

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

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.6530/Mum/2019  
(A.Y. 2012-13)**

Asst. Commissioner of Income Tax, Circle- 9(3)(2), Room No. 418, 4 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s Future E-Commerce Infrastructure Limited Ground Floor, Knowledge House, Off Jogeshwari Vikhroli Link Road, Jogeshwari (East) Mumbai - 400060
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCF1008K		
Respondent	..	Appellant

Appellant by :	Vipul Joshi
Respondent by :	Achal Sharma

Date of Hearing	07.07.2022
Date of Pronouncement	29.07.2022

आदेश / O R D E R

**Per Amarjit Singh (AM):**

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-16, Mumbai, which in turn arises from the order passed by the A.O u/s 143(3) of the Act for A.Y.2012-13. The revenue has raised the following grounds before us:

- “1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred the fact that the assessee repeatedly ignoring the findings of Tax Auditor about the inadmissibility of expenses for AY 2012-13 and 2013-14 and claimed inadmissible expenses not only in the instant year but also in preceding year?”

2. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the penalty of Rs. 3.18,94,000/- in the instant case ignoring the provisions of section 271(1)(c) of the Act?"*
3. *The appellant prays that the order of the Ld.CIT(A) on the above ground be set aside and that of the AO be restored.*
4. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."*

2. The brief fact is that the assessment u/s 143(3) of the Act was completed on 29.03.2015 determining total loss at Rs.29,50,39,290/-. The A.O has made disallowance of Rs.9,67,00,000/- as provision for diminution in value of investment Rs.16,00,000/- debited as prior period expenditure, Rs.5,89,12,582/- disallowed u/s 40(a)(ia) of the Act. During the course of penalty proceedings the A.O stated that assessee had debited Rs. 9,67,00,000/- as provision for diminution in value of investment. However, the same was not added in the computation of total income. The A.O has further stated that assessee had debited Rs.16,00,000/- on account of electricity expenses pertaining to prior period. These expenses were disallowed stating that same were not related to the year under consideration. In response to the notice issued the assessee explained that it had adequately disclosed of necessary details in the return of income, tax audit report and financial statement and it has also provided detailed explanation during the course of assessment proceedings and also explained that it had not made any concealment of income and not furnished any inaccurate particulars of income. However, the A.O has not agreed with the submission of the assessee and levied penalty of Rs.3,18,93,435/- on the total disallowed amount of Rs. 9,83,00,000/-.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has dismissed the appeal of the assessee.

4. During the course of appellate proceedings before us the ld. Counsel at the outset contended that assessee has filed application under Rule 27 of ITAT Rules vide letter dated 06.04.2022 and one of the ground taken that A.O had not struck off the irrelevant portion in the notice showed non application of mind by the A.O while issuing the notice. The ld. Counsel has placed reliance on the decision of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom). The ld. Counsel has also submitted that ld. CIT(A) has not specifically dealt with the ground of the assessee that A.O has not specified the limb of Sec. 271(1)(c) of the Act in the notice issued.

On the other hand the ld. D.R. supported the order of lower authorities.

5. Heard both the sides and perused the material on record. Assessment u/s 143(3) of the Act in the case of the assessee was completed on 29.03.2015 by making addition of Rs.9,67,00,000/- on account of provision for diminution in the value of investment, Rs.16,00,000/- on account of prior period expenditure on which the A.O had levied penalty of Rs. 3,18,94,000/- u/s 271(1)(c) of the Act. During the course of appellate proceedings before us the ld. counsel has submitted that A.O had not struck off the irrelevant portion in the notice issued u/s 274 of the Act dated 29.03.2015. He also submitted that ld. CIT(A) has also not adjudicated its ground pertaining to the notice issued, without specifying limb of Sec.271(1)(c) of the Act. In this regard we have perused the order of ld. CIT(A) passed on 31.07.2019 and noticed that at para no. 3 of the order under the ground no. 2 the ld. CIT(A) has mentioned that notice not specified the limb of u/s 271(1)(c) of the Act. However, the ld. CIT(A) has not given specific finding on the

issue of not specifying the limb of Section 271(1)(c) in the above referred notice issued u/s 274 of the Act. The assessee has placed copy of the notice issue u/s 274 r.w.s 271(1)(c) of the Act dated 29.03.2015 as annexure in the paper book submitted on 06.04.2022. We have perused the copy of notice placed in the paper book the relevant part of the same reproduced as under:

**NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF  
THE INCOME TAX ACT,1961**

सेवा में /  
PAN : AABCF1008K.

To,  
M/s FUTURE E- COMMERCE  
INFRASTRUCTURE LTD.  
KNOWLEDGE HOUSE, SHYAM NAGAR,  
OFF JOGESHWARI VIKHROLI LINK RD,  
JOGESHWARI, EAST, MUMBAI - 400060.

आयकर कार्यालय/Office of the  
Dy,Commi of I-Tax,Circle-9(3)(2),  
Room No. -418, 4<sup>th</sup> floor,  
Aayakar Bhavan, M.K.Road,  
Mumbai 400020  
Ph : 22039131 ext : 2418  
तारीख/Dated : 29/03/2015

*pen ss / pg 148  
14-15*


**PENALTY U/S 271(1)(c)**

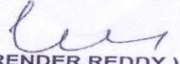
सूक्ति कर निर्धारण वर्ष ..... के संबंध में मेरे यहाँ होने वाली कार्रवाई के दौरान मुझे प्रतीत होता है कि आपने :-  
Whereas in the course of proceedings before me for the Assessment Year **2012-13** it appears to me that you:-

- \*बिना उचित कारण के यह आय विवरणी नहीं दी है जो आपको भारतीय आयकर अधिनियम, 1922 की 22(1), 22(2)/ 34 के अधीन दी गई सूचना के अनुसार देनी ठीक या जो आपको धारा 139(1) के अधीन या आयकर अधिनियम,1961 की धारा 139(2)/148 के अधीन दी गई सूचना सं. .... ता. .... अनुसार दाखिल करनी ठीक अथवा उचित कारण के बिना आपने दिए गए समय के अन्दर और उक्त धारा 139(1) या इस प्रकार की सूचना द्वारा अपेक्षित नीति से विवरणी नहीं दी है।
- \* Have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under Section 139 (2)/148 of the Income Tax Act,1961 No. .... dated ..... or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139(1) or by such notice.
- \*बिना उचित कारण के आपने भारतीय आयकर अधिनियम,1922 की धारा 22(4)/23(2) या आयकर अधिनियम,1961 की धारा 142(1)/143(2) के अधीन दी गई सूचना सं. .... ता. .... का अनुपालन नहीं किया है।
- \* Have without reasonable cause failed to comply with a notice under Section 22(4) / 23(2) of the Indian Income-tax Act, 1922 or under Section 142(1) / 143(2) of the Income-Tax Act, 1961, No ..... dated .....
- \* आपकी आय के ब्यौरे दिए गए हैं या ..... इस प्रकार की आय के ब्यौरे गलत दिए हैं।  
\* have Concealed the particulars of your income or ..... Furnished inaccurate particulars of such income.  
आपको एतद्वारा सूचित किया जाता है कि ता..... 200 .... को बजें ..... अ.म./प.म. में आप मेरे कार्यालय में उपस्थित हो और कारण बताएँ के आयकर अधिनियम,1961 की धारा 271 के अधीन आप पर दण्ड लगाने का आदेश क्यों न दिया जाए। यदि आप स्वयं उपस्थित होकर या प्रधिकृत प्रतिनिधि द्वारा सुनवाई के लिए दिए गए अवसर का लाभ नहीं उठाना चाहते तो उक्त तारीख को या उससे पूर्व लिखकर इसका कारण बताएँ,जिस पर धारा 271 के अधीन कोई ऐसा आदेश देने से पूर्व विचार किया जाएगा।

You are hereby requested to appear before me on **17/04/2015** at **11.00 AM** and Show cause why an order imposing a penalty on you should not be made under Section 271 of the Income -tax Act, 1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative, you may show cause in writing on or before the said date which will be considered before any such order is made under Section **271(1)(c)**. of the I.T. Act 1961.

(मोहर)  
Seal



  
( V. AMARENDER REDDY )  
Dy.Commissioner Income Tax Circle -9(3)(2),  
Mumbai

On perusal of the aforesaid notice it is clear that A.O has not specified whether the penalty is levied on account of concealment of particular of income or furnishing of inaccurate particulars of income. In this regard we have gone through the case of jurisdictional High Court referred by ld.

Counsel in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bom), wherein the relevant part of head note is reproduced as under:

*“Section 271(1)(c), read with section 274 of the Income-tax Act, 1961 Penalty For concealment of income (Recording of satisfaction) Whether where assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1)(c), a mere defect in notice-not striking off irrelevant matter would vitiate penalty proceedings-Held, yes- Whether since penalty proceedings culminate under a different statutory scheme that remains distinct from assessment proceedings, therefore, assessee must be informed of grounds of penalty proceedings only through statutory notice Held, yes Whether even if notice contains no caveat that inapplicable portion be deleted, it is in interest of fairness and justice that notice must be precise, it should give no room for ambiguity-Held, yes [Paras 181 and 188]In favour of assessee)”*

9. Further, we have also perused the decision of coordinate Bench of the ITAT, Mumbai in the case of M/s Bhavya Shashank Shanbhag Vs. DCIT in ITA No. 4630Mum/2019 vide order dated 09.07.2021, wherein the co-ordinate Bench in identical issue and similar facts has deleted the penalty after following the decision of Hon’ble Jurisdictional High Court in the case of Mohd. Farhan A Shaikh (supra). The relevant part of the decision of coordinate Bench is reproduced as under:-

*“3. We have heard rival submissions and perused the materials available on record. We find that assessee for both the assessment years vide ground No.1(e) had raised the preliminary technical ground that in the show-cause notice issued by the ld. AO u/s.274 r.w.s. 271(1)(c) of the Act, he had not struck-off the irrelevant portion and that the ld. AO had not specified the specific offence committed by the assessee by stating as to whether the assessee has concealed his particulars of income or had furnished inaccurate particulars of income. 3.1. We find that this issue is no longer res-integra in view of the Full Bench decision of the Hon’ble Jurisdictional High Court in the case of Mohd. Farhan A Shaikh vs. DCIT reported in 434 ITR 1 (Bom). The relevant portion of the said order is reproduced hereunder:-*

*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, Smt. Kaushalya case (supra) 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 on to 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". Smt. Kaushalya case (supra) 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 Smt. Kaushalya case (supra). In fact, for one assessment year, it set aside the penalty proceedings on the grounds of nonapplication 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 Case (supra) 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 case (supra), 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 case (supra), 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 Case (supra) disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays non-application 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* [2007] 27 SCC 181, in which the Apex Court has quoted with approval its earlier judgment in *State of Orissa v. Dr. Binapani Dei* AIR 1967 SC 1269. 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 Case* (supra) 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.

3.2. Respectfully following the aforesaid decision, we hold that the penalty levied by the ld. AO for both the assessment years is hereby directed to be deleted.

3.3. Since the relief is granted to the assessee on this aspect by adjudicating the ground No.1(e), the other grounds raised by the assessee for both the years on legality of levy penalty as well as on merits of the case are not adjudicated herein and the same are hereby left open."

10. In the light of the decision of the co-ordinate Bench as elaborated above, there is nothing before us on hand to differs from the issue raised in the cases cited (supra) so as to take a different view on this issue. Therefore, since the issue on hand being squarely covered following the principle of consistency, we find merit in the submission of the assessee and direct the Assessing Officer to delete the penalty since, the notice issued under section 274 read with section 271(1)(c) dated 18th March 2015 was bad in law. Since, we have deleted the penalty on account of invalid notice issued under section under section 274 read with section 271(1)(c) dated 18th March 2015, therefore other ground on merit are not require to be adjudicated.

6. In the result, the appeal of the revenue is allowed.

Order pronounced in the open court on 29.07.2022

Sd/-  
(Aby T Varkey)  
JUDICIAL MEMBER

Sd/-  
(Amarjit Singh)  
ACCOUNTANT MEMBER

Mumbai, Dated 29.07.2022

PS: Rohit

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,  
सत्यापित प्रति // True Copy //

(Asst. Registrar)  
ITAT, Mumbai