

**IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA Nos.195 to 197/Mum/2021
(A.Ys.1998-99, 1999-2000 & 2002-03)**

Triumph International Finance India Limited, 10, Shroff Lane, Oxford Centre, Colaba Causway, Colaba, Mumbai – 400 005	Vs.	Joint Commissioner of Income-tax (OSD), Central Circle-7(1) Aayakar Bhavan, M.K. Road, Mumbai- 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACE0308A		
Appellant	..	Respondent

Appellant by :	Rajiv Khandelwal
Respondent by :	Dr. P. Daniel

Date of Hearing	09.02.2022
Date of Pronouncement	09.03.2022

आदेश / O R D E R

PER AMARJIT SINGH, AM:

All these three appeals of the assessee are based on identical issue and similar facts, therefore, for the sake of convenience these appeal are adjudicated together by taking ITA No. 196/Mum/2021 as the lead case and its finding will be applicable to the other two appeals. The assessee has filed the following grounds before us:

“The Commissioner of Income-tax (Appeals) - 49, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Joint Commissioner of Income-tax (OSD), Central Circle 7(1), Mumbai (hereinafter referred to as the Assessing Officer) in confirming the levy of penalty of Rs.84,03,212 under section 271(l)(c) of the Act.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have confirmed the levy of the impugned penalty under section 271(1)(c).

The appellants further, contend that there is total non-application of mind by the Assessing Officer inasmuch as he has initiated and levied the impugned penalty for both the limbs of section 271(l)(c) that is, for concealment of particulars of income and furnishing inaccurate particulars thereof; thus, the levy of the impugned penalty is without application of mind.

The appellants further, contend that there is total non- application of mind by the Assessing Officer inasmuch as he has referred to Explanation 1(B) to section 271(1) for the purpose of levying the impugned penalty for concealment of particulars of income and furnishing inaccurate particulars of income though Explanation 1(B) to section 271(1) is only applicable to concealment of particulars of income; thus, the levy of the impugned penalty is without application of mind.

The appellants crave leave to add to, alter or amend the aforestated ground of appeal.”

2. Fact in brief is that return of income declaring income of Rs.1,75,70,820/- was filed on 04.12.1999. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 19.12.2000. The assessment u/s 143(3) was finalized on 31.10.2002 determining total income at Rs.3,65,60,42,340/-. Simultaneously, penalty proceeding u/s 271(1)(c) was initiated vide issuing of notice u/s 274 r.w.s 271(1)(c) of the Act on 31.10.2002 for concealment and furnishing of inaccurate particulars of income. In the appeal the ld. CIT(A) has revised the total income at Rs.1,07,76,13,640/-. The ITAT vide order No. 4407/Mum/2004 and ITA No. 4876/Mum/2004 partly allowed the appeal of the department as well as assessee for statistical purposes. The ITAT had restored the two issue to the file of the ld. CIT(A) i.e (i) disallowance of set off brought forward losses and unabsorbed depreciation; (ii) allowance of depreciation of pharmaceutical division. The ld. CIT(A) held that the assessee was not eligible for carry forward of unabsorbed depreciation of the asset pertaining to pharmaceutical

business and also held that assessee was not entitled for depreciation of assets pertaining to pharmaceutical business. Therefore, the assessing officer issued show cause letter dated 19.02.2019 to the assessee as to why not penalty u/s 271(1)(c) of the Act be levied in respect of following disallowance addition:

Sr. No.	Description	Amount (Rs.)
1.	Disallowed depreciation	92,369
2.	Disallowed brought forward business Loss and unabsorbed depreciation	2,39,16,807
	Total	2,40,09,176

The A.O stated assessee has failed to submit any documentary evidences to substantiate its claim that the loss shown by the assessee was genuine and by not offering the above amount of Rs.24,04,09,176/-, the assessee has sought to eliminate its incidence of taxation by furnishing inaccurate particulars and has thereby concealed its actual income. Consequently, the assessing officer has levied penalty of Rs.84,03,212/- being 100% tax sought to be evaded.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

4. During the course of appellate proceedings before us at the outset the ld. Counsel contended that in the notice issued u/s 274 of the Act the assessing officer has not satisfied whether the penalty to be levied for concealment of income or furnishing inaccurate particulars of income. The ld. Counsel has placed reliance on the decision of jurisdictional High Court of Bombay in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom) wherein it is held that if there is a defect in not striking off the irrelevant matter the penalty cannot be levied. On the other hand

the ld. Counsel has placed reliance on the decision of the lower authorities.

5. Heard both the side and the perused the material on record. Without retreating the facts as elaborated above the assessing officer vide order u/s 271(1)(c) of the Act, dated 30.03.2019 has levied penalty of Rs.84,03,212/- being 100% taxed sought to be evaded in respect of disallowance of depreciation and disallowance of brought forward losses and unabsorbed depreciation as mentioned supra in this order. In para 5 of the penalty order the assessing officer categorically stated that the assessee has furnished inaccurate particulars of income and thereby concealment of its actual income in respect of the following addition:

“5. *In view of the above discussion it is amply clear that the assessee furnished inaccurate particulars of income and thereby concealment of its actual income in respect of the following disallowance/additions:*

<i>Sr. No.</i>	<i>Description</i>	<i>Amount (Rs.)</i>
1.	<i>Disallowed depreciation</i>	<i>92,369</i>
2.	<i>Disallowed brought forward business Loss and unabsorbed depreciation</i>	<i>2,39,16,807</i>
	<i>Total</i>	<i>2,40,09,176</i>

Thereafter, in para 13 of the penalty order the A.O has stated that assessee has sought to eliminate its incidence of taxation by furnishing inaccurate particulars as thereby concealed its actual income. The ld. Counsel has vehemently contended that assessing officer has not specified in the notice issued u/s 274 r.w.s 271(1)(c) of the Act whether the penalty is levied for concealment of income or furnishing inaccurate particulars of income. We have gone through the copy of notice u/s 274 r.w.s 271 of the I.T. Act, dated 30.10.2002 filed in the submission of the assessee dated 17.11.2002. The relevant part of the notice issued is reproduced as under:

“Whereas in the course of proceedings before me for the Assessment year 1999-2000 it appears that you have concealed the particulars of your income or furnished inaccurate particulars of such income.

You are hereby requested to appear before me within seven days from the receipt of this notice and show cause why an order imposing a penalty on you should not be made under section 271 of the Income Tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271.”

6. On perusal of the aforesaid notice it is clear that Assessing Officer has not specified whether the penalty is being levied on account of concealment of particulars of income or furnishing of inaccurate particulars of income. In this regard, we have gone through the case of Jurisdictional High court referred by learned counsel in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 125 taxmann.com 253 (Bombay), wherein the relevant Para of the head note is reproduced as under:-

“Section 271(1)(c), read with section 274 of the Income-tax Act, 1961 - Penalty - For concealment of income (Recording of satisfaction) - Whether where assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1)(c), a mere defect in notice-not striking off irrelevant matter would vitiate penalty proceedings - Held, yes - Whether since penalty proceedings culminate under a different statutory scheme that remains distinct from assessment proceedings, therefore, assessee must be informed of grounds of penalty proceedings only through statutory notice - Held, yes - Whether even if notice contains no caveat that inapplicable portion be deleted, it is in interest of fairness and justice that notice must be precise, it should give no room for ambiguity - Held, yes [Paras 181 and 188][In favour of assessee]”

7. Further, we have also perused the decision of co-ordinate Bench of the ITAT, Mumbai in the case of M/s Bhavya Shashank Shanbhag Vs. DCIT in ITA No. 4630Mum/2019 vide order dated 09.07.2021, wherein the co-ordinate Bench in identical issue and similar facts has deleted the penalty after following the decision of Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh (supra). The relevant part of the decision of co-ordinate Bench is reproduced as under:-

“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 nonapplication 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."

8. In the light of the decision of the co-ordinate Bench as elaborated above, there is nothing before us on hand to differ from the issue raised in the cases cited (supra) so as to take a different view on this issue. Therefore, since the issue on hand

being squarely covered following the principle of consistency, we find merit in the submission of the assessee and direct the Assessing Officer to delete the penalty since, the notice issued under section 274 read with section 271(1)(c) dated 31.10.2002 was bad in law. Since, we have deleted the penalty on account of invalid notice issued under section under section 274 read with section 271(1)(c) dated 31.10.2002, therefore other ground on merit are not require to be adjudicated.

9. The appeal of the assessee is allowed.

ITA Nos.195 & 197/Mum/2021

10. As the facts and the issue involved in both the appeals remains the same as were there before us in the appeal of the assessee for the immediately preceding year i.e ITA 196/Mum/2021 for A.Y. 1999-2000, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposing off both the appeals. Accordingly, on the same terms, the appeal filed by the assessee for A.Y. 1998-99 & 2002-03 in ITA Nos. 195 & 197/Mum/2021 are allowed.

11. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 09.03.2022

Sd/-
(Kuldip Singh)
Judicial Member

Sd/-
(Amarjit Singh)
Accountant Member

Place: Mumbai
Date 09.03.2022
Rohit: PS

आदेश की प्रतिलिपि ँ ग्रेषित/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 DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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