आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 150/RPR/2023

निर्धारण वर्ष / Assessment Year : 2010-11

Ashok Kumar Singh
P-10, Rishab Green City,
Pulgaon, Durg-491 001 (C.G)
PAN : BCFPS1394K

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer-2(2),
Bhilai (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri S.R. Rao, Advocate
Revenue by : Shri Satya Prakash Sharma, Sr. DR

सुनवाई की तारीख / Date of Hearing : 21.08.2023
घोषणा की तारीख / Date of Pronouncement : 04.09.2023

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the CIT (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 06.03.2023, which in turn arises from the order passed by the A.O. u/s.271(1)(c) of the Income-tax Act, 1961 (for short 'Act'), dated 21.06.2018 for A.Y. 2010-11. The assessee has assailed the impugned order on the following grounds of appeal before us:

> "1) In the facts and circumstances of the case and law, the ld. Assessing Officer has erred in initiating the penalty proceedings u/s.271(1)(c) of the Income-tax Act, 1961 by issuing show cause notice u/s.274 r.w.s. 271(1)(c) of the Act without defining the nature of default.
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> 2) In the facts and circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in deciding the appeal ex-parte without considering the submissions of the appellant submitted on 27.12.2022.
>
> 3) In the facts and circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) has erred in confirming penalty of Rs.54,108/- u/s 271(1)(c) of the Income-tax Act, 1961.
>
> 4) The impugned order is bad in law and on facts.
>
> 5) The appellant reserves the right to add, alter or omit all or any of the grounds of appeal in the interest of justice.

2. Succinctly stated, as the assessee who was deriving income from two streams, viz. (i) salary income; and (ii) income from other sources, had failed to file his return of income for the year under consideration; therefore, the A.O initiated proceedings u/s.147 of the Act. Notice u/s.148 of the Act dated 18.12.2017 was

issued to the assessee. In response, the assessee filed his return of income, declaring an income of Rs.4,92,662/-. The A.O. framed the assessment vide his order passed u/s. 143(3) r.w.s. 147 dated 28.12.2017 assessing the income returned by the assessee as such. As the assessee had filed a return of income only pursuant to the notice issued by the A.O u/s.148 of the Act, therefore, the A.O, while culminating the assessment, initiated penalty proceedings u/s.271(1)(c) of the Act. Accordingly, a "Show Cause Notice" (SCN) u/s.274 r.w.s 271(1)(c) of the Act dated 31.12.2017 was issued by the A.O, Page 13 of APB. Considering the facts mentioned above, the A.O. vide his order passed u/s.271(1)(c) dated 21.06.2018 imposed a penalty of Rs.54,108/-.

3. Aggrieved the assessee assailed the order passed by the A.O u/s. 271(1)(c) of the Act dated 21.06.2018 before the CIT(Appeals) but without success.

4. The assessee, being aggrieved with the order of the CIT(Appeals), has carried the matter in appeal before us.

5. The Ld. Authorized Representative (for short 'AR') for the assessee submitted that as the Assessing Officer had failed to point out the specific default in the "Show Cause" notice (herein referred to as 'SCN's) issued u/s 274 r.w.s 271 of the Act, dated 31.12.2017 (supra) for which the assessee was called upon to put forth an explanation that as to why he may not be saddled with penalty, therefore, the penalty which he thereafter had imposed u/s 271(1)(c) of the Act cannot be sustained and is liable to be vacated. The ld. AR to drive home his aforesaid claim had drawn our

attention to the SCN dated 31.12.2017. Referring to the discrepancy mentioned above in the SCN, dated 31.12.2017, it was submitted by the ld. AR that as the AO had failed to validly put the assessee to notice regarding the default for which the impugned penalty under Sec. 274 r.w.s 271(1)(c) was sought to be imposed on him; therefore, the assessee had remained divested of an opportunity to put forth in his defense a clear explanation that no such penalty u/s 271(1)(c) was called for in his case. The ld. AR, in support of his contention above had relied on certain judicial pronouncements, as under:

> (i) K.V.S Prakasa Rao, Bhilai (C.G.) Vs. DCIT, Circle-1(1), Bhilai (C.G.) ITA No.123/RPR/2018 dated 09.08.2018
>
> (ii) Meeta Gutgutia, New Delhi Vs. ACIT, Central Circle-10, New Delhi, ITA No.327/Del/2014 dated 31.03.2016

6. Per contra, the Ld. Departmental Representative (for short 'D.R') relied upon the orders of the lower authorities. The Ld. D.R submitted that as the assessee was afforded sufficient opportunity in the course of penalty proceedings, thus, it needed to be corrected on his part to claim that no opportunity of being heard was afforded to him. The Ld. D.R submitted that now when the assessee, in compliance with the SCN, dated 31.12.2017, had submitted that no penalty u/s 271(1)(c) of the Act was called for in his hands; therefore, it was beyond comprehension that as to on what basis he could after that claim that he was not validly put to notice about the default for which penalty u/s.271(1)(c) of the Act was sought to be imposed on him.

7. We have heard the ld. Authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by the Ld. AR to drive home his contentions. Admittedly, on a perusal of the SCN dated 31.12.2017, it stands revealed that the Assessing Officer had failed to strike off the irrelevant default while calling upon the assessee to explain why he may not be subjected to penalty u/s 271(1)(c) of the Act. For the sake of clarity, the SCN dated 31.12.2017, Page 13 of APB is culled out as under:

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE INCOME TAX OFFICER
WARD 2(2) BHILAI

To,
ASHOK KUMAR SINGH
P-10, RISHABH GREEN CITY PULGAON
DURG 491001, Chhattisgarh
India

PAN:	Assessment Year:	Date:	Notice No. :
BCFPS1394K	**2010-11**	31/12/2017	**ITBA/PNL/S/271(1)(c)/2017-18/1008095822(1)**

Notice under section 274 read with section 271(1)(c) of the Income Tax Act, 1961

Sir/ Madam,

Whereas in the course of proceedings before me for the Assessment Year **2010-11**, it appears to me **that you have concealed the particulars of income or furnished inaccurate particulars of such income.**

You are hereby requested to appear before me either personally or through a duly authorised representative at **11:00 AM** on **15/01/2018** and show cause why an order imposing a penalty on you should not be made under section **271(1)(c)** of the Income Tax Act, 1961.

If you do not wish to avail yourself of this opportunity of being heard in person or through authorised 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)** of the Income Tax Act, 1961.

PADMA SHOBHA VENUGOPAL
WARD 2(2) BHILAI

At this stage, we may herein observe that though the A.O, while framing the assessment vide his order passed u/s.143(3) r.w.s. 147, dated 28.12.2017, had initiated the penalty proceedings u/s.271(1)(c) for concealment of income, but the usage of the term "OR" as a conjunction between the two defaults, i.e. *"concealed the particulars of your income or furnished inaccurate particulars of such income"* in the SCN mentioned above dated 31.12.2017 in no clear terms conveyed to the assessee the specific default for which the penalty proceedings were sought to be

proceeded with in his hands. In sum and substance, the A.O vide the aforesaid SCN dated 31.12.2017 (supra) had failed to validly put the assessee to notice as regards the default for which he was called upon to put forth an explanation as to why penalty u/s.271(1)(c) may not be imposed on him. As the A.O in the aforesaid SCN had mentioned both the defaults, i.e., "concealment of income" or "furnishing of inaccurate particulars of income", therefore, by using "OR" as a conjunction between both the defaults mentioned above, he had not only failed to validly convey to the assessee in clear terms the specific defaults for which the penalty was sought to be imposed in his case but had kept the latter guessing about the default/defaults for which penalty was sought to be imposed in his case.

8. Insofar the validity of the jurisdiction assumed by the A.O for imposing penalty u/s 271(1)(c) is concerned, we find that the same has been assailed before us on the ground that as the A.O had in the aforesaid "Show cause" notice, dated 31.12.2017 failed to point out the specific default for which penalty u/s.271(1)(c) was sought to be imposed in his case; therefore, the assessee was not validly put to notice as regards the default/defaults for which he was called upon to explain that as to why penalty may not be imposed on the under Sec. 271(1)(c) of the I.T Act.

9. We have given thoughtful consideration to the facts of the case and are persuaded to subscribe to the claim of the Ld. AR that the A.O. in the aforesaid SCN dated 31.12.2017 had failed to point out the default for which penalty was sought to be imposed on the assessee. In our considered view, as both of the two defaults

envisaged in Sec. 271(1)(c) i.e., 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults that operate in their respective independent and exclusive fields; therefore, the A.O needed to have put the assessee to notice as regards the default for which he was being called upon to explain that as to why penalty under Sec. 271(1)(c) may not be imposed on him. As observed hereinabove, a perusal of the 'Show cause' notice issued in the present case by the A.O under Sec. 274 r.w. Sec. 271(1)(c), dated 31.12.2017, clearly reveals that there was no application of mind by the A.O. while issuing the same. We say so for the reason that the A.O by using the term "OR" as a conjunction between both the defaults, i.e., *"concealed the particulars of your income or furnished inaccurate particulars of such income"*, had clearly failed in his statutory obligation of conveying and validly putting the assessee to notice penalty was sought to be imposed upon him for which default; and, thus, had divested him from putting forth his defense that as to why no such penalty was called for in his case. We are of a firm conviction that the very purpose of affording a reasonable opportunity of being heard to an assessee as per the mandate of Sec. 274(1) of the Act would not only be frustrated but would be rendered redundant if he is not conveyed in clear terms the specific default for which penalty under the said statutory provision was sought to be imposed. In our considered view, the indispensable requirement on the part of the A.O to put the assessee to notice as regards the specific charge contemplated under the aforesaid statutory provision, viz. 'concealment of income' or 'furnishing of inaccurate particulars of income' or both of the said defaults is not merely an idle

formality but is a statutory obligation cast upon him, which we find had not been discharged in the present case as per the mandate of law.

10. We would now test the validity of the aforesaid "Show Cause" notice dated 31.12.2017 and the jurisdiction emerging therefrom in the backdrop of the judicial pronouncements on the issue under consideration. Admittedly, the A.O. has the powers to levy penalty under Sec. 271(1)(c) of the Act if, in the course of the proceedings, he is satisfied that the assessee had either 'concealed his income' or 'furnished inaccurate particulars of his income' or had committed both the defaults w.r.t. the various additions/disallowances made in his hands while framing the assessment. In our view, as penalty proceedings are like quasi criminal proceedings; therefore, as a matter of a statutory right, the assessee is supposed to know the exact charge for which he is being called upon to explain why the same may not be imposed on him. The non-specifying of the charge in the 'Show cause' notice not only reflects the non-application of mind by the A.O but defeats the very purpose of giving a reasonable opportunity of being heard to the assessee as envisaged under Sec. 274(1) of the I.T. Act. We find that the fine distinction between the said two defaults contemplated in Sec. 271(1)(c), viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' had been appreciated at length by the **Hon'ble Supreme Court** in its judgments passed in the case of **Dilip & Shroff Vs. Jt. CIT *(2007) 210 CTR (SC) 228*** and **T. Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC)**. The Hon'ble Apex Court in its aforesaid judgments had observed that the two expressions, viz. 'concealment of particulars of income' and 'furnishing of inaccurate

particulars of income' have a different connotation. The Hon'ble Apex Court was of the view that the non-striking off the irrelevant limb in the notice clearly revealed a non-application of mind by the A.O, and had observed as under:-

> "83. It is of some significance that in the standard proforma 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. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he has furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing reliance on the order of assessment laid emphasis that he had dealt with both the situations.
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> 84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice [See Malabar Industrial Co. Ltd. Vs. CIT (2000) 2 SCC 718].

We are of the considered view that now when as per the settled position of law the two defaults, viz. 'concealment of income' and 'furnishing of inaccurate particulars of income' are separate and distinct defaults, therefore, it was incumbent on the part of the A.O to have clearly specified his said intention in the 'Show cause' notice dated 31.12.2017 (supra), which we find he had failed to do in the case before us. The aforesaid failure of the A.O cannot be merely dubbed as a technical default as the same had clearly divested the assessee of his statutory right of an opportunity of being heard and defend his case.

11. We find the **Hon'ble High Court of Karnataka** in the case of **CIT Vs. SSA's Emerald Meadows (73 taxmann.com 241)(Kar)** following its earlier order in the case of **CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565**

(Kar) had held that where the notice issued by the A.O under Sec. 274 r.w Sec. 271(1)(c) does not specify the limb of Sec. 271(1)(c) for which the penalty proceedings were initiated, i.e., whether for 'concealment of particulars of income' or 'furnishing of inaccurate particulars', then, the same has to be held as bad in law. The 'Special Leave Petition' (for short 'SLP') filed by the revenue against the order mentioned above of the **Hon'ble High Court of Karnataka** had been dismissed by the **Hon'ble Supreme Court** in **CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 248 (SC).** Apart from that, we find that the Hon'ble High Court of Bombay had taken a similar view in the case of **CIT Vs. Samson Perinchery (ITA No. 1154 of 2014; Dt. 05.01.2017)(Bom).** The Hon'ble High Court relied on the judgment of the Hon'ble High Court of Karnataka in the case of Manjunathja Cotton and Ginning Factory (supra), which in turn had relied on the decision of the Hon'ble Apex Court in T. Ashok Pai Vs. CIT, 292 ITR 1 (SC) had approved the order of the Tribunal that had deleted the penalty u/s 271(1)(c) imposed by the A.O and had, inter alia, observed that the failure of the AO to strike off the irrelevant default in the notice issued under Sec. 274 of the Act, which is in a standard proforma indicates a non-application of mind by the A.O. while issuing the notice. Further, we find that the **Hon'ble High Court of Bombay** in the case of Pr. **CIT (Central), Bengaluru Vs. Golden Peace Hotels & Resorts (P) Ltd. (2021) 124 tamnn.com 249 (SC)**, by drawing support from its earlier order in the case of **CIT Vs. Shri Samson Perinchery (2017) 392 ITR 4 (Bom)** and **PCIT Vs. New Era Sova Mine (2020) 420 ITR 376 (Bom),** had observed that AO while issuing show-cause should clearly

indicate that as per him the case of the assessee involves concealment of particulars of income; or there is furnishing of inaccurate particulars. It was further observed, that if the notice is issued in the printed form, then, the necessary portions which are not applicable are required to be struck-off, so as to indicate with clarity the nature of the satisfaction recorded. The High Court observed that as in the case before them the AO had failed to strike-off the irrelevant default in the body of the SCN issued under Sec. 274 of the Act, therefore, the penalty imposed by the AO u/s 271(1)(c) of the Act was liable to be vacated. For the sake of clarity the observations of the Hon'ble High Court of Bombay in its aforesaid order are culled out as under:

> "4. We have carefully examined the record as well as duly considered the rival contentions. Both the Commissioner (Appeals) as well as the ITAT have categorically held that in the present case, there is no record of satisfaction by the Assessing Officer that there was any concealment of income or that any well as in New Era Soya Mine (supra) has held that the notice which is inaccurate particulars were furnished by the assessee. This being a sine qua non for initiation of penalty proceedings, in the absence of such satisfaction, the two authorities have quite correctly ordered the dropping of penalty proceedings against the assessee.
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> 6. Besides, we note that the Division Bench of this Court in Samson (supra) as applicable are required to be struck off, so as to indicate with clarity the nature of the satisfaction recorded. In both Samson Perinchery and New Era Soya furnishing of inaccurate particulars of income or both, with clarity. If the notice is issued in the printed form, then, the necessary portions which are not applicable are required to be struck off, so as to indicate clarity the nature of satisfaction recorded. In both Samson Perinchery and New Era Sova Mine (supra), the notices issued had not struck off the portion which were inapplicable. From this, the Division Bench concluded that there was no proper record of satisfaction or proper application of mind in matter of initiation of penalty proceedings.
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> 7. In the present case, as well if the notice dated 30/09/16 (at page 32) is perused, it is apparent that the inapplicable portions have not been struck off. This coupled with the fact adverted to in paragraph (5) of this order, leaves no ground for interference with the impugned

> order. The impugned order is quite consistent with the law laid down in the case of Samson Perinchery and New Era Soya Mine (supra) and therefore, warrants no interference."

The Special Leave Petition (SLP) filed by the revenue against the above order had been dismissed by the **Hon'ble Apex Court** in **Pr. CIT (Central) Vs. Golden Peace Hotels and Resorts (P) Ltd. (2021) 124 taxmann.com 249 (SC).** Also, the "Full bench" of the **Hon'ble High Court of Bombay** in the case of **Mohd. Farhan A. Shaikh V. DCIT, Central Circle-1, Bengaluru (2021) 280 Taxman 334** (Bombay), had observed that where the assessment order records a satisfaction for imposing penalty on one or other; or both grounds mentioned in Sec. 271(1)(c), but there is a defect in the SCN, wherein the AO had failed to strike-off the irrelevant default, then, the same would vitiate the penalty proceedings. The Hon'ble High Court, while concluding as hereinabove, had held as under:

> " 173. We, however, accept that the Revenue, often, adopts a pernicious practice of sending an omnibus, catch-all, printed notice. It contains both relevant and irrelevant information. It assumes, perhaps unjustifiably, that whoever pays tax is or must be well-versed in the nuances of tax law. So it sends a notice without specifying what the assessee, facing penalty proceedings, must meet. In justification of what it omits to do, it will ask, rather expect, the assessee to look into previous proceedings for justification of its action in the later proceedings, which are, undeniably, independent. It forgets that a stitch in time saves nine. Its one cross or tick mark clears the cloud, enables the assessee to mount an effective defence, and, in the end, its diligence avoids a load of litigation. Is not prejudice writ large on the face of the mechanical methods the Revenue adopts in sending a statutory notice to the assessee under section 271 (1) (c) read with section 274 of the Act? Pragmatically speaking, Kaushalya casts an extra burden on the assessee and assumes expertise on his part. It wants the assessee to make up for the Revenue's lapses.
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> Ex Post and Ex Ante Approaches of Adjudication:
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> 174. In ex-post adjudication, the Court looks back at a disaster or other event after it has occurred and decides what to do about it or how to remedy it. In an ex-ante

adjudication, the Court looks forward, after an event or incident, and asks what effects the decision about this case will have in the future—on parties who are entering similar situations and have not yet decided what to do, and whose choices may be influenced by the consequences the law says will follow from them. The first perspective also might be called static since it accepts the parties' positions as given and fixed; the second perspective is dynamic since it assumes their behaviour may change in response to what others do, including judges. (for a detailed discussion, see Ward Farnsworth's Legal Analyst: A Toolkit for Thinking about the Law)[72].

175. Kaushalya has adopted an ex-post approach to the issue resolution; Goa Dourado Promotions, an ex-ante approach. Kaushalya saves one single case from further litigation. It asks the assessee to look back and gather answers from whatever source he may find, say, the assessment order. On the other hand, Goa Dourado Promotions saves every other case from litigation. It compels the Revenue to be clear and certain. To be more specific, we may note that if we adopt Kaushalya's approach to the issue, it requires the assessee to look for the precise charge in the penalty proceedings not only from the statutory note but from every other source of information, such as the assessment proceedings. That said, first, penalty proceedings may originate from the assessment proceedings, but they are independent; they do not depend on the assessment proceeding for their outcome. Assessment proceedings hardly influence the penalty proceedings, for assessment does not automatically lead to a penalty

176. Second, not always do we find the assessment proceedings revealing the grounds of penalty proceedings. Assessment order need not contain a specific, explicit finding of whether the conditions mentioned in section 271(1)(c) exist in the case. It is because Explanations 1(A) and 1(B), as the deeming provisions, create a legal fiction as to the grounds for penalty proceedings. Indeed, the Apex Court in CIT v. Atul Mohan Bindal [73], has explained the scope of section 271(1)(c) thus:

> "[Explanation 1, appended to section 27(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false, or the explanation offered by him is not substantiated, and he fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, for the purposes of section 271(1)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income."

177. That is, even if the assessment order does not contain a specific finding that the assessee has concealed income or he is deemed to have concealed income because of the existence of facts which are set out in Explanation 1, if a mere direction to initiate penalty proceedings under clause (c) of sub-section (1) is found in the said order, by legal fiction, it shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under the said clause (c). In other words, the Assessing Officer's satisfaction as to be spelt out in the assessment

order is only prima facie. Even if the assessment order gives no reason, a mere direction for penalty proceedings triggers the legal fiction as contained in the Explanation (1).

178. Therefore, in every instance, it is a question of inference whether the assessment order contained any grounds for initiating the penalty proceedings. Then, whenever the notice is vague or imprecise, the assessee assails it as bad; the Revenue defends it by saying that the assessment order contains the precise charge. Thus, it becomes a matter of adjudication, opening litigious floodgates. The solution is a tick mark in the printed notice the Revenue is used to serving on the assessees.

179. Besides, the prima facie opinion in the assessment order need not always translate into actual penalty proceedings. These proceedings, in fact, commence with the statutory notice under section 271(1)(c) read with section 274. Again, whether this prima facie opinion is sufficient to inform the assessee about the precise charge for the penalty is a matter of inference and, thus, a matter of litigation and adjudication. The solution, again, is a tick mark; it avoids litigation arising out of uncertainty.

180. One course of action before us is curing a defect in the notice by referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice—and that 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 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 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 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 Kaushalya does not lay down the correct proposition of law.

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

184. Indeed, Kaushalya did discuss the aspect of prejudice. As we have already noted, Kaushalya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushalya, “fully knew in detail the exact charge of the Revenue against him”. For Kaushalya, 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 closes 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 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(1)(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.”

Also, the **Hon’ble High Court of Bombay,** in the case of **Pr. CIT (Central) Bengaluru Vs. Goa Coastal Resorts and Recreation Pvt. Ltd. (2020) 113 taxmann.com 574 (Bombay)** had observed that where there was no recording of satisfaction by the AO in relation to any concealment of income or furnishing of inaccurate particulars by the assessee in the notice issued for initiation of such

proceedings, then, the Tribunal had in the absence of said statutory requirement rightly vacated the penalty proceedings. Also, the **Hon'ble High Court of Bombay** in the case of **PCIT, Panaji Vs. Goa Dourdo Promotions (P) Ltd. (2021) 433 ITR 268 (Bombay)** relying upon its earlier orders in the case of, viz.(i). Goa Coastal Resorts & Recreation P. Ltd. (supra); (ii). Samson Perinchery (supra); and (iii). New Era Sova Mine (supra), had observed that recording of satisfaction by AO in relation to any concealment of income or furnishing of inaccurate particulars by the assessee in notice issued u/s 271(1)(c) is the *sine qua non* for initiation of such proceedings. Further, we find that the **ITAT, Pune** in **Ashok Sahahakari Sakhar Karkhana Ltd. Vs. ACIT (2018) 99 taxman.com 374 (Pune),** had held that where in a notice issued u/s 274 of the Act the AO had used conjunction "or" to mention both limbs, i.e, concealment of income or furnishing inaccurate particulars of income and charge for levy of penalty was not explicitly clear from notice, then, the same was to be held as bad in law and penalty was liable to be set aside. On a similar footing was the view taken by the **ITAT, Mumbai "B" Bench in ACIT Vs. Bhushan Kamanayan Vora (2018) 99 taxmann.com 373 (Mum)**. It was observed by the Tribunal that where the AO was not sure about the charge, i.e. whether it was for concealment of income or furnishing of inaccurate particulars of income, the penalty imposed by him u/s 271(1)(c) could not be sustained.

12. We have given thoughtful consideration to the issue before us. After deliberating on the facts, we are of the considered view that the failure on the part of the A.O. to put the assessee to notice as regards the default for which penalty under

Sec. 271(1)(c) was sought to be imposed on him by clearly and explicitly pointing out the specific defaults in the SCN, dated 31.12.2017, for which he was called upon to explain that as to why penalty u/s.271(1)(c) of the Act may not be imposed upon him, had, thus, left the assessee guessing of the default for which he was being proceeded against, and had divested him of an opportunity to put forth an explanation before the A.O that no such penalty was called for in his case. We, thus, in the backdrop of our observations above, are of a firm conviction that as the A.O had failed to discharge his statutory obligation of fairly putting the assessee to notice as regards the defaults for which he was being proceeded against, therefore, the penalty under Sec. 271(1)(c) of Rs.54,108/- imposed by him being in clear violation of the mandate of Sec. 274(1) of the Act cannot be sustained. We, thus, for the reasons above not being able to persuade ourselves to subscribe to the imposition of penalty by the A.O, therefore, set aside the order of the CIT(A) who had upheld the same. The penalty of Rs.54,108/- imposed by the A.O under Sec.271(1)(c) is quashed in terms of our observations above. The **Ground of appeal Nos. 1 to 3** raised by the assessee are allowed in terms of our aforesaid observations.

13. As the penalty imposed on the assessee under Sec. 271(1)(c) of the Act had been quashed by us for want of valid assumption of jurisdiction by the A.O; therefore, we refrain from adverting to and adjudicating the other grounds of appeal raised by the assessee, wherein he has assailed the penalty sustained by the CIT(Appeals) qua the merits of the case, which, thus, are left open.

14. **Ground of appeal Nos. 4 & 5,** being general, are dismissed as not pressed.

15. In the result, the assessee's appeal is allowed in terms of our observations above.

Order pronounced in open court on 04th day of September, 2023.

Sd/-	Sd/-
ARUN KHODPIA	**RAVISH SOOD**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

रायपुर/ RAIPUR ; दिनांक / Dated : 04th September, 2023
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-1, Raipur (C.G.)
4. The Pr. CIT, Raipur-1 (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.