

**IN THE INCOME TAX APPELLATE TRIBUNAL**

**"F" BENCH, MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER AND**

**SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER**

**ITA no.474/Mum./2024**

**(Assessment Year : 2007-08)**

**Fabrikant Trading (India) Pvt. Ltd.**

A/603, Rama Residing, Dadabhai  
Cross Road No.3, Vile Parle West,  
Mumbai-400056  
PAN – AAACF1609H

..... Appellant

v/s

**DCIT, Circle5(1)(2)**

Room No.525, 5<sup>th</sup> Floor,  
Aayakar Bhavan,  
Maharshi Karve Marg,  
Mumbai-400020

..... Respondent

Assessee by : Shri Rashmikant Modi/Ms. Ketki  
Rajeshirke

Revenue by : Ms Usha Gaikwad, Sr. AR

Date of Hearing – 20/06/2024

Date of Order – 26/08/2024

**ORDER**

**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal has been filed by the assessee challenging the impugned order dated 28/12/2023, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*], which in turn arose from the penalty order passed under section 271(1)(c) of the Act, for the assessment year 2007-08.

2. In its appeal, the assessee has raised the following grounds: –

*"1. Fair Opportunity of being heard is not given:*

*On the facts and in the circumstances of the case, the Appellant submits that the Hon'ble Commissioner of Income Tax Appeals erred in upholding the action of the Learned Assessing Officer of giving sufficient opportunity of being heard without considering the Appellant's submission that the notices issued were never received by the Appellant as the Assessing Officer issued notices manually on old address instead of issuing them on the updated address ch with the records of income tax department.*

*The Appellant submits that a fair opportunity of being heard be given.*

*2. Notice issued u/s 274 issued is invalid and Penalty Order :assed u/s 271(1)(c) is bad in law .*

*a. On the facts and circumstances of the case, the Appellant submits that the Hon'ble Commissioner of Income Tax Appeals erred in not adjudicating the technical ground of appeal raised in Ground No. 2 for questioning the validity of notice issued u/s 274 r.w.s. 271(1)(c) raised for not striking off the irrelevant portion of the limb and failed to intimate the Appellant the relevant limb and charge for which the notices were issued. The Hon'ble Commissioner of Income Tax Appeals erred in merging it with the ground of appeal raised on merits related to levy of penalty u/s 271(1)(c) in respect of the addition made without adjudicating the same.*

*The Appellant submits that the technical ground of appeal raised by the Appellant be considered.*

*b. On the facts and in the circumstances of the case, the Appellant submits that the Hon'ble Commissioner of Income Tax (Appeals) erred in upholding the action of the Assessing Officer of issuing Notice u/s 274 r.w.s. 271(1)(c) without specifying the charge for which the notice was issued i.e. either for concealment of particulars of income or furnishing of inaccurate particulars of such income.*

*The Appellant submits the Notice issued u/s 274 r.w.s. 271(1)(c) is without application of mind and therefore be treated as bad in law and consequently the penalty order passed u/s 271(1)(c) be treated as bad in law and therefore, be quashed.*

*3. Penalty of Rs. 29 02 020/- is levied u/s 271(1)(c) on the addition of Rs.86 21 564/- made u/s 69C:*

*On the facts and in the circumstances of the case, the Appellant submits that the Hon'ble Commissioner of Income Tax Appeals erred in upholding the action of the Assessing Officer of levying the penalty of Rs.29,02,020/- u/s 271(1)(c) by treating the adhoc addition of Rs. 86,21,564/- on the basis of peak balance as concealed income by relying heavily on the assessment proceedings and without considering the submissions alongwith the recent judgements relied upon by the Appellant.*

*The Appellant submits that the penalty of Rs. 29,02,020/- levied u/s 271(1)(c) be deleted.*

*The Appellant craves leave to reserve to itself the right to add, after, amend or annul any of the grounds of appeal at or before the time of hearing and to produce such further evidences, documents and papers as may be necessary.*

3. The issue arising in ground no.2, raised in assessee's appeal, is a jurisdictional issue and pertains to the validity of notice issued under section 274 r/w section 271(1)(c) of the Act.

4. The brief facts of the case, as emanating from the record, are: The assessee is in the business of diamond trading. For the year under consideration, the assessee filed its return of income on 30/10/2007 declaring a total loss of Rs.2,36,95,147. The return filed by the assessee was selected for scrutiny and the assessment order under section 143(3) of the Act was passed on 29/10/2010 at the returned loss. Subsequently, based on the information received from the DGIT (Investigation), Mumbai regarding the search action carried out at Surat-based non-genuine diamond concern, who were involved in providing non-genuine sale bills, it was noted that the assessee is one of the beneficiaries who has obtained accommodation entries (sales) from parties who are bogus concerns/companies. Accordingly, notice under section 148 was issued on 28/03/2014 and proceedings under section 147 of the Act were initiated. The Assessing Officer ("AO") vide order dated 24/02/2015 passed under section 143(3) r/w section 147 of the Act by applying the peak credit theory made an addition of Rs.86,21,564 under section 69C of the Act by considering the assessee's claim of purchases from the bogus entities as non-genuine.

5. Subsequently, the penalty order dated 14/05/2018 was passed by the AO under section 271(1)(c) of the Act, wherein a penalty of Rs.29,02,020, was levied. In the further appeal against the penalty order, the learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee and upheld the levy of penalty under section 271(1)(c) of the Act. Being aggrieved, the assessee is in appeal before us.

6. During the hearing, the learned Authorised Representative ("*learned AR*"), inter-alia, submitted that the penalty in the present case has been levied without specifying the head under which the same has been levied. The learned AR by referring to the penalty notice dated 24/02/2015 issued under section 274 r/w section 271(1)(c) of the Act submitted that the AO has not specified whether the penalty has been levied for concealment of income or for furnishing inaccurate particulars of income. The learned AR in support of his submission relied on various decisions of the coordinate bench of the Tribunal including the decision of the Larger Bench of the Hon'ble jurisdictional High Court in Mohd. Farhan A. Shaikh v/s CIT, [2021] 434 ITR 1 (Bom.).

7. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the order passed by the lower authorities and submitted that the issue of alleged defect in notice issued under section 274 r/w section 271(1)(c) of the Act has been recently considered by the Hon'ble jurisdictional High Court in the Veena Estate (P) Ltd. v/s CIT, [2024] 461 ITR 483 (Bom.).

8. We have considered the submissions of both sides and perused the material available on record. In the present case, the AO initiated penalty proceedings under section 271(1)(c) of the Act and levied a penalty of Rs.29,02,020. From the perusal of the notice dated 24/02/2015 issued under section 274 r/w section 271(1)(c) of the Act, forming part of the paper book on page 11, we find that the AO did not strike-off any of the twin charges i.e., concealment of particulars of income or furnishing of inaccurate particulars of income. We find that the Larger Bench of the Hon'ble Jurisdictional High Court in Mohd. Farhan A. Shaikh (supra) held that the defect in notice by not striking off the irrelevant matter would vitiate the penalty proceedings. During the hearing, the learned DR placed reliance upon the decision of the Hon'ble Jurisdictional High Court in Veena Estate (P) Ltd. (supra), wherein it was held that an alleged defect in notice issued to assessee under section 274 r/w section 271(1)(c) of the Act, in regard to which assessee had never raised an objection from very inception could not be permitted to raise in appeal before High Court in absence of any prejudice being caused. It is the plea of the assessee that the issue as regards the defect in the notice has been raised by the assessee in the appellate proceedings against the initiation of penalty under section 271(1)(c) of the Act.

9. From the perusal of the appeal record, we find that in the appeal against the penalty order dated 14/05/2018 passed under section 271(1)(c) of the Act before the learned CIT(A), the assessee specifically raised the ground no.2 and submission regarding the defect in the notice issued under section 274 r/w section 271(1)(c) of the Act as the AO did not mention under which the limb

penalty under section 271(1)(c) of the Act has been levied. Further, we find that the assessee also, inter-alia, placed reliance upon the decision of the Larger Bench of the Hon'ble Jurisdictional High Court in Mohd. Farhan A. Shaikh (supra) in support of its submission, as is evident from page 7 of the paper book. However, we find that the learned CIT(A) vide impugned order dismissed the appeal filed by the assessee and upheld the levy of penalty under section 271(1)(c) of the Act without dealing with the aforesaid submission of the assessee. Being aggrieved, the assessee has again raised this issue in the present appeal before us. Therefore, from the aforesaid factual matrix, we find merit in the submissions of the assessee that the issue as regards the defect in the penalty notice has been raised since the appellate proceedings before the learned CIT(A) against the initiation of penalty under section 271(1)(c) of the Act. Accordingly, we are of the considered view that the decision of the Hon'ble Jurisdictional High Court in Veena Estate (P) Ltd. (supra) does not support the plea of the learned DR in the present case, as the same has been rendered in a completely different factual matrix, where after 30 years the taxpayer sought to raise ground as regards the defect in notice issued under section 274 r/w section 271(1)(c) of the Act before the Hon'ble High Court for the first time. Therefore, the reliance placed by the learned DR on the decision of the Hon'ble Jurisdictional High Court in Veena Estate (P) Ltd. (supra) is completely misplaced in the facts of the present case.

10. The learned DR has also relied upon the decision of the coordinate bench of the Tribunal in Moola Padmaja v/s ACIT, in ITA No. 234/Hyd./2022. From the perusal of the aforesaid order dated 22/02/2023 rendered in the aforesaid

case, we find that the coordinate bench following the decision of the Hon'ble Andhra Pradesh High Court in CIT v/s Chandulal, 152 ITR 228 held that merely for non-specifying in the notice as to under which limb the penalty is levied, the penalty cannot be cancelled especially when the assessee who is a non-filler was put to notice which he has understood and has replied to such notice issued by the AO. The learned DR has further placed reliance upon the decision of the Hon'ble Calcutta High Court in PCIT v/s Thakur Prasad Sao & Sons (P) Ltd.; [2024] 163 Taxmann.com 449 (Cal.) to support the contention that when the AO has recorded in the assessment order particulars of concealed income/undisclosed income of the assessee and on that basis initiated penalty proceedings under section 271(1)(c) of the Act then consequential notice under section 274 issued by the AO to the assessee is to afford him the opportunity of hearing. However, it is pertinent to note that the decision in Mohd Farhan A. Shaikh (supra), relied upon by the assessee, has been rendered by the Larger Bench of the Hon'ble Jurisdictional High Court and therefore the same is a binding precedent for this bench.

11. Thus, in view of the facts and circumstances as noted in the foregoing paragraph, we are of the considered view that the decision of the Larger Bench of the Hon'ble Jurisdictional High Court in Mohd Farhan A. Shaikh (supra) squarely covers this issue. Accordingly, respectfully following the aforesaid decision of the Hon'ble Jurisdictional High Court in Mohd. Farhan A. Shaikh (supra), the penalty notice issued under section 274 r/w 271(1)(c) of the Act is held to be invalid, and the penalty order passed under section 271(1)(c) of

the Act for the assessment year 2007-08 is hereby quashed. As a result, ground No. 2 raised in assessee's appeal is allowed.

12. Since the relief has been granted to the assessee on this short issue, the other grounds raised by the assessee have become academic and therefore are left open.

13. In the result, the appeal by the assessee is allowed.

Order pronounced in the open Court on 26/08/2024

**Sd/-**  
**OM PRAKASH KANT**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SANDEEP SINGH KARHAIL**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 26/08/2024**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

By Order

Assistant Registrar  
ITAT, Mumbai