

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

ITA No. 3090/MUM/2023
Assessment Year: 2011-12

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| Deputy Commissioner of Income Tax- 14(1)(1), Mumbai | Vs. | Michael Page International Recruitment Pvt. Ltd., 5 th Floor, 2 North Avenue Maker Maxity, Bandra (East), Mumbai – 400 051 (PAN : AAGCM8425N) |
| (Appellant) | | (Respondent) |

CO No. 40/MUM/2024
Assessment Year: 2011-12

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| Michael Page International Recruitment Pvt. Ltd., 5 th Floor, 2 North Avenue Maker Maxity, Bandra (East), Mumbai – 400 051 (PAN : AAGCM8425N) | Vs. | Deputy Commissioner of Income Tax- 14(1)(1), Mumbai |
| (Appellant) | | (Respondent) |

Present for:

Assessee : Ms. Hirali Desai, CA and
Ms. Tejal Saraf, CA

Revenue : Smt. Mahita Nair, Sr. DR

Date of Hearing : 11.07.2024

Date of Pronouncement : 27.09.2024

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

The appeal filed by the revenue and the Cross Objection filed by the assessee are against the order of Ld. CIT(A), National Faceless

Assessment Centre, New Delhi, vide No. ITBA/NFAC/S/250/2023-24/1053355719(1), dated 31.05.2023 passed against the penalty order of Assistant Commissioner of Income Tax – 14(1), Mumbai, u/s. 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 31.03.2018 for AY 2011-12.

2. Grounds of appeal taken by the Revenue are reproduced as under:

“1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting penalty levied u/s. 271(1)(c) by holding that penalty is not leviable when two views are possible without elaborating the views of CIT(A) was referring to

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the expenses incurred by the assessee towards improvement of leasehold as revenue expenses ignoring the fact that the said expense were incurred for setting up of new business by the assessee with the objective of bringing enduring benefit to its business and therefore claiming same expenditure as revenue expenditure in the current year amounts to filing of inaccurate particular and hence penalty has to be levied u/s. 271(1)(c).

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring the fact that assessee has suo moto offered leasehold improvement expenses as capital expenditure in subsequent years and therefore claiming same expenditure as revenue expenditure in the current year amounts to filing of inaccurate particular and hence penalty has to be levied u/s. 271(1)(c).

3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.”

2.1. Grounds of cross-objection taken by the assessee are reproduced as under:

“1. On the facts and in the circumstances of the case and in law, the Learned Assessing Officer (Ld. AO) erred in levying penalty amounting to Rs 51,70,708 under Section 271(1)(c) of the Act.

The Assessee prays that the penalty levied under Section 271(1)(c) of the Act be deleted.

2. On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer (the AO) erred in initiating the penalty proceedings for furnishing of inaccurate particulars of income but ultimately levying penalty for concealment of income relying upon Explanation: Clause B to section 271(1)(e) of the Act.

The Assessee prays that the penalty levied under Section 271(1)(c) of the Act be deleted.

3. On the facts and in the circumstances of the case and in law, the Ld. Assessing Officer (the AO) erred in initiating the penalty proceedings without specifying the reason for penalty initiation under section 274 r.w.s. 271(1)(c) of the Act.

The Assessee prays that the notice initiating penalty is ambiguous in the absence of clear mention of the limb under which penalty is initiated, the notice is therefore invalid, and the penalty is unsustainable hence the penalty proceedings ought to be dropped.

4. On the facts and in the circumstances of the case and in law, the Ld. AO erred in levying penalty amounting to Rs 51,70,708 under Section 271(1)(c) of the Act.

While doing so, the Ld. AO failed to appreciate that:

- the Cross-objector had made full and adequate disclosure of all the material facts at the time of filing its return of income.*
- no penalty under Section 271(1)(c) of the Act can be levied when there are two plausible views or opinions on the issue.*

The Assessee prays that the penalty levied under Section 271(1)(e) of the Act be deleted.

5. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Ld. AO erred in not granting relief while computing the amount of penalty to the extent of depreciation allowed to the Assessee.

The Assessee prays that the relevant excess penalty levied under Section 271(1)(c) of the Act be deleted.”

3. The moot point raised before the Tribunal is in respect of imposition of penalty of Rs.51,70,708/-, u/s. 271(1)(c) of the Act. In the cross objection filed by the assessee, jurisdictional issue has been raised vide ground no.3 of the said cross objection, whereby it is contested that the impugned penalty proceedings were initiated without specifying a specific charge in the notice issued u/s. 274 r.w.s. 271(1)(c), which renders the said notice as invalid and therefore the penalty is unsustainable.

4. Assessee invited the attention of the Bench to the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act, dated 31.03.2014 placed in the

paper book at page -1, to point out that the appropriate words and paragraphs have not been deleted so as to be specific on the charge for which the impugned penalty proceedings are initiated. Scanned copy of the said notice is as under:

GLT.NS.-29

आयकर अधिनियम, 1961 की धारा 271 के साथ पढी गई धारा 274 के अधीन
**NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
 THE INCOME TAX ACT,1961**

सेवा में /

PAN : AAGCM8425N

M/S. Michael Page International Recruitment
Pvt. Ltd.Level-02, Kalptaru Synergy,
Off Grand Hyatt, Santacruz (E),
Mumbai 400055

आयकर कार्यालय/Office of the

Dy. Commissioner of income tax

10(1) Room No. -455,
Aayakar Bhavan, M.K.Road,
Mumbai 400020

तारीख/Dated : 31.03.2014

PENALTY U/S 271(1)(c)

चूंकि कर निर्धारण वर्ष के संबंध में मेरे यहां होने वाली कार्रवाई के दौरान मुझे प्रतीत होता है कि आपने :-

Whereas in the course of proceedings before me for the **Assessment Year 2011-12** it appears to me that You:-

* बिना उचित कारण के वह आय विवरणी नहीं दी है जो आपको भारतीय आयकर अधिनियम, 1922 की 22(1), 22(2)/ 34 के अधीन दी गई सूचना के अनुसार देनी थीक या जो आपको धारा 139(1) के अधीन या आयकर अधिनियम, 1961 की धारा 139(2)/148 के अधीन दी गई सूचना सं. ता. अनुसार दाखिल करना ठीक अथवा उचित कारण के बिना आपने दिए गए समय के अन्दर और उक्त धारा 139(1) या इस प्रकार की सूचना द्वारा अपेक्षित नीति से विवरणी नहीं दी है।

* Have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under Section 139 (2)/148 of the Income Tax Act, 1961 No. dated or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said Section 139(1) or by such notice.

* बिना उचित कारण के आपने भारतीय आयकर अधिनियम, 1922 की धारा 22(4)/23(2) या आयकर अधिनियम, 1961 की धारा 142(1)/143(2) के अधीन दी गई सूचना सं. ता. का अनुपालन नहीं किया है।

* Have without reasonable cause failed to comply with a notice under Section 22(4) / 23(2) of the Indian Income-tax Act, 1922 or under Section 142(1) / 143(2) of the Income-Tax Act, 1961, No DCIT 10(1)/scrutiny/2011-12 dated 04.02.2014.

* अपनी आय के ब्यौरे छिपा लिए हैं या इस प्रकार की आय के ब्यौरे गलत दिए हैं।

* have Concealed the particulars of your income or Furnished inaccurate particulars of such income

आपको पतलद्वारा सूचित किया जाता है कि ता..... 200 को बजे अ.म./पू.म. में आप मेरे कार्यालय में उपस्थित हों और कारण बताएं के आयकर अधिनियम, 1961 की धारा 271 के अधीन आप पर दण्ड लगाने का आदेश क्यों न दिया जाए। यदि आप स्वयं उपस्थित होकर या प्रधिकृत प्रतिनिधि द्वारा सुनवाई के लिए दिए गए अवसर का लाभ नहीं उठाना चाहते तो उक्त तारीख को या उससे पूर्व लिखकर इसका कारण बताएं, जिस पर धारा 271 के अधीन कोई ऐसा आदेश देने से पूर्व विचार किया जाएगा।

You are hereby requested to appear before me on **17.04.2014 at 2:30 P.M.** and Show cause why an order imposing a penalty on you should not be made under Section 271 of the Income-tax Act, 1961. If you do not wish to avail 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 **271(1)(c)**

(मोहर)
SealNikhil Govila
DY. CIT-10(1),नि. क. गोविंदा
Mumbai

N. K. GOVILA

• जो शब्द या पैरे अनिवार्यक हों उन्हें काट दीजिए

• Delete in appropriate words and Paragraphs.

4.1. From the perusal of the above said notice, it is pointed out that what is not appropriate has not been struck off for the purpose of initiating the proceeding for imposing penalty, i.e., whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income. Assessee 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 Vs. DCIT (2021)125 taxmann.com 253(Bom), 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.

5. 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.

6. 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.”

6.1. 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.

6.2. 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)”.

6.3. 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.

6.4. 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.”

6.5. 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. She 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.

7. 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, as 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.”

8. 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, ground no. 3 taken by the assessee in this respect is allowed. As ground no.3 taken by the assessee is allowed on the jurisdictional issue, all other grounds taken by assessee are rendered as academic in nature, so also grounds taken by the Revenue are rendered infructuous.

9. In the result, cross objection of assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on day of 27 September, 2024 under Rule 34 of
The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Satbeer Singh Godara)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated: 27 September, 2024

MP, Sr.P.S.

Copy to :

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

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai