IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI

BEFORE,
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.439/Del/2020
(ASSESSMENT YEAR 2009-10)

Arun Duggal 1406-F, 2nd Floor Gali No.13 Govindpuri, Kalka ji New Delhi-110019 PAN-AGUPD 5708Q	Vs.	Asst.CIT Central Circle-4 New Delhi
(Appellant)		**(Respondent)**

Appellant by	Mr. Kapil Goel, Advocate
Respondent by	Mr. P. Parveen Sidharth, CIT-DR

Date of Hearing	17/07/2023
Date of Pronouncement	20/07/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-23, New Delhi ["Ld. CIT(A", for short], dated 15.01.2020 for Assessment Year 2009-10.

"1) That on the facts and in the circumstances of the case and in law. Ld CIT-A grossly erred in without appreciating that the impugned penalty order u/s 271(1)(c) was baseless, void-ab-initio and penalty was levied on arbitrary and unlawful reasons.
2) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld AO has erred in

law and facts of the case of levying penalty as the assessment order for AY 2009-10 is invalid and the penalty levied on the basis of such assessment order / additions are also invalid. The reasons the assessment order is invalid due to the facts.

- *i) Reasons were recorded without application of mind and with the facts in non-existence.*
- *ii) The approval given to the reasons recorded by the Hon'ble Pr CIT is without application of mind and in a mechanical manner.*
- *iii) Four consequent events has occurred in one day in such a speedy manner, which can't be due to human probabilities, Receipt of information. Recording of reasons on the basis thereof, getting approval from the Pr CIT, and issuance of notice.*
- *iv) The objections filed to the reasons recorded were never quashed before framing the assessment order.*
- *v) Provisions of Sec 148 are not applicable in case of action taken under Sec 132 as specifically excluded by Sec 153A.*

3) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld Assessing Officer is erred in law and on facts of the case of levying penalty as whole of the additions are made u/s 68 on the basis of bank statement, which can never be made as the assesse is not maintaining any bank account and no penalty in such cases can be levied.

4) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld Assessing Officer is erred in law and on facts of the case of levying penalty as the assesse has offered bona-fide explanation to the credits to the bank account in quantum/ assessment proceedings, which shows the assesse has strong arguable case, and the matter is highly debatable and contentious in nature. (Here theory of equally hypothesis applies) and such the penalty proceedings are out of jurisdiction.

5) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld Assessing Officer is erred in law and on facts of the case of levying penalty, while the quantum appeal is still pending before the Hon'ble ITAT Delhi.

6) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld Assessing Officer is erred in law and on facts of the case of levying penalty as none of the replies furnished while framing the assessment and while framing the

penalty order has been considered. The replies/ adjournment requests for levying penalty were thrown in dustbin and the claims of the assesse have totally been flushed away, without any consideration/thought on it.

7) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the Ld AO erred in law and on facts of the case, as the Ld AO failed to make a specific charge upon the assesse / le no specific limb of the section/requirements in it has been adhered to.

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8.) That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in without appreciating that the penalty order of Learned Assessing Officer is bad in Law and facts as it is prejudice to the interests of the Assessee due to lack of natural justice or violation of principles natural justice. Further no show-cause notice was issued before passing such penalty order.

Others
9. That the Appellant prays for the grant of permission to add, alter, delete or modify, any or all the grounds of appeal at any time on or before or during the time of hearing before the Hon'ble CIT(A).”

2. The brief facts of the case are that the assessment order came to be passed against the assessee u/s 147 r.w.s.143(3) of the Act by determining the income of the assessee at Rs.12,86,550/- as against the return income of Rs.4,94,550/-. In continuation with the assessment order, the penalty proceedings have been initiated against the assessee and an order u/s 271(1)(c) of the Act r.w.s. 274 of the Act came to be issued on 28/03/2019 by imposing penalty at 100% of Rs.4,36,27,144/-. Aggrieved by the order of the penalty, the assessee preferred an appeal before the Ld. CIT(A). The

Ld. CIT(A) dismissed the appeal filed by the assessee vide order dated 05/01/2020 which is the order impugned before us.

3. On the ground mentioned above. The learned counsel for the assessee submitted that the penalty proceedings initiated on the basis of defective notice issued u/s 274 r.w. Section 271 (1) (c) of the Act wherein no specific limb has been mentioned, apart from the same, the learned Counsel submitted that, in the assessment order, the AO mentioned that 'a separate penalty proceedings u/s 271(1)(c) of the Act for concealment of income' but the order of the penalty has been passed for 'furnishing inaccurate particulars of income'. Therefore, submitted that the order of the penalty is deserves to be quashed.

4. The Ld. DR relying on the order of the lower authorities, submitted that in the quantum appeal addition made against the assessee has been confirmed by the Tribunal, therefore, prayed for dismissal of the appeal.

5. We have heard both the parties and perused the material available on record. During the course of assessment proceedings while passing the assessment order, the Ld. AO in so far as initiation of penalty proceedings, observed as under:

> *"Penalty proceedings have been initiated separately u/s 271(1)(c) of I.T. Act for* ***concealment of income"***

A penalty notice has been issued against the assessee u/s 274 of the Act wherein it has mentioned as under:

> *"have* ***concealed*** *the particulars of your income or…….****furnished inaccurate particulars*** *of such income."*

Further, it is observed that the penalty order has been passed levying penalty Rs.4,36,27,144/- u/s 271(1)(c) of the Act i.e., 100% of tax sought to be evaded for furnishing '**inaccurate particulars of the income'**. Thus, it is clear that the A.O. was not certain regarding the limb on which the penalty proceedings to be initiated against the assessee. Apart from the same, the Ld. AO while issuing notice u/s 274 of the Act not specified the proper the limb of the penalty to be initiated against the assessee.

6. On verifying the notice issued u/s 274 read with Section 271 of the Act, it is found that the said notice is stereotype one and the AO has not specified any limb or charge for which the notice was issued i.e. either for concealment of particulars of income or furnishing of inaccurate particulars of such income. It can be seen from the said notice, Assessing Officer did not strike off irrelevant limb in the notice specifying the charge for which notice was issued.

7. The identical issue as to whether 'the order of the penalty is sustainable which was initiated by issuing a defective notice without striking off irrelevant limb and without specifying the charge for which notice was issued?' has been decided by the 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 Dilip 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 non application 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 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."

8. 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.

9. 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 was 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.

10. Thus, by following the above ratio, we hold that, the penalty order passed u/s 271(1)(c) of the Act by the Assessing Officer for A.Y 2009-10 and the order of the CIT(A) in confirming the penalty order are erroneous. Accordingly, the penalty order dated 23/12/2016 passed by the A.O for Assessment Year 2009-10 is hereby quashed.

11. In the result, the appeal of the assessee is allowed.

Order pronounced in open Court on 20th July, 2023

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

Dated: 20/07/2023
Pk/R.N, Sr.ps

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI