

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH MUMBAI
BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA Nos.133 & 134/MUM/2024
Assessment Year: 2011-12

| | | |
|---|-----|--|
| Mahavir Enterprises 11/12. Anuraj Building, Daftary Road, Next to Agarwal Hospital, Malad East, Mumbai – 400 097 (PAN : AAKFM6017F) | Vs. | Income Tax Officer – 41(3)(1), Mumbai |
| (Appellant) | | (Respondent) |

Present for:

Assessee : Shri Shailesh Parmar
Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 10.07.2024
Date of Pronouncement : 24.07.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

These two appeals filed by the assessee are against the orders of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order nos.

- i) ITBA/NFAC/S/250/2023-24/1058211893(1), dated 24.11.2023 passed against the assessment order by the Income Tax Officer – 24(2)(4), Mumbai, u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 26.03.2014 for Assessment Year 2011-12.

- ii) ITBA/NFAC/S/250/2023-24/1058212299(1), dated 24.11.2023 passed against the penalty order by the Income Tax Officer – 30(2)(3), Mumbai, u/s. 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 23.09.2014 for Assessment Year 2011-12.

2. We first take up appeal in ITA No.133/Mum/2024 which is on the quantum additions wherein three issues are involved relating to addition of Rs.1,15,589/- towards interest income and Rs.2,89,953/- being commission income, both on account of mismatch as per 26AS statement and addition of Rs.26,77,172/- towards unsecured loans held as unexplained cash credits u/s.68 of the Act.

3. Brief facts of the case are that assessee is a partnership firm engaged in the business of distributor, re-seller, trader of telecom products like recharge vouchers, SIM and e-top up balance. In respect of addition of Rs.1,15,589/-, assessee has furnished a chart giving details of interest income earned in gross amount, TDS thereon and the net amount. The chart also contains details in respect of additions made as per the assessment order and the correct increase in income as per assessee along with explanation for each of the line items therein. The said chart is reproduced as under:

Mahavir Enterprises
AY 2011-12

| Interest Income - Vodafone India Limited - Sr No 3 of 26AS | | | | | | | Annexure 1 |
|--|-----------------|----------|--------|----------|-------------------------|----------------------------|--|
| Sr. No as per 26AS | Particulars | Gross | TDS | Net | As per Assessment Order | Correct increase in income | Remarks |
| 1 | 194A - Interest | 35,726 | 3,573 | 32,153 | - | | No discrepancy |
| 2 | 194A - Interest | 20,140 | 2,014 | 18,126 | 20,140 | 2,014 | As per settlement letter dated 24-01-2011 sum of ₹6,60,259/- credited to 'Claim from Vodafone Account' and net balance of ₹2,28,106/- credited to Profit and Loss Account. Income offered to tax. Income short credited to the extent of TDS of 2,014. Credit of TDS of 2,014 be granted |
| 3 | 194I - Rent | 2,53,000 | 25,300 | 2,27,700 | - | | Data punching error - accepted by Ld. CITA Addition deleted |
| 4 | 194A - Interest | 81,890 | 8,189 | 73,701 | 8,189 | 8,189 | Interest short credited to the extent of TDS. Credit of TDS be granted |
| 5 | 194A - Interest | 81,890 | 8,189 | 73,701 | - | | CONTRA |
| 6 | 194A - Interest | -81,890 | -8,189 | -73,701 | - | | CONTRA |
| 7 | 194A - Interest | 87,260 | 8,726 | 78,534 | 87,260 | - | Data punching error |
| 8 | 194A - Interest | 87,260 | 8,726 | 78,534 | - | | CONTRA |
| 9 | 194A - Interest | -87,260 | -8,726 | -78,534 | - | | CONTRA |
| | TOTAL | 4,78,016 | 47,802 | 4,30,214 | 1,15,589 | 10,203 | |

3.1. From the above chart, items at Sr.No.2 and 4 are accepted by the ld. Counsel in the course of hearing for which it is submitted that income is short credited to the extent of TDS done of Rs.2,014/- and Rs.8,189/- for which credit of the same is to be granted. For the remaining item at Sr. No.7, it is contended that this amount of Rs.87,260/- was never received by the assessee and is a result of data punching error by the Vodafone India Ltd. In this respect, reference was made to page 34 of the paper book containing email from the said company written to the assessee whereby it was affirmed that due to error while filing its TDS return for Quarter-II of financial year 2010-11 relevant to Assessment Year 2011-12, the said company had inadvertently quoted the PAN of the assessee whereas it actually and correctly belonged to another concern with similar name, i.e., Mahavir Enterprise, Govandi. In the said letter, the company had assured to revise its TDS return for the mistake committed by it. In this respect, Sr. DR placed reliance on the order of Ld. CIT(A).

3.2. Considering above stated facts we are in agreement with the submissions made before us by the ld. Counsel and thus delete the

addition of Rs.87,260/- which is on account of error of data punching of PAN of the assessee against payment made to another concern with similar name. For the remaining two amounts, since the assessee itself has accepted the same, these are sustained with a direction to grant credit of TDS for the same. Accordingly, ground No.3 is partly allowed.

4. In respect of addition made on account of commission income, assessee had furnished a chart giving details of commission received by it from three telecom companies viz, Aircel Ltd., Videocon Telecom and Etisalat DB Telecom, totalling to Rs.21,57,984/- as per the assessment order. In 26AS statement, this total amount is reflected at Rs.21,20,557/-. The said chart is extracted below:

| Mahavir Enterprises AY 2011-12 | | | | | | | | | | | |
|--|------------------|---------------|-------------------------------|------------------|-----------------|------------------|---------------------|---------------------------|----------------------------|-----------------|------|
| Commission Income - Sr No 1, 2 and 4 of 26AS | | | | | | | | | | | |
| Annexure 2 | | | | | | | | | | | |
| Part's Name | As per 26AS | Diff | As per Assessment Order (1+2) | Gross | TDS | Net (4-5) | As per books of A/c | Differential Amount (3-7) | Correct increase in income | Balance (8-9) | Note |
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
| Aircel Limited | | | | | | | | | | | |
| Total amount as per 26AS | 7,31,851 | 37,427 | 7,69,278 | | | | | | | | |
| Less: Contractual - 194C | 81,632 | 0 | 81,632 | | | | | | | | |
| Balance Commission - 194H | 6,50,219 | 37,427 | 6,87,646 | 5,64,313 | 56,431 | 5,07,882 | 5,07,880 | 1,79,766 | 56,431 | 1,23,335 | 2 |
| Videocon Telecommunication | 3,22,112 | - | 3,22,112 | 2,35,472 | 23,547 | 2,11,925 | 2,11,925 | 1,10,187 | 23,547 | 86,640 | 1 |
| Etisalat DB Telecom P L | 11,48,226 | - | 11,48,226 | 11,48,228 | 1,14,823 | 10,33,405 | 11,48,226 | - | - | - | |
| TOTAL | 21,20,557 | 37,427 | 21,57,984 | 19,48,013 | 1,94,801 | 17,53,212 | 18,68,031 | 2,89,953 | 79,978 | 2,09,973 | |

Note
1. Sum of ₹86,640/- has been offered as income in FY 2011-12 i.e. AY 2012-13. Balance difference of ~~₹1,23,335~~ ^{₹5547} /- (As per S. no. 7, 8 and 9)

| Videocon Telecommunication - AY 2012-13 - Commission Income Offered | | | | | |
|---|--|--|---------------|--------------|---------------|
| Sr. No 7 of 26AS of AY 2011-12 | | | 6,280 | 628 | 5,652 |
| Sr. No 8 of 26AS of AY 2011-12 | | | 80,000 | 8,000 | 72,000 |
| Sr. No 9 of 26AS of AY 2011-12 | | | 360 | 36 | 324 |
| Total | | | 86,640 | 8,664 | 77,976 |

2. On surrender of distributorship, the amount received offered as income in FY 2011-12 i.e. AY 2012-13. Balance of ₹1,23,335/- not received

3. Distributorship has been surrendered. The respective companies has repaid net deposits/dues after deducting on account of various expenses. The income, if any has been offered as income finally in FY 2011-12 i.e. AY 2012-13

4.1. For commission received by the assessee from Aircel, it is contended that for the difference of Rs.1,79,766/- arising out of the amount as per Book of Accounts and as taken by the Id. Assessing Officer, the correct increase in income is Rs. 56,431/- only. Out of the total stated difference, Rs.1,23,335/- has not been received by the

assessee therefore cannot be added as its income. Similarly, for the difference of Rs.1,10,187/- relating to commission from Videocon Telecommunication, it is submitted that Rs.86,640/- has been offered as income in Assessment Year 2012-13 and the balance difference of Rs.23,547/- is to be taken as correct increase in the income. To substantiate these claims of the assessee, ld. Counsel referred to the letter of full and final settlement from Vodafone SR Ltd. along with its computation and ledger extracts, all placed in the paper book.

4.2. Considering these facts as submitted before us and the documents placed in the paper book, we find it appropriate that this issue be remitted back to the file of ld. Jurisdictional Assessing Officer (JAO) for the limited purpose of verification of the contentions made by the assessee about part of the additions offered as income in AY 2012-13, part of it not received by the assessee and the balance to be considered as correct increase in income. We direct the ld. JAO to verify the details furnished by the assessee in the chart submitted by it and allow the claim of the assessee after being satisfied thereon in accordance with the provisions of law. Accordingly, ground no. 4 taken by the assessee is allowed for statistical purposes.

5. The third issue relating to addition of Rs.26,77,172/- towards unsecured loans held as unexplained cash credits u/s. 68, we perused para-8 of the impugned assessment order which is extracted below for ready reference:

“8. Un secured loans of Rs 26,77,172/-As per the balance sheet filed, the assessee has shown unsecured loans raised during the year is R 26,77,172/-. The assessee was provided many opportunities to furnish supporting documents for the same. On 27-08-2014 assessee produced the Xerox copy from HMT Brokers saying that loan is taken through broker and I am not knowing the loan parties.

Assessee has not produced the loan parties for verification. In view of the facts, it is seen that the assessee has failed to offer any explanation about the source of unsecured loans in his books, Accordingly, the sum of Rs 26,77,172/-

credited to the books as unsecured loans is added to the total income of the assessee as unexplained cash credits u/s 68 of the I t act. penalty proceedings u/s 271(1)(c) of the IT Act is initiated for concealment of income and furnishing inaccurate particulars of income.”

5.1. From the above quoted observations and findings of Id. Assessing Officer, it is indiscernible as to how this figure of Rs.26,77,172/- has been arrived at from the balance sheet since Id. Counsel has taken us through the balance sheet of the assessee, where the amount of unsecured loan reported is Rs.39,07,173/-. This balance sheet is placed at page 26 of the paper book. Furthermore, Id. Assessing Officer has nowhere noted about as to whom these amounts belong to, i.e., who are the parties from whom the assessee has received these unsecured loans for which the addition has been made. He has mentioned that assessee has failed to offer any explanation about the source of unsecured loans. Contrary to this, assessee has furnished a detailed chart which is reproduced below:

| Mahavir Enterprises AY 2011-12 | | | | | | | | | | | | |
|-----------------------------------|---------------------------|------------|------------------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------|----------------------------|
| Unsecured Loans | | | | AY 2011-12 | | | | AY 2012-13 | | AY 2013-14 | | Page no |
| S. no | Details of Lender | PAN | Relation | 01-04-2010 | Additions | Repayment | 31-03-2011 | Repayment | 31-03-2012 | Repayment | 31-03-2013 | |
| 1 | Harilal N Shah | AAEPS4803M | Father of Partner Samir Shah | 2,00,000 | 21,00,000 | 22,00,000 | 1,00,000 | 1,00,000 | - | | | 26, 31, 32, 42, 43, 46-48 |
| 2 | Heena Saiya | AAVPS0463L | Sister of Partner Samir Shah | 2,00,000 | - | - | 2,00,000 | 2,00,000 | - | | | 26, 31, 32, 42, 43, 49 |
| 3 | Manjula H Shah | AAEPS4818C | Mother of Partner Samir Shah | 7,07,172 | 4,50,000 | - | 11,57,172 | 1,00,000 | 10,57,172 | 10,57,172 | - | 26, 31, 32, 42, 45, 50-52 |
| 4 | Jayesh Gandhi | AABFG4778N | Friend | - | 6,50,000 | - | 6,50,000 | 6,50,000 | - | | | 26, 31, 32, 42, 44, 54, 63 |
| 11 | Kunverji Kheraj Gogri HUF | AAEHR4347N | Friend | - | 10,00,000 | - | 10,00,000 | 10,00,000 | - | | | 26, 31, 32, 42, 44, 78-81 |
| 5 | Hirachand Gala | AABPG3090F | Through HMT Finance Broker | 2,50,000 | - | - | 2,50,000 | 2,50,000 | - | | | 26, 31, 32, 42, 43, 55-57 |
| 6 | Lanesh H Gala | AEPFG5683L | | 2,50,000 | - | - | 2,50,000 | 2,50,000 | - | | | 26, 31, 32, 42, 44, 58-60 |
| 7 | Navalben V Gala | AAMPG2493H | | 3,00,000 | - | - | 3,00,000 | 3,00,000 | - | | | 26, 31, 32, 42, 45, 61-63 |
| 8 | Hiraj Rayshi Pasad | AAAPP1613K | | 1,60,000 | - | 1,60,000 | - | 1,60,000 | - | | | 26, 31, 32, 42, 44, 64-67 |
| 9 | Bhavesh H Pasad | AGR 9798R | | 1,00,000 | - | 1,00,000 | - | 1,00,000 | - | | | 26, 31, 32, 42, 43, 69-73 |
| 10 | Poonam Bhavesh Pasad | ASJPP5083D | | 1,70,000 | - | 1,70,000 | - | 1,70,000 | - | | | 26, 31, 32, 42, 74-77 |
| | TOTAL | | | 23,37,172 | 42,00,000 | 26,30,000 | 39,07,172 | 32,80,000 | 10,57,172 | 10,57,172 | - | |

Return of Income for the AY 2012-13 filed on 22/09/2012 [Assessment Order dated 26-03-2014] (pages 82-103 and 104-105)
Return of Income for the AY 2013-14 filed on 27/07/2013 [Assessment Order dated 26-03-2014] (pages 106-130)

5.2. Assessee demonstrated that it had received Rs.42,00,000/- during the year as unsecured loans which included loan from father, mother and friends of partner of the assessee firm. Assessee had also demonstrated that these loans had been repaid during the year itself or in subsequent years. It has also placed on record loan confirmation

letters along with bank statements and ITR acknowledgements for the returns filed by the lender parties to demonstrate their identity and credit worthiness as well as to establish the genuineness of the transactions. Taking into consideration the details furnished by the assessee along with the documentary evidences, it is indiscernible as to how and from where ld. AO has taken note of the figure of Rs.26,77,172/- towards unsecured loans received by the assessee during the year or the amount reported in the balance sheet for which addition has been made. Under these given set of facts, we are compelled to delete the addition so made by the ld. AO which demonstrates nothing but his non-application of mind and casual approach adopted in this respect. The addition of Rs.26,77,172/- is thus deleted. Ground No.5 taken by the assessee is allowed.

6. In the result, appeal of the assessee is partly allowed.

7. Now, we take up ITA No.134/Mum/2024 which is in respect of penalty of Rs.9,24,814/- imposed u/s. 271(1)(c) of the Act. In this respect, assessee has challenged the imposition of said penalty on the ground that notice dated 26.03.2014 issued u/s.274 r.w.s. 271(1)(c) is bad in law which does not specify the charge for which penalty proceedings were taken up. Copy of the said notice is placed on record and was referred before us to demonstrate that the charge has not been specified for the penalty proceeding as to whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income.

8. We heard both the parties and perused the material on record. The issue raised before us is no longer *res integra* and has been dealt in plethora of cases. In a recent order by the Coordinate Bench of ITAT Mumbai in the case of Ritu Multitrade Service Pvt. Ltd. in ITA No.938/Mum/2024 dated 28.06.2024 (where the undersigned

Accountant Member is the author) identical issue was dealt with by considering the decisions of Hon'ble Jurisdictional High Court of Bombay in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021)125 taxmann.com 253 (Bom) and Veena Estate (P) Ltd. Vs. CIT (2024) 158 taxmann.com 341 (Bom).

8.1. The relevant observations and findings from the said decision of the Coordinate Bench are extracted below:

"2.1 Assessee has also raised an additional ground by application dated 19.06.2024 which is purely legal in nature and does not require examination of additional facts. The said additional ground is reproduced as under:

"1. In the facts and circumstances of the case and in law, the Learned Assessing Officer had erred in initiating the penalty proceeding by issuing the impugned show cause notice dated 30.11.2017 under section 274 read with section 271(1)(c)- without striking off the irrelevant/ in-applicable limb; thereby issuing a defective notice which is bad in the eyes of law as held by Hon'ble Jurisdictional High Court in the case of Mohd. Farhan A. Shaikh vs. DCIT [2021] 125 taxmann.com 253 (Bombay) and several other binding judicial precedents."

3. The additional ground raised by the assessee is purely legal in nature and therefore is admitted for adjudication. We first take up this additional ground which is in respect of challenging the imposition of penalty of Rs.10,46,312/- u/s.271(1)(c) of the Act, which liable to be quashed since Ld. Assessing Officer has failed to specify the charge in the notice issued u/s.274 r.w.s. 271(1)(c) as held by Hon'ble Jurisdictional High Court of Bombay in the case of Mohd. Farhan A. Shaikh Vs. DCIT (2021)125 taxmann.com 253(Bom).....

5. The said notice is dated 30.11.2017. He thus, referring to the said notice submitted that no specific charge has been made out by the Ld. AO for imposition of penalty. He placed reliance on several judicial precedents including that of the Hon'ble jurisdictional High Court of Bombay in the case of Mohd. Farhan A. Shaikh (Supra), wherein the Hon'ble Court had come to the conclusion that unless the charge against the assessee is specific, the same could not be maintained. Thus, on this sole technical defect in the notice issued u/s. 274 read with section 271(1)(c) of the Act, the penalty so imposed is ought to be deleted.

6. Per contra, Ld. Sr. DR placed reliance on another decision of Hon'ble Jurisdictional High Court of Bombay in the case of Veena Estate (P) Ltd. Vs. CIT (2024) 158 taxmann.com 341 (BOM) to counter the submissions made by the Ld. Counsel for the assessee. She submitted that according to this decision, it is not a case of any real prejudice or a case of breach of principles of natural justice. The plea of defect in the notice cannot be an empty plea. Such plea can be accepted only when a demonstrable prejudice was to be set out by the assessee which would go to the root of the adjudication. According to her, in the said decision, the test of prejudice is inapplicable in the facts of the case. Thus,

according to her, there is no defect in the notice so issued and the penalty so imposed is rightfully done by the Ld. Assessing Officer.

7. In the rebuttal, Ld. Counsel for the assessee strongly asserted that the facts of the case in the decision of *Veena Estates (P) Ltd. (Supra)* are peculiar and cannot be applied in general to every other case. He referred to para 1 of the said order to point out the peculiarities of the facts involved in this case. For this, from the first para, he read out the following:

“The question is as to whether an alleged defect in the notice issued to the appellant u/s.271(1)(c) r.w.s.274 of the Act, in regard to which the appellant had never raised an objection from the very inception, i.e., since last 30 years (from 19.08.1993) can now be permitted to be raised, in the absence of any prejudice being caused to the appellant assessee.”

7.1. He further pointed out from para 3 of the said order that the appeal was admitted by the Hon’ble Court by order dated 14.09.2004 on the substantial question of law raised therein. He further referred to para 4 to point out that during the pendency of the hearing, it was only by oral application that a technical plea of vagueness in the notice was raised before the Hon’ble Court, thereby the question was recorded by passing an order on 13.07.2023 which is almost 20 years after the admission of the appeal along with its substantial question of law.

7.2. Ld. Counsel then referred to para 34 on the observation made by the Hon’ble Court where the Court questioned itself as to-

*“Should the Court now after more than 20 years of the order being passed by the Tribunal accept the contention as urged on behalf of the assessee that in these circumstances, the Court should accept the notice as issued to the assessee u/s.274 of IT Act was defective, and hence the proceedings would stand covered by the decision of the Coordinate Bench in this Court in *Ventura Textiles Ltd. (Supra)*”.*

7.3. On this above questions raised by the Hon’ble Court unto itself, it expressed its opinion in para 35 to point out that case of *Ventura Textile Ltd.* was a case wherein the Court was considering an appeal u/s.260A of the IT Act, whereby for the first time an issue was raised as to whether the order passed u/s.271(1)(c) of the IT Act was bad in view of the fact that both, at the time of initiation as well as at the time of imposition of the penalty, the Assessing Officer was not clear as to which limb of section 271(1)(c) was attracting. It is in this context, the Division Bench of this Court considered the decision in regard to the two ingredients of Section 271(1)(c) being attracted in a notice to be issued for invoking the provisions for levy of penalty.

7.4. Ld. Counsel, further pointed out from para 63, the observation made by the Hon’ble Court -

“Certainly such grievance cannot be raised, i.e., after 23 years, to be new invention, after the Assessing Officer had decided the issue.”

7.5. Thus, by pointing out the above referred peculiarities of facts and circumstances in the case of *Veena Estates (P) Ltd. (Supra)*, Ld. Counsel distinguished its applicability in the present case of the assessee, as contended

by the Ld. Sr.DR. He further submitted that at the time of issuing the notice u/s.274 r.w.s. 271(1)(c), Assessing Officer is not aware of the fact as to whether assessee is going in appeal or not on the quantum additions made. Hence, the notice so issued for initiating penalty proceedings must contain a specific charge out of the two charges contained in section 271(1)(c) for imposing a penalty on the assessee.

8. We note that in the present case before us, the facts and circumstances are altogether different from the peculiar set of facts as contained in the case of Veena Estates (P) Ltd. pointed out by the Ld. Counsel, narrated above. The observations and findings arrived at by the Hon'ble Court in that case are specific to those peculiar set of facts. In the case of Mohd. Farhan A. Shaikh (Supra), the Hon'ble Jurisdictional High Court of Bombay had held 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.”

9. We therefore, respectfully following the judicial precedent in the case of Hon'ble Jurisdiction High Court of Bombay in the case of Mohd. Farhan A. Shaikh (Supra) delete the penalty imposed in the present case, since similar facts are present in this appeal. Accordingly, grounds taken by the assessee in this respect are allowed.

9. Considering the identical set of facts in the present case and by adopting judicial consistency in terms of the above decision of the Coordinate Bench, the penalty so imposed is deleted.

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

11. In the result, appeal of the assessee in ITA No.133/Mum/2024 is partly allowed and appeal in ITA No.134/Mum/2024 is allowed.

Order is pronounced in the open court on 24 July, 2024

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 24 July, 2024

MP, Sr.P.S.

Copy to :

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|---|------------------|
| 1 | The Appellant |
| 2 | The Respondent |
| 3 | DR, ITAT, Mumbai |
| 4 | Guard File |
| 5 | CIT |

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai