

**आयकर अपीलीय अधिकरण "एफ " न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"F" BENCH, MUMBAI**

**माननीय श्री छल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON'BLE SHRI C.N. PRASAD, JM AND**  
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**  
**(Hearing Through Video Conferencing Mode)**

आयकर अपील सं./ I.T.A. No.1732/Mum/2020  
(निर्धारण वर्ष / Assessment Year: 2013-14)

<b>Shri Francis Thomas</b> 29-C, D-1, Aravali Apartments, Sec-52 Noida, UP-203 303	बनाम/ Vs.	<b>JCIT (OSD)-CC-2(3)</b> 803, 8 <sup>th</sup> Floor, Old CGO Building Pratishtha Bhawan, M.K. Road Mumbai-400 020
<b>PAN No.: ADGPT-3709-E</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

&amp;

आयकर अपील सं./ I.T.A. No.2000/Mum/2020  
(निर्धारण वर्ष / Assessment Year: 2013-14)

<b>DCIT -CC-2(3)</b> 803, 8 <sup>th</sup> Floor, Old CGO Building Pratishtha Bhawan, M.K. Road Mumbai-400 020	बनाम/ Vs.	<b>Shri Francis Thomas</b> 29-C, D-1, Aravali Apartments Sec-52 Noida, UP-203 303
<b>PAN No.: ADGPT-3709-E</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

<b>Assessee by</b>	:	Shri Rajiv Khandelwal – Ld. AR
<b>Revenue by</b>	:	Ms. Usha Gaikwad - Ld. Sr. DR

सुनवाई की तारीख/ <b>Date of Hearing</b>	:	06/05/2021
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	17/06/2021

**आदेश / O R D E R**

**Per Bench**

1. Aforesaid cross-appeals for Assessment Year [AY in short] 2013-14 contest the order of Ld. Commissioner of Income Tax (Appeals)-48, Mumbai [in short CIT(A)], Appeal No. CIT(A)-48/IT 247/DCCC-2(3)/2017-

18 dated 17/02/2020. The sole issue involved in cross-appeal is imposition of penalty u/s 271(1)(c). The Ld. AO has imposed penalty u/s 271(1)(c) for Rs. 104.64 Lacs vide order dated 26/02/2018 which was computed @200% of tax sought to be evaded by the assessee. Upon further appeal, Ld. CIT(A) reduced the same to 100% of tax sought to be evaded by the assessee. The said adjudication has given rise to cross-appeals before us. The revenue is agitating the reduction in penalty amount whereas the assessee is aggrieved by confirmation of penalty in the impugned order.

2. The registry has noted a delay of 101 days in assessee's appeal, the condonation of which has been sought by the assessee on the strength of condonation petition dated 16/12/2020 which is supported by the affidavit of the assessee, The delay has been attributed to the fact that physical order was received late and the appeal could not be filed in time due to lockdown situation arising out of Covid-19 pandemic. Keeping in view the principles laid down by Hon'ble Supreme Court in **Collector, Land Acquisition V/s Mst. Katiji (1987; 167 ITR 471)**, we are inclined to condone the delay and admit the appeal.

Similar delay of 210 days has been noted in revenue's appeal. However, Authorization Memo takes note of the fact that as per Gazette of India, Ministry of Finance Notification No.CG-DL-E-24062020-220145-Extraordinary-Part-II-Section-2-sub-section (ii)-No.1807, New Delhi, Wednesday, June 24, 2020 / Asadha 3, 1942 [SO No.2033(E)], the extended last date of filing of appeal would be 31/03/2021. Therefore, as per the said notification, the appeal has been filed within extended time. Going by the said notification and also keeping in view the adverse

situation arising out of Covid-19 pandemic, we are inclined to condone this delay and admit the appeal.

3.1 The facts leading to imposition of penalty are that an assessment was framed against the assessee for the year u/s 143(3) on 31/03/2015 which accepted the returned income of Rs.202.59 Lacs filed by the assessee on 28/09/2013 u/s 139(1).

3.2 During assessment proceedings, it transpired that a requisition was made u/s 132A in respect of cash of Rs.175 Lacs seized from one Mr. Louis Basil Rodrigues (an employee of Ryan International School, Vasant Kunj, New Delhi) on 02/03/2013 while he was travelling in a car from Delhi to Ludhiana. Mr. Louis Basil Rodrigues could not explain the source and the purpose of carrying cash satisfactorily and accordingly, the cash was seized u/s 132A of the Income Tax Act, 1961. In his statement to DDIT(Inv.), Patiala, he stated that cash belonged to St. Xavier Education Trust, Vasant Kunj, New Delhi and the same was being carried for school purposes. The cash was stated to be handed over to him by Mr. Novert Fernandes, an accountant of St. Xavier Education Trust, New Delhi. Consequently, a survey action u/s 133A was carried out at Ryan International School, Vasant Kunj, New Delhi on 05/03/2013 and the statement of the assessee, who was working as administrator of the school, was recorded u/s 131. Though initially the assessee submitted that the cash belonged to the school, however, in later part of the statement, an admission was made that the source of cash was commission taken by him from various vendors as well as contractors. The assessee admitted that cash belonged to him and he promised to offer the same as his additional income for AY 2013-14. This admission was honored by the assessee and the additional income of Rs.175 Lacs

was offered in the return of income filed u/s 139(1). The returned income has been accepted by Ld. AO while framing the assessment order. The Ld. AO held that this amount was to be added on protective basis u/s 69A. Consequently, penalty proceedings were initiated in the assessment order by observing as under: -

*Penalty proceedings u/s 271AAB/271(1)(c) are initiated separately.*

3.3 Upon further appeal against quantum order, the Ld. CIT(A) substantively confirmed the addition in the hands of the assessee and consequently, deleted the addition made in the hands of St. Xavier Education Trust. This order has attained finality since no further appeal has been filed by any party against the same. Thus, the quantum addition as offered by the assessee has finally been accepted by the revenue.

4. In the meantime, penalty proceedings were initiated against the assessee and a notice was issued u/s 274 r.w.s. 271 on 31/03/2015 which was followed by another show-cause notice dated 08/08/2017 wherein the assessee was directed to defend the penalty proceedings. The assessee, inter-alia, submitted that there was no concealment of income or furnishing of inaccurate particulars of income since the returned income was accepted by the Ld. AO. However, the said plea was rejected in view of the fact that if no cash was found, the income would not have come to light. The income was offered since no alternative was left with the assessee. No credible explanation could be furnished by the assessee and therefore, the penalty would be leviable against the assessee. Accordingly, in para-10 of the order, the penalty was levied by Ld. AO by observing as under: -

*In view of the above, it is hereby held that the assessee has failed to declare true and correct income and has, thereby, concealed its income as well as furnished inaccurate particulars of its income at the time filing of return of income u/s 139(1) of the Income Tax Act, 1961, This being so, I am satisfied that this is a fit case for imposition of penalty u/s 271(1)(c) on account of cash seized of Rs.1,75,00,000/- as the same conceded by the assessee. The penalty u/s 271(1)(C) are worked out at Rs.52,32,400/- being 100% and Rs.1,56,97,200/- being 300% of tax sought to be evaded. However, I levy penalty of Rs.1,04,64,800/- being 200% of the amount of tax sought to be evaded by reason of concealment of taxable income as well as furnishing of inaccurate particulars of such income.*

5. Aggrieved, the assessee assailed the imposition of penalty before Ld. CIT(A) with partial success vide impugned order dated 17/02/2020. The Ld. CIT(A) while confirming the imposition of penalty, reduced the same to 100% of tax sought to be evaded. In other words, the penalty of Rs.104.64 Lacs as imposed by Ld.AO was reduced to Rs.52.32 Lacs. The aforesaid adjudication has given rise to cross-appeals before us.
6. The Ld. AR assailed penalty on legal grounds by placing reliance on the recent decision of larger bench of Hon'ble Bombay High Court in **Mohd. Farhan A.Shaikh V/s DCIT (125 Taxmann.com 253)**. On merits, Ld. AR submitted that concealment of income or furnishing of inaccurate particulars of income should be in the return of income filed by the assessee. Since returned income filed by the assessee was accepted by Ld. AO, no penalty would be leviable as per the decision of Hon'ble Delhi High Court in **CIT V/s SAS Pharmaceutical (335 ITR 259)**.
- The Ld. DR, on the other hand, submitted that the disclosure was made by the assessee only because cash was seized by the department. Had there been no seizure by the department, the amount would not have been declared in the return of income.

**Our findings and Adjudication**

7. We have carefully considered the rival submissions and perused relevant material on record. So far as the factual matrix is concerned, it is undisputed position that the cash seized by the department was owned up by the assessee and the same was also disclosed in the return of income filed u/s 139(1). The returned income has finally been accepted by Ld. AO since no further addition has been made. The addition has already attained finality since no further appeal has been preferred against appellate order with respect to quantum addition.

8. So far as the legal ground is concerned, it could be seen that penalty has been initiated in the assessment order u/s 271AAB as well as u/s 271(1)(c). The copy of show cause-notice dated 31/03/2015 as issued by Ld. AO to the assessee during penalty proceedings has been placed on record. The perusal of the same would show that penalty has been proposed against both the limbs of Sec. 271(1)(c) i.e. for concealment of income as well as for furnishing of inaccurate particulars of income. The applicable limb has not been specified. Another notice has been issued on 08/08/2017. A perusal of the same would show that penalty has been proposed by Ld. AO u/s 271AAB of the Act. Another notice has been issued on 22/01/2018 which show-cause the assessee to defend the penalty as proposed in notice dated 31/03/2015 u/s 271(1)(c) for concealment of income as well as for furnishing of inaccurate particulars of income. As noted in preceding para-4, the penalty has finally been levied u/s 271(1)(c) for concealment of income as well as for furnishing of inaccurate particulars of income. The chronology of the events would show that Ld. AO has failed to frame as well as specify the exact charge for which penalty was being levied

against the assessee. Both the stated limbs i.e. concealment of income & furnishing inaccurate particulars of income, as per settled legal position, carry different connotations and operate differently. It was obligatory on the part of Ld. AO to frame specific charge against the assessee before levying penalty. The failure to do the same would render the penalty null and void in the eyes of law. As rightly pointed out by Ld. AR, the issue of framing of specific charge in the notice has been dealt with at length by larger bench of Hon'ble Bombay High Court in the recent decision titled as **Mohd. Farhan A.Shaikh V/s DCIT (125 taxmann.com 253)** wherein the Hon'ble Court has answered the issue of reference as follows: -

Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiate the penalty proceedings?

**181.** It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, *prima facie* or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings, Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

**182.** More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.

**183.** Therefore, we answer the first question to the effect that Goa Dourado Promotions and other cases have adopted an approach more in consonance with the statutory scheme. That means we must hold that Kaushalya does not lay down the correct proposition of law.

Question No. 2: Has Kaushalya failed to discuss the aspect of 'prejudice'?

**184.** Indeed, Kaushalya did discuss the aspect of prejudice. As we have already noted, Kaushalya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushalya, "fully knew in detail the exact charge of the Revenue against him". For Kaushalya, the statutory notice suffered from neither non-application of mind nor any prejudice. According to

it, "the so-called ambiguous wording in the notice [has not] impaired or prejudiced the right of the assessee to a reasonable opportunity of being heard". It went on to observe that for sustaining the plea 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". *Kaushalya* closes the discussion by observing that the notice issuing "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".

**185** No doubt, there can exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by the authority and/or ultimate prejudice to the right of opportunity of hearing contemplated under section 274. So asserts *Kaushalya*. In fact, for one assessment year, it *set aside* the penalty proceedings on the grounds of non-application of mind and prejudice.

**186.** That said, regarding the other assessment year, it reasons that the assessment order, containing the reasons or justification, avoids prejudice to the assessee. That is where, we reckon, the reasoning suffers. *Kaushalya's* insistence that the previous proceedings supply justification and cure the defect in penalty proceedings has not met our acceptance.

Question No. 3: What is the effect of the Supreme Court's decision in Dilip N. Shroff on the issue of non-application of mind when the irrelevant portions of the printed notices are not struck off ?

**187** In Dilip N. Shroff, for the Supreme Court, it is of "some significance that in the standard Pro-forma 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". Then, Dilip N. Shroff, on facts, has felt that the assessing officer himself was not sure whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars.

**188.** We may, in this context, respectfully observe that a contravention of a mandatory condition or requirement for a communication to be valid communication is fatal, with no further proof. That said, even if the notice contains no caveat that the inapplicable portion be deleted, it is in the interest of fairness and justice that the notice must be precise. It should give no room for ambiguity. Therefore, Dilip N. Shroff disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays non-application of mind. And, therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.

**189.** In Sudhir Kumar Singh, the Supreme Court has encapsulated the principles of prejudice. One of the principles is that "where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, "except in the case of a mandatory provision of law which is conceived not only in individual interest but also in the public interest".

**190.** Here, section 271(1)(c) is one such provision. With calamitous, albeit commercial, consequences, the provision is mandatory and brooks no trifling with or dilution. For a further precedential prop, we may refer to *Rajesh Kumar v. CIT* [(2007) 2 SCC 181], in which the Apex Court has quoted with approval its earlier judgment in *State of Orissa v. Dr. Binapani Dei* [AIR 1967 SC 1269]. According to it, when by reason of action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice must be followed. In such an

event, although no express provision is laid down on this behalf, compliance with principles of natural justice would be implicit. If a statute contravenes the principles of natural justice, it may also be held *ultra vires* Article 14 of the Constitution.

**191.** As a result, we hold that Dilip N. Shroff treats omnibus show-cause notices as betraying non-application of mind and disapproves of the practice, to be particular, of issuing notices in printed form without deleting or striking off the inapplicable parts of that generic notice.

Since there is failure on the part of Ld.AO to frame specific charge against the assessee, the penalty would not be sustainable in the eyes of law as held by Hon'ble Jurisdictional High Court in the above decision after considering catena of judicial pronouncements on the issue.

9. Another aspect of the matter is that returned income filed by the assessee has ultimately been accepted by the revenue. The concealment of income or furnishing of inaccurate particulars of income has to be in the return of income filed by the assessee as held by Hon'ble Delhi High Court in **CIT V/s SAS Pharmaceuticals (335 ITR 259)**. The relevant observations were as follows: -

15. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income-tax return filed by it. There is sufficient indication of this in the judgment of this Court in the case of CIT v. Mohan Das Hassa Nand [1983] 141 ITR 203 / 13 Taxman 328 and in Reliance Petroproducts (P.) Ltd. (supra), the Supreme Court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income-tax return filed by the assessee. This view gets supported by Explanation 4 as well as Explanations 5 and 5A to section 271 of the Act as contended by the learned counsel for the respondent.

16. No doubt, the discrepancies were found during the survey. This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under the provisions of section 271(1)(c) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Section 271(1)(c) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the income-tax return and offered the surrendered amount for the purposes of tax.

Going by the ratio of aforesaid decision, in view of the fact that returned income has finally been accepted by the revenue, no penalty could be imposed.

10. Viewed from any angle, the impugned penalty is not sustainable in the eyes of law. By deleting the same, we allow the assessee's appeal and dismiss the appeal preferred by revenue.

11. The assessee's appeal ITA No.1732/Mum/2020 stand allowed whereas revenue's appeal ITA No.2000/Mum/2020 stand dismissed.

*Order pronounced on 17<sup>th</sup> June, 2021*

**Sd/-**  
**(C.N. Prasad)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**  
**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 17/06/2021  
Sr.PS, Jaisy Varghese

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**