

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAVISH SOOD, JUDICIAL MEMBER**

ITA NO. 3525/MUM/2014 : (A.Y : 2008-09)

Smt. Aruna Satish Kabra Vs. ITO-12(3)(4),
C/o. Kabra Agencies Mumbai (Respondent)
2nd floor, Mustfa Building,
Sir P.M. Road, Fort,
Mumbai 400 023 (Appellant)
PAN : AAHPK4542N

**Appellant by : Shri Shekhar Gupta
Respondent by : Shri Ajai Pratap Singh**

**Date of Hearing : 31/05/2017
Date of Pronouncement : 31/05/2017**

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order of CIT(A)-23, Mumbai dated 14.2.2014, pertaining to the Assessment Year 2008-09, which in turn has arisen from the order passed by the Assessing Officer dated 27.6.2011 under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, the solitary issue raised by the assessee is with respect to penalty imposed u/s 271(1)(c) of the Act amounting to Rs.4,24,100/-.

3. In brief, the relevant facts are that the assessee is an individual who had declared Long Term Capital Gains on sale of property and claimed the same as exempt u/s 54F of the Act. In the return of income, assessee had shown Long Term Capital Gains on sale of plot at Rs.2,19,801/- and on the sale of house property at Rs.16,76,230/- and the entire Capital Gain was claimed as exempt u/s 54F/54 of the Act on account of purchase of a new residential property of Rs.47,06,600/-. The Assessing Officer found discrepancies in some of the claims made by the assessee on account of cost of improvements, etc. and instead, determined the Long Term Capital Gains on sale of plot at Rs.3,79,050/- and on sale of house property at Rs.21,92,522/-. Even with regard to the claim of deduction u/s 54/54F of the Act on account of investment made in a new residential house of Rs.46,06,000/, the Assessing Officer allowed the deduction only to the extent of Rs.7,00,000/-. Be that as it may, the Assessing Officer determined Long Term Capital Gains on sale of plot and sale of house property at Rs.18,71,572/- after allowing deduction u/s 54 of the Act of Rs.7,00,000/-. The said variance between the assessed and the returned Capital Gains led the Assessing Officer to impose penalty u/s 271(1)(c) of the Act amounting to Rs.4,24,100/-, being 100% of the tax sought to be evaded on such difference in the assessed Long Term Capital Gain. The CIT(A) has also affirmed the levy of penalty, against which the assessee is in appeal before us.

4. Before us, the learned representative for the assessee has made a solitary argument based on the show cause notice issued u/s 274 r.w.s. 271(1)(c) dated 29.12.2010, a copy of which was produced at the

time of hearing. According to the learned representative, penalty notice issued does not reveal any application of mind by the Assessing Officer inasmuch as the irrelevant portion of the notice has not been struck off and, therefore, it is not clear as to whether the Assessing Officer intended to levy penalty with respect to which of the two limbs of Sec. 271(1)(c) of the Act. In support of the said proposition, he has relied on the decision of the Tribunal in the case of *Meherjee Cassinath Holdings Pvt. Ltd.* in ITA No. 2555/Mum/2012 dated 28.4.2017, copy of which has been placed on record.

5. On this aspect, the Id. DR pointed out that the penalty has been levied by the Assessing Officer on both counts, namely for furnishing of inaccurate particulars of income as well as for concealment of income and, therefore, the aforesaid objection of the assessee is untenable.

6. We have carefully considered the rival submissions. Factually speaking, insofar as the assessment order passed u/s 143(3) of the Act dated 29.12.2010 is concerned, the only reference to Sec. 271(1)(c) of the Act is in the last line, which says "*Issue notice u/s. 274 r.w.s. 271(1)(c)*". Similarly, the notice issued u/s 274 r.w.s. 271(1)(c) of the Act dated 29.12.2010 is in standard form and the irrelevant portion has not been struck off. An identical controversy was considered by our coordinate Bench in the case of *Meherjee Cassinath Holdings Pvt. Ltd.* (*supra*) and the following discussion is worthy of notice :-

"8. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty to the extent specified if, in the course of any proceedings under the

Act, he is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income. In other words, what Sec. 271(1)(c) of the Act postulates is that the penalty can be levied on the existence of any of the two situations, namely, for concealing the particulars of income or for furnishing inaccurate particulars of income. Therefore, it is obvious from the phraseology of Sec. 271(1)(c) of the Act that the imposition of penalty is invited only when the conditions prescribed u/s 271(1)(c) of the Act exist. It is also a well accepted proposition that 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' referred to in Sec. 271(1)(c) of the Act denote different connotations. In fact, this distinction has been appreciated even at the level of Hon'ble Supreme Court not only in the case of Dilip N. Shroff (supra) but also in the case of T.Ashok Pai, 292 ITR 11 (SC). Therefore, if the two expressions, namely 'concealment of the particulars of income' and 'furnishing of inaccurate particulars of income' have different connotations, it is imperative for the assessee to be made aware as to which of the two is being put against him for the purpose of levy of penalty u/s 271(1)(c) of the Act, so that the assessee can defend accordingly. It is in this background that one has to appreciate the preliminary plea of assessee, which is based on the manner in which the notice u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 has been issued to the assessee-company. A copy of the said notice has been placed on record and the learned representative canvassed that the same has been issued by the Assessing Officer in a standard proforma, without striking out the irrelevant clause. In other words, the notice refers to both the limbs of Sec. 271(1)(c) of the Act, namely concealment of the particulars of income as well as furnishing of inaccurate particulars of income. Quite clearly, non-striking-off of the irrelevant limb in the said notice does not convey to the assessee as to which of the two charges it has to respond. The aforesaid infirmity in the notice has been sought to be demonstrated as a reflection of non-application of mind by the Assessing Officer, and in support, reference has been made to the following specific discussion in the order of Hon'ble Supreme Court in the case of Dilip N. Shroff (supra):-

“83. It is of some significance that in the standard proforma 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. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. (See Malabar Industrial Co. Ltd. v. CIT [2000] 2 SCC 718)”

9. Factually speaking, the aforesaid plea of assessee is borne out of record and having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the notice in the instant case does suffer from the vice of non-application of mind by the Assessing Officer. In fact, a similar proposition was also enunciated by the Hon'ble Karnataka High Court in the case of M/s. SSA's Emerald Meadows (supra) and against such a judgment, the Special Leave Petition filed by the Revenue has since been dismissed by the Hon'ble Supreme Court vide order dated 5.8.2016, a copy of which is also placed on record.

10. In fact, at the time of hearing, the Id. CIT-DR has not disputed the factual matrix, but sought to point out that there is due application of mind by the Assessing Officer which can be demonstrated from the discussion in the assessment order, wherein after discussing the reasons for the disallowance, he has recorded a satisfaction that penalty proceedings are initiated u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income. In our considered opinion, the attempt of the Id. CIT-DR to demonstrate application of mind by the Assessing Officer is no defence inasmuch as the Hon'ble Supreme Court has approved the factum of non-

striking off of the irrelevant clause in the notice as reflective of non-application of mind by the Assessing Officer. Since the factual matrix in the present case conforms to the proposition laid down by the Hon'ble Supreme Court, we proceed to reject the arguments advanced by the Id. CIT-DR based on the observations of the Assessing Officer in the assessment order. Further, it is also noticeable that such proposition has been considered by the Hon'ble Bombay High Court also in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017 (supra) and the decision of the Tribunal holding levy of penalty in such circumstances being bad, has been approved.

11. *Apart from the aforesaid, the Id. CIT-DR made an argument based on the decision of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Others, 216 ITR 660 (Bom.) to canvass support for his plea that non-striking off of the irrelevant portion of notice would not invalidate the imposition of penalty u/s 271(1)(c) of the Act. We have carefully considered the said argument set-up by the Id. CIT-DR and find that a similar issue had come up before our coordinate Bench in the case of Dr. Sarita Milind Davare (supra). Our coordinate Bench, after considering the judgment of the Hon'ble Bombay High Court in the case of Smt. Kaushalya & Ors., (supra) as also the judgments of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) and Dharmendra Textile Processors, 306 ITR 277 (SC) deduced as under :-*

“12. A combined reading of the decision rendered by Hon'ble Bombay High Court in the case of Smt. B Kaushalya and Others (supra) and the decision rendered by Hon'ble Supreme Court in the case of Dilip N Shroff (supra) would make it clear that there should be application of mind on the part of the AO at the time of issuing notice. In the case of Lakhdir Lalji (supra), the AO issued notice u/s 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income. The Hon'ble Gujarat High Court quashed the penalty since the basis for the penalty proceedings disappeared when it was held that there was no suppression of income. The Hon'ble Kerala High

Court has struck down the penalty imposed in the case of N.N.Subramania Iyer Vs. Union of India (supra), when there is no indication in the notice for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. In the instant case, the AO did not specify the charge for which penalty proceedings were initiated and further he has issued a notice meant for calling the assessee to furnish the return of income. Hence, in the instant case, the assessing officer did not specify the charge for which the penalty proceedings were initiated and also issued an incorrect notice. Both the acts of the AO, in our view, clearly show that the AO did not apply his mind when he issued notice to the assessee and he was not sure as to what purpose the notice was issued. The Hon'ble Bombay High Court has discussed about non-application of mind in the case of Kaushalya (supra) and observed as under:-

"...The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charge he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

In the instant case also, we are of the view that the AO has issued a notice, that too incorrect one, in a routine manner. Further the notice did not specify the charge for which the penalty notice was issued. Hence, in our view, the AO has failed to apply his mind at the time of issuing penalty notice to the assessee."

12. *The aforesaid discussion clearly brings out as to the reasons why the parity of reasoning laid down by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) is to prevail. Following the decision of our coordinate Bench in the case of Dr. Sarita Milind Davare (supra), we hereby reject the aforesaid argument of the Id. CIT-DR.*

13. *Apart from the aforesaid discussion, we may also refer to the one more seminal feature of this case which would demonstrate the importance of non-striking off of irrelevant clause in the notice by the Assessing Officer. As noted earlier, in the assessment order dated 10.12.2010 the Assessing Officer records that the penalty proceedings u/s 271(1)(c) of the Act are to be initiated for furnishing of inaccurate particulars of income. However, in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act of even date, both the limbs of Sec. 271(1)(c) of the Act are reproduced in the proforma notice and the irrelevant clause has not been struck-off. Quite clearly, the observation of the Assessing Officer in the assessment order and non-striking off of the irrelevant clause in the notice clearly brings out the diffidence on the part of Assessing Officer and there is no clear and crystallised charge being conveyed to the assessee u/s 271(1)(c), which has to be met by him. As noted by the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra), the quasi-criminal proceedings u/s 271(1)(c) of the Act ought to comply with the principles of natural justice, and in the present case, considering the observations of the Assessing Officer in the assessment order alongside his action of non-striking off of the irrelevant clause in the notice shows that the charge being made against the assessee qua Sec. 271(1)(c) of the Act is not firm and, therefore, the proceedings suffer from non-compliance with principles of natural justice inasmuch as the Assessing Officer is himself unsure and assessee is not made aware as to which of the two limbs of Sec. 271(1)(c) of the Act he has to respond.*

14. *Therefore, in view of the aforesaid discussion, in our view, the notice issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 10.12.2010 is untenable as it suffers from the vice of non-application of mind having regard to the ratio of the judgment of the Hon'ble Supreme Court in the case of Dilip N. Shroff (supra) as well as the judgment of the Hon'ble Bombay High Court in the case of Shri Samson Perinchery (supra). Thus, on this count itself the penalty imposed u/s 271(1)(c) of the Act is liable to be deleted. We hold so. Since the penalty has been deleted on the preliminary point, the other arguments raised by the appellant are not being dealt with."*

7. In our considered opinion, the parity of reasoning prevailing with the Tribunal in the case of *Meherjee Cassinath Holdings Pvt. Ltd. (supra)* is clearly attracted to the facts of the instant case also. Therefore, having regard to the manner in which the notice has been issued by the Assessing Officer u/s 274 r.w.s. 271(1)(c) of the Act dated 29.12.2010 and the ratio of the judgment of the Hon'ble Supreme Court in the case of *Dilip N. Shroff, 161 Taxman 218 (SC)* as well as the judgment of the Hon'ble Bombay High Court in the case of *Shri Samson Perinchery, ITA No. 4625 to 4630/Mum/2013 dated 11.10.2013*, the notice issued is untenable and suffers from the vice of non-application of mind. Therefore, on this count itself, the penalty imposed u/s 271(1)(c) of is liable to be deleted. We hold so.

8. In the result, appeal of the assessee is allowed, as pronounced in the open court in the presence of both the parties at the conclusion of hearing on 31st May, 2017.

Sd/-

(RAVISH SOOD)
JUDICIAL MEMBER

Mumbai, Date : 31st May, 2017

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai