

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC" MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No. 4198/MUM/2019
Assessment Year: 2005-06
&
ITA No. 4199/MUM/2019
Assessment Year: 2010-11
&
ITA No. 4200/MUM/2019
Assessment Year: 2011-12
&
ITA No. 4201/MUM/2019
Assessment Year: 2012-13**

Mr. Mohan Manoj Dhupelia,
12-13, Esplanade, 3rd floor, 3, A.K.
Nayak Marg, Fort,
Mumbai-400 001.

PAN No. AAIPD 4113 F

Appellant

Vs. The Deputy Commissioner of
Income Tax, Central Circle-1(1),
Mumbai.

Respondent

Assessee by : Mr. K. Shivaram, AR
Revenue by : Mr. Sanjay J. Sethi, DR

Date of Hearing : 10/08/2021
Date of pronouncement : 05/10/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeals have been filed by the assessee challenging the order of even date 25th April 2019, passed by the learned Commissioner of

Income Tax (Appeals)-54, Mumbai, for the assessment years 2005-06, 2010-11, 2011-12 and 2012-13.

2. The common issue raised by the assessee in all these appeals, except variation in figures, relates to levy of penalty under section 271(1)(c) r/w Explanation 1(A) of the Act on addition of notional interest income accruing on alleged deposit of ₹ 2,34,64,398 with LGT Bank Liechtenstein in the name of Ambrunova Trust.

3. The assessee before is an individual. During the year under consideration, the assessee had earned salary income, share of profit from firms, capital gains and income from other sources. For the year under consideration, the assessee had electronically filed his return of income on 30th June, 2010, declaring total income of ₹13,41,895/-. The return of the assessee was selected for scrutiny by the Assessing Officer. In response to notices, the assessee appeared before the Assessing Officer from time to time and furnished various details and explanations called for. However, disregarding the details and explanations furnished, the Assessing Officer assessed the income at ₹16,45,154/- by making an addition of ₹3,03,259/- on account of unaccounted interest/benefit on the deposits/asset derived from LGT Bank, Liechtenstein in the name of Ambrunova Trust. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) r/w section 274 of the Act. The assessee being aggrieved by the said order, filed appeal before the first appellate authority.

4. The learned CIT(A) confirmed the levy of penalty under section 271(1)(c) r/w Explanation 1(A) of the Act of on addition of notional interest income

accruing on alleged deposit of ₹2,34,64,398/- with LGT Bank Liechtenstein in the name of Ambrunova Trust.

5. Before us, the learned Counsel for the assessee submitted that there is no concealment of income in terms of Explanation 1(A) to section 271(1) (c) of the Act as the assessee had offered bona fide explanation and such explanation has not been found to be false. He further submitted that no penalty for concealment of income can be made on the addition made on estimated and notional basis and based on conjuncture and surmises to the income of the assessee which do not tantamount to the concealment of income. The learned Counsel for the assessee further submitted that the appeal of the lead year i.e., assessment year 2002-2003 in quantum proceedings is admitted by Hon'ble Jurisdictional High Court in Appeal No.755 of 2015, in January, 2018, hence it is apparent that the addition is debatable, hence penalty cannot be levied u/s. 271(1)(c), in the light of law laid down by Hon'ble Jurisdictional High Court in the case of CIT v/s Dhariwal Industries Ltd, Appeal No.1129, 1133 & 1136 of 2016 dated September. 2013 and CIT v/s M/s. Advaita Estate Development Pvt. Ltd. in Appeal No.1498 of 2014 dated 17th February, 2017. The learned Counsel while concluding submitted that the Notice dated 19'n March 2013, issued under section 274 of the Act did not specify the charges for which the penalty proceedings under section 271(1)(c) of the Act.

6. The learned Departmental Representative relied upon the order of the authorities below and submitted that the quantum appeal is against the assessee and pending before Hon'ble High Court.

7. Considered the rival submissions and perused the material on record. We find that the Assessing Officer did not strike off either of the two limbs namely whether the assessee concealed the particulars of income or furnished inaccurate particulars of such income, although, even if it was to be levied, it was a case of furnishing of inaccurate particulars of income. The attention of the Bench was also invited to the full Bench decision of the Hon'ble Bombay High Court in Mohd. Farhan A. Shaikh Vs. Dy. CIT, [2021] 125 taxmann.com 253 (Bom.) has considered this very issue.

8. Before us, it is brought to our notice that in the case of M/s.Bhavya Shashank Shanbhag v. Dy. Commissioner of Income Tax in ITA No. 4630, 4631/M/2019, the Co-ordinate Bench has deleted the similar issue of penalty based on defective notices issued by the AO. The relevant findings of the Co-ordinate Bench is reproduced below :

"3. We have heard rival submissions and perused the materials available on record. We find that assessee for both the assessment years vide ground No.1(e) had raised the preliminary technical ground that in the show-cause notice issued by the ld. AO u/s.274 r.w.s. 271(1)(c) of the Act, he had not struck-off the irrelevant portion and that the ld. AO had not specified the specific offence committed by the assessee by stating as to whether the assessee has concealed his particulars of income or had furnished inaccurate particulars of income.

3.1. We find that this issue is no longer res-integra in view of the Full Bench decision of the Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A Shaikh vs. DCIT reported in 434 ITR 1 (Bom). The relevant portion of the said order is reproduced hereunder:-

“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, Smt. Kaushalya case (supra) 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 onto 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". Smt. Kaushalya case (supra) 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 Smt. Kaushalya case (supra). 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 Case (supra) 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 case (supra), 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 case (supra), 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 Case (supra) 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] 27 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 Case (supra) 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.

3.2. Respectfully following the aforesaid decision, we hold that the penalty levied by the ld. AO for both the assessment years is hereby directed to be deleted.

3.3. *Since the relief is granted to the assessee on this aspect by adjudicating the ground No.1(e), the other grounds raised by the assessee for both the years on legality of levy penalty as well as on merits of the case are not adjudicated herein and the same are hereby left open."*

9. Respectfully following the above decision, we also deemed it fit and appropriate to delete the penalty levied by the AO in assessment year 2005-06, 2010-11, 2011-12 & 2012-13. Accordingly, the appeals filed by the assessee are allowed.

10. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the open Court on 05/10/2021.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 05/10/2021

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Assistant Registrar)
ITAT, Mumbai