

(2024) 05 ITAT CK 0040**Income Tax Appellate Tribunal (Delhi SMC Bench)****Case No:** Income Tax Appeal No. 112/DEL/2024

Ajit Singh

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision: May 27, 2024**Acts Referred:**

- Income Tax Act, 1961 - Section 271(1)(C), 274

Hon'ble Judges: Challa Nagendra Prasad, J**Bench:** Single Bench**Advocate:** Rajiv Saxena, Sumangla Saxena, Shyam Sundar, Om Parkash**Final Decision:** Partly Allowed

Judgement

1. This appeal is filed by the assessee against the order of the Ld.CIT(Appeals) – 1, Gurgaon dated 30.05.2018 for the AY 2011-12 in sustaining the penalty levied u/s 271(1)(c) of the Act.

2. Ld. Counsel for the assessee, at the outset, submits that the penalty order passed u/s 271(1)(c) of the Act is bad in law for the reason that the penalty proceedings were initiated and penalty was levied without assigning specific charge, the exact limb of section 271(1)(c) of the Act. In other words, it is submitted that the AO did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. Therefore, it is submitted that in the absence of specific charge in the notice issued u/s 271(1)(c) of the Act the said notice is bad in law and consequently the penalty order is bad in law. Reliance was placed on the decision of the coordinate bench of Delhi High Court in the case of Manisha Jain Vs. ITO in ITA No.3420/Del/2018 dated 16.10.2023.

3. On the other hand, the Ld. DR supported the orders of the authorities below.

4. Heard rival submissions. On perusal of the penalty notice issued u/s 274 r.w.s. 271(1)(c) of the Act we observe that the notice was issued mechanically stating that assessee has concealed the particulars of income or furnished inaccurate particulars of such income. The AO failed to specify the exact limb for which the notice was issued. In other words, the AO did not specify the specific charge for which the penalty proceedings were initiated i.e. either for concealment of particulars of income or for furnishing of inaccurate particulars of income.

5. We observe that an identical issue came up before the Hon'ble Bombay High Court (full bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh vs. ACIT [434 ITR (1)] and the Hon'ble High Court held as under:

"Question No.1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(l)(c), does a mere defect in the notice— not striking off the irrelevant matter—vitiate the penalty proceedings?

181. It does. The primary burden ties on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(l)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.

183. Therefore, we answer the first question to the effect that Goa Dourado Promotions and other cases have adopted an approach more in consonance with the statutory scheme. That means we must hold that Kaushaiya does not lay down the correct proposition of law.

Question No.2: Has Kaushaiya failed to discuss the aspect of 'prejudice?

184. Indeed, Kaushaiya did discuss the aspect of prejudice. As we have already noted, Kaushaiya noted that the assessment orders already contained the

reasons why penalty should be initiated. So, the assessee, stresses Kaushaiya, "fully knew in detail the exact charge of the Revenue against him". For Kaushaiya, the statutory notice suffered from neither non-application of mind nor any prejudice. According to it, "the so called ambiguous wording in the notice [has not] impaired or prejudiced the right of the assessee to a reasonable opportunity of being heard". It went onto observe that for sustaining the plea of natural justice on the ground of absence of opportunity, "it has to be established that prejudice is caused to the concerned person by the procedure followed". Kaushalya doses the discussion by observing that the notice issuing "is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done ",

185. No doubt, there can exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by the authority and/or ultimate prejudice to the right of opportunity of hearing contemplated under section 274. So asserts Kaushalya. In fact, for one assessment year, it set aside the penalty proceedings on the grounds of non-application of mind and prejudice.

186. That said, regarding the other assessment year, it reasons that the assessment order, containing the reasons or justification, avoids prejudice to the assessee. That is where, we reckon, the reasoning suffers. Kaushalya's insistence that the previous proceedings supply justification and cure the defect in penalty proceedings has not met our acceptance.

Question No. 3: What is the effect of the Supreme Court's decision in Dilip N. Shroff on the issue of non-application of mind when the irrelevant portions of the printed notices are not struck off ?

187. In Dilip N. Shroff, for the Supreme Court, it is of "some significance that in the standard Pro-forma 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". Then, Dilip N. Shroff, on facts, has felt that the assessing officer himself was not sure whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars.

188. We may, in this context, respectfully observe 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. Therefore, Dilip N. Shroff disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays

non-application of mind. And, therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.

189. In Sudhir Kumar Singh, the Supreme Court has encapsulated the principles of prejudice. One of the principles is that "where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, "except in the case of a mandatory provision of law which is conceived not only in individual interest but also in the public interest".

190. Here, section 271(l)(c) is one such provision. With calamitous, albeit commercial, consequences, the provision is mandatory and brooks no trifling with or dilution. For a further precedential prop, we may refer to Rajesh Kumar v. CIT[74], in which the Apex Court has quoted with approval its earlier judgment in State of Orissa v. Dr. Binapani Dei[75]. According to it, when by reason of action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice must be followed. In such an event, although no express provision is laid down on this behalf, compliance with principles of natural justice would be implicit. If a statute contravenes the principles of natural justice, it may also be held ultra virus Article 14 of the Constitution.

191. As a result, we hold that Dilip N. Shroff treats omnibus show cause notices as betraying non-application of mind and disapproves of the practice, to be particular, of issuing notices in printed form without deleting or striking off the inapplicable parts of that generic notice.

Conclusion: We have, thus, answered the reference as required by us; so we direct the Registry to place these two Tax Appeals before the Division Bench concerned for further adjudication."

6. As could be seen from the above the Hon'ble Bombay High Court (Full Bench at Goa) in the case of Mr. Mohd. Farhan A. Shaikh v. ACIT [(2021) 434 ITR 1 (Bom)] while dealing with the issue of non strike off of the irrelevant part in the notice issued u/s 271 (1)(c) of the Act, held that assessee must be informed of the grounds of the penalty proceedings only through statutory notice and an omnibus notice suffers from the vice of vagueness.

7. In the case of PCIT Vs. Sahara India Life Insurance Co. Ltd. (supra) the Hon'ble jurisdictional High Court held as under:-

"The respondent had challenged the upholding of the penalty imposed under section 271(1)(c) of the Act, which was accepted by the Income Tax Appellate Tribunal. It followed the decision of the Karnataka High Court in CIT Vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Karn.) and observed

that the notice issued by the Assessing Officer would be bad in law if it did not specify in which limb of section 271(1)(c) the penalty proceedings had been initiated under, i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgement in the subsequent order in CIT Vs. SSA's Emerald Meadows (2016) 73 taxmann.com 241 (Karn.), the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by an order dated August 5, 2016 [CIT Vs. SSA's Emerald Meadows (2016) 386 ITR (St.) 13 (SC)]."

8. Similar view has been taken by the Hon'ble Jurisdictional High Court in the case of PCIT Vs. Gopal Kumar Goyal (supra), wherein the Hon'ble High Court held as under: -

"11. The Tribunal, after perusing the record and considering the submissions, observed as follows:

"13. In the present appeal, the show-cause-notice dated 15-3-2013 which has been issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Act reveals that Assessing Officer has not recorded any clear cut satisfaction as to whether the penalty under section 271(l)(c) of the Act has been levied for concealment of income or for furnishing of inaccurate particulars of income."

12. As is evident upon a perusal of the impugned order, the Tribunal, in concluding that there was a requirement in law for the AO to clearly indicate his satisfaction, as to which limb of section 271(l)(c) of the Act was triggered qua the respondent/assessee, placed reliance on the following judgments: Pr. CIT v. Sahara India Life Insurance Co. Ltd. [2019] 108 taxmann.com 597/[2021] 432 ITR 84 (Delhi) and Mohd. Farhan A Sheikh v. Dy. CIT [2021] 125 taxmann.com 253/280 Taxman 334/434 ITR 1 (Bom.) (FB).

13. Thus, having regard to the aforesaid, the Tribunal concluded, that the penalty order could not be sustained, and consequently allowed the appeal of the respondent/assessee.

14. Mr Kumar, in support of his appeal, has vehemently argued that the impugned order is erroneous. In support of his submission, Mr Kumar has relied upon the judgment of another coordinate bench of this Court in CIT v. ECS Ltd. [2010] 194 Taxman 311/T20111 336 ITR 162.

15. Having heard Mr Kumar and perused the record, in our view, there cannot be any dispute, that the AO failed to clearly reflect his satisfaction in the penalty notice, as to which limb of the provisions of section 271(l)(c) of the Act was triggered vis-a-vis the respondent/assessee.

16. As indicated above, in a given case, both limbs may get attracted, but even in such situation the AO would need to set forth his prima facie, satisfaction in the penalty notice. The reason, perhaps, why the Legislature has provided for two circumstances in section 271(l)(c) of the Act, to our minds, emanates from the need to distinguish between the gravity and consequences which may accompany concealment of particulars of income, as against a case which involves furnishing inaccurate particulars. The quantum of penalty, that the AO may levy, would depend on which slot and/or limb of section 271(l)(c) of the Act, the assessee's infraction falls in.

17. Furthermore, having regard to the doctrine of stare decisis which impels courts not to disturb settled propositions or points of law, we are of the view, that the judgment of the coordinate bench of this Court rendered in Sahara India Life Insurance Co. Ltd's, case (supra) would have to be followed, as nothing has been brought on record by Mr Kumar, which would persuade us to deviate from the view taken by the coordinate bench, and refer the matter to a larger bench.

18. We may also note, that this very view has been taken by another coordinate bench, of which one of us i.e., Rajiv Shakdher, J. was a member. This view has been rendered in Pr. CIT v. Ms. Minu Bakshi 2022: DHC:2814-DB and also in the judgment in Pr. CIT v. Unitech Reliable Projects (P.) Ltd. 2023: DHC:4258-DB. The relevant observations made in the aforesaid judgement are extracted hereafter:

"21. Penalty proceedings entail civil consequences for the assessee. The AO is required to apply his mind to the material particulars, and indicate clearly, as to what is being put against the respondent/assessee when triggering the penalty proceedings.

22. In case the AO concludes, that a case is made out under section 271 (l)(c) of the Act, he needs to indicate, clearly, as to which limb of the said provision is attracted. The reason we say so is, that apart from anything else, the pecuniary burden may vary, depending on the infraction(s) committed by the respondent/assessee. In a given case, where concealment has taken place, a heavier burden may be imposed, than in a situation where an assessee is involved in furnishing inaccurate particulars.

23. Therefore, it is necessary for the AO to indicate, broadly, as to the provision/limb under which penalty proceedings are triggered against the assessee.

24. Clearly, this has not happened in the instant case. "

9. As could be seen from the above the Hon'ble jurisdictional High Court upheld the order of the Tribunal in holding that the notice issued by the Assessing Officer was bad

in law if it did not specify under which limb of section 271(1)(c) of the Act the penalty proceedings had been initiated i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income.

10. Ratio of the full bench decision of the Hon'ble Bombay High Court (Goa) squarely applies to the facts of the assessee's case as the notice u/s. 274 r.w.s. 271(l)(c) of the Act was issued without striking off the irrelevant portion of the limb and failed to intimate the assessee the relevant limb and charge for which the notices were issued. Thus, respectfully following the said decision we hold that the penalty order passed u/s. 271(l)(c) of the Act by the Assessing Officer is bad in law and accordingly the penalty order passed u/s. 271(l)(c) of the Act for Assessment Year 2012-13 is quashed.

11. As we have decided the preliminary and legal ground in favour of the assessee by quashing the penalty order the other grounds raised by the assessee on merits are not gone into as the adjudication of these grounds become only academic at this stage.

12. In the result, appeal of the assessee is partly allowed as indicated above.