levy the penalty because the particular charge was not tick off in the notice, therefore, in the said circumstances, the penalty is not justifiable hence the order of the CIT(A) confirming the penalty levied by the AO is wrong against law and facts and is liable to be set aside. In support of these contentions the Ld. Representative of the assessee has placed reliance upon the law settled in ITA. No.1154/M/2014 in the case of **CIT-11 Vs. Samson Perinchery and the order of the ITAT, Mumbai**



Bench in ITA. No.2555/M/2012 vide order dated 28.04.2017 titled as Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2). However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. The copy of notice dated 27.02.2014 is on the file in which the Assessing Officer nowhere specify any limb to levy the penalty because none of the charge was tick off in the notice. It is not in dispute that the penalty u/s 271(c) of the Act is leviable on account of the concealment of particular of income and on account of furnishing the inaccurate particulars of income. Both have different connotations. In this regard, the Hon'ble Supreme Court has appreciated the distinction between both the limb in the case **Dilip N. Shroff 161 taxman 218 (SC)**. As per the record, the assessment order speaks about levying the penalty on account of furnishing the inaccurate particulars of income but the notice nowhere specify any limb to levy the penalty. The notice is not justifiable in view of the law settled by the Bombay High Court in the case of **CIT-11 Vs. Samson Perinchery**. At the time of argument, the Ld. Representative of the assessee has also placed reliance upon the finding of the Hon'ble ITAT in ITA. No. 2555/M/2012 titled as **Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2)**. The relevant para is hereby reproduced below: -

“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 of 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 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 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.

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 Dilip 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 ld. 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/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. 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 ld. 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 circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. 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 (Bom.) 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 ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble 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 Dharmendra 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. B 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 AO at the time of issuing notice. In the case of Lakhdar Lalji (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 AO 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 AO, 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 AO 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 AO 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. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the ld. 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."

6. We also find that the assessee had shown his income as LTCG which has been changed as income from other sources. Undisputedly, the assessment of the assessee was reopened on the basis of the information received from the DIT (I & CI), Delhi and thereafter, the case of the assessee was reopened u/s 148 of the Act and after the reply of the assessee, the Short Term Capital Gain of the assessee was treated as income from other sources. Anyhow the change of head of the income nowhere justifiably leads to levy the penalty. In this



regard. We also find support of the law settled by Hon'ble Apex Court in the case of **Reliance Petroproduct Vs. CIT (P) Ltd. 322 ITR 158 SC**. Further, in the case of any addition on account bogus purchase, no penalty is liable in view of the decision of the Hon'ble Gujarat High Court in the case of **Gujarat High Court in the case titled as National Textiles Vs. CIT 2001 164 CTR 2009 (Guj)**. In the said circumstances, we are of the view that the finding of the CIT(A) is not justifiable, therefore, we set aside the same and delete the penalty.

7. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 20/11/2019.

Sd/-

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 20/11/2019

Vijay/Sr. PS



ITA. No.4253/M/2018
A.Y. 2008-09

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**