

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "S.M.C." NEW DELHI]

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER, S.M.C.

आ.अ.सं./I.T.A No. 7804/Del/2019

निर्धारणवर्ष/Assessment Year: 2010-11

Shri Rakesh Gupta, H - 87, Ashok Viohar, Phase - 1, New Delhi - 110 052.	<u>बनाम</u> Vs.	ACIT, Circle : 34 (1), New Delhi.
PAN No. AEWPG7366R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितीकीओरसे / Assessee by :	N o n e;
राजस्वकीओरसे / Department by :	Shri Om Parkash, Sr. D. R.;

सुनवाईकीतारीख / Date of hearing :	18/05/2022
उद्घोषणाकीतारीख / Pronouncement on :	25/05/2022

आदेश / O R D E R

PER C. N. PRASAD, J.M. :

1. This appeal is filed by the assessee against the order of the Id. Commissioner of Income Tax (Appeals)-12, New Delhi, [hereinafter referred to CIT (Appeals)] dated 31.07.2019 in

sustaining the penalty levied under Section 271(1)(c) of the Income Tax Act, 1961 (the Act) for assessment year 2010-11.

2. The notices sent by the Registry through Speed Post with acknowledgement due posting the appeal for hearing on 23.08.2021 on 18.05.2022 have been served. In spite of service of notices on the address mentioned in Form No. 36, none appeared on behalf of the assessee nor any adjournment was sought. Therefore, this appeal is disposed of, on hearing the Id. DR.

3. The Id. DR submits that assessee filed return of income declaring income of Rs.8,26,970/-. In the return filed assessee has shown short term capital gain of Rs.17,800/- and whereas long term capital gain from trading in the scrips of Blue Print Securities Ltd. has been shown as 'NIL'. Based on the investigation Report of the Directorate of Investigation, Kolkata Wing, wherein it was identified that several listed donors of companies shares were used for generating bogus long term capital gain by various entry operators, but the beneficiaries who had approached with the entry operators. As per the information shared by the DIT, Investigation Wing, Kolkata, the assessee sold the shares of Blue Print Securities Ltd., at a consideration of Rs.20,65,500/-. Therefore, on the basis of this information the assessment of the assessee was re-opened under Section 148 of the Act on 31.03.2017. In compliance to the said notice assessee filed return declaring total taxable income of Rs.28,67,152/- by including income of Rs.20,58,021/- which was claimed earlier as exempt, as income from other sources. The Id. DR submits that since assessee has filed the return in compliance to notice under Section 148 of the Act and he himself has withdrawn the claim of exemption

claiming under Section 10(38) of the Act by surrendering the income of Rs.20,58,021/- as income from other sources, which was earlier claimed as exempt. Re-assessment was completed by the ITO treating the exemption claimed earlier by the assessee of Rs.20,58,021/- as addition under Section 68 of the Act. The ld. DR further submits that the Assessing Officer also added Rs.20,580/- being 1% of Rs.20,58,021/- as commission paid for the accommodation of the entry as unexplained investment under Section 69C of the Act. The Assessing Officer also initiated penalty proceedings under Section 271(1)(c) read with Section 274 of the Act and passed an order dated 20.06.2018 levying penalty of Rs.6,42,288/-. On appeal the ld. CIT (Appeals) sustained the penalty against which the assessee is in appeal before the Tribunal. The ld. DR strongly relied upon the orders of the ld. CIT (Appeals).

4. Heard the ld. DR perused the orders of the ld. CIT (Appeals) and also the penalty order passed by the AO. On perusal of the order of the ld. CIT (Appeals) it is noticed that the assessee before the ld. CIT (Appeals) contended that the notice issued for levy of penalty was bad in law. Before the ld. CIT (Appeals) the assessee contended that the notice dated 7.12.2017 issued for initiating the penalty proceedings is bad in law. It was contended that the language of the notice issued it is clear that the AO was not aware about the default for which the notice was being issued by him. In other words, it was contended that the AO was not aware as to whether the assessee had concealed the particulars of his income or have furnished inaccurate particulars of income. Placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC)

the assessee contended that the notice must be specific for a single default and in case the same is being issued for multiple defaults, no penalty can be levied. The assessee also relied on the decision of the Hon'ble Delhi High court in the case of New Holland Tractors India Pvt. Ltd. (ITA. No. 182/2002). Hon'ble Rajasthan High Court in the case of Raj Trading Co. 217 ITR 208 (Raj.) and also the decisions of Delhi Tribunal in the case of M.G. Contractors Pvt. Ltd. (ITA. No. 7034/Del/2014) and Poysha Goyal (ITA. No. 1721/Del/2013). However, it is observed that the Id. CIT (Appeals) referring to the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Smt. Kaushlaya 216 ITR 660 (Bom.) and also the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Zoom Communications Pvt. Ltd. 327 ITR 51 (Del.) sustained the penalty levied by the Assessing Officer.

5. It is observed that an identical issue came up before the Hon'ble Bombay High Court (full bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh vs. ACIT [434 ITR (1)] and the Hon'ble High Court considering its earlier decision in the case of CIT Vs. Smt. Kaushlaya (supra) held as under:

"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(l)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiating 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(l)(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 Kaushaiya does not lay down the correct proposition of law.

Question No.2: Has Kaushaiya failed to discuss the aspect of 'prejudice'?

184. Indeed, Kaushaiya did discuss the aspect of prejudice. As we have already noted, Kaushaiya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushaiya, "fully knew in detail the exact charge of the Revenue against him". For Kaushaiya, 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". Kaushaiya does 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 Kaushaiya. 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 DUip N. Shroff, 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, 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 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, section 271(l)(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[74], in which the Apex Court has quoted with approval its earlier judgment in State of Orissa v. Dr. Binapani Dei[75]. 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 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.

Conclusion: We have, thus, answered the reference as required by us; so we direct the Registry to place these two Tax Appeals before the Division Bench concerned for further adjudication."

6. As could be seen from the above the Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT [(2021) 434 ITR 1 (Bom)] while dealing with the issue of non-strike off of the irrelevant part in the notice issued u/s.271(l)(c) of the Act, held that assessee must be informed of the grounds of the penalty proceedings only through statutory notice and an omnibus notice suffers from the vice of vagueness. This decision squarely applies to the facts of the case. Respectfully following the said decision I hold that the initiation of penalty proceedings are bad in law. Consequently the penalty levied under Section 271(1)(c) of the Act is deleted.

7. As I have decided the appeal on preliminary and jurisdictional ground, the other grounds taken by the assessee on merits are not gone into as the same are academic at this stage.

8. In the result, the appeal of the assessee is allowed, as indicated above.

Order pronounced in the open court on : 25/05/2022.

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 25/05/2022.

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	19.05.2022
Date on which the typed draft is placed before the dictating member	20.05.2022
Date on which the typed draft is placed before the other member	25.05.2022
Date on which the approved draft comes to the Sr. PS/ PS	25.05.2022
Date on which the fair order is placed before the dictating member for pronouncement	25.05.2022
Date on which the fair order comes back to the Sr. PS/ PS	25.05.2022
Date on which the final order is uploaded on the website of ITAT	25.05.2022
Date on which the file goes to the Bench Clerk	25.05.2022
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	

