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

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER

AND

SHRI YOGESH KUMAR US, JUDICIAL MEMBER

I.T.A. No. 76/DDN/2019 (A.Y 2012-13)

Ekshad Ahmad Patodi, U S Nagar Prop. M/s New Hind Agency, Ward No. 2, Near Jama Masjid, Sitarganj, Udham Singh Nagar, Uttarakhand, **PAN No. ARKPP3016C** **(APPELLANT)**	Vs.	ACIT, (OSD) Ward-2(3) (5) Khatima, Udham Singh Nagar, Uttarakhand **(RESPONDENT)**

Assessee by	**None**
Department by	**Sh. Mayank Prabha Tomar, Addl. CIT**

Date of Hearing	**15.12.2022**
Date of Pronouncement	**16.12.2022**

ORDER

PER YOGESH KUMAR US, JM

This appeal is filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals), Haldwani [hereinafter referred to CIT (Appeals) dated 17/05/2019 for assessment year 2012-13.

2. The assessee has raised the following substantive grounds of appeal:-

"I. The Ld. Commissioner of Income Tax, Appeals (CIT-A) has without going into the facts of the case has sustained penalty u/s 271(1)(c) of the Act amounting to Rs. 88,000,00/-

2. The CIT-A) did not appreciate the contention of the appellant while sustaining penalty and missed to note that disallowance of an expense per se cannot mean that the assessee has furnished inaccurate particulars of its income and as such do not call for penal action.

3. The Ld. CIT-A) missed to note that the legitimate claim of the assessee was disallowed u/s 40A(3) of the Act.

4. The Ld. CIT-A) has sustained penalty contrary to facts and against law.

5. That the impugned order is bad in law and not in consonance with facts, and against the principles of natural justice."

3. None appeared for the assessee even after the registry issued notices to the assessee.

4. Considering the facts and circumstances of the case, we deem it fit to decide the appeal after hearing Ld. DR and on verifying the materials on record.

4. In the present case, the Assessing Officer while passing assessment order regarding initiation of penalty proceedings u/s 271(1)(c)has mentioned as under:-

"Assessment is completed u/s 143(3) of I.T. Act, 1961 on the total income 704660/- in the assessee status of individual issued notice of demand and challan. Issued Penalty u/s 274 read with Section 271(1)(c) of the I.T. Act, 1961.

5. Further in Page No. 2 has also mentioned as under:-

"Penalty proceedings 271(1)(c) are initiated separately."

6. After passing the assessment order, the Ld. A.O. has issued notice u/s 274 of the Act for initiation of Penalty Proceedings vide notice dated 10/03/2015. As per the assessment order and the penalty order it is not clear as to on which limb the penalty proceedings has been initiated against the assessee. Neither the assessment order nor the penalty notice has specified the relevant and exact limb of the penalty proceedings to be initiated against the assessee.

7. 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.

8. 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. l: 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 ties 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'sfavour.

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 piea 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 nonappiication of mind. And, therefore, the infraction of a mandatory procedure leading to penai 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 statue 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."

9. 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.

10. 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.

11. In this background of the above said legal position and having regarded to the manner in which A.O passed the assessment order without mentioning the exact limb of the penalty proceedings to be initiated against the assessee and consequent to the same issuance of the notice u/s 274 of the Act on 10/03/2015 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.

12. In view of the above discussion, we are of the opinion that the penalty order deserves to be deleted, accordingly the Grounds of appeal of the assessee are allowed and penalty order against the assessee stood deleted.

13. In the result, the Appeal filed by the assessee is allowed.

Order pronounced in the Open Court on : 16.12.2022.

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

Dated : 16/12/2022

R.N, Sr PS

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT NEW DELHI