

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA Nos. 583 & 584/MUM/2023
Assessment Years: 2014-15 & 2015-16

Gautam Puranmal Poddar
(HUF),
Plot No. RL 1 Milap Nagar MIDC
Residential Area Dombivli East
Kalyan,
Thane-421 301.

PAN No. AAEHG 6868 A

Appellant

Vs. ACIT, Circle-3(2),
2nd floor, Rani Mansion,
Above Canara Bank,
Murbad Rd.
Kalyan-421 301.

Respondent

Assessee by : Mr. Jayant Bhatt, CA
Revenue by : Mr. Paresh Deshpande, DR

Date of Hearing : 27/04/2023
Date of pronouncement : 28/04/2023

ORDER

PER OM PRAKASH KANT, AM

These two appeals by the assessee are directed against two separate orders, both dated 27.12.2022 passed by the Ld. CIT(A) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2014-15 and 2015-16 respectively in relation to penalty u/s 271(1)(c) of the Act, 1961 (in short ‘the Act’) levied by the Assessing Officer. Being identical issues in dispute involved in both these appeals, same were heard together and disposed off by



way of this consolidated order for convenience and avoid repetition of facts.

2. Firstly, we take up the appeal for assessment year 2014-15. The grounds raised by the assessee are reproduced as under:

1. *The CIT Appeal of National Faceless Appeal Centre has erred in confirming the order of ACIT.*
2. *The CIT Appeal National Faceless Appeal Centre has erred in confirming the Penalty of Rs. 5,42,776/- u/s 271(1)(c).*

3. Briefly stated, facts of the case are that in the assessment completed u/s 143(3) of the Act on 27.12.2016 claim of exemption of Rs.20,87,787/- u/s 10(38) of the Act for long term capital gain was added to the returned income. The addition made was accepted by the assessee and no further appeal was filed. In the assessment order dated 27.12.2016, the Assessing Officer initiated penalty u/s 271(1)(c) of the Act. After taking into consideration, the submission of the assessee, the Assessing Officer levied penalty on 29.06.2017.

4. On further appeals, the Ld. CIT(A) upheld the penalty levied by the Assessing Officer. On the issue of specifying particular of limb of section 271(1)(c) of the Act i.e. concealment of income or furnishing inaccurate particulars of income, the Ld. CIT(A), following the decision of the **Hon'ble Bombay High Court in the case of CIT v. Kaushaliya (1994) 75 Taxmann 549 (Bombay)** held as under:



“10 (i). Further, with reference to need for specifying the limb of section 271(1)(c) of the Act, reliance is placed upon the decision of the Hon'ble Bombay High Court in the case of CIT vs. Kaushaliya(1994) 75 Taxmann 549 (Bombay) in which it has been held that mere mistake in the language used or mere non-striking of inaccurate portion, cannot by itself in validate notice us 274 of the Act. Further, the strength is drawn from the decision of the Hon'ble ITAT, Delhi in the case of Trimurti Engineering Works vs ITO (2012) 25 taxmann.com 363 (Delhi). On the similar facts the Hon'ble TAT, Mumbai in the case of Danraj Mills Put. Ltd., ITA No. 3830, 33/Mumbai/2009 has upheld the penalty order passed by the AO. The relevant part of the order is reproduced as under:-

“2.16. We have considered the rival contention and gone through the various decisions relied by them. We have also gone through the order of penalty passed by Assessing Officer and the order passed by Ld. Commissioner of Income Tax (Appeal). We are conscious that any of the party may raise legal issue at this stage, if the same can be emanated from the record of the case. The Hon'ble jurisdictional High Court in CIT Vs Smt. Kaushalya (supra) while dealing with the similar ground about the limb of charge, whether mere mistake in language used or mere not striking off of inaccurate portion cannot by itself invalidate notice issued under section 274 of the Act. The language of the section does not speak about the issuance of notice. All that is required is that the assessee be given an opportunity of show cause. The issuance of notice is an administrative device for informing the assessee about the proposal of levy of penalty in order to enable him to explain why it should not be levied against him. If it is taken for the sake of argument that mere mistake in the language in the notice for non-striking off of 'inaccurate particular' or marking on 'concealment of income' portion cannot by itself invalidate the notice. Entire facts and backgrounds thereof are to be kept in mind. Every concealment of fact may ultimately result in



filing of or furnishing inaccurate particular. It was further argued that no statutory notice has been prescribed in this behalf in the Income tax Act

2.17. The Hon'ble Karnataka High Court in CIT Versus Manjunatha Cotton & Ginning Factory (supra) held that notice under section 274 of the act should specifically state the grounds mentioned in section 271(1)(c) that is, whether it is for concealment of income or for furnishing of inaccurate particular of income, sending printed form where all the grounds mentioned in the section 271 are mentioned would not specify the requirement of law, the assessee should know the grounds which he has to meet specifically. Otherwise, the Principles of Natural Justice are offended. On the basis of such proceedings, no penalty could be imposed on the assessee. Taking up the penalty proceeding on one limb and finding the assessee guilty on another limb is also bad in law. Though the penalty proceeding emanate from proceeding of assessment, they are independent and separate aspect of proceeding. All the other decisions relied by the Ld counsel for the assessee is based on the decision of CIT Vs Manjunatha Cotton & Ginning Factory (supra), wherein the decision of CIT Vs Kaushlya (supra) was not brought in the notice of coordinate bench of Mumbai Tribunal.

2.18. The Hon'ble Karnataka High Court in CIT Versus SSA'S Emerald Meadows in ITA No. 380 of 2015 order dated 23/11/2015, while dismissing the appeal of Revenue followed the decision of CIT Versus Manjunatha Cotton & Ginning Factory (supra). Against the judgment of Karnataka High Court the Revenue filed Special Leave Petition before the Hon'ble Apex Court and the same was dismissed vide SLP (CC No. 11485/2016) on 05/08/2016. There is no

dispute to the settled proposition of law that dismissal of the Special Leave Petition in limine by Hon'ble Apex Court does not mean that the reasoning



of the judgment of the High Court against which the Special Leave Petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that Apex Court did not consider the case for worth examining for the reason, which may be other than merit of the case. Nor such an order of Apex Court operates as res-judicata. An order rejecting the Special Leave Petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent. And the similar view was expressed in various judgments, viz,

A. *The Workmen of Cochin Port Trust Vs The Board of Trustees of the Cochin Port Trust & Anr* AIR 1978 SC 1283;

B. *Ahmedabad Manufacturing & Calico Printing Co Ltd Vs The Workmen & Anr* AIR 1981 SC 960;

C. *Indian Oil Corporation Ltd. Vs. State of Bihar & Ors.* AIR 1986 SC 1780;

D. *Supreme Court Employees' Welfare Association Vs. Union of India & Ors.* AIR 1990 SC 334;

E. *Yogendra Narayan Chowdhury & Ors Vs. Union of India & Ors* AIR 1996 SC 751;

F. *Union of India & Anr. Vs Sher Singh & Ors,* AIR 1997 SC 1796;

G. *V.M. Salgaocar & Bros. (P) Ltd. Vs. Commissioner of Income Tax* AIR 2000 SC 1623;

H. *Saurashtra Oil Mills Association Gujrat Vs. State of Gujrat & Anr.* AIR 2002 SC 1130; I. *Union of India & Ors Vs. Jaipal Singh* (2004) 1 SCC 121; and J. *Y. Satyanarayan Reddy Vs Mandal Revenue Officer, Andhra Pradesh* (2009) 9 SCC 447.

2.19. *The Hon'ble Apex Court in Kunhayammed & Ors Vs State of Kerala & Anr.* AIR 2000 SC 2587,



considered the similar issue and some of the earlier judgments and came to the conclusion that dismissal of special leave petition in limine by a non-speaking order may not be a bar for further reconsideration of the case for the reason that the Court might not have been inclined to exercise its discretion under Article 136 of the Constitution of India. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment as in that case doctrine of merger would come into play. This Court laid down the following principles:-

“(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law. (ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal. (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter. (iv) An order refusing special leave to appeal may be a nonspeaking order or a speaking one. In either case it does not attract the doctrine of merger. An order



refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. (v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res-judicata in subsequent proceedings between the parties.” 2.20. As there is no declaration of law which may be governed by Article 141 of the Constitution of India in the case of CIT Versus SSA’S Emerald Meadows dismissed by Hon’ble Apex Court, vide SLP (CC No. 11485/2016) on 05/08/2016. The judgment of Hon’ble Jurisdictional High Court in CIT Vs Kaushalya (supra) is still having a binding force on us. Thus, with utmost regards to the judgment of Karnataka High Court in CIT Vs Manjunatha Cotton & Ginning Factory (supra) we are bound to follow the judgment of jurisdictional High Court in CIT Vs Kaushalya (supra). Our view also find support from a decision of the Mumbai Bench of the Tribunal in the case of Dhawal K. Jain vs Income Tax Officer (ITA No.996/Mum/2014) order dated 30/09/2016. With these observations, the argument of ld. counsel of the assessee on the legal/technical ground is rejected. Thus, all these four appeals are, therefore, dismissed and the stand of the Ld. Commissioner of Income Tax (Appeal) is affirmed.



(ii) The Hon'ble Delhi High Court in the case of New Holland Tractors (India) (P.) Ltd. Vs CIT in [2014] 49 taxmann.com 573 (Delhi)/[2015] 228 Taxman 66 (Delhi/ 2015] 275 TR 291 (Delhi) wherein it has been held that at times and it is fairly common, the charge of concealment and 'furnishing of inaccurate particulars' may overlap.

11. Respectfully following the decisions of the Hon'ble High Courts and Hon'ble ITAT (supra), as discussed above, it is held that the penalty notice issued by the AO u/s 274 of the Act and penalty order u/s 271(1)(c) of the Act were not bad in law and the same are held as valid. Accordingly, in view of the above detailed discussion, on merits also it is held that the AO was justified in levying penalty u/s 271(1)(c) of the Act at Rs.5,42,776/- in this case and the same is hereby confirmed. Ground of appeal Nos. 1 to 5 are dismissed.”

5. Before us, the Ld. Counsel of the assessee referred to the appeal setpage No. 52 and submitted that in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act, the Assessing Officer has not stricken/indicated the relevant limb for levy of the penalty. He submitted that since the charges for levy of penalty were not specified in the notice issued, the action of levy of penalty u/s 271(1)(c) of the Act is vitiated , in view of the decision of the Hon'ble **Bombay High Court in the case of Mohd. Farhan A. Shaikh v. Dy. CIT [2021] 434 ITR 1 (Bom)**, which has been further relied by the **Hon'ble Bombay High Court in the case of Ganga Iron & Steel Trading Co. CIT [2022] 135 taxmann.com 244 (Bombay)**.

6. On the contrary, the Ld. DR relied on the order of the lower authorities and referred to the decision of the Hon'ble Delhi High



Court in the case of **New Holland Tractors (India) (P.) Ltd. v. CIT in [2014] 49 taxmann.com 573 (Delhi)** which was relied upon by the Ld. CIT(A).

7. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. We find that the Ld.CIT(A) has decided the issue of non-striking of relevant limb for levy of the penalty i.e. either concealment of the income or furnishing inaccurate particulars of income, following the decision of the Hon'ble Bombay High Court in the case of CIT v. Kaushaliya (supra). We find that the Hon'ble full Bench of the Bombay High Court in the case of Mohd. Farhan A. Shaikh (supra) has considered the finding in the case of Smt. Kaushaliya (supra) and overruled the said decision holding that defect in the notice of not striking of the relevant limb vitiate the penalty proceedings. The Hon'ble Court held that primary burden lies on the Revenue to specify the charges of penalty in notice. The Hon'ble Court further observed that prima facie opinion in the assessment order translate in action only through the statutory notice u/s 274 r.w.s. 271(1)(c) of the Act and therefore, these proceedings must stand on its own. Thus, the assessee must be informed on the ground of penalty proceedings, only during the statutory notices and omnibus notice suffers from the vice of vagueness. More particulars, a penal provision, even with civil consequences, must be construed strictly, and ambiguity, if any, must be resolved in the affected



assessee's favour. The Hon'ble Jurisdictional High Court in the case of Ganga Iron & Steel Trading Co. (supra) have further observed as under:

"8. We may at the outset refer to the judgment of the Full Bench of this Court in Mohd. Farhan (supra) wherein this precise question was 8 ITL5.2016(J) considered and answered. The said question reads as under:

1. If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice-not striking off the irrelevant matter-vitiate the penalty proceedings?

9. After considering various decisions of the Hon'ble Supreme Court and of this Court including the decision in Dilip Shroff (supra) the Full Bench answered the aforesaid question as under:

"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(1)(c), read with Section 274 of the 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 9 ITL5.2016(J) have adopted an approach more in consonance with the statutory scheme. That means we must hold that Kaushalya does not lay down the correct proposition of law."

It is thus clear from the law as laid down that even if there was an order recording satisfaction for imposing penalty on one or the other, or on both grounds as mentioned in Section 271(1)(c) of the said Act, if the show cause notice suffers from the vice of vagueness the same would vitiate such notice.

10. We find that the law as laid down by the Full Bench applies on all fours to the facts of the present case as in the show cause notice dated 12.02.2008, the Assistant Commissioner of Income Tax is not clear as to whether there was concealment of particulars of income or that the Assessee had furnished inaccurate particulars of income. We therefore find that issuance of such show cause notice without specifying as to whether the Assessee had concealed particulars of his income or had furnished inaccurate particulars of the same has resulted in vitiating the show cause notice.

Heavy reliance was placed by the learned counsel for the Revenue on the decision in Mak Data Private Limited (supra) to urge that the penalty contemplated by Section 271 (1) (c) of the said Act was in the nature of civil liability and mens rea was not essential therein. The decision in Dilip Shroff (supra) having been held as not laying down good law in Dharmendra Textile 10 ITL5.2016(J) Processors Ltd. (supra), it was submitted that the show cause notice issued in the present proceedings was liable to be upheld. It may be noted that all the decisions relied upon by the learned counsel for the Revenue were considered by the Full Bench while answering the issues referred to it on reference. The Full Bench



having considered these decisions and having answered the question as regards defect in the notice under Section 271(1)(c) of the said Act resulting in vitiating the penalty proceedings, we find ourselves bound by the answers given by the Full Bench. It would not be permissible for us to disregard this aspect and take a different view of the matter.

Accordingly substantial question of law no. III is answered by holding that since the show cause notice dated 12.02.2008 does not indicate whether there was concealment of particulars of income or furnishing of incorrect particulars of such income, the same would vitiate the penalty proceedings.

11. Since it has been found that the show cause notice dated 12.02.2008 that was issued to the Assessee was vague and the penalty proceedings initiated on that basis were vitiated, it would not be necessary to answer substantial questions of law as framed at serial nos. I and II. This is for the reason that the said substantial questions pertain to the merits of the adjudication of the proceedings under Section 271(1)(c) of the said Act. Once it is found that the show cause notice dated 12.02.2008 issued to the Assessee 11 ITL5.2016(J) was not in accordance with law, the orders passed thereon would automatic cease to operate.

12. In view of the answer given to the substantial question of law no.III, the impugned order passed by the Tribunal in I.T.(SS)A.No.05/Nag/ 2011 dated 10.07.2015 is set aside. Income Tax Appeal No.5/2016 is allowed with no order as to costs.

8. Respectfully following the decision of the Hon'ble Jurisdictional High Court in the case of **Mohd. Farhan A. Shaikh (supra)** and **Ganga Iron & Steel Trading Co. (supra)**, we set aside the order of the Ld. CIT(A) on the issue-in-dispute and delete the



penalty levied by the Assessing Officer. The grounds of appeal of the assessee for AY 2014-15 are allowed.

9. The grounds raised in ITA No. 584/M/2023 for assessment year 2015-16 are reproduced as under:

1. *The CIT Appeal of National Faceless Appeal Centre has erred in confirming the order of ACIT.*
2. *The CIT Appeal National Faceless Appeal Centre has erred in confirming the Penalty of Rs. 4,28,153/- u/s 271(1)(c).*

10. Facts and circumstances and the issue raised being identical to assessment year 2014-15 and therefore to have consistency in our decision, the order of the Ld. CIT(A) on the issue-in-dispute is set aside and penalty levied by the Ld. Assessing Officer is deleted as particular limb i.e. concealment of the income furnishing inaccurate particulars of income, not specified in the notice for levying the penalty u/s 271(1)(c) of the Act. The grounds appeal of the assessee are accordingly allowed.

11. In the result, the appeals of the assessee are allowed.

Order pronounced in the open Court on 28/04/2023.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 28/04/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant



2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai