

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H", MUMBAI  
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER  
**ITA No. 1618/Mum/2021 (A.Y. 2007-08)**

Kamlesh M. Kanungo,  
C/o. D.C. Bothra & Co. LLP (CA),  
(Formerly known as D.C. Bothra & Co.),  
297, Tardeo Road, Wille Mansion,  
1<sup>st</sup> Floor, Opp. Bank of India,  
Nana Chowk, Mumbai-400004.

**PAN: ABBPK9675R**

..... Appellant

Vs.

Dy.CIT- CC-1(4),  
9<sup>th</sup> Floor, Old CGO Annexe Building,  
M.K. Road, Mumbai-400020.

..... Respondent

Appellant by	:	Sh. Rajkumar Singh
Respondent by	:	Sh. Manoj Sinha
Date of hearing	:	08/07/2022
Date of pronouncement	:	03/10/2022

**ORDER**

**PER GAGAN GOYAL, A.M:**

This appeal by the assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals)-47, Mumbai [hereinafter referred to as [‘CIT(A)’] dated 10.02.2021 passed under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as [‘the Act’] for the Assessment Year (AY) 2007-08. The assessee has raised the following grounds of appeal:

*“1. That the Id. C.I.T. (Appeals) has erred in upholding the validity of impugned penalty order dated 28/09/2018 passed u/s 271 (1)(c) imposing the penalty at Rs. 5,17,561/- consequent to invalid show cause notice issued on 27/03/2014 by Id. A.O. in standard computer generated form without striking out the inapplicable words and provisions depriving the assessee to present his case in effective, proper and lawful manner in absence of specification of exact default in the show cause notice.*

*2. That on merit of the case and also in law penalty imposed by Id. A.O. u/s. 271(1)(c) at Rs. 5,17,561/- and upheld by Id. C.I.T. (Appeals) to the extent of Rs. 1,28,134/- in respect of debatable disallowance which has been upheld on ad hoc basis and modified differently by the different appellate authorities that too without properly appreciating the various contention raised by appellant in the detailed written submission filed being wrong on facts and bad in law therefore may kindly be deleted.*

*3. That appellant craves the leave to amend, alter, substitute and or to raise new or additional grounds of appeal at the time of hearing.”*

2. Brief facts of the case are that the assessee is a proprietor of M/s Trisons Impex and director in M/s Sikkim Ferro Alloys Ltd. engaged in the business of materials used for Stainless Steel melting and Stainless-Steel Finished products, flat products and rolled products. There was a search and seizure action carried out in the case of Ms Tirupati Group of Companies on 29-04-2011. During the search and seizure action original sales invoices amounting to Rs. 9,00,61,192/- were found which were seen to be issued by in M/s Sikkim Ferro Alloys Ltd to M/s Max Tac Oil and Gas Services Pvt Ltd. Consequently, statement of the assessee were recorded in which the assessee stated that the invoices were arranged by Shri Amit Jain (director of M/s Tirupati Iron & Impex Pvt. Ltd).

3. In the mean while a survey action u/s 133(A) of the act was conducted on the assessee on 26-12-2012. During the survey it was found that the assessee had shown purchased from a party who had allegedly provided accommodation entry

without actual delivery of goods amounting to Rs. 1,90,33,581/-. During scrutiny proceedings AO observed certain things like cash purchased from undisclosed party from open market to support the sales which are accepted by the AO and to cover up such cash purchases accommodation purchases bill had been obtained by the assessee against payment of commission. The AO worked out the peak credit balance and disallowed an amount of Rs. 1,65,33,581/- along with unaccounted commission expenses @ 1% amounting to Rs. 90,335/-.

4. Against this addition assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) deleted the addition on account of commission expense and addition on account of peak credit amounting to Rs. 1,90,335/- and Rs. 1,65,33,581/- respectively. Ld. CIT(A) applied GP rate @ 4.25 on Rs. 1,65,33,581/-.

5. Against this order of Ld. CIT (A) assessee as well as department moved on to ITAT (MUMBAI). ITAT (MUM) Reduced the addition @ 2% in the case of assessee's appeal amounting to Rs. 380672/-. However, the ITAT passed another order in respect of departmental appeal and enhanced the addition on account of bogus purchase from 4.25 to 8% amounting to Rs 15,22,686/-. On this amount of Rs. 15,22,686/- AO levied penalty u/s 271(1C) amounting to Rs. 5,17,561/-. Against this order of penalty assessee preferred an appeal before the Ld. CIT(A)-47(Mum). Ld. CIT(A) reduced the amount of penalty from Rs 517561/- (levied on addition of Rs. 15,22,686/-) to Rs 1,28,134/- i.e., on addition of Rs. 3,80,671/-. Against this order of Ld. CIT(A) assessee preferred an appeal before us.

6. We have gone through the order of AO, Ld. CIT(A), order of ITAT in the case of assessee's appeal and order of ITAT in the case of departmental appeal with

reference to disallowance of bogus purchase. We further consider the order of the AO and Id. CIT(A) with reference to penalty-imposed u/s. 271(1)(c).

7. Assessee has raised two grounds of appeal before us Ground No-1 challenges the validity of the notice of penalty issued on 27-03-2014 and second ground pertains to merits of the case.

8. Before engaging ourselves in Ground No-2 we would like to adjudicate Ground No-1. In Ground No-1 assessee challenged the validity of the penalty show cause notice as the same is issued in standard computer generated form without striking out the in applicable words and provisions and non-ticking of the relevant limb of charge in the penalty notice, depriving the assessee to present this case in effective, proper and lawful manner in absence of specification of exact default committed by the assessee against which assessee is liable to respond. As per assessee this show cause creates a confusion and chaos in the mind of the assessee to represent his matter effectively.

9. We have gone through the notice issued by the AO attached vide Page no-33 of the paper -book. We found the objection raised by the assessee factually correct. In the light of above facts and respectfully following the decision of hon'ble jurisdictional High Court of Bombay in the case of Farhan. A. Shaikh V/s PCIT- 125 Taxmann.com 253, we found force in the ground raised by the assessee. Relevant extract of the High Court decision we are reproducing herein below:

*“As aptly pointed out by the referring Division Bench, before this Court there are two sets of cases. One set of cases is led by CIT v. Smt. Kaushalya [\[1994\] 75 Taxman 549/216 ITR 660 \(Bombay\)](#) a decision earliest in point of time. The other set does not have a lead case; they all have been cryptic but stand persuaded by Manjunatha (supra). For that reason, the Karnataka High Court's decision has*

been discussed in detail. Nevertheless, the referring Division Bench has found on one precedential plank these cases: (1) CIT v. Samson Perinchery [\[2017\] 88 taxmann.com 413/392 ITR 4 \(Bom.\)](#) (2) Pr. CIT v. Goa Coastal Resorts and Recreation (P.) Ltd. [\[2020\] 113 taxmann.com 574/272 Taxman 157 \(Bom.\)](#) (3) Pr. CIT v. New Era Sova Mind [TX Appeal Nos.70 of 2019 dated 18-6-2019] and (4) Pr. CIT v. Goa Dourado Promotions (P.) Ltd. [TX Appeal No. 18 of 2019, dated 26-11-2019]. On the opposite plank is Kaushalya (supra). All by co-equal Benches, though. [Para 162]

The Tax Appeal No. 24/2019, decided on 11-11-2019, relates to Pr. CIT (Central) v. Goa Coastal Resorts & Recreation (P.) Ltd. In that one, the Division Bench has held that the notice which is issued to the assessee must indicate whether the Assessing Officer is satisfied that the case of the assessee involves concealment of particulars of income or furnishing of inaccurate particulars of income or both, with clarity. If the notice is issued in the printed form, then the necessary portions which are not applicable are required to be struck off, so as to indicate with clarity the nature of the satisfaction recorded. In both Samson Perinchery and New Era Sova Mine, the notices issued had not struck off the portion which were inapplicable. From this, the Division Bench concluded that there was no proper record of satisfaction or proper application of mind in a matter of initiation of penalty proceedings. In the present case, as well if the notice is perused, it is apparent that the relevant portions have not been struck off. This leaves no ground for interference with the impugned order. The impugned order are quite consistent by the law laid down in the case of Samson Perinchery case (supra) and New Era Sova Mine case (supra) and, therefore, warrant no interference. [Para 169]

*Question No. 1: If assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1)(c), does a mere defect in notice—not striking off irrelevant matter—vitiate penalty proceedings?*

*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. 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. [Para 181].*

*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. [Para 182]*

*Therefore, the first question is answered to the effect that Pr. CIT v. Goa Dourado Promotions (P.) Ltd. [Tax Appeal No. 18 of 2019, dated 26-11-2019] and other cases have adopted an approach more in consonance with the statutory scheme. That means it must be held that CIT v. Smt. Kaushalya [\[1994\] 75 Taxman 549/\[1995\] 216 ITR 660 \(Bom.\)](#) does not lay down the correct proposition of law. [Para 183]*

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

*Indeed, Smt. Kaushalya Case (supra) did discuss the aspect of prejudice. As 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'. [Para 184]*

*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. [Para 185]*

*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, it is reckoned, the reasoning suffers. Kaushalya's insistence that the previous proceedings supply justification and cure the defect in penalty proceedings has not met acceptance. [Para 186]*

**Question No. 3: What is effect of Supreme Court's decision in Dilip N. Shroff v. Jt. CIT [2007] 161 Taxman 218/291 ITR 519 (SC), on issue of non-application of mind when irrelevant portions of printed notices are not struck off ?**

*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. [Para 187]*

*It may, in this context, be respectfully observed 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. [Para 188]*

*In State of U.P v. Sudhir Kumar Singh 2020 SCC Online SC 847 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'. [Para 189]*

*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, Rajesh Kumar v. CIT [2007] 2 SCC 181, may be referred to 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 statue contravenes the principles of natural justice, it may also be held ultra vires Article 14 of the Constitution. [Para 190]*

*As a result, it is held 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. [Para 191]"*

10. In view of the above Ground No-1 raised by the assessee is allowed and AO is directed to delete the penalty-imposed u/s 271(1C) amounting to Rs. 128,134/-.

11. Assessee has also raised a plea through Ground No-2 on the merits of the order. Upon careful consideration we found that since we have already deleted the penalty on validity of the penalty notice, adjudication on merits is only of academic interest hence we are not engaging ourselves to the same.

12. **In the result, appeal filed by the assessee is allowed.**

Order pronounced in the open court on 3<sup>rd</sup> day of October 2022.

Sd/-  
(VIKAS AWASTHY)  
JUDICIAL MEMBER  
Mumbai, दिनांक / Dated: 03/10/2022  
SK, Sr.PS

Sd/-  
(GAGAN GOYAL)  
ACCOUNTANT MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) /The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy. /Asstt.Registrar)  
**ITAT, Mumbai**