

IN THE INCOME TAX APPELLATE TRIBUNAL  
“E” BENCH, MUMBAI  
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &  
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 258/Mum/2021

(A.Y: 2014-15)

Shoreline Hotel Ltd, 29 Dar-Ul-Habib, Marine Drive, Churchgate, Mumbai – 400023.	Vs.	DCIT, CC-1(2) Old CGO Bldg, 9 <sup>th</sup> Floor, Pratishta Bhavan, M.K. Road Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCS1380B		
Appellant	..	Respondent

Appellant by :	Mr. Anuj Kisnadwala. AR
Respondent by :	Mr. Vivek Upadhay. DR

Date of Hearing	12.01.2022
Date of Pronouncement	18.01.2022

आदेश / O R D E R

**PER PAVAN KUMAR GADALE JM:**

The assessee has filed the appeal against the order of the CIT(A)-47, Mumbai passed u/s 271(1)(c) and 250 of the Act. The assessee has raised the following grounds of appeal

- 1. On the facts and circumstances of the case and in law the Ld. CIT(A) erred in confirming the penalty of Rs. 11,94,808/- u/s 271(1)(c) of the Act.*
- 2. The Ld. CIT(A) erred in not appreciating the fact that the notice issued does not make any specific charge on which penalty proceedings have been initiated and further the*

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*penalty being levied on estimate basis the same needs to be cancelled.*

*3. The appellant craves leave to add, alter or amend any grounds of appeal at the time of hearing.*

2. The Brief facts of the case are that the assessee company is carrying on the business of Hotel services. The assessee has filed the return of income for the A.Y 2014-15 on 30.09.2014 with a total income of Rs. 84,940/-The assessee has filed the revised return of income on 20.11.2014 with the same total income but with rectification in claim of TDS and the return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire are issued. In compliance, the Ld. AR of the assessee appeared from time to time and submitted the details and the case was discussed. The A.O has received the information from DGIT(Inv)Mumbai that the assessee is beneficiary of accommodation entries being the alleged bogus purchases of Rs. 84,53,245/- whereas the A.O has issued notice u/s 133(6) on the four parties to test check the genuineness of the transactions. But the notices were returned by the postal authorities with remark 'not known'. The assessee has submitted further details and information of the transactions but the A.O was not satisfied with the information and has observed

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that the assessee has failed to discharge the burden of genuineness of the purchases from the entities and made 100% addition of purchases of Rs.84,53,244/-and assessed the total income of Rs.1,69,48,250/- and passed the order u/s 143(3) of the Act on 30.09.2016.

3. Subsequently, the A.O. has initiated penalty proceedings u/s 271(1)(c) of the Act. In the course of penalty proceedings, it was brought to the knowledge of the assessing officer that the assessee has filed an appeal with the CIT(A) on the quantum additions on account of bogus purchases. The CIT(A) relied on the facts and judicial decisions and observed that the books of accounts were rejected u/s 145(3) of the Act and only profit element embedded in the bogus purchases has to be taxed and restricted the addition to the extent of 17% of the purchases. The assessee has submitted the explanations referred at Para 2.2 of the penalty order. Whereas, the A.O has dealt on the findings of the scrutiny assessment and the CIT(A) decision and levied a penalty of Rs.11,94,808/-and passed the order u/s 271(1)(c) dated 30.03.2019.

4. Aggrieved by the order the assessee has filed an appeal before the CIT(A).Whereas the CIT(A) has dismissed the assessee appeal and confirmed the action of the A.O in levying the penalty. Aggrieved by the CIT(A)

order, the assessee has filed a appeal before the Honble Tribunal.

5. At the time of hearing the Ld. AR submitted that, against the CIT(A) order granting partial relief to the assessee by restricting the addition of bogus purchases @ 17% considering the profit element embedded, the revenue has filed the appeal before the Hon'ble Tribunal and was dismissed. Further, the CIT(A) has erred in not appreciating fact that the notice issued by the A.O does not specify any charge on which penalty proceedings have been initiated and the penalty has been levied on estimated income, which is not sustainable. The Ld.AR supported the submissions relying on the Coordinate Bench of the Honble Tribunal decision in the assessee's own case and prayed for deletion of penalty. Contra, the Ld. DR supported the orders of the lower authorities.

6. We have heard the rival submissions and perused the material on record. The sole crux of the disputed issues as envisaged by the Ld. AR that the penalty levied u/s 271(1)(c) of the Act cannot be sustained on two aspects (i) The notice issued for levy of penalty does not specify the charge or limb, whether the charge is for concealment of income or furnishing of inaccurate particulars of income and (ii) the penalty cannot be

levied on estimated income. We find in the assessee's own case The Hon'ble Tribunal has granted the relief relying on the decision of the Hon'ble High Court of Bombay in ITA No. 2044/M/2020 dated 16.12.2021 dealt at page 3 to 11 Para 5 to 10 of the order which is read as under:

*5. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. In so far as factual aspect of the issue is considered, there is no dispute that certain purchases claimed to have been made by the assessee during the year were treated as non genuine by the AO and entirely disallowed. However, learned Commissioner (Appeals) restricted the disallowance to 17% of the alleged non-genuine purchases. It is a fact on record that aforesaid decision of learned Commissioner (Appeals) was also upheld by the Tribunal while deciding appeal filed by the revenue and cross objection by the assessee. It is a fact on record that based on addition sustained by learned Commissioner (Appeals), the AO has imposed penalty under section 271(1)(c) of the Act.*

*6. While recording satisfaction for initiating penalty proceedings in the assessment order, the AO has observed that the assessee had furnished inaccurate particulars of income and thereby concealed the income. Whereas, in the order passed imposing penalty under section 271(1)(c) of the Act, the AO has alleged furnishing of inaccurate particulars of income. On a perusal of the show cause notice dated 25.03.2015 issued under section 274 r.w.s. 271(1)(c) of the Act in a printed format, it is noticed that the AO has not struck off or deleted the unnecessary words to specify the exact limb for which he intended to impose penalty under section 271(1)(c) of the Act. This is the uncontroverted factual position emerging from record. Thus, the issue which requires examination is, whether the penalty proceeding has been validly initiated with proper application of mind.*

7. In our view, the issue is no more *res integra* in view of the decision of the Hon'ble jurisdictional High Court in case of *Mohammed Farhan A Shaikh vs DCIT (supra)*. In fact, while dealing with identical issue, the coordinate Bench in case of *DCIT vs. Thane District Central Co-operative Bank Ltd. (supra)* has followed the aforesaid decision of the Hon'ble jurisdictional High Court and has held as under:-

“9. We have considered rival submissions and perused materials on record. Undisputedly, the assessee has challenged the validity of the penalty order passed under section 271(1)(c) of the Act because of the defective show cause notice issued by the assessing officer under section 274 r.w.s. 271(1)(c) of the Act. Pertinently, a perusal of the show cause notice dated 14-03-2017 issued under 274 r.w.s. 271(1)(c) of the Act, a copy of which is at page 46 of the paper book, makes it clear that the assessing officer has not mentioned the specific limb of section 271(1)(c) of the Act applicable to assessee, by striking off the inapplicable words. In fact, the assessing officer had again issued a notice dated 19-06-2017 to the assessee requiring to show cause why penalty under section 271(1)(c) of the Act should not be levied. However, a reference to the said notice, a copy of which is at page 47 of the paper book, would reveal that, though, the assessing officer has referred to his earlier show cause notice issued in the printed form; however, in the subsequent notice also he has not mentioned the specific limb of section 271(1)(c) of the Act for which he intended to impose penalty. Whereas, a perusal of the assessment order passed for the impugned assessment year clearly reveals that the assessing officer has initiated proceeding for imposition of penalty under section 271(1)(c) of the Act alleging furnishing of accurate particulars of income.

10. Further, a careful perusal of the impugned penalty order also reveals that the assessing officer has ultimately levied penalty under section 271(1)(c) of the Act on the charge of furnishing of inaccurate particulars of income. This fact is clearly evident from the observations of the assessing officer at paragraph 8 and 9 of the penalty order. Thus, a conjoint

reading of the assessment order and penalty order would reveal that the assessing officer, from the very beginning, intended to levy penalty under section 271(1)(c) of the Act for furnishing of inaccurate particulars of income. Whereas, in the show cause notice issued under section 274 r.w.s. 271(1)(c) of the Act on 14-03-2013, the assessing officer has mentioned both the limbs of section 271(1)(c) of the Act without striking off the words "concealed the particulars of your income". Even, in the subsequent show cause notice issued on 09-06-2017, though, not in a printed form, the assessing officer has still not disclosed the exact offence for which he intended to levy penalty.

11. Further, the following observations of the assessing officer in the remand report furnished to learned Commissioner (Appeals), as reproduced in the impugned order of learned Commissioner (Appeals), would set at rest the factual position regarding the specific limb for which penalty proceeding was initiated:- "As would be seen, the assessing office has observed as under:-

"(b) In the quantum order, after due deliberations, it is clearly indicated by the AO that the penalty proceeding is initiated for furnishing inaccurate particulars which shows due application of mind qua penalty proceedings. However, while notice u/s 274 r.w.s. 271(1)(c) was issued for initiation of penalty proceedings striking off the irrelevant point was not done inadvertently." Thus, there is a clear admission by the assessing officer that the show cause notice issued under section 274 r.w.s. 271(1)(c) of the Act is an omnibus/generic notice. 12. Keeping in view the aforesaid factual position, let us deal with the submissions of learned Departmental Representative. In this regard, the following submissions would be relevant:-

"The penalty notice has charged the assessee with both the limbs of concealment and furnishing of inaccurate particulars. The assessee has in fact met this charge in its reply at S no 2,4,7,9, and 10 reproduced at para 5 of the penalty order. The penalty order accordingly levied penalty u/s 271(1) (c) due to

*both the limbs of concealment and furnishing of inaccurate particulars being established.”*

*As could be seen from the above quoted portion, learned Departmental Representative has tried to make out a case that the assessing officer had intended to levy penalty under both the limbs of section 271(1)(c) of the Act. This submission of learned Departmental Representative is contrary to the facts on record. When the assessing officer has unequivocally accepted that penalty proceeding was initiated for the offence of furnishing inaccurate particulars of income, we are afraid, at this stage learned Departmental Representative cannot improve upon the admitted factual position.*

*13. Having dealt with the factual aspect, at this stage, it would be relevant to examine the Full Bench decision of the hon'ble jurisdictional High Court in case of Mohammed Farhan A Shaikh vs DCIT (supra). After conspectus of a catena of decisions on the impact of non striking off of inappropriate words in the show cause notice issued under section 274 qua the validity of the penalty proceeding, the hon'ble jurisdictional High Court has observed as under:-*

*“179. Besides, the prima facie opinion in the assessment order need not always translate into actual penalty proceedings. These proceedings, in fact, commence with the statutory notice under s. 271(l)(c) r/w s. 274. Again, whether this prima facie opinion is sufficient to inform the assessee about the precise charge for the penalty is a matter of inference and, thus, a matter of litigation and arising out of uncertainty.*

*180, One course of action before us is curing a defect in the notice by the referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice — and that prevention takes just a tick mark. Prudence demands prevention is better than cure. Answers :*

*Question No. 1 : If the assessment order clearly records satisfaction for posing penalty on one or the other, or both grounds mentioned in s. 271(2)(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 s. 271(1)(c) r/w.s. 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 coireet 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 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". 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 s. 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 AO 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 AO 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 any ambiguity. Therefore, Dilip N. Shroff disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays nonapplication 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, s. 271(l)(c) is one such provision. With calamitous, albeit the commercial, consequences, the provision is mandatory and brooks no trifling with or dilution. For a further precedential prop, we may that refer to Rqjesh Kumar & Ors. vs. CIT (2006) 206 CTR (SC) 175 : (2007) 2 SCC 181, in which the apex Court has quoted with approval its earlier judgment in State of Orissa us. 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 statue contravenes the principles of natural justice, it may also be held ultra vires Art. 14 of the Constitution.*

*191. As a result, we hold that Dilip N. Shroff treats omnibus showcause 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.”*

*14. A careful reading of the aforesaid observations/finding would make it amply clear that not only the hon'ble High Court has held that the earlier decision in case of Smt. Kaushalya & Others (1995) 216 ITR 260 does not lay down the correct proposition of law, but they have also very clearly and categorically held that the defect in the show cause notice by not striking off the irrelevant matter vitiates the penalty proceedings. This is so because the assessee must be informed of the grounds of the penalty proceedings only through the statutory notice. The hon'ble Court has observed that an omnibus notice suffers from the vice of vagueness. Proceeding further, the hon'ble Court has held that a penalty provision even for civil consequences, must be construed strictly and ambiguity, if any, must be resolved in assessee's favour. While coming to such conclusion, the hon'ble jurisdictional High Court has also referred to the decision of the hon'ble Supreme Court in case of Dilip N Shroff (supra), wherein, the hon'ble Supreme Court disapproved the routine ritualistic practice of omnibus show cause notice issued in printed form without deleting or striking off the inapplicable part, which betrays non application of mind. Therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.*

*15. Therefore, if we apply the ratio laid down in the aforesaid Full Bench decision of the hon'ble jurisdictional High Court to the facts of the present appeal, it can be seen that the assessing officer has issued a generic show cause notice in a printed form without mentioning the specific charge by striking off the inapplicable words. Thus, the show cause notice issued under section 274 r.w.s section 271(1)(c) is a vague and omnibus notice revealing complete nonapplication of mind by the assessing officer. Thus, viewed in the light of the ratio laid down by the Full Bench of the hon'ble jurisdictional High Court (supra), the penalty order passed under section 271(1)(c) of the Act, has to be declared as invalid. In fact, the Division Bench decision of the hon'ble jurisdictional High Court in case*

*of Ventura Textiles Ltd vs CIT (supra) (also taken note of by the hon'ble Full Bench) also propounded similar legal principles.”*

*8. In our considered opinion, the ratio laid down in the aforesaid judicial precedent is clearly applicable to the facts of the present case. Thus, respectfully following the judicial precedents cited before us by learned Counsel for the assessee, we hold that the AO has issued the show cause notice under section 274 r.w.s. 271(1)(c) of the Act mechanically without proper application of mind and has failed to specify the specific charge for which he intended to impose penalty. Thus, show cause notice issued in a printed format being a vague and generic notice without specifying the specific charge, is invalid. Therefore, the entire proceeding leading to imposition of penalty under section 271(1)(c) of the Act is vitiated. In view of the aforesaid, order imposing penalty under section 271(1)(c) of the Act cannot be sustained. Accordingly, we delete the penalty imposed under section 271(1)(c) of the Act.*

*9. As far as the merits of the issue is concerned, since, we have already deleted the penalty imposed on the ground of invalid show cause notice issued under section 274 r.w.s. 271(1)(c) of the Act, there is no need to dwell upon the merits. Suffice to say, the contention of the assessee that based on addition made on purely guess work/estimation basis, penalty under section 271(1)(c) of the Act cannot be imposed, deserves to be upheld.*

*10. In the result, appeal is allowed.*

7. We find the facts of the case are similar and identical. The Ld. AR has referred to page 33 of paper book where the notice u/s 274 r.w.s 271(1)(c) was filed and cannot be disputed. We find the facts of the present case are similar as dealt by the Hon'ble Tribunal in the earlier assessment years. We follow the judicial

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precedence and find that even in this current assessment year, the A.O has not specified the charge, whether the charge is for concealment of income or furnishing of inaccurate particulars of income. Accordingly, we direct the Assessing officer to delete the penalty and allow the grounds of appeal in favour of the assessee.

8. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 18.01.2022.

Sd/-

(PRASHANT MAHARISHI)  
**ACCOUNTANT MEMBER**

Sd/-

(PAVAN KUMAR GADALE)  
**JUDICIAL MEMBER**

Mumbai, Dated 18.01.2022

KRK, PS

**आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :**

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

( Asst. Registrar)  
ITAT, Mumbai