

THE INCOME TAX APPELLATE TRIBUNAL  
"C" Bench, Mumbai  
Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 3279/Mum/2016 (A.Y. 2007-08)  
I.T.A. No. 4477/Mum/2016 (A.Y. 2006-07)

M/s. Vijay Grihnirman P. Ltd. 205, Marine Chambers 43, New Marine Lines Churchgate Mumbai-400 020.  PAN : AAACV2806N (Appellant)	Vs.	DCIT, CC-15&16 Mumbai      (Respondent)
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Assessee by	Shri Prateek Jain
Department by	Shri S. Abi Rama Karthikeyan
Date of Hearing	29.08.2022
Date of Pronouncement	05.09.2022

O R D E R

Per B.R.Baskaran (AM) :-

Both the appeals filed by the assessee are directed against the orders passed by learned CIT(A)-51, Mumbai and they relate to A.Y. 2006-07 and 2007-08. The assessee is aggrieved by the decision of learned CIT(A) in confirming the penalty in both the years under section 271(1)(c) of the I.T. Act.

2. The assessee company is engaged in the business of construction. In A.Y. 2006-07, the Assessing Officer made addition of Rs. 10 lakhs as undisclosed income from sale of row house. The Assessing Officer levied penalty of Rs. 3,36,600/- under section 271(1)(c) of the Act

3. In A.Y. 2007-08, the Assessing Officer made an addition of Rs.30 lakhs relating to loan received by the assessee but not recorded in the books of account and further addition of Rs. 5,40,000/- towards interest payable on

the above said loan. Against this addition the Assessing Officer levied penalty of Rs. 11,91,560/- under section 271(1)(c) of the Act.

4. Learned CIT(A) confirmed the penalty levied in both the years and hence the assessee has filed this appeal before us.

5. At the time of hearing, the assessee raised a legal contention stating that the Assessing Officer has not struck down inapplicable portion in the charge for levying penalty mentioned in the notice issued under section 271 of the of the Act in both the years, i.e. the Assessing Officer has not stated in the notice as to whether the penalty has been initiated in both the years for concealment of particulars of income or furnishing of inaccurate particulars of income. The Learned AR submitted that non-striking of inapplicable portion of in the penalty notice would vitiate penalty proceedings. In this regard, the learned AR placed his reliance on the following decisions rendered by the Coordinate Benches, wherein the Coordinate Benches have quashed the penalty order following the decision rendered by Hon'ble Bombay High Court in the case of CIT Vs. Samson Perinchery (392 ITR 4)

- a) DCIT Vs. M/s. Pennozoil Quaker State India Ltd. (ITA No. 7386 & 7503/Mum/2014 dated 12.1.2018
- b) Nandivardhan Construction Pvt. Ltd. Vs. DCIT (ITA No. 4973/Mum/2022 dated 28.4.2022)

Accordingly learned AR prayed for quashing of the penalty orders passed in both the years under consideration.

6. Learned DR however supported the orders passed by learned CIT(A).

7. We have heard the rival submissions and perused the record. The Learned AR furnished copies of penalty notices issued by the Assessing Officer for both the years under consideration and we find that the Assessing Officer did not strike off inapplicable charge or limb mentioned in the penalty notice, meaning thereby, it is not clear from the notice as to whether the

Assessing Officer has initiated penalty proceedings either for concealment or for furnishing of inaccurate particulars of income.

8. The question with regard to validity of notice issued without striking of inapplicable portion was examined by the Coordinate Bench in the case of M/s. Pennzoil Quaker State India Ltd. (supra). The Coordinate Bench has decided the issue in favour of the assessee by observing as under :-

5. We have heard the rival submissions, perused the orders of the authorities below, the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act, Assessment Order and the penalty orders. On a perusal of the notice issued u/s. 271(1)(c) of the Act for initiation of proceedings we find that the Assessing Officer did not strike off and specify the charge/limb for which he is proposing to initiate penalty proceedings. However, in the Assessment Order, Assessing Officer records that the penalty proceedings are initiated for furnishing inaccurate particulars of income.

6. An identical situation has been considered by the Coordinate Bench in [Meherjee Cassinath Holdings v. ACIT](#) in ITA.No. 2555/Mum/2012 dated 28.04.2017 as to whether the action of the Assessing Officer in initiating penalty proceedings u/s.271(1)(c) of the Act without striking off one of the limbs and without specifying the specific charge in the notice initiating penalty proceedings for inaccurate particulars of income in the Assessment Order and the Coordinate Bench considering the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Samson Perinchery [392 ITR 4] and also various decisions held that action of the Assessing Officer in non-striking off relevant clause in the notice shows that the charge being made against the assessee is not firm therefore proceedings suffer from non-compliance with principles of natural justice in as much as the Assessing Officer himself is not sure of the charge and the assessee is not made aware as to which of the two limbs of section u/s. 271(1)(c) of the Act he has to respond. While holding so the Coordinate Bench observed as under: -

“8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well-

accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

"83. It is of some significance that in the standard proforma 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. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See [Malabar Industrial Co. Ltd. v. CIT](#) [2000] 2 SCC 718)"

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar

proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the ld. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the ld. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the ld. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. Apart from the aforesaid, the ld. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the ld. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-

"12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdar Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for

furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

"...The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the Id. CIT-DR.

13. Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the

notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.

14. Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non-application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with.

7. Following the above decision, similar view has been taken by the Coordinate Bench in the case of [Orbit Enterprises v. Income Tax Officer](#) [60 ITR (Trib.) 252]. Respectfully following the said decision, we hold that the notice issued by the Assessing Officer u/s. 274 r.w.s. 271(1)(c) of the Act is on account of non-application of mind and therefore on this account itself the penalty imposed u/s.271(1)(c) is liable to be deleted. Thus, we direct the Assessing Officer to delete the penalty levied u/s.271(1)(c) of the Act. As we have held that the penalty be deleted on the preliminary point the other arguments raised by the Ld. Counsel for the assessee are not being dealt with.”

9. We noticed that the Coordinate Benches have decided this issue in favour of the assessee following the decision rendered by Hon'ble Jurisdictional Bombay High Court in the case of Samson Perinchery (supra). Accordingly, following the above said case law, we hold that the impugned

penalty orders passed by the Assessing Officer in both the years are liable to be quashed on account of non-application of mind on the part of the AO while issuing penalty notices in both the years under consideration. Accordingly, we set aside the orders passed by the tax authorities in both the years. Since, we have quashed the penalty orders on the legal ground discussed above, there is no necessity to adjudicate other grounds urged by the assessee on merits.

10. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open court on 05.09.2022.

Sd/-  
(RAHUL CHAUDHARY)  
JUDICIAL MEMBER

Sd/-  
(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 05/09/2022

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS