

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

ITA NO. 142/MUM/2021 (A.Y: 2011-12)

Pan India Networks Infravest Limited 135, Continental Building Dr. Annie Besant Road Worli, Mumbai - 400018 PAN: AACCP2459H	v.	DCIT- Central Circle – 7(1) Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri Jay Bhansali
Department by	:	Shri R.A. Dhyani
Date of Hearing	:	09.03.2022
Date of Pronouncement	:	25.05.2022

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)–49, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 11.12.2020 for the A.Y. 2011-12 in sustaining the penalty levied u/s. 271(1)(c) of the Act.
2. Assessee has raised following grounds in its appeal: -

"1. The Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)] erred in upholding the action of the Assessing Officer [hereinafter referred to as "the AO"] in levying penalty of Rs. 2,47,200/- under section 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on the disallowance of amalgamation expenses of Rs. 8,00,000/- made in the assessment order under section 143(3) dated 13.03.2015, for reasons which are wrong, contrary to the facts of the case and against the provisions of law.

2. The CIT(A) / AO failed to appreciate that in the instant case, the appellant has neither concealed any income nor furnished inaccurate particulars of income so as to warrant levy of penalty under section 271(1)(c) of the Act.

3. The CIT(A) / AO failed to appreciate that a disallowance arising out of bonafide mistake / oversight do not invite penal provisions under section 271(1)(c) of the Act.

4. The CIT(A) failed to appreciate that the action of the AO in initiating and thereafter levying penalty in a mechanical manner, unclear as to the charge for which penalty is leviable, is not sustainable in the eyes of law and therefore, the penalty order under section 271(1)(c) deserves to quashed.

5. The above grounds / sub-grounds are without prejudice to each other.

The appellant craves the leave to add, amend or alter all or any of the grounds of appeal."

3. At the time of hearing, Ld. AR stressed Ground No. 4 raised by the assessee and submitted that the penalty levied by the Assessing Officer is bad in law considering the fact that the notice issued by the Assessing Officer is defective, in this regard he brought to our notice Page No. 54 of the Paper Book which is the notice issued by the Assessing Officer u/s.271(1)(c) r.w.s. 274 of Income-tax Act, 1961 (in short "Act"). As per the notice received by the assessee the Assessing Officer has not indicated

on which limb of the penalty he is proceeding to levy the penalty. Further he brought to our notice Page No. 55 of the Paper Book which is the further show cause notice issued by the Assessing Officer dated 19.02.2019 and he submitted that even in this show cause notice Assessing Officer has not indicated on which limb of penalty he is proceeding to levy penalty. Further he brought to our notice Para No. 4 of the penalty order in which Assessing Officer discussed the issues involved in the quantum addition and at Para No. 5 Assessing Officer stated that this issues pertains to furnishing of inaccurate particulars of income further at Para No. 10.4, Assessing Officer stated that the assessee has filed inaccurate particulars of income which had been detected during the assessment proceedings. Further at Para No. 12 he stated that the assessee has sought to eliminate its incidence of taxation and has thereby concealed its income. Therefore, the Assessing Officer applied both the limbs to levy the penalty. He prayed that the penalty may be deleted due to defective notice.

4. Ld.Counsel for the assessee submits that Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. DCIT [(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(1)(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. Therefore, it is submitted that since the notice issued u/s.274 r.w.s. 271(1)(c) of the Act did not specify the limb for which or the charge for which it was issued the penalty order passed pursuant to such notice is bad in law. It is submitted that the Full Bench decision of the Hon'ble Jurisdictional High Court squarely applies to the facts of the assessee's case.

5. On the other hand, Ld.DR relied on the orders passed by the lower authorities.

6. Considered the rival submissions and material placed on record, we observe from the submissions made by the Ld. AR that notice issued u/s.271(1)(c) r.w.s. 274 of the Act in which Assessing Officer failed to indicate on which limb of penalty he is proceeding to levy the penalty. Further Assessing Officer has issued show cause notice and even in such show cause notice also he failed to indicate the proceedings he has initiated. We have perused the orders of the authorities below and the decision of the Hon'ble Jurisdictional High Court in the case of Mr. Mohd. Farhan A. Shaikh *v.* ACIT (*supra*). On a perusal of the notice issued

u/s.274 r.w.s. 271(1)(c) of the Act we observe that the Assessing Officer has not specified any limb for which the notice was issued i.e., either for concealment of particulars of income or for furnishing inaccurate particulars of such income. Assessing Officer did not strike off irrelevant limb in the notice and specifying the charge for which notice was issued.

7. We observed that an identical issue came up before Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT (supra) and the Hon'ble Jurisdictional High Court 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(1)(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(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, Kaushalya 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". Kaushalya 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 Kaushalya. 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 Dilip 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(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[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."

8. Ratio of this full bench decision of the Hon'ble Bombay High Court (Goa) squarely applies to the facts of the assessee's case as the notice u/s. 274 r.w.s. 271(1)(c) of the Act was issued mechanically in a printed format without striking off the irrelevant portion of the limb and failed to intimate the assessee the relevant limb and charge for which the notice was issued. Thus, respectfully following the said decision we hold that the penalty order passed u/s. 271(1)(c) of the Act by the Assessing Officer is bad in law and accordingly the penalty order passed u/s. 271(1)(c) of the Act is quashed. As we have decided the preliminary ground in favour of the assessee and quashed the penalty order the other grounds raised by the assessee on merits are not gone into as they become only academic at this stage.

9. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 25th May, 2022.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER
Mumbai / Dated 25/05/2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum