

आयकर अपीलीय अधिकरण
मुंबई पीठ "जी "
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
आअसं. 1697/मुं/2018(नि.व.2010-11)
ITA NO. 1697/MUM/2018 (A.Y.2010-11)

Shri Sunder Katwaru Rajbhar,
C/o. Suresh N. Otwani,
305, 3rd Floor, Adamji Building,
413, Katha Bazar, Mumbai- 400 009
PAN: ABFPR-8942-L

: अपीलार्थी/ **Appellant**

बनाम/ Vs.

Income Tax Officer , Ward 3(4),
Rani Mansion, 2nd Floor,
Murbad Road,
Kalyan (W)- 421 301.

: प्रत्यर्थी/ **Respondent**

Appellant by : None
Respondent by : Shri Hoshang B. Irani
सुनवाई की तारीख/
Date of Hearing : 19/04/2022
घोषणा की तारीख /
Date of Pronouncement : 21/04/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax(Appeals)-1,Thane [in short 'the CIT(A)'] dated 22/12/2017 for the assessment year 2010-11 confirming levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. This appeal of the assessee is pending for adjudication since 2019. Except on the first date of hearing i.e. 16/04/2019 none appeared to represent the assessee despite repeated opportunities. Notices were sent to the assessee through RPAD on the address mentioned in Form No.36. Neither the assessee nor any Authorized Representative of the assessee appeared before the Bench in response of notices. No letter seeking adjournemtn was either filed by the assessee. It seems that the assessee is not keen to pursue his appeal. Therefore, we are taking up this appeal for adjudication with the assistance of Id. Departmental Representative and the material available on record.

3. The brief facts of the case as emanating from records are: The assessee filed his return of income declaring total income of Rs.2,99,740/- for the Assessment Year 2010-11. During the course of scrutiny assessment proceedings, the Assessing Officer found that the assessee has earned capital gain and the same was not offered to tax in the return of income. The Assessing Officer made addition of Rs.1,06,44,032/- on account of undisclosed Long Term Capital Gains. The Assessing Officer thereafter issued notice dated 22/03/2013 u/s.274 r.w.s 271(1)(c) of the Act. for levy of penalty. Thereafter, the Assessing Officer issued second notice for levy of penalty on 31/07/2015. The penalty order u/s. 271(1)(c) of the Act for levying penalty of Rs.21,92,670/- was passed by the Assessing Officer on 27/08/2015. The assessee filed appeal before CIT(A) against the order levying penalty. The CIT(A) vide impugned order dismissed the appeal of assessee, hence, the present appeal.

4. Shri Hoshang B. Irani representing the Department vehemently defended the impugned order and prayed for dismissing appeal of the assessee.

5. We have heard the submissions made by Id. Departmental Representative and have examined the material available on record. A perusal of the assessment order reveals that the Assessing Officer has made addition on account of Long term Capital Gain not disclosed by the assessee in the return of income, however, there is no satisfaction recorded in the assessment order for levy of penalty u/s 271(1)(c) of the Act in respect of the aforesaid addition. The only reference to the penalty u/s. 271(1)(c) of the Act is in the last line of the order, wherein the Assessing Officer has mentioned “ *Issue D.N & challan, issue show cause notice u/s.274 r.w.s. 271(1)(c) of the I.T.Act.*” Except the aforesaid line there is no other reference to levy of penalty in the assessment order in respect of the addition made. Thereafter, the Assessing Officer issued notice dated 22/03/2013 u/s. 274 r.w.s. 271(1)(c) of the Act for levy of penalty. The said notice is at page -8 of the paper book. A perusal of the notice reveals that both charges of section 271(1)(c) of the Act are mentioned in the said notice, the irrelevant charge is not struck off in the said notice. Second notice u/s. 271 r.w.s. 271(1)(c) of the Act was issued to the assessee on 31/07/2015. In the second notice as well both limbs of section 271(1)(c) of the Act i.e. concealed the particulars of income or furnished inaccurate particulars of income are mentioned.

6. In the instant case, we find that in the first place the Assessing Officer has not recorded his satisfaction for levy of penalty while passing the assessment order. It is a well settled law that consequent to any addition made in the assessment order levy of penalty u/s 271(1)(c) of the Act is not automatic. Before initiating penalty proceedings, the Assessing Officer has to record satisfaction in an unambiguous manner that the penalty proceedings

are being initiated separately for concealment of income or furnishing inaccurate particulars of income, as the case may be. In the present case, the absence of such satisfaction in the assessment order is conspicuous. In the absence of satisfaction penalty proceedings in respect of the addition made are not sustainable.

7. Secondly, we find that notice issued u/s. 274 and 271(1)(c) of the Act is defective as the irrelevant limb of section 271(1)(c) of the Act has not been struck off. The full Bench of the Hon'ble Jurisdictional High Court in the case of Mohammed Farhan A. Shaiek vs. DCIT reported as 434 ITR 1 (Bom) has held that non-striking of irrelevant matter in notice would make the notice defective and hence, would vitiate penalty proceedings. The relevant extract of the order is reproduced herein below:

“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—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 light of the law expounded by the Hon'ble Bombay High Court the notices issued in the present case under section 274 r.w.s. 271(1)(c) of the Act are held to be defective. Hence, the proceedings arising therefrom are vitiated.

8. In the light of our above findings, the impugned order is set-aside and the appeal by the assessee is allowed.

Order pronounced in the open Court on Thursday the 21st day of April, 2022.

Sd/-

(AMARJIT SINGH)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 21/04/2022

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy 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