

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "E" NEW DELHI]**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 7327/DEL/2018 (A.Y 2014-15)

ACIT, Circle : 18 (2), New Delhi. (APPELLANT)	Vs.	M/s. Noesis Industries Ltd., 1201-B, 12 th Floor, Hemkunt Chamber, 89, Nehru Place, New Delhi – 110 019. PAN No. AAACM6996L (RESPONDENT)
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Assessee by	N o n e;
Department by	Shri Amit Shukla, Sr. D. R.;

Date of Hearing	29.11.2022
Date of Pronouncement	06.12.2022

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the Revenue for assessment year 2014-15 against the order of the Id. Commissioner of Income Tax (Appeals)-6, New Delhi, dated 10.09.2018.

2. The Revenue has raised the following substantive ground of appeal:-

“The ld. CIT (Appeals) has erred in deleting the addition made by the AO of Rs.1,92,68,281/- on account of disallowance of prior period expenses as the Explanation 1 of section 271(1)(c) puts the burden of proof on the assessee.”

3. Brief facts of the case are that, the return of income declaring filing income at ‘NIL’ and claimed loss at Rs. 9,92,88,186/- filed by the assessee. The assessment proceedings initiated against the assessee and an assessment order u/s 143(3) of the Income Tax Act (‘Act’ for short) has been passed by making following additions/disallowances :-

(a) Disallowance of Prior period expenses	=Rs. 1,92,68,281/-
(b) Addition of interest income	= Rs. 50,560/-
(c) Disallowance u/s 14A	=Rs. 6,51,710/-

The penalty proceedings has been initiated against the assessee and an order u/s 271 (1)(c) of the Act has been passed by imposing penalty of Rs. 59,69,520/-has been levied against the assessee.

4. As against the Penalty Order, the assessee has preferred an appeal before the CIT(A) and the Ld.CIT(A) vide order dated 10/09/2018 deleted the penalty Rs. 59,69,520/- made by the A.O. on account of disallowance of prior period expenses.

5. Aggrieved by the order of the CIT (A) dated 10/09/2018 the department has preferred the present appeal on the grounds mentioned above.

6. None appeared for the assessee, the notice issued by the Registry as returned with an endorsement 'Left'. Further, the efforts made to serve the notice through the Department by way of affixture has been executed by affixing the notice to the last known address of the assessee. Even thereafter the assessee has not appeared before the Tribunal. Therefore, we are compelled to decide the appeal on merits after hearing the DR and on verifying the material on record.

7. In the present case, in the Assessing Officer, while passing the Assessment Order, regarding initiation of penalty u/s 271(1)(c) of the Act has mentioned as under:-

“3.2 The reply of the assessee is considered but it is not found to be acceptable. Since the assessee has incurred expense amounting to Rs. 1,92,68,281/- for the prior period, the same is being disallowed and added to the assessee’s total income.”

8. Further in Para 7 of the assessment order, the Ld. A.O. has also observed as under:-

“Assessed at current year’s loss of Rs. 7,93,17,635/-. Penalty proceedings u/s 271(1)(c) read with Section 274 of the Act are initiated separately. Issue necessary forms.”

9. After passing the assessment order, the A.O. has issued notice u/s 274 of the Act for initiation of penalty proceedings vide notice dated 23/12/2016 & 06/06/2017 as under:-

“2.1 As per copies of notice issued u/s 274 read with Section 271 dated 23.12.2016 and dated 06.06.2017 enclosed, the Ld. A.O. has issued a Vague notice holding that the appellant:

- ***Have concealed the particulars of your income or furnished inaccurate particulars of such income.***
- *As per the assessment order, satisfaction is recorded by the Ld. A.O. in respect of addition under the head Prior Period Expenses and interest income by stating that “Assessee company has concealed the income/filed inaccurate particulars.”*
- *Penalty is levied vide order dated 23.06.2017, since the assessee **has furnished inaccurate particulars of income for which tax has been sought to be evaded.***

10. In our view, the penalty provisions of Section 271(1)(c) of the Act are attracted, where the assessee concealed the particulars of income or furnished inaccurate particulars of income. It is well settled law that the aforesaid two limbs of Section 271(1)(c) of the Act, carrying different meanings. Therefore, it is imperative for the A.O. to specify the relevant and exact limb so as to make the assessee aware as to what is the charge made against him so that he can respond adequately.

11. Hon'ble Bombay High Court (full bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh vs. ACIT [434 ITR (1)] and the Hon'ble 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\(l\)\(c\)](#), does a mere defect in the notice--not striking off the irrelevant matter--vitiates 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(l)(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 Kaushaiya does not lay down the correct proposition of law.

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

184. Indeed, Kaushaiya did discuss the aspect of prejudice. As we I.T.A.No.1409/Del/2016 have already noted, Kaushaiya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushaiya, "fully knew in detail the exact charge of the Revenue against him". For Kaushaiya, 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 doses 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 DUip 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 I.T.A.No.1409/Del/2016 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\(l\)\(c\)](#) 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."

12. As could be seen from the above the Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT [(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(l)(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.

13. 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(l)(c) of the Act were issued without striking off the irrelevant portion of the limb and failed to intimate the assessee the relevant limb and charge for which the notices were issued.

14. In this background of the above said legal position and having regarded to the manner in which A.O issued the notice u/s 274 of the Act on 23/12/2016 and 06/06/2017 which the A.O. has fail to specify the limb under which the penalty proceedings having initiated and proceeded with, apparently goes to prove that above notices have been issued in a mechanical manner without applying the mind. Being so, the said notice issued u/s 271(1)(c) of the Act is bad in law consequently the penalty levied there under cannot be sustained.

15. In view of the above discussion, we do not find merits in the Grounds of Appeal of the Revenue. In the result, the Appeal filed by the Revenue is dismissed.

Order pronounced in the Open Court on : 06.12.2022.

**Sd/-
(Dr. B. R. R. KUMAR)
ACCOUNTANT MEMBER**

**Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

Dated : 06/12/2022

R.N, Sr. PS

Copy forwarded to :-

1. Appellant
2. Respondent
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI