IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.5990/Mum/2019

(**निर्धारण वर्ष** / Assessment Year: 2009-10)

Memon Co-op Bank Ltd C/o Memon Co-op Bank Ltd, Patel & Sony Arcade, 234 Bellasis Road, Nagpada, Mumbai-400008.	**बनाम**/ Vs.	DCIT-1(3)(2) Aaykar Bhavan, M. K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAAT0066G		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Pankaj Toprani
Revenue by:	Ajay Chandra (DR)

सुनवाई की तारीख / Date of Hearing: 02/02/2022

घोषणा की तारीख /Date of Pronouncement: 08/03/2022

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 17.07.2019 passed by the Commissioner of Income Tax (Appeals)-03, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2009-10 wherein the penalty levied by the AO has been ordered to be confirmed.

2. The assessee has raised the following grounds: -

"a. On the facts and circumstances of the case the learned CIT(A) erred in confirming the penalty of Rs.70,61,337/- u/s 271(1)(c).

b. The learned C.1.T. (A) failed to appreciate that:

The assessee bank is no longer in banking business as the banking license was cancelled by RBI as per letter no UBD.MRO.BSS IV No. 10725/12.07.142/ 2010-11 dated 12.05.2011, the loss claimed is of no consequence as it cannot be adjusted in the future and therefore there is no loss to the revenue, which fact was indicated during the assessment proceedings.

All the facts relating to expenses which were debited to Profit & Loss Account were before the Assessing Officer and therefore it cannot be said that the assessee bank has deliberately concealed the particulars of such expenses. The assessee bank had no control over its accounts as the same including its computers etc, were taken over by the Bank of Baroda as per the direction of the Reserve Bank of India. As per latin maxim Lex Non Cogit Ad Impossibilia - meaning thereby that the law does not compel a man to do a thing which he cannot possibly perform, the assessee bank failed to substantiate the details of overdue interest reserve claimed in its return of income due to the fact that it had no control over its accounts as specific assets and liabilities and all the computers were taken over by Bank of Baroda as per the direction from Reserve Bank of India.

As per the decision of the Supreme Court in the case of T. Ashokpai v. CIT (292 ITR 11), it has been held that concealment refers to deliberate act on the part of the assessee to suppress the facts from the Assessing Officer. Mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

On similar facts the learned CIT(A) has deleted the penalty levied u/s 271(1)(c) for 2011-12 and 2012-13 assessment years. The department filed an appeal before the order of the CIT(A) before the Hon'ble

tribunal which has vide its order dated 28.02.2019 dismissed the appeal of the department.

c. The Learned CIT(A) ought to have deleted the penalty of Rs.25,70,61,337/-.

2. The appellant craves leave to amend or alter any ground or add a new ground at the time of hearing."

3. The brief facts of the case are that the assessee filed its return of income on 16.09.2009 declaring total income to the tune of Rs. Nil and claiming carry forward of loss of Rs.(-) 74,42,44,846/-. The assessment was completed u/s 143(3) on 09.11.2011 accepting the returned loss. Thereafter, the assessment was reopened u/s 147 of the Act and the assessment was completed by raising the addition to the tune of Rs.75,66,01,861/- resulting in the taxable income of the assessee to the tune of Rs.1,23,57,020/- as against the returned income of Rs.Nil. During the year under consideration, the assessee booked the expenditure of Rs.75,66,01,861/- on account of unrealized interest on NPS OD/CC A/c. Notice was given and after the reply of the assessee, the AO raised the addition to the extent of Rs.75,66,01,861/-. Notice to levy the penalty was given and after the reply of the assessee, the penalty to the tune of Rs.25,70,61,337/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the penalty, therefore, the assessee has filed the present appeal before us.

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the assessee has argued that the issue has duly been

covered by the decision of Hon'ble ITAT in the assessee's own case bearing ITA. No.4290/Mum/2017 for the A.Y.2011-12 dated 09.12.2019, therefore, the penalty is not liable to the sustainable in the eyes of law. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. The case bearing ITA. No.4290/Mum/2017 for the A.Y.2011-12 dated 09.12.2019 in the assessee's own case is on the file in which the relevant finding has been given as under: -

> *"5. We have heard the rival submissions and perused the orders of the authorities below. On a perusal of the order of the Tribunal in ITA.No.4291/Mum/2017 dated 28.02.2019, we find that identical issue came up before the Tribunal in assessee's own case for the A.Y. 2012-13 and the Tribunal deleted the penalty observing as under: -*
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> *"5. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have noted that during the assessment, the Assessing Officer noted that assessee bank is under liquidation since Financial Year 2010-11 and ceased to function except carrying out liquidation related activities. During the assessment, the Assessing Officer issued show-cause notice as to why the loss of Rs. 1.43 Crore should not be disallowed as assessee bank is in liquidation. The assessee could not furnish any detail pertaining to loss. The Assessing Officer thereby disallowed the loss of Rs. 1.43 Crore.*
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> *6. We have noted that the loss was disallowed as requisite details pertaining to loss were not furnished before the Assessing Officer. The penalty was levied by Assessing Officer on such disallowance vide its order dated 30.07.2015. Before the ld. CIT(A), the assessee urged that*

the operation of assessee bank were taken over by Bank of Baroda as per the direction of Reserve Bank of India. All its employees, branches and record including infrastructure became part of Bank of Baroda, hence, it was not possible to them for furnishing the various details of losses. The loss was disallowed due to non-submission of details. The ld. CIT(A) after considering the contention of assessee concluded that there was justifiable cause for non-submission of the details due to which the loss could not be substantiated being extraordinary nature of case and as there is no entry in existence. The loss claimed by assessee was voluntarily given up and determination of loss and further creating a demand is of no consequence. The ld. CIT(A) also concluded that loss claimed by assessee was voluntarily given up. The ld. CIT(A) also concluded that the Assessing Officer has not identified the type of particulars of income or concealment of income by the assessee merely not filing details called for, which was not in a position to be submit and claiming the loss which they have already given up. The ld. CIT(A) concluded that assessee has not concealed the income for invoking the provision of section 271(1)(c) of the Act. We have given the careful consideration to the finding of ld. CIT(A) and find that there was a sufficient and justifiable reasons that the assessee for not furnishing the requisite details of loss claimed by assessee. Moreover, the assessee has not claimed set off of loss against any future income. Therefore, we concur with the finding of ld. CIT(A)."

6. Facts being identical, respectfully following the said decision of the Tribunal in assessee's own case for the A.Y. 2012-13 we uphold the order of the Ld. CIT(A) in deleting the penalty imposed by the

Assessing Officer for the year under appeal i.e., A.Y. 2011-12. We order accordingly."

5. On appraisal of the above mentioned finding, we noticed that the penalty was levied on account of similar type of addition which was deleted by Hon'ble ITAT in the assessee's own case bearing ITA. No.4290/Mum/2017 for the A.Y.2011-12 dated 09.12.2019. Since the issue has duly been covered by decision of Hon'ble ITAT (supra), therefore, we are of the view that the penalty is not liable to be sustainable in the eyes of law. At the very outset, the Ld. Representative of the assessee has argued that the penalty notice nowhere speaks about specific limb to levy the penalty because the particular charge was not tick off in the notice, therefore, in the said circumstances, the penalty is not liable to be sustainable in the eyes of law, hence the order of the CIT(A) confirming the penalty order of the AO is wrong against law and facts and is liable to be set aside. In support of these contentions the Ld. Representative of the assessee has placed reliance upon the law settled in ITA. No.1154/M/2014 in the case of **CIT-11 Vs. Samson Perinchery and the order of the ITAT, Mumbai Bench in ITA. No.2555/M/2012 vide order dated 28.04.2017 titled as Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2).** However, on the other hand, the Ld. Representative of the Department has refuted the said contentions. The copy of notice dated 30.06.2017 is on the file in which the Assessing Officer nowhere specify any limb to levy the penalty because none of the charge was tick off in the notice. It is not in dispute that the penalty u/s 271(c) of the Act is leviable on account of the concealment of particular of income and on account of furnishing the inaccurate particulars of income. Both have different

connotations. In this regard, the Hon'ble Supreme Court has appreciated the distinction between both the limb in the case **Dilip N. Shroff 161 taxman 218 (SC).** As per the record, the assessment order speaks about levying the penalty on account of taken the action in view of provisions u/s 274 r.w.s. 271 (1)(c) of the Act but the notice nowhere specify any limb to levy the penalty. The notice is not justifiable in view of the law settled by the Bombay High Court in the case of **CIT-11 Vs. Samson Perinchery.** At the time of argument, the Ld. Representative of the assessee has also placed reliance upon the finding of the Hon'ble ITAT in ITA. No. 2555/M/2012 titled as **Meherjee Cassinath Holdings P. Ltd. Vs. ACIT, Circle-4(2).** The relevant para is hereby reproduced below:

> *"8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at*

the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T. Ashok Pal, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee-company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma 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. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718]"

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is

due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue

had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N. N. Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated

and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

"...The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this back ground, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the ld. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallized charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non-application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with."

6. This preposition has been confirmed by the Hon'ble Bombay High Court in the case of **Mohd. Farhan A. Shaikh Vs. DCIT, Central Circle-1 Belgaum reported in 125 taxmann.com 253 dated 11.03.2021**. In view of the above facts and circumstances, it is quite clear that the penalty is not leviable in accordance with law. Accordingly, we delete the penalty.

7. In the result, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 08/03/2022

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(AMARJIT SINGH)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 08/03/2022
Vijay Pal Singh (Sr. PS)

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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