

आयकर अपीलिय अधिकरण
मुंबई पीठ "एच "
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम. बालगणेश, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 6504/मुं/2019 (नि. व. 2004-05)
ITA NO.6504/MUM/2019(A.Y.2004-05)

Shri Kirit Kadecha,
Room No.1, Sai Sadan,
Roshan Nagar, Chandavarkar Road,
Borivali West, Mumbai 400 092
PAN: AGHPK-4337-R

..... अपीलार्थी /Appellant

बनाम Vs.

The ITO-32(2)(2),
Room No.108, 1st Floor, C-11,
Bandra Kurla Complex,
Mumbai 400 051

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : None

प्रतिवादी द्वारा/Respondent by : Ms. Smitha Nair

सुनवाई की तिथि/ Date of hearing : 31/01/2022

घोषणा की तिथि/ Date of pronouncement : 31/01/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax(Appeals)-44, Mumbai [in short 'the CIT(A)'] dated 26/07/2019 for the assessment year 2004-05, confirming levy of penalty u/s 271(1)(c) of the Income Tax Act,1961 (in short 'the Act').

2. The assessee in appeal has assailed levy of penalty u/s 271(1)(c) of the Act, inter-alia, on the ground that notice issued u/s. 274 r.w.s. 271(1)(c) of the Act is defective as the irrelevant charge in the notice has not been struck off by the Assessing Officer.

3. The brief facts of the case as emanating from records are: In assessment proceedings u/s. 143(3) r.w.s. 147 of the Act, the Assessing Officer made addition of Rs.7,00,000/- on account of undisclosed income. The Assessing Officer initiated penalty proceedings u/s. 271(1)(c) of the Act. Notice u/s 274 r.w.s. 271 of the Act dated 15/12/2011 was served on the assessee. The Assessing Officer vide order dated 29/12/2017 levied penalty of Rs.2,33,060/- for concealment of income in respect of addition made in assessment order. The assessee carried the issue in appeal before the CIT(A) assailing levy of penalty. The CIT(A) dismissed the appeal of assessee, hence, the present appeal before the Tribunal. Before the Tribunal the assessee has assailed levy of penalty on merits as well as on the legal ground pointing defect in the notice issued u/s 274 r.w.s. 271 of the Act.

4. Repeated notice of hearing of appeal were sent to the assessee on the address mentioned in Form No.36. Some of the notices sent to the assessee have been received back unserved by the Postal Authorities with the remark "Left". Effort was also made to serve the assessee through the office of DR. The Income Tax Officer in report dated 26/08/2021 has stated that the assessee is not available at the address mentioned in Form No.36. The assessee has not revised Form No.36 intimating his current address. Since, the time appeal has been listed for hearing for the first on 19/12/2021 none has appeared on behalf of the assessee. It seems that the assessee is not

interested in pursuing his appeal, therefore, this appeal is taken up for hearing with the assistance of Id. Departmental Representative and material available on record.

5. Ms. Smitha Nair Representing the Department vehemently supported the findings of CIT(A) and prayed for dismissing appeal of the assessee.

6. We have heard the submissions made by Id. Departmental Representative and have examined the orders of authorities below, as well as, copy of the notice issued u/s 274 r.w.s. 271 of the Act dated 15/12/2011. A perusal of the aforesaid notice reveals that the notice has been issued to the assessee in a pre-printed performa. Both the charges of section 271(1)(c) of the Act i.e. “concealing particulars of income” or “furnishing inaccurate particulars of income” are mentioned in the said notice. The irrelevant charge/limb of section 271(1)(c) of the Act has not been struck off by the Assessing Officer in the notice.

7. In the present case, we further observe that it is not clearly emanating from the assessment order as to under what limb of section 271(1)(c) of the Act, the Assessing Officer wants to initiate penalty proceedings u/s. 271(1)(c) of the Act. In the penultimate paragraph of the assessment order the Assessing Officer has observed as under:-

“Penalty proceedings u/s 271(1)(c) of the Act are initiated separately for furnishing inaccurate particulars leading to concealment of income.”

The Hon'ble Apex Court in the case of T. Ashok Pai vs. CIT, 292 ITR 11 has held that concealment of income and furnishing inaccurate particulars of income carry different connotations. Hence, these two expressions/charges cannot be

used interchangeably or to amplify each other. Undisputedly, the Assessing Officer can initiate penalty under section 271(1)(c) of the Act on both the charges, if the facts leading to addition so warrants. In that situation, the Assessing Officer has to record satisfaction for invoking both charges of section 271(1)(c) of the Act explicitly. Therefore, in our considered view the manner in which the Assessing Officer has recorded his satisfaction itself is ambiguous. It appears that the Assessing Officer is not clear as to under which limb of section 271(1)(c) of the Act, penalty is to be initiated. The ambiguity in the mind of Assessing Officer is further reflected in the notice issued u/s 274 r.w.s. 271 of the Act. The Assessing Officer did not strike off irrelevant charge of section 271(1)(c) of the Act in the pre-printed performa notice, thus, making the notice vague and defective.

8. The Full Bench of Hon'ble Bombay High Court in the case of Mohd.Farhan A. Shaikh vs. DCIT, 434 ITR 1 has held that the notice issued without striking off irrelevant clause would make the notice ambiguous and hence, defective. Consequently, the entire penalty proceeds would be vitiated. For the sake of completeness the question before the Hon'ble Full Bench and the relevant extract of the decision is reproduced herein under:

“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—vitate 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."

Thus, in the facts of the case and in the light of decision of Hon'ble Bombay High Court (supra), we hold that the notice issued under section 274 r.w.s. 271 of the Act is defective, hence, the subsequent penalty proceedings arising therefrom are vitiated.

9. In the result, the impugned order is quashed and appeal of the assessee is allowed.

Order pronounced in the open court on Monday the 31st day of January, 2022.

Sd/-

(M. BALAGANESH)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 31/01/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित **Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai