

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.3209/Mum/2023

(निर्धारण वर्ष / Assessment Years: 2007-08)

&

आयकर अपील सं/ I.T.A. No.3208/Mum/2023

(निर्धारण वर्ष / Assessment Years: 2009-10)

Himanshu Chimanlal Engineer 33 – Chamunda Niwas, B- Wing, 3 rd Floor, Tagore Road, Santa Cruz (West), Mumbai-400054.	बनाम / Vs.	Assistant Commissioner Income Tax, 19 (2) Piramal Chambers, Parel, Mumbai-400012.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAP0548H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Anant N Pai	
Revenue by:	Shri. P D Chougale (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 16/01/2024

घोषणा की तारीख /Date of Pronouncement: 30/01/2024

आदेश / ORDER

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-34, Mumbai/National Faceless Appeal Center, Delhi (NFAC) [hereinafter referred as “Ld. CIT(A)”] dated 14.07.2023 for the assessment year (AY) 2007-08 & AY 2009-10.

2. Both sides agree that these appeals are penalty appeals; and facts as well as the penalty levied are similar/identical in both appeals. Therefore, appeal for the AY 2007-08 is taken as the lead case, and the result of which will be followed *mutatis mutandis* for the appeal for AY 2009-10.



ITA Nos. 3209 & 3208/Mum/2023

A.Y. 2007-08, 2009-10

Himanshu Chimanlal Engineer, Mumbai

3. Coming to appeal for AY 2007-08, the Ld. AR of the assessee Shri Anant N Pai pointed out that the AO had levied an amount of Rs.5,00,000/- u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter “the Act”) by penalty order dated 31.03.2014 for AY. 2007-08 (and Rs. 10,00,000/- for AY 2009-10). Further according to him, the Ld. CIT(A) has confirmed the impugned penalty levied by the AO. Before us the assessee has raised an addition ground of appeal wherein assessee has raised the legal issue which is reproduced as under:-

“**Additional Ground 1A:** - On facts and circumstances of the case and in law, the Ld. Commissioner (Appeals) erred in confirming the penalty u/s 271(1)(c) of the Act of Rs.5,00,000/- when penalty proceedings were initiated by the Ld. Assessing Officer under a notice u/s 274 which did not specify clearly whether – the alleged concealment of income was on account of concealing particulars of income or furnishing inaccurate particulars of income.

The penalty proceedings are therefore without jurisdiction and deserve to be quashed in appeal.”

4. A perusal of the additional ground raised by the assessee reveals that it is a legal issue, which we note assessee can raise even for the first time before this Tribunal as held by the Hon’ble Supreme Court in the case of NTPC v/s CIT (1998) 229 ITR 383 (SC). Even though Ld. DR opposed the admission of this ground, we relying on the decision of Hon’ble Supreme Court in the case of NTPC (supra) admit this additional ground of appeal.



ITA Nos. 3209 & 3208/Mum/2023

A.Y. 2007-08, 2009-10

Himanshu Chimanlal Engineer, Mumbai

5. The Ld. AR assailing the imposition of penalty submitted that in the show cause notice issued by AO prior to levy of penalty, the AO failed to strike out from the pro-forma notice the faults/charges which are not applicable to assessee. In other words, the AO in the penalty notice didn't specify the fault/charge against which assessee is being proceeded against for levy of penalty; and so, according to him, assessee was in the dark as to what was the fault/charge alleged against it for levy of penalty and therefore, according to him the notice itself was invalid in the eyes of law, and therefore, the consequent levy of penalty need to be held as bad and penalty be deleted. In support of his aforesaid submission, he drew our attention to the penalty notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 29.12.2009 for AY 2007-08 (*likewise penalty notice for AY 2009-10 dated 21.12.2011*) and pointed out that AO has not stricken out the inapplicable portion in the pro-forma notice and resultantly the charges/fault for which assessee was proceeded was ambiguous, and therefore defective/invalid. Per contra, the Ld. DR after perusal of the impugned notices (*supra*) could not controvert the aforesaid facts/submission of the Ld. AR, but he defended the impugned action of levy of penalty.

6. We have heard both the parties and perused the record. From perusal of the impugned notices for both years i.e. AY 2007-08 & 2009-10, we note that the penalty notices have been issued by AO which were prepared in the standard pro-forma which contents show that both faults/charge have been spelled out i.e. *have concealed the particulars of income and/or furnished inaccurate particulars of such*



*ITA Nos. 3209 & 3208/Mum/2023
A.Y. 2007-08, 2009-10
Himanshu Chimanlal Engineer, Mumbai*

income. And we find that AO failed to specify in the notices as to which charge/fault assessee is being proceeded for levy of penalty by striking down any one of the two (2) limbs stated therein. According to Ld. AR by not striking down one of fault/charge, the assessee was not able to defend properly the charge/fault against which the AO was proposing to levy penalty. Therefore, according to Ld AR the penalty levied by AO is vitiated and pleaded for deletion of penalty. And in support of his aforesaid submission, the Ld. AR has relied on the Full Bench decision of the Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021) 434 ITR 1 (Bombay) dated 11.03.2021 wherein it was held that the show cause notice issued prior to levy of penalty without specifying the fault/charge against which the assessee is being proceeded, would vitiate the penalty itself. And thus the Hon'ble High Court upheld the view of the division bench order in the case of PCIT Vs. Goa Dourado Promotions (P.) Ltd. (Tax Appeal No.18 of 2019, dated 26.11.2019) and also held that the contrary view taken by an another division bench in the case of CIT Vs. Smt. Kaushalya (1995) 216 ITR 660 (Bom) does not lay down the correct proposition of law.

7. As noted earlier, we find that the penalty notice dated 29.12.2009 (for AY 2007-08) & notice dated 21.12.2011 (for AY 2009-10) did not explicitly convey to the assessee the specific fault/charge the assessee is being proceeded for levy of penalty. Resultantly, the show cause notices need to be held as defective/invalid and therefore we hold that impugned notices to be



ITA Nos. 3209 & 3208/Mum/2023
A.Y. 2007-08, 2009-10
Himanshu Chimanlal Engineer, Mumbai

bad in law. For doing that we also rely on the decision of the Hon'ble Karnataka High Court in the case of CIT vs Manjunatha Cotton and Ginning Factory reported in (2013) 359 ITR 565 (Kar) and the Department's SLP against it has been dismissed by the Hon'ble Supreme Court. We also find that Hon'ble Karnataka High Court in the case of CIT Vs. SSA's Emerald Meadows, reported in (2016) 73 taxmann.com 241 (Kar) endorsed the same view in Manjunatha Cotton and Ginning Factory (supra) and held as under:-

“3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short ‘the Act’), to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565/218 Taxman 423/35 taxmann.com 250(Kar).

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed.”

8. Since, we find that show cause notices issued by the AO dated 29.12.2009 & 21.12.2011 u/s 274 r.w.s. 271(1)(c) of the Act are defective/invalid it is held to be bad in law. And therefore, consequential action of AO to levy penalty is held to be ‘null’ in eyes



ITA Nos. 3209 & 3208/Mum/2023
A.Y. 2007-08, 2009-10
Himanshu Chimanlal Engineer, Mumbai

of law by relying on the Full Bench decision of the Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh (supra) and other judicial precedents supra and consequently allow the appeal of the assessee and direct deletion of penalty levied for both years (AY 2007-08 & 2000-10).

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

Order pronounced in the open court on this 30/01/2024.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/01/2024.
Aniket Singh Rajput, (Steno)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai



*ITA Nos. 3209 & 3208/Mum/2023
A.Y. 2007-08, 2009-10
Himanshu Chimanlal Engineer, Mumbai*