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

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

आयकर अपील सं/ I.T.A. No.5075/Mum/2012
(**निर्धारण वर्ष** / Assessment Year: 2006-07)

Maharashtra State Electricity Distribution Co. Ltd. Prakashgad, 1st Floor, Anant Kanekar Marg, Station Road, Bandra (E), Mumbai-400051.	**बनाम**/ Vs.	ACIT, Circle-10(1) Aayakar Bhavan, Maharshi Karve Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAECM2933K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Niraj D. Sheth & Ketan Ved
Revenue by:	Shri T. Shankar (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 09/02/2022
घोषणा की तारीख /Date of Pronouncement: 28/04/2022

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 03.05.2012 passed by the Commissioner of Income Tax (Appeals)-21, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2006-07 wherein the penalty levied by the AO has been ordered to be confirmed.

2. The assessee has raised the following grounds: -

> *"1:1 The Commissioner of Income-tax (Appeals) has erred in upholding the penalty levied by the Assessing Officer u/s. 271 (1) (c) of the Income-tax Act, 1961 on the Appellant.*

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it has not furnished inaccurate particulars of income and /or concealed any particulars of its income and hence no penalty whatsoever can be levied on it u/s. 271 (1) (c) of the Income-tax Act, 1961 and the Commissioner of Income-tax (Appeals) ought to have held as such.

1:3 The Appellant submits that the impugned Order levying penalty u/s. 271 (1) (c) of the Income-tax Act, 1961 be struck down.

1:4 The Commissioner of Income-tax (Appeals) has erred in not admitting the additional evidence filed by the Appellant during the course of the appellate proceedings.

2:0 Re: General:

2:1 The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

3. The brief facts of the case are that the assessee company filed its return of income on 29.11.2006 declaring total income of Rs. Nil after claiming set off brought forward losses and unabsorbed depreciation of Rs.111,78,92,149/-. Thereafter, the assessee filed the revised return of income on 29.10.2007 declaring total income at Rs.Nil after claiming set off of brought forward losses amounting to Rs.111,78,92,149/-. Thereafter, assessment order u/s 143(3) of the Act was passed on 31.12.2008. During the assessment proceeding, it was observed that the recovery made in sum

of Rs.7.68 crores from temporary service connection was transferred to liabilities account by the assessee. Show cause notice dated 09.02.2011 was given. The reply was filed stating therein that the present year was the first year of assessment and on account of de-merger and dealing with the accounts being voluminous details and complex, the error was happened. The AO did not find the explanation justifiable and reject the accounts of the assessee and to make a huge addition to the total income of the assessee. It was held that the assessee furnished inaccurate particulars of income and concealed its income of Rs.7.68 crores. Subsequently, the AO issued the penalty notice and after the reply of the Assessee, levied the penalty to the tune of Rs.775,52,640/-. 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.

ISSUE NO. 1.1 TO 1.4

4. Under these issues the assessee has challenged the penalty notice. The assessment order dated 31.12.2008 u/s 143(3) speaks about the initiation of penalty on account of concealment/furnishing inaccurate particulars of income. The notice dated 12.03.2018 u/s 271(c) nowhere specify any limb to levy the penalty. However, both the limbs were tick off. After that the penalty order dated 31.03.2011 was passed to levy the penalty under both the limbs. According to the law, there should be specific limb to levy the penalty. In this regard, we relied upon the decision of Jurisdiction High Court in the case of **Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1.** The relevant para is hereby reproduced as under: -

*"**180**. One course of action before us is curing a defect in the notice by 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 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—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 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."*

5. Since in the present case, the notice dated 12.03.2018 lies at page no. 318 of the paper book nowhere specify any limb, therefore, the same is defective in view of the decision in the case of **Mohd. Farhan A. Shaikh(supra),** hence, the penalty is not liable to be sustainable in the eyes of law. So far as the issue on merits is concerned, undoubtedly the said addition to the tune of Rs.7.68 crores was made on account of observation made by 'Comptroller and Auditor General of India' (CAG). The CAG observed as under: -

CAG Observation

> *Liability for Expenses (Account Code: 46-400) Rs. 297.62 crore:*
>
> *21.(i)……*
>
> *22. This is overstated by Rs.7.64 crore due to non-accounting (*) of payment made before 31st March 2006 (WM section). Similarly, this includes Rs.3,62 lakhs (Rastapeth Urban Circle) being the amount of deposits received for temporary service connections between 1997-98 & 1999-2000. There are no corresponding dues recoverable for temporary service connections. This amount should have been transferred to Miscellaneous Income Account. This has resulted in overstatement of current liabilities and deficit by Rs.7.68 crore.*

6. The assessee has also replied to the observation as under: -

Appellant comments response thereto

> *Necessary rectification entries have been passed in the books during the financial year 2006-07. Further, necessary instructions have been issued to the concerned so that these types of mistakes should not recur in future.*

7. Subsequently, the account was corrected by assessee and in this regard the intimation was sent to the CAG. The said amount was corrected in the next assessment year and the tax was paid accordingly. The facts have been shown in the books of account. There is no concealment of particulars of income even the amount has been shown in wrong head which was pointed out by 'Comptroller and Auditor General of India' (CAG). In view of the decision in the case of **Reliance Petroproduct Vs. CIT (P) Ltd. 322 ITR 158 (SC)** also the penalty is not liable to be sustainable**.** We nowhere found the case to levy the penalty. Accordingly, on the merits also the penalty is not liable to be sustainable in the eyes of law. Accordingly, we delete the penalty.

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

Order pronounced in the open court on 28/04/2022

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

मुंबई Mumbai; दिनांक Dated : 28/04/2022
Vijay Pal Singh (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/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, 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**