

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.3186/M/2022
Assessment Year: 2009-10**

Mrs. Vaishali Kamlesh Bavishi, 53 Samrat Ashok, 36 Poddar Road, Santacruz (West), Mumbai – 400 054 PAN: AAFPB1304H	Vs.	National Faceless Appeal Centre (NFAC) Delhi Room No.356, C.R. Building, New Delhi – 110 002
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Hari Raheja, A.R.
Revenue by : Ms. Vrunda U. Matkari, D.R.

Date of Hearing : 31 . 01 . 2023
Date of Pronouncement : 24 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, Mrs. Vaishali Kamlesh Bavishi (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 20.10.2022 passed by the National Faceless Appeal Centre(NFAC) [Commissioner of Income Tax (Appeals), Delhi] (hereinafter referred to as CIT(A)) confirming the penalty levied by the Assessing Officer (AO) under section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') qua the assessment year 2009-10 on the grounds inter-alia that :-

“1. On the facts and in the circumstances of the case and in law the CIT(A) was not justified in confirming the penalty of Rs. 77,600/- levied by the Assessing Officer u/s 271(1)(c) of the Income-tax Act, 1961.

2. The appellant submits that there is no concealment of income in as much as the purchases made by the appellant are genuine and it was only to buy peace that the appellant did not file an appeal against the adhoc disallowance of 25% of the alleged purchases treated by the Assessing Officer as no genuine upto some extent.

3. The appellant submits that the adhoc disallowance is a mere hypothetical estimate and not a case of concealment or furnishing of inaccurate particulars.

4. The appellant craves leave to add to, alter or vary the grounds of appeal at or before the hearing of the appeal.”

2. The assessee by moving an application sought to raise the additional ground that :

“On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the penalty of Rs.77,600/- levied u/s 271(1)(c) of the Income tax Act, 1961 as he has not specified the exact charge for which the penalty was proposed to be levied.”

on the ground that the same is a legal ground which is necessary for adjudication of the issues at hand. Keeping in view the fact that the assessee by way of moving an application sought to raise additional ground which is purely a legal one, necessary to decide the issue at hand, which can be raised at any stage of the proceedings, is allowed.

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of assessment framed by the AO under section 143(3) of the Income Tax Act, 1961 (for short ‘the Act’) making addition of Rs.2,98,741/- being the 25% of the bogus purchases made by the assessee to the tune of Rs.11,94,963/- which was added to the total income of the assessee

under section 69C of the Act, penalty proceedings under section 271(1)(c) of the Act were initiated. Declining the contentions raised by the assessee, the AO proceeded to levy the penalty of Rs.77,600/- being 100% of the tax sought to be evaded.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has dismissed the same by way of confirming the penalty. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. Undisputedly the assessee has accepted the addition of Rs.2,98,741/- made by the AO under section 69C of the Act by not filing any appeal. Now the assessee by relying upon the decision rendered by Hon'ble Bombay High Court Full Bench in case of Md. Farhan A Sheikh vs. ACIT (2021) 434 ITR 1(FB-Bombay) contended that on the basis of invalid notice issued by the AO penalty under section 271(1)(c) cannot be levied and sought to delete the same.

7. Before proceeding further we would extract the notice issued by the AO under section 274 read with section 271 of the Act for ready perusal as under:

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I.T.N.S.-29

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आयकर अधिनियम, 1961 की धारा 271 के साथ पढ़ी गई धारा 274 के अधीन सूचना
NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME TAX ACT, 1961

सेवा में /
PAN : AAFPB1304H

To,
Smt. Vaishali Kamlesh Bavishi
17-A, 1st Floor,
Nirmala Niketan,
S. V. Road,
Santacruz (West),
Mumbai - 400 054.

आयकर कार्यालय/Office of the
Income Tax Officer
Ward -19(2) (2),
Room No. -309,
Piramal Chamber, Lalbaug,
Mumbai 400012.

तारीख/Dated : 29/09/2014

Pen/19/P.G. 43/2014-15

PENALTY U/S 271(1)(c)

चूंकि कर निर्धारण वर्ष के संबंध में मेरे यहां होने वाली कार्रवाई के दौरान मुझे प्रतीत होता है कि आपने

Whereas in the course of proceedings before me for the **Assessment Year 2009-10** it appears to me that You-

"बिना उचित कारण के वह 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 को धारा 139(2)/148 के अधीन दी गई सूचना सं. ता. अनुसार दायित्व 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 तैरि 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 22(1)/22(2)/34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or 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

* अपनी आय के ब्यौरे छिपा लिए 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 बजे अ.म./पू.म. में आप मेरे कार्यालय में उपस्थित हों और कारण बताएं 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 बताएं, जिस पर धारा 271 के अधीन कोई ऐसा आदेश देने से पूर्व विचार किया जाएगा।

You are hereby requested to appear before me on **28/10/2014** at **11.30 A.M.** 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)**

(मोहर)

Seal



(AJAY T. VERMA)
Income Tax Officer,
Ward -19(2)(2), Mumbai.

* जो शब्द या पैरे अनवश्यक हो उन्हें काट दीजिए

* Delete in appropriate words and Paragraphs.

8. Bare perusal of the notice (supra) issued in this case by the AO goes to prove that the AO at the time of issuing the notice was not satisfied if he was initiating the penalty against the assessee for concealing particulars of his income or for furnishing inaccurate particulars of such income.

9. This issue has been decided by the Hon'ble Bombay High Court in Full Bench Judgment rendered in Md. Farhan A Sheikh (supra) and held that penalty under section 271(1)(c) of the Act is not leviable when invalid notice as in the instant case has been issued to the assessee. The operative part of the order passed by the Hon'ble Bombay High Court is as under:

“180. One course of before us is curing a defect in the notice by referring to the assessment order, which may or not contain reason for the penalty proceedings. The other course of action is the prevention of defect in the notice - and that

7. Sailesh Mehta v. CIT(A) ITA No.2445, 2439, 2444 &2443/Mum/2021 prevention takes just a tick mark. Prudence demands prevention is better than cure.

Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Sec. 271(1)(c), docs a mere defect in the notice - not striking off the irrelevant matter vitiate 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 Sec. 271(1)(c), r.w.s. 274 of the 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 deferent 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."

10. So following the order passed by the Hon'ble Bombay High Court in case of Md. Farhan A Sheikh (supra) we are of the considered view that since the AO has failed to initiate the penalty proceedings under section 271(1)(c) of the Act by issuing the valid notice, penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable in the eyes of law as the assessee has never been informed about the charges framed to initiate the penalty proceedings through statutory notice.

11. Consequently appeal filed by the assessee is hereby allowed and penalty levied by the AO and confirmed by the Ld. CIT(A) is ordered to be deleted.

Order pronounced in the open court on 24.02.2023.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 24.02.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.