Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.51 OF 2012

MOHD. FARHAN A SHAIKH ... Appellant

Versus

THE DEPUTY COMMISSIONER OF INCOME -TAX ...Respondent

WITH

TAX APPEAL NO.57 OF 2012

MOHD. FARHAN A SHAIKH ...Appellant

Versus

THE ASST. COMMISSIONER OF INCOME TAX. ...Respondent

WITH

STAMP NUMBER (APPLN.) NO.425 OF 2020

IN

TAX APPEAL NO.57 OF 2012

MOHD. FARHAN A SHAIKH ...Applicant

Versus

THE ASST. COMMISSIONER OF INCOME TAX. ...Respondent

Mr. S. R. Rivankar, Senior Advocate with Mr. Rama G. Rivankar, Advocate for the appellant.
Ms. Amira Abdul Razaq, Standing Counsel for the respondent.

CORAM: SUNIL P. DESHMUKH & M. S. SONAK, JJ

DATED: 9th August 2021

P.C.

1. Heard Mr. Rivankar, learned Senior Advocate who appears along with Mr. Rama Rivankar for the appellant in both these appeals and Ms. A. Razaq, learned Standing counsel for the Income Tax Department.

2. On 6th December 2019, an additional substantial question of law was framed in both these appeals.

> *"Whether the notice dated 22/12/2008 issued u/s 274 r/w Section 271 of the IT Act in the printed form without specifically mentioning whether the proceedings are initiated on the ground of concealment of income or on account of furnishing of inaccurate particulars is valid and legal ?"*

3. Thereafter, vide order dated 28th February 2020, this Court noticed the conflict between two sets of decisions and invoked the provisions of Chapter I, Rule 8 of the Bombay High Court Appellant Side Rules, 1960. The matters were then referred to the Full Bench for resolving the conflict.

4. The Full Bench, by its detailed judgment and order dated 11th March 2021, has framed and answered three questions which arose before it in the following manner.

> *"**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 lies 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(1)(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 Kaushalya does not lay down the correct proposition of law.

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

184. Indeed, Kaushalya did discuss the aspect of prejudice. As we have already noted, Kaushalya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushalya, "fully knew in detail the exact charge of the Revenue against him". For Kaushalya, 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 closes 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(1)(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[(2007) 2 SCC 181], in which the Apex Court has quoted with approval its earlier judgment in State of Orissa v. Dr. Binapani Dei[AIR 1967 SC 1269]. 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 statue contravenes the principles of natural justice, it may also be held ultra vires 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."*

5. Having regard to the aforesaid, both these appeals will have to be allowed and the aforesaid additional substantial question of law as framed will have to be answered in favour of the assessee and against the revenue. We do so accordingly.

6. Both the appeals are disposed of in the aforesaid terms. There shall be no order as to costs.

7. Stamp Number (Appln.) No.425 of 2020 do not survive/worked out and therefore, the same is disposed of.

M. S. SONAK, J **SUNIL P. DESHMUKH , J**

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