

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH “H”, MUMBAI
BEFORE SHRI P.K. BANSAL, VICE PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No.3363/Mum/2016 (Assessment Year- 2007-08)

Rekha Bhupendra Dalal Bhupen Chambers, Ground Floor, Dalal Street, Mumbai-400001 PAN: AAUPD0962E	Vs.	The DCIT, OSD-II, Central Range-7, Mumbai.
(Appellant)		(Respondent)

Assessee by : Shri Vipul Joshi- Advocate

Revenue by : Shri M.C. Omi Ningshen
(DR)

Date of hearing : 29.05.2017

Date of Pronouncement : 29.05.2017

Order Under Section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee under section 253 of the Income-tax Act (the Act) is directed against the order of Id. Commissioner of Income Tax (Appeals)-40 [the CIT(A)], Mumbai dated 23.01.2013 for the Assessment Year 2007-08. The solitary ground of appeal raised by assessee is that “If Id. CIT(A) erred in confirming the penalty levied u/s 271(1)(c) of the Act in respect of exemption claimed u/s 54 of the Act”.
2. Brief facts of the case are that the assessee filed return of income for relevant AY on 31.10.2007 declaring total income of Rs. 1,42,170/-. The assessee has shown to have earned ‘Income from Business & Profession’ and from ‘Income from Other Sources’. The assessee claimed Long Term Capital Gain (LTCG) of Rs.

44,68,390/- and claimed exemption u/s 54 of the Act. The assessment was completed on 17.11.2009 u/s 143(3) of the Act accepting the return of income. Subsequently, a search u/s 132 of the Act was conducted on 31.05.2008 in the premises of Shri Vinod Faria and Milan Dalal. On the basis of incriminating material found in the search, the assessment was reopened on 24.11.2010. No revised return was filed in response to the notice u/s 148 of the Act. The assessment was completed u/s 143(3) r.w.s. 147 of the Act on 28.12.2011. In the re-opening assessment the Assessing Officer (AO) disallowed the exemption claimed u/s 54F of the Act. Thus, the Capital Gain of Rs. 44,68,390/- was brought to tax. No further appeal was filed by assessee against the quantum assessment. The AO thereafter initiated the penalty proceeding u/s 271(1)(c) of the Act. The notice under section 274 r.w.s. 271(1) (c) was issued on 18.12.2011. The assessee filed reply to the show-cause notice vide reply dated 21.02.2012. In the reply, the assessee contended that she agreed to purchase a flat in the building which was constructed at Borivali and builder has agreed to give possession within three years. It was only on account of the fact that the building was delayed and the assessee did not get possession within time, the facts that she could not get the possession of flat, was beyond her control. The claim of exemption was made on genuine belief. It was further contended that assessee disclosed all particular in the return of income and there was no concealment. The contention of assessee was not accepted by AO levied the penalty @ 100% on the tax sought to be evaded vide order dated 27.06.2012. On appeal before the Id. CIT(A), the order was sustained. Further, aggrieved by the order of AO, this appeal is filed before us.

3. We have heard the Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the Revenue and perused the material available on record. The Id. AR of the assessee argued that assessee sold 1/8th interest (share) in the residential Flat No. 91/92, Chitrakoot Apartment, Altamount Road, Mumbai-26 on 24.05.2006. The sale gave rise to the LTCG of Rs. 44,68,380/- to the assessee, the assessee claimed u/s 54 in respect of Capital Gain. The assessee had agreed to purchase a Flat which was under construction at Pluto Building No.2, Borivali (W), Mumbai expecting that construction would be completed within three years on the bonafide and genuine belief, the assessee claimed exemption u/s 54 of the Act in her return of income. The return of income was accepted after scrutiny assessment u/s 143(3) on 17.11.2009. The case of assessee was re-opened u/s 148 of the Act wherein the exemption was disallowed. No further appeal was filed by assessee as building was not completed within three years of sale of Flat. At the time of making claim, the assessee was under genuine belief that construction of the building would be completed within three years and the assessee would be entitled to exemption u/s 54 of the Act. It was further argued that no particular of income was concealed, assessee disclosed all particular in her return of income. The disallowance was made by AO, as the building was not completed within three years. The Id AR prayed that the assessee prayed that no penalty lie against the assessee as the claim of the assessee was not found to be false. It was further argued that the similar penalty order was passed against one of the co-owner Smt. Veena Milan Dalal on disallowance of claim u/s 54. The said co-owner also invested the LTCG in the same building which was under

construction. The AO levied the penalty on similar facts against Smt. Veena Milan Dalal. On appeal before the ld. CIT(A), the penalty was completed by ld. CIT(A)-40 vide order dated 07.11.2014. However, the similar order was sustained against the assessee. In the alternative argument the ld. AR of the assessee argued that while issuing notice u/s 274 r.w.s. 271(1)(c) of the Act. The AO not specified the specific charge whether the penalty is initiated for concealment of income or filing inaccurate particulars. The ld. AR of the assessee argued that non-striking of relevant clause shows a non-application of mind by AO. The ld. AR of the assessee further relied upon the decision of Hon'ble Bombay High Court in CIT v/s Hiralal Doshi (383 ITR 19(Bom.)), CIT v/s Bennett Coleman & Co. Ltd. [2013] 33 taxmann.com 227 (Bom.), decision of Hon'ble Apex Court in CIT v/s Reliance Petroproducts (P.) Ltd. [(2010) 322 ITR 158 (SC)], Price Waterhouse Coopers (P.) Ltd. v/s. CIT – [(2012) 304 ITR 306 (SC)], DIT(IT) v/s. Asia Attractive Dividend Stock Fund- [2013] 35 taxmann.com 265 (Bom)], CIT v/s. Somany Evergreen Knits Ltd. [(2013) 352 ITR 592 (Bom)] and the decision of Mumbai Tribunal in Meherjee Cassinath holdings Pvt. Ltd. v/s. ACIT in ITA No. 2555/Mum/2012 dated 28.04.2017. On the other hand, ld. DR for the Revenue supported the order of authorities below. The ld. DR for the Revenue further argued that the AO levied the penalty on both limbs of section 271(1)(c) of the Act. It was further argued that assessee furnished inaccurate particular of income and thus, concealed the income. It was further argued that mere non-striking out the relevant charge in the notice u/s 274 r.w.s. 271(1)(c) is not fatter. The ld. DR for the Revenue further argued that it was a fit claim for levying the penalty.

4. We have considered the rival contention of the parties and gone through the orders of authorities below. The assessee claimed exemption of Capital Gain in the return of income filed on 31.10.2007. The claim was accepted in the assessment order passed u/s 143(3) on 17.11.2009. The assessment was re-opened on the basis of search action conducted u/s 132 on 31.05.2008 in the premises of Shri Vinod Faria and Milan Dalal and its group in the search, it was noticed that Milal Dalal and seven other his family members sold a residential Flat on 24.05.2006 for sale consideration of Rs. 14.08 Crore. Accordingly, LTCG of 1/8th share in each of the co-owner/co-sharers and was earned in the year under consideration, the amount of LTCG comes to Rs. 43.5 Lakhs in each assessee's share. The assessee claimed exemption of her share. In case of assessee, the assessment was re-opened and was completed u/s 144 r.w.s. 147 of the Act (though the assessment order is passed u/s 143(3) r.w.s. 147). In the re-opening assessment, the exemption of LTCG was denied. While completing the assessment, the AO initiated the penalty proceeding in the assessment order; the penalty was initiated for furnishing the inaccurate particular of income. The AO issued notice dated 18.12.2011 u/s 274 r.w.s. 271(1)(c) of the Act. The AO issued a notice on standard Performa without striking out the relevant clause. Thus, the notice refers to both the limbs of section 271(1)(c) of the Act for concealment of particular of income as well as furnishing inaccurate particulars of income, the non-striking of the irrelevant limb of the said notice does not convey to the assessee as to which of the two charges, it has to respond. The Id. AR of the assessee had demonstrated that non-striking of relevant clause shows a non-application of mind by AO.

5. We have further seen that in assessee's group case, a similar penalty was levied in case of Smt. Veena Milan Dalal (PAN: ACBPD4089R). However, the same was deleted by Id. CIT(A) vide order dated 07.11.2014 vide Appeal CIT(A)-40/DCIT(OSD-II)/390/2013-14 (As per Paper Book page No. 18 to 31).
6. The Id. AR of the assessee besides the other decision relied upon the decision of co-ordinate bench in case of Meherjee Cassinath holdings Pvt. Ltd. v/s ACIT (supra) wherein the co-ordinate bench after considering the various decision and considering the similar argument as argued by Id. DR for the Revenue passed the following order:

“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 (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 back ground, 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.”

7. Considering the decision of co-ordinate bench, we hold that the AO failed to crystallize the charge on which the penalty was proposed u/s 271(1)(c) of the Act, which has to be met out by the assessee. Considering the decision of various Superior Courts, Hon'ble Bombay High Court in the case of Shri Samson Perinchery, ITA Nos. 1154, 953, 1097 & 1126 of 2014 dated 5.1.2017, we delete the penalty levied by AO. As we have deleted the penalty on alternative submission of the assessee, thus, the other submissions made by ld. AR of the assessee have become academic.
8. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 29th day of May 2017.

Sd/-

(P.K. BANSAL)

ACCOUNTANT MEMBER

Mumbai; Dated 29/05/2017

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai