

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“D” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM, &  
SHRI GAGAN GOYAL, AM**

1. आयकरअपीलसं./ I.T.A. No. 1316/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2006-07)

And

2. आयकरअपीलसं./ I.T.A. No. 1316/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2007-08)

<b>Royal Rich Developers Pvt. Ltd.</b> C/o- Suresh Velji Faria, Mahavir General Store, 154, Bora Bazar Street, Fort, Mumbai-400 001	<u>बनाम/</u> Vs.	<b>DCIT CC- 4(4),</b> Central Range-4, 19 <sup>th</sup> floor, Air India Building, Nariman Point, Mumbai.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AADCR2578J		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

3. आयकरअपीलसं./ I.T.A. No. 2839/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2006-07)

And

4. आयकरअपीलसं./ I.T.A. No. 2840/Mum/2017  
(निर्धारणवर्ष / Assessment Year: 2007-08)

<b>DCIT CC- 4(4),</b> Central Range-4, 19 <sup>th</sup> floor, Air India Building, Nariman Point, Mumbai.	<u>बनाम/</u> Vs.	<b>Royal Rich Developers Pvt. Ltd.</b> C/o- Suresh Velji Faria, Mahavir General Store, 154, Bora Bazar Street, Fort, Mumbai-400 001
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Girish Dave & Tanzil Padvekar, Ld. ARs
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Dharmveer Yadav, Ld. DR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	20.06.2022
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	27.06.2022

आदेश / O R D E R

**Per Amit Shukla, Judicial Member:**

The aforesaid cross appeals have been filed by the assessee as well as revenue against the separate impugned order dated 17.01.2017 & 20.01.2017, passed by Ld. CIT(A)-52, Mumbai in relation to the penalty proceedings u/s 271(1)(c) for the AY 2006-07 and 2007-08 respectively.

2. Since the grounds raised as well as issues involve in all the appeals are common and are arising identical set of facts, therefore the same were heard together and disposed of by way of this consolidated order.

3. The brief facts of the case are that, assessee is in the business of civil construction real estate. A search and seizure action was carried out u/s 132(1) on 31.05.2008 in the case of Shri Vinod

Faria group and assessee was covered under survey u/s 133A. It was gathered that Assessee Company has received subscription of Rs. 160 crores on premium of Rs. 30 per share in the AY 2006-07 and Rs. 3.75 crores on premium of Rs. 30 per share in the AY 2007-08. The company was formed on 17.03.2006 and during the relevant AY 2006-07, it was only in existence for 15 days. During the course of search of Shri Vinod Faria in his statement on oath recorded u/s 132(4) on 31.05.2008 had stated that, share application money received were accommodation entries and bogus. It was arranged by CAs to whom 8% commission was paid. He had surrendered sum of Rs. 10 crores during the course of search and one of the grounds for the surrender was not being able to establish the genuineness of the share application receipt by the assessee company. Another director Shri Suresh Faria also stated in his statement on oath u/s 132(4) that the above share subscription in the case of assessee company was also bogus and were mainly accommodation entries. Based on this material fact, the assessee's cases were reopened u/s 148 and addition of Rs. 1.60 crores was added u/s 68 for the AY 2006-07 and Rs. 3.75 crores for the AY 2007-08. The said addition were confirmed from the stage of Ld. CIT

(A) and also finally confirmed by the Tribunal vide order dated 24.08.2016. Now the AO has levied 200% penalty on the said additions. Apart from that, Rs. 70,000/- was disallowed in AY 2006-07 and Rs. 1 lakhs was disallowed in AY 2007-08 on account of salary expenses.

4. Ld. CIT (A) has confirmed the penalty on the ground that major addition u/s 68 has been confirmed by the Tribunal and even for the salary expenses, he rejected the contention of the assessee and confirmed the penalty. However, he has reduced the quantum of penalty 200% to 100%.

5. Accordingly, both the parties are in appeal before us. Revenue has contended that the penalty should be confirmed @ 200% whereas assessee is against confirming the said penalty.

6. Before us, Ld. Counsel for the assessee had filed additional ground in both the assessment years which are as under:-

*1. On the facts and in the circumstances of the case and in law, whether decision of the Hon'ble Jurisdictional High Court confirming the addition in the case of appellant would have bearing on penalty proceedings.*

2. *On the facts & in the circumstances of the case and in law, the order imposing penalty requires to be cancelled on account of the fact that in the notice issued for levy of penalty under section 271(l)(c) of the Act, relevant limb is not specified / marked whereas the basis for imposition of penalty is held to be concealment of income.*

3. *Without prejudice to above, Ld. Assessing Officer has erred in law in imposing the penalty and Ld. CIT(Appeals) in confirming the same on the basis of statement of Shri Vinod Faria notwithstanding the fact that the individual shareholders have confirmed the transactions.*

7. Ld. Counsel Mr. Girish Dave submitted that these are purely legal grounds, therefore the same should be admitted as all the material facts are already on record. He submitted that here in this case, AO while issuing show cause notice u/s 274 r.w.s. 271(1)(c) has not specified the charge or has stroked out the relevant limb in which AO proposes to initiate levy penalty, i.e., either for furnishing of inaccurate particulars of income or for concealment of income. He further submitted that now this issue is squarely covered by the decision of full bench of Hon'ble Jurisdictional High Court in the case of **Mohd. Farhan A. Shaikh Vs. DCIT (2021) 125 tasmann.com 253 (Bom)**, wherein it was held that even though

assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1)(c), then also a mere defect in notice not striking off irrelevant matter would vitiate penalty proceedings. Thus on this ground alone, the penalty levied by the AO should be quashed.

8. On the other hand, Ld. DR submitted that AO has specifically recorded his satisfaction in the assessment order that assessee has suppressed and concealed the true particulars of taxable income and assessee was aware of the specific charge.

9. We have heard the aforesaid legal submission as raised in the additional ground by the assessee. Since it is purely legal ground challenging the validity of initiation of penalty proceedings u/s 271(1)(c), therefore the same is admitted.

10. From the perusal of assessment order, we find that AO made the addition on the ground that assessee has suppressed and concealed the true particulars of its taxable income. However, AO while issuing the show cause notice u/s 274 r.w.s. 271(1)(c), nowhere has specified the charge that, under which limp he intend to levy the penalty or has strike the claims wherein charges have

been mentioned. It is a trite law that penalty proceeding are separate and distinct from the assessment proceedings and AO has to validly initiate and conclude the penalty proceedings independently and it is not adjunct to assessment proceedings. For initiating the penalty proceedings u/s 271(1)(c), the AO has to issue show cause notice on a specific charge and he must specify the limb when he intends to levy penalty for furnishing of inaccurate particulars of income or for concealment of income. The penalty is not automatic in all the cases where additions were made. Notice u/s 274 should state the grounds mentioned us/ 271(1)(c) and assessee should be confronted with the grounds on which he has to give explanation.

11. **The Hon'ble Jurisdictional Bombay High Court in a Full bench case in Mohd. Farhan A. Shaikh Vs. DCIT (supra)** had to consider the following question of law which was framed for reference:-

*“[In] the assessment order or the order made under Sections 143(3) and 153C of the IT Act, [when] the Assessing Officer has clearly recorded satisfaction for the imposition of penalty on one or the other, or both grounds mentioned in Section 271(l)(c), [would] a*

*mere defect in the notice of not striking out the relevant words [...] vitiate the penalty proceedings?*

11.1 The Hon'ble Court after considering various judgment discussing the principle of law laid down on section 271(1)(c) and earlier judgment of Hon'ble Bombay High Court in the case of **CIT vs. Smt. Kaushalya (276 ITR 660)** wherein it was decided the issue against the assessee, has held as under:-

*177. That is, even if the assessment order does not contain a specific finding that the assessee has concealed income or he is deemed to have concealed income because of the existence of facts which are set out in Explanation 1, if a mere direction to initiate penalty proceedings under clause (c) of sub-section (1) is found in the said order, by legal fiction, it shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under the said clause (c). In other words, the Assessing Officer's satisfaction as to be spelt out in the assessment order is only prima facie. Even if the assessment order gives no reason, a mere direction for penalty proceedings triggers the legal fiction as contained in the Explanation (1). 178. Therefore, in every instance, it is a question of inference whether the assessment order contained any grounds for initiating the penalty proceedings. Then, whenever the notice is vague or imprecise, the assessee assails it as bad; the Revenue defends it by saying that*

*the assessment order contains the precise charge. Thus, it becomes a matter of adjudication, opening litigious floodgates. The solution is a tick mark in the printed notice the Revenue is used to serving on the assesseees.*

*179. Besides, the prima facie opinion in the assessment order need not always translate into actual penalty proceedings. These proceedings, in fact, commence with the statutory notice under section 271(1)(c) read with section 274. Again, whether this prima facie opinion is sufficient to inform the assessee about the precise charge for the penalty is a matter of inference and, thus, a matter of litigation and adjudication. The solution, again, is a tick mark; it avoids litigation arising out of uncertainty.*

*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(l)(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.*

*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.*

12. Thus in view of above, we hold that even though the AO in the assessment order might have mentioned the grounds for initiation of penalty proceedings, but while issuing show cause notice, there is no charge specified by the AO. Therefore, the notice is vague, and consequently the entire proceedings of initiation of u/s 271(1)© penalty is bad in law and vitiate the penalty proceedings itself. Thus, here in this case also, the notice is vague as it does not specify the charge under which limb AO proposes to initiate penalty proceedings which is conspicuously lacking. Accordingly, on this ground alone, initiation of entire penalty proceedings is quashed and the penalty levied by the AO in both the assessment years is deleted.

13. In the result, all the appeals filed by **assessee is allowed** and **revenue's appeal are dismissed.**

*Orders pronounced in the open court on 27<sup>th</sup> June 2022.*

*Sd/-*  
(Gagan Goyal)  
Accountant Member

*Sd/-*  
(Amit Shukla)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.06.2022

*Sr.PS. Dhananjay*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार (Dy./ Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai**