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

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER

ITA No.224, 225 & 226/DEL/2023,
A.Y. 2017-18, 2018-19 & 2019-20

Jaina Marketing & Associates,D-170, Okhla industrial Area, Phase-1, Tehkhand, South East Delhi, Delhi-110020 PAN No. AADFJ4417D	Vs.	DCIT, Central Circle-18, Delhi
(Appellant)		**(Respondent)**

Appellant by	Shri Gautam jain, Adv. & Shri lalit mohan, CA & Shri parth Singhal, Adv.
Respondent by	Mr. Waseem Arshad, CIT(DR)

Date of Hearing	28/02/2024
Date of Pronouncement	20/03/2024

ORDER

PER YOGESH KUMAR U.S., JM:

The above three appeals filed by the assessee challenging the order of the Ld. CIT(A) wherein the Ld. CIT(A) confirmed the orders of penalty u/s 271A (A.Y 2017-18), 271AB (A.Y 2018-19) & 271AAB (A.Y 2018-19) respectively.

2. The assessee is a partnership firm engaged in the business of trading and distribution of mobile phones and accessories, mainly

in Karbonn and Panasonic brand Mobile Phones. On 29/08/2018 a search and seizure operation u/s 132 of the Act was conducted on different business and residential premises of Jain Group of case based at Delhi and other places. As a consequence of the above search, assessment orders have been passed u/s 153A/143(3) of the Act by making various additions in Assessment Year 2017-18 to 2019-20. Pursuant to the assessment orders three penalty orders u/s 271(1)(c)/271A and 271AAB of the Act have been passed on 12/10/2021 for the years under consideration. Aggrieved by the penalty orders the assessee preferred the Appeals before the CIT(A). The Ld. CIT(A) vide orders dated 29/12/2022 and 26/12/2022 dismissed the Appeals filed by the assessee. As against the orders of the Ld. CIT(A), the assessee preferred the above appeals on the grounds mentioned above. Since the appeals are pertaining to single assessee and issues involved in the Appeals are being identical which were heard together and dispose off in this common order.

3. The Grounds of Appeal of the Respective Appeals are as under:

ITA No. 224/Del/2023

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) {CIT(A)} is bad both in the eyes of law and on facts.

2. On the facts and circumstances of the case, the Learned CIT(A) has erred both on facts and in laws in confirming the action of the AO levying penalty of Rs. 2,10,90,362/- invoking the provision of section 270A read with section 274 of the Income Tax Act.

3. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied on the addition of Rs. 3,51,50,603/- made by AO estimating profit on undisclosed sales on the basis of documents seized during the course of search.

4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO rejecting the contention of the assessee that no penalty can be levied on the addition made on the basis of estimation.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO rejecting the contention of the assessee that penalty under section 270A(9)(a) of the Act was levied without recording any satisfaction holding that the case falls under clause (a) to section 270A(9) of the Act.

6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied despite the fact that the notice issued by AO under section 270A read with section 274 of the Act does not specify the charge against the assessee.

7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming

penalty levied by AO ignoring the contention of the assessee that the addition on which penalty has been levied by the AO is itself untenable in law.

8. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty despite the fact that there is neither misreporting of income nor under reporting of income.

9. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the penalty levied by the AO ignoring the contention of the assessee that the penalty proceedings are independent proceedings, as such mere disallowance does not lead to levy of penalty.

10. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the penalty levied u/s 270A of the Act despite the fact that no finding has been given on merit regarding underreporting of income in the order passed by the AO.

11. The appellant craves leave to add, amend or alter any of the grounds of appeal."

ITA NO. 225/Del/2023

"1. On the facts and circumstances of the case, the order passed by the Learned Commissioner of Income Tax (Appeals) (CIT(A)) is bad both in the eyes of law and on facts.

2. On the facts and circumstance of the case, the Learned CIT(A) has erred both on facts and in laws in confirming the action of the AO levying penalty of Rs.2.51,96,355/- invoking the provision of section 271AAB read with section 274 of the Income-tax Act.

3. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the

penalty levied by the AO on the addition of Rs.3,09,93,925/- made by AO estimating profit on undisclosed sales on the basis of documents seized during the course of search.

4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied on the addition of Rs. 1,10,00,000/- made by AO on account of advertisement expenditure claimed by the assessee treating the same as bogus.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO rejecting the contention of the assessee that no penalty can be levied on the addition made on the basis of estimation.

6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO u/s 271AAB despite the fact that case of the assessee does not fall in the definition of "Undisclosed income" and no penalty under section 271AAB is leviable.

7. On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in confirming penalty levied by AO ignoring the contention of the assessee that the addition on which penalty has been levied by the AO is itself untenable in law.

8. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied despite the fact that the notice issued by AO under section 271AAB of the Act does not specify the charge against the assessee.

9. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the penalty levied by the AO ignoring the contention of the assessee that the penalty proceedings are independent

proceedings, the penalty u/s 271AAB is not automatic and hence, not mandatory in nature.

10. That the appellant craves leave to add, amend or alter any of the grounds of appeal.

ITA NO. 226/Del/2023

1. On the facts and circumstances of the case, the order passed by the Learned Commissioner of Income Tax (Appeals) {CIT(A)) is bad both in the eyes of law and on facts.

2. On the facts and circumstance of the case, the Learned CIT(A) has erred both on facts and in laws in confirming the action of the AO levying penalty of Rs. 1,35,63,276/- invoking the provision of section 271AAB read with section 274 of the Income-tax Act.

3. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO on the addition of Rs.98,14,508/- made by AO estimating profit on undisclosed sales on the basis of documents seized during the course of search.

4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO on the addition of Rs.27,90,952/-made by AO estimating profit on undisclosed sales on the basis of documents seized during the course of search.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied on the addition of Rs.1,00,00,000/- made by AO on account of cash found during the course of search proceedings treating the same as unexplained invoking the provision of section 69A read with section 115BBE of the Act.

6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO rejecting the contention of the assessee that no penalty can be levied on the addition made on the basis of estimation.

7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied by the AO u/s 271AAB despite the fact that case of the assessee does not fall in the definition of "Undisclosed income" and no penalty under section 271/AAB is leviable.

8. On the facts and circumstances of the case, the learned CIT (A) has erred both on facts and in law in confirming penalty levied by AO ignoring the contention of the assessee that the addition on which penalty has been levied by the AO is itself untenable in law.

9. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty levied despite the fact that the notice issued by AO under section 271AAB of the Act does not specify the charge against the assessee.

10. On the facts and circumstances of the case the learned CIT (A) has erred both on facts and in law in confirming the penalty levied by the AO ignoring the contention of the assessee that the penalty proceedings are independent proceedings, the penalty u/s 271AAB is not automatic and hence, not mandatory in nature."

4. First we take up the Appeal in ITA No. 224/Del/2023 for A.Y 2017-18. The Ld. Counsel for the assessee submitted after passing the assessment order and consequence to the same, a penalty proceedings has been initiated by issuing notice u/s 270 of the Act, which is vague and not particularly specified the basis of

charge subject to which the penalty is imposed. The Ld. Counsel further submitted that notice dated 02/06/2021 issued u/s 274 of the Act merely refers to the word 'under reported income' but the penalty has been levied for 'mis reporting of income' and there is no whisper of allegation to 'mis-reporting of income' in the penalty notices. The said notice failed to state as to how the Assessee's case/addition falls within instances given in clauses (a) to (g) of the sub-Section (2) or Clauses (a) to (f) of Sub-Section (9) of Section 270A of the Act and, therefore, the impugned notice issued u/s 270A being 'vague notice' and thus illegal and consequently the penalty order and the order of the CIT(A) is also liable to be set aside. The Ld. Counsel has relied on several decisions of Hon'ble High Courts and the coordinate benches decisions of various benches of the Tribunal.

5. Per contra, the Ld. Departmental Representative also made both written and oral submission and submitted that the assessee has participated in the penalty proceedings and has been given full opportunity to defend the case; therefore, the assessee cannot plea technicalities before the Tribunal and cannot find fault in the penalty orders. The Ld. Departmental Representative referring to

the provision of Section 270A(9) of the Act submitted that the word 'mis-reporting of the income' includes 'misrepresentation or suppression of facts' and 'under reporting income' therefore, the notice issued by the A.O. cannot be termed as vague or defective. The Departmental Representative by relying on the findings and the conclusion of the Ld. CIT(A) sought for dismissal of the appeal filed by the assessee.

6. We have heard both the parties and perused the material available on record. The notice of penalty u/s 274 of the Act dated 02/06/2021 refers to the word 'under-reported income'. The allegation of the A.O. in the penalty notice was only regarding "under reporting of income". For the sake of convenience, the penalty notice dated 02/06/2021 issued for the Assessment Year 2017-18 is reproduced as under:-

> *"Notice under section 274 read with section 270A of the Income Tax Act, 1961*
> *Sir/Madam,*
>
> *Whereas in the course of proceedings before me for the Assessment Year 2017-18, it appears to me that you have <u>under-reported income</u>.*
>
> *You are hereby requested to appear before me either personally or through a duly authorized representative at 11:15 AM on 02/07/2021 and show cause why an order*

imposing a penalty on you should not be made under section 270A 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 270A of the Income Tax Act, 1961.

Ganesh Prasad
Central Circle 18, Delhi"

7. As could be seen from the above penalty notice, the Ld. A.O. has mentioned the provision of Section 270A of the Act, the A.O. has not specified as to how the Assessee's case falls within the instances given in Clauses (a) to (g) of the sub-Section (2) or Clauses (a) to (f) of Sub-Section (9) of Section 270 of the Act, as per the said notice, apparently the penalty was intended for 'under reported income'. But the order of the penalty passed u/s 270A of the Act by the A.O. levying penalty for 'mis-reporting of income'. The various High Courts and Benches of the Tribunal repeatedly held that the defective penalty notice issued by the Department without mentioning the proper limbs and details will be fatal to the entire penalty proceedings.

8. The Hon'ble Jurisdictional High Court in the case of Schneider Electric South East Asia (HQ) Pte Ltd vs. ACIT in W.P.(C) 5111/2022 (Del) dated 28.03.2022 held as under:-

> *"6. Having perused the impugned order dated 09th March, 2022, this Court is of the view that the Respondents' action of denying the benefit of immunity on the ground that the penalty was initiated under Section 270A of the Act for misreporting of income is not only erroneous but also arbitrary and bereft of any reason as in the penalty notice the Respondents have failed to specify the limb "underreporting" or "misreporting" of income, under which the penalty proceedings had been initiated.*
>
> *7. This Court also finds that there is not even a whisper as to which limb of Section 270A of the Act is attracted and how the ingredient of sub- section (9) of Section 270A is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the Respondents in the assessment order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.*
>
> *8 This Court is of the opinion that the entire edifice of the assessment order framed by Respondent No. 1 was actually voluntary computation of income filed by the Petitioner to buy peace and avoid litigation, which fact has been duly noted and accepted in assessment order as well and consequently, there is no question of any misreporting.*

9. The Hon'ble Jurisdictional High Court in the case of Prem Brothers Infrastructure LLP v. NFAC reported in 288 Taxmam 768 (Del)

"7. This Court is of the opinion that the only addition in the assessment order framed by Respondent No. 1 is in respect of disallowance under section 14A of the Act. The Petitioner has made a disallowance of Rs. 3.20,14,010- which was recomputed by the Assessing Officer at Rs. 6,82,45.759/-. Thus, this is a case where the amount of underreporting of income is consequent to increase in the disallowance voluntarily estimated by the assessee. This court is conscious of the fact that there can be cases where underreporting of income may result in misreporting of income, however, in peculiar facts of the present case, the underreporting allegedly done by the assessee cannot amount to misreporting as the assessee had furnished all the details of the transactions relating to disallowance made under section 14A of the Act and the AO as well as assessee has used the same details to arrive at different conclusions ie. differing quantum of disallowances under section 14A of the Act. This by no stretch of imagination can be held to be 'misreporting'.

8. This Court also finds that there is not even a whisper as to which limb of section 270A of the Act is attracted and how the ingredient of sub- section (9) of section 270A is satisfied. In the absence of such particulars, the mere reference to the word "misreporting" by the Respondents in the penalty order to deny immunity from imposition of penalty and prosecution makes the impugned order manifestly arbitrary.

9. Consequently, the impugned penalty order dated 28th March, 2022 passed by Respondent No. 1 under section 270A of the Act is quashed and Respondent No. 1 is directed to grant immunity under section 270AA of the Act to the Petitioner."

10. The Mumbai Bench of the Tribunal in ITA No. 13/Mum/2023 in the case of Saltwater Studio LLP v. NFAC, Delhi vide order dated 22.5.2023 held as under:-

> *"11. It has to be examined as to whether the action of the AO to have levied penalty under sub-section (9) of section 270A of the Act is legally valid or not. The AO in order to levy the penalty has given the reason for doing so as under:-*
>
> > *"The contention of the assessee to drop the penalty proceedings is rejected because the assessee has clearly misreported its income by an amount of Rs.3,94,996/- as per the provisions of the Section 270(A)(9) of the Act. And a misreported income leads to evasion of Tax. Hence, it is clearly established that the assessee has committed an intentionally fault under the provisions of the Section 270(A)(9) of the Act by under reporting its income in consequence of misreporting its income, to the tune of Rs.3,94,996/-. Therefore, I am satisfied that it is a fit case for levy of penalty u/s 270A of the Income Tax Act, 1961. The amount of penalty that is to be levied for the fault of under reporting income in consequence of misreporting income is determined under section 270A(8) of the Act, which is two hundred percent of the tax payable on under reported income in consequence of misreported income."*
>
> *12. And the above action of AO has been confirmed by the Ld. CIT(A) on the same reasoning. The question is whether the AO's action to levy penalty u/s 270A(9) of the Act is sustainable in the given facts of the case. In order to examine that let us have a look at relevant provisions of Section 270(8) & (9) of the Act which reads as under: -*

> *13. The AO has levied the higher penalty of 200% of tax payable of misreporting income. Then in such a scenario, the AO has to bring the action/omission on the part of the assessee in the ken of sub-section (9) of section 270A of the Act which are given (supra), viz (a) to (f) of section 270A(9) of the Act. However, a reading of the reasons given by the AO to levy penalty for misreporting (supra) it is discerned that he has failed to spell out as to how the assessee's case/additions falls within the ken of instances given in clause (a) to (f) of sub-section (9) of section 270A of the Act. Since AO failed to bring the addition/disallowance he made in quantum assessment, under the ken of (a) to (f) of the sub-section(9) of section 270A of the Act, the penalty levied for misreporting @ 200% cannot be sustained because it is trite law that penalty provisions have to be strictly interpreted. And therefore, taking into consideration, the facts and circumstances of the case, we find that the levy of penalty by the AO u/s 270A of the Act suffers from the vice of non-application of mind as well as violates principles of natural justice. And therefore, the penalty levied on addition of sustained quantum addition of Rs.67,970/- cannot survive. And therefore, it is directed to be deleted.*

11. The Pune Bench of the Tribunal in ITA No. 54 & 55/Pune/2023 Kishore Digambar Patil v. ITO dated 23.6.2023 held as under:-

> *"4. Both the learned representatives vehemently reiterated their respective stands against and in support of the impugned penalties. The assessee more particularly argued that both the learned lower authorities have erred in law and on facts in imposing sec.270A penalties in issue without even specifying the relevant limb under sub-section (9) thereof pertaining to "misreporting of income". Learned counsel quoted the*

erstwhile earlier penalty mechanism provided u/sec.271(1)(c) of the Act wherein the law stood duly settled in light of Mohd. Farhan A Shaikh vs. ACIT [2021] 434 ITR 1 (Bom.) (FB); CIT vs. M/s. SSA's Emerald Meadows [2016] 386 ITR (St.) 13 (SC) and CIT vs. Manjunatha Cotton Ginning Factory (2013) 359 ITR 565 (Kar) 5. Mr. Murkunde on the other hand strongly supported the learned lower authorities action imposing the impugned penalties. He took us to the Assessing Officer's corresponding assessments, penalty orders as well as the lower appellate discussion extracted in the preceding paragraphs that the rigor of sub-section (9) stands duly complied with once it has been categorically concluded that this is a fit case to impose penalty u/sec.270A of the Act for "under reporting which is in consequence of misreporting of income". His further contention is that such a penalty @ 200% is levied u/sec.270A(8) of the Act reading as under: Mr. Murkunde lastly sought to buttress the point that section

5.1. 270A(8) nowhere makes it mandatory to include any of the clause "(a) to (f)" provided in sub-section (9) thereof. He further submitted that various judicial precedents quoted at the assessee's behest in the preceding paragraphs are no more applicable once the legislature has amended the penalty provision i.e., sec.271 itself.

6. I have given my thoughtful consideration to the vehement rival stands and find no merit in the Revenue's arguments. It is made clear that the assessee's case law indeed relates to the earlier penalty provision i.e., sec.271(1)(c) of the Act only wherein various hon'ble higher judicial forums had settled the law that the Assessing Officer ought to specify as to whether the concerned taxpayer had concealed or furnished inaccurate particulars of his taxable income during the course of assessment. I am of

the view that the very line of judicial precedents would squarely apply even for the amended penalty provision i.e., sec.270A of the Act as well wherein the legislature has not only prescribed twin limbs of "under reporting of income as well as misreporting of income", but also, unlike the earlier provision u/sec.271, this time it has stipulated specific deeming illustrations under both the twin foregoing heads of the "under reported income" and "misreporting of income" in sub-sections (2) and (9) (a to f) respectively. In my considered opinion, once the instant twin appeals involve levy of penalty @ 200% of the taxes sought to be evaded and the learned lower authorities have held the assessee to have "under-reported his taxable income in consequence to misreporting", the latter limb of misreporting containing six "sub-limbs" in clauses (a to f) under sub- section- (9) deserve to be read as an extension of sub-section (8) to section 270A only. This indeed seems to be the only possible view as the legislature has incorporated the non-obstante clause "Notwithstanding anything contained in sub-sec. (6) or sub-sec. (7)" thereby not including the sub-section (9) envisaging the six instances defining "misreporting of income" in section 270A of the Act.

6.1. Mr. Murkunde could further not dispute the fact that right from the Assessing Officer's twin assessments to his impugned penalty orders as well the NFAC's detailed discussion, the learned lower authorities have nowhere specified the corresponding "sub-limbs" (a to f) in sub-sec.(9) of sec.270A of the Act. That being the case, I wish to quote para 62.10 in the CBDT's circular no.3/2017 (supra) making it explicitly clear that these six clauses (a to f) would indeed form part of sub-section (8) to sec.270A as under:

6.2. Faced with the situation and in light of overwhelming material strongly supporting the assessee's case and going by stricter interpretation as

per Commissioner of Customs (Imports), Mumbai vs. Dilipkumar And Co. &Ors. 2018 (9) SCC 1 (SC) (FB), I am of the view that the above stated judicial precedents regarding the "limb theory" would squarely apply even in case of failure of the Assessing Officer to quote any of the six sub-limbs as well prescribed in sec.270A(9) (a) to (f) of the Act introduced by the legislature in order "to rationalize and bring objectivity, certainty and clarity in the penalty provisions". And that his noncompliance to this clinching effect would not only defeat the legislative mandate but also it renders the amending provisions an otiose. 1 accordingly hold in these peculiar facts and circumstances that both the impugned penalties deserve to be quashed as not sustainable in the eye of law. Ordered accordingly."

12. The Ld. Departmental Representative while arguing the Appeal heavily relied on judgment of Hon'ble Delhi High Court in the case of Madhushree Gupta reported in 317 ITR 107 Delhi. First of all, Madhushree Gupta Delhi High Court decision was rendered by the Division Bench and not by the Full Bench as stated by the Id. DR. The said decision is reported in 317 ITR 107 (Del). The said Judgment of Delhi High Court Decision in the case of Madhushree Gupta (supra) is for the proposition that the addition made in the quantum assessment together with issuance of show cause notice is sufficient. In-fact in the said case the question that went before the Delhi High Court was only with regard to constitutional validity of newly inserted provisions of section 271(1B) of the Act.

Madhushree Gupta (supra) was never on the proposition with regard to non-mentioning of specific limb of offence in the penalty show cause notice.

13. The issue of not mentioning specific limb in the penalty notice is fully covered by the decision of the Hon'ble Delhi High Court in the case of Sahara India Life Insurance Ltd reported in 432 ITR 84 (Del) wherein it was held that:-

> *"21. The Respondent had challenged the upholding of the penalty imposed under section 271(1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory [2013] 35 taxmann.com 250/218 Taxman 423/359 ITR 565 and observed that the notice issued by the AO would be bad in law if it did not specify which limb of section 271(1)(c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in CIT v. SSA's Emerald Meadows [2016] 73 taxmann.com 241, the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.*
>
> *22. On this issue again this Court is unable to find any error having been committed by the ITAT. No substantial question of law arises.*
>
> *23. The appeals are accordingly dismissed."*

14. Further all the other decisions relied upon by the Id. DR were duly considered by the Full Bench Decision of Hon'ble Bombay High Court in the case of Mohd. Farhan A Shaikh vs DCIT reported in 434 ITR 1 (Bom) (FB) wherein it was held as under:-

> *"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(1)(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. Smt. Kaushalya case (supra) 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". Smt. Kaushalya case (supra) 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 Smt. Kaushalya case (supra) 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 Case (supra) 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 case (supra), 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 case (supra), 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 Case (supra) 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 principle Supreme Court has procedural and/or substantive provisions of law embody the principle thahatwhat 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 [2007] 27 SCC 181, in which the Apex Court has quoted with approval its earlier judgment in State of Orissav. Dr. Binapani Dei AIR 1967 SC 1269 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 Case (supra) 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.

15. In the instant case, on perusal of the penalty notice placed on record dated 02/06/2021, it is evident that the Ld. AO had show caused the assessee as to why the assessee should not be imposed with penalty for '*under reporting of income'*. The assessee had filed its submissions stating that he had not '*under reported its income'*. We are unable to comprehend ourselves to accept to the argument of the Ld. DR that assessee did not make any submissions with regard *to 'mis reporting of income'*. The assessee could be expected to give reply only in respect of show cause notice that is put to him. Why at all the assessee should infer/ assume/presume that the Ld. AO having recorded satisfaction in the quantum assessment order that offence of both 'under reporting' and 'mis reporting' is committed by the assessee and accordingly the penalty would be levied on the assessee for both in terms of section 270A(9) of the Act?

16. It is well settled that penalty proceedings and assessment proceedings are separate and distinct. Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of

Anantharam Veera Singhaiah & Co. Vs. CIT reported in 123 ITR 457 (SC) wherein it was held that findings recorded in assessment proceedings cannot be taken as conclusive for penalty proceedings. Even the provisions of section 270A(6) of the Act provides for granting immunity from penalty if the case falls in "under reporting of income". Moreover different rates of penalty are prescribed for 'under reporting of income' alone and for 'under reporting' in consequence of 'misreporting of income'. Hence it is all the more essential to mention in the show cause notice itself as to which of the offence is committed by the assessee for which explanations are being sought for by the Id. AO. There is no whisper at all in the notice issued u/s 270A read with section 274 of the Act about "misreporting of income". In-fact two notices were issued by the Id. AO and in both the notices, the A.O. had only directed the assessee to reply with regard to 'under reporting of income'. But we find that the penalty had been levied ultimately for both 'under reporting' and 'misreporting of income' @ 200% in terms of section 270A(9) of the Act for which show cause notice was never issued to the assessee. The ratio laid down in the aforesaid Full Bench decision of Hon'ble Bombay High Court, the decision of Hon'ble

Jurisdictional High Court in the case of Sahara India Life Insurance reported in 432 ITR 84 (Del) and other decision reffered supra squarely applies to the facts of the instant case before us. Hence we direct the Ld. AO to delete the penalty levied u/s 270A of the Act for the Assessment Year 2017-18. Accordingly, we allow the Appeal of the Assessee on this technical ground and leave the grounds raised on levy of penalty on merits left open as adjudication of the same becomes academic in nature.

17. Now, we take up the appeals are pertaining for A.Y 2018-19 & 2019-20. The impugned orders of penalty have been passed u/s 271AAB of the Act. The Ld. Counsel for the assessee submitted that the penalty notice issued u/s 271AAB of the Act in both the Assessment Years are not in manner depicting the charge against the assessee as to whether under which clause (a), (b) or (c) of Section 271AAB (1) or Clause (a) or (b) of 271AAB(1A) of the Act, penalty is leviable on the assessee. Thus, submitted that the notice initiating the penalty u/s 271AAB of the Act is a vague notice and therefore, illegal consequently, the order of penalty and the order of the Ld. CIT(A) thereon deserves to be set aside. The Ld.

Counsel for the assessee relied on various judicial precedents in support of the said submission.

18. The Ld. Departmental Representative has also produced various Judgments relying on the orders of the Lower Authorities submitted that the order of the Lower Authorities, are well reasoned, the assessee has been heard before passing the order of penalty and the assessee is not prejudiced in any manner in issuing the penalty notice in the manner which it has been issued, therefore, sought for dismissal of the Appeals filed by the assessee.

19. We have heard both the parties and perused the material available on record. In both the Assessment Years i.e. A.Y 2018-19 and 2019-20, the identical penalty notice u/s 271AAB has been issued. For the sake of convenience, the penalty notice for Assessment Year 2018-19 reproduced reads as under:

> *"Whereas in the course of proceedings before me for the Assessment Year 2018-19. it appears to me that a search was conducted in your case and you were found to have undisclosed income, you are hereby requested to appear before me either personally or through a duly authorized representative at 11:30 AM on 02/07/2021 and show cause why an order imposing a penally on you should not be made under section 271AAB of the Income Tax Act, 1961. If you do not wish to aval 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 271AAB of the Income Tax Act, 1961."

20. A show cause notice was also issued on 09/09/2021 for imposing penalty u/s 271AAB for A.Y 2018-19 and identical show cause notice was also issued for A.Y 2019-20. The show cause notice dated 09/09/2021 reads as under:-

"During the course of proceedings before me for the assessment year 2019-20, it was found that consequent upon search proceeding you were found to have undisclosed income. You were show caused vide letter ITBA/PNL/S/271AAB/2021-22/1033245356(1) dated 02.06.2021 as to why an order imposing a penalty on you should not be made u/s 271AAB of Income Tax Act, 1961. You were requested to submit your reply by 02.07.2021 but no reply has been submitted by you till date.

You are, hereby, given further opportunity to explain as to why an order imposing a penalty u/s 271AAB of the IT Act, on you should not be made. You are requested to submit your explanation in writing on or before 14.09.2021 which will be considered before any such order is made under section 271AAB of the Income Tax Act, 1961. Please note that in case of non- compliance, it will be assumed that you have nothing to explain in your support and penalty shall be imposed on the basis of material available on record."

21. As could be seen from the above the notice issued u/s 271AAB of the Act, it does not depict the charge against the

assessee as to under which Clause (a), (b) or (c) or Section 271AAB (1) or Clause (a) or (b) of 271 AAB (1A) of the Act penalty is leviable on the assessee. Therefore, we are of the opinion that the notice initiating penalty u/s 271AAB of the Act is vague and the assessee was not made aware of the actual charge on which the penalty proceedings will be initiated on the assessee. The various judicial precedents have held that the penalty notice should be clear enough to convey the assessee about the charge which is to be levied against him/her/it for levying penalty for the contravention of the related provisions of the Act.

22. An Identical question came for consideration before the Jaipur bench of the Tribunal in the case of Sri. Mahaveer Prasad Agarwal Vs.The DCIT in ITA No.1218/JP/2019 vide order dated 02-06-2022, wherein the similar notice has been issued to the Assessee therein and the Tribunal held as under:

> *"5.1 In case of Shri Padam Chand Pungliya vs. ACIT (supra), the Coordinate Bench has held at para 5 page 7 of its order as under :-*
>
> > *"It is pertinent to note that the disclosure of additional income in the statement recorded under section 132(4) Itself is not sufficient to levy the penalty under section 271AAB of the Act until and unless the income so*

disclosed by the assessee falls in the definition of undisclosed income defined in the explanation to section 271AAB(1) of the Act. Therefore, the question whether the income disclosed by the assessee is undisclosed income in terms of the definition under section 271AAB of the Act has to be considered and decided in the penalty Since the assessee has offered the said income in the return of income filed under section 139(1) of the Act, therefore, the question of taking any decision by the AO in the assessment proceedings about the true nature of surrender made by the assessee does not arise and only when the AO has proposed to levy the penalty then it is a pre-condition for invoking the provisions of section 271AAB that the said income disclosed by the assessee in the statement under section 132(4) is an undisclosed income as per the definition provided under section 271AAB. Therefore, the AO in the proceedings uno section 271AAB has to examine all the facts of the case as well as the basis of the surrender and then arrive to the conclusion tharth income disclosed by the assessee falls in the definition of undiscloses income as stipulated in the explanation to the said section. Therefore we do not agree with the contention of the Id. D/R that the levy of penalty under section 271AAB is mandatory simply because the AO has to first issue a show cause notice to the assessee and then has to make a decision for levy of penalty after considering the fact that all the conditions provided under section 271AAB are satisfied."

It is evident from the show cause notice issued under section 274 read with section 271AAB (APB Page 1) that the AO was not clear as to on what precise charge the appellant was asked to show cause, whether the assessee shall pay by way of penalty under clause (a), (b) or (c) of section 271AAB. The AO has just mentioned "deliberately concealed the true income". Thus the AO without mentioning specific default of the assessee in terms of clause (a), (b) or (c) of section 271AAB of the Act, the, show cause notice issued in routine manner cannot be considered a valid notice in the eyes of law and accordingly the levy of penalty against the assessee is held to be void ab initio.

Further, the assessee has substantiated the undisclosed cash available, as to the extent of surrendered income of Rs. 8,73,000/-.

6. In view of the above, considering the peculiar facts, the grievance of the assessee is accepted as genuine and as such the order of the Id. CIT (A) sustaining the penalty is hereby quashed.

7. In the result, appeal of the assessee is allowed."

22. The Indore Bench of the Tribunal in ITA No. 869/1nd/2018 in the case of Shri Ashok Bhatia vs. DCIT vide order dated 05.02.2020 held as under:-

"8. From perusal of the above provision we observe that sub section 3 of Section 271AAB of the Act talks about issuing the notice u/s 274 of the Act. So for initiating the penalty proceedings u/s 271AAB of the Act the first step to be taken by 1.d. A.O is to issue a valid notice u/s 274 of the Act. Sub- section (1) to Section 274 of the Act provides a procedure that "No order imposing a penalty under this Chapter shall he made unless the assessee has been heard, or has been given a reasonable opportunity of being heard". To comply with this requirement the notice u/s 274 should be clear enough to convey the assessee about the charge which is to be leveled against him/her/it for levying the penalty for the contravention of the related provisions of the Act which in the instant case relates to not surrendering of undisclosed amount during the course of search which is subsequently admitted during the course of assessment and not challenged before the Ld. CIT(A). So it was incumbent for Ld. A.O that in the notice issued u/s 274 of the Act he should have mentioned that penalty u/s 271AAB of the Act may be levied na 10/20/30% since the assessee falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. He

should have further mentioned that as the assessees case falls under clause-c of section 271AAB of the Act, why she should not be visited by penalty (30% of the undisclosed income. Against this charge the assessee should have been given a reasonable opportunity of being heard.

From going through the above three notices issued to the assessee on 22.03.2016, 03.06.2016 and 16.09.2016, we find that there is no mention about various conditions provided u/s 271 AAB of the Act. The Ld. A.O has very casually used the proforma used for issuing notice before levying penalty u/s 271(1)(c) of the Act for the concealment of income or furnishing of inaccurate particulars of income. Except mentioning the Section 271AAB of the Act in the notice it does not talk anything about the provision of section 271AAB. Certainly such notice has a fatal error and technically is not a correct notice in the eyes of law because it intends to penalize an assessee without spelling about the charge against the assessee. Hon'ble Jurisdictional High Court in the case of PCIT V/s Kulwant Singh Bhatia (supra) dealt the issue of defective notice issued u/s 274 r.w.s. 271(1)(c) of the Act and Hon'ble court after relying judgment of Hon'ble Supreme Court in the case of CIT V/s Manjunatha Cotton Ginning Factory and CIT v/s SSA'S Emerald Meadows (supra) held that such show cause notices would not satisfy the requirement of law as notice was not specific. Merely issuing notice in general proforma will negate the very purpose of natural justice. Hon'ble Apex Court in the case of Dilip N Shraf 161 Taxmann 218 held that "the quasi criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice".

15. We, therefore respectfully following the judgment of jurisdictional High Court in the case of PCIT V/s Kulwant Singh Bhatia (supra), decision of Coordinate Bench of Chennai in the case of DCIT V/s R. Elangovan (supra) and Jaipur Bench in the case of Ravi Mathur Vs DCIT (supra) and in the given facts and circumstances of the case wherein the matter written in the body of the notice issued

u/s 274 of the Act does not refer to the charges of provision of Section 271AAB of the Act makes the alleged notice defective and invalid and thus deserves to be quashed. Since the penalty proceedings itself has been quashed the impugned penalty of Rs.64,22,348/- stands deleted. Thus assessee succeeds on legal ground challenging the validity of notice issued u/s 274 r.w.s. 271AAB of the Act."

23. The Kolkata Bench of the ITAT in the case of Sushil Kumar Paul vs. ACIT in ITA No. 2274/Ko1/2019 vide order dated 15.12.2022, held as under:-

"From the perusal of the above proposition, we observe that sub section 3 of section 271AAB of the Act talks about issuing the notice u/s 274 of the Act. So for initiating the penalty proceedings u/s 271 AAB of the Act, the first step to be taken by Id. Assessing Officer issue a valid notice u/s 274 of the Act provides a procedure that "No order imposing a penalty under this Chapter shall be made unless the assessee has been heard. or has been given a reasonable opportunity of being heard." To comply with this requirement the notice u/s 274 should be clear enough to convey the assessee about charge which is to be leveled against him/her it for levying penalty for contravention of the related provisions of the Act. So it was incumbent for Id. AO that in the notice issued u/s 274 of the Act should have mentioned that penalty u/s 271AAB of the Act may be levied @ 10/20/30% since the assessee falls in Clauses (a)/(b)/(c) of section 271AAB of the Act. He should have further mentioned that as the assesseee's case falls under Clause-c of section 271AAB of the Act, why he should not be visited by the penalty (ee. 30% of the undisclosed income. Against this charge. the assessee should have been given reasonable opportunity of being heard.

> *10. From going through the above notice issued to the assessee on 28.12.2017. we find that there is no mention about various conditions provided u/s 27IAAB of the Act. The Id. AO has very casually used the proforma used for issuing notice before levying penalty u/s 271(1)(c) of the Act for the concealment of income or furnishing of inaccurate particulars of income. Except mentioning the section 271AAB of the Act in the notice, it does not talk anything about the provisions of section 271AAB. Therefore, certainly such notice has a fatal error and technically' is not a correct notice in the eyes of law because it intends to penalize an assessee without spelling about the charge against the assessee".*

24. The similar views have been taken in the following orders of the Tribunal:-

i) Hyderabad Bench of the Tribunal in ITA No. 756/Hyd/20 ACIT dated 04.01.2022 vs Smt. Pallem Reddy Sreelakshmi, Tirupati.

ii) Indore Bench of the Tribunal in ITA No. 249/Ind/2021 dated 28.06.2022 ACIT vs. Shri. Arnit Tiwari

iii) Jabalpur Bench of the Tribunal in ITA No. 1218/JP/2019 dated 02.08.2022 Shri Mahaveer Prasad Agarwal vs. DCIT.

25. For the detailed reasoning and discussion made above and considering the fact that no specific charge has been mentioned in the penalty notice issued u/s 271AAB of the Act and also following the principles laid down in the above judicial pronouncements, we

delete the penalty imposed by the A.O. On this technical grounds for the Assessment Years 2018-19 & 2019-20.

26. Since, penalty is cancelled on technical ground, the adjudication of levy of penalty on merits becomes academic in nature. Hence, no opinion is rendered thereon and they are left open. Accordingly, Appeals filed by the assessee are allowed.

Order pronounced in open Court on 20th March, 2024.

Sd/-	Sd/-
(M.BALAGANESH)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 20/03/2024
B.R.,/R.N Sr. Ps.

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI