IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

INCOME TAX APPEAL NO.5 OF 2016

Appellant : M/s. Ganga Iron & Steel Trading Co.,
Bagadganj, Nagpur.

...V E R S U S...

Respondent : The Commissioner of Income Tax,
Central, Nagpur.

Shri K.P.Dewani, Advocate for appellant.
Shri S.N.Bhattad, Advocate for respondent.

CORAM : A.S.CHANDURKAR and G.A.SANAP, JJ.
ARGUMENTS WERE HEARD ON : 24.11.2021
JUDGMENT IS PRONOUNCED ON : 22.12.2021

JUDGMENT (Per A.S.CHANDURKAR, J.)

When this Income Tax Appeal was admitted the following substantial questions of law were framed :

> *(I) Whether the Income Tax Appellate Tribunal, Nagpur was justified in law in upholding the levy of penalty under Section 271(1)(c) of the Income Tax Act, 1961 by holding that the assessee has concealed the income of Rs.96 Lakhs ?*
>
> *(II) Whether the Income Tax Appellate Tribunal, Nagpur was justified in law in upholding the levy of penalty under Section 271 (1) (c) of the Income Tax Act, 1961 when the assessee had offered income of Rs.96 Lakhs in*

order to buy peace and avoid litigation even though no such income is assessable at the hands of assessee ?

2. After hearing the learned counsel for the parties for some time an additional substantial question of law was framed on 23.11.2021 which reads as under:

> *(III) "Whether the show cause notice dated 12.02.2008 issued to the appellant without indicating that there was concealment of particulars of income or furnishing of incorrect particulars of such income would vitiate the penalty proceedings or whether such notice as issued can be held to be valid ?"*

3. The learned counsel for the parties have been heard on all the three substantial questions of law as framed.

4. Shri K.P.Dewani, learned counsel for the appellant - Assessee inter-alia submits that the Assessing Officer on 31.12.2007 in proceedings under Section 143 (3) of the Income Tax Act, 1961 (for short, 'the said Act') observed that an amount of Rs.96,00,000/- towards unexplained cash was taken into consideration by the Assessing Officer and on the premise that the Assessee had concealed income, proposed imposition of penalty under Section 271(1)(c) of the said Act. Pursuant thereto a show cause notice dated 12.02.2008 was issued by the Assistant Commissioner of Income Tax as to

why penalty under Section 271(1)(c) of the said Act should not be imposed. It is submitted by the learned counsel in the context of substantial question of law no. III that since the show cause notice refers to concealment of particulars of income or furnishing inaccurate particulars of such income, the said show cause notice being vague in nature indicates non-application of mind on the part of the Authority issuing the same. Placing reliance on the judgment of the Full Bench in ***Mohd. Farhan A. Shaikh vs. Deputy Commissioner of Income Tax, Central Circle 1, Belgaum 2021 (434) ITR 1 (Bombay)***, it was submitted that such defect in the show cause notice of not mentioning the basis for imposition of penalty resulted in vitiating the penalty proceedings. It was his submission that under Section 271(1)(c) of the said Act penalty was contemplated either for concealment of income or for furnishing incorrect particulars of the same or both. It was necessary for the Authority issuing the show cause notice to specifically indicate as to whether there was any concealment of particulars or furnishing of incorrect details on the part of the Assessee or both. In that regard the learned counsel referred to the decisions in Income Tax Appeal No.796 of 2016 with connected appeal (*The Pr. Commissioner of Income Tax-17 Vs. Hafeez S. Contractor*) decided on 11.12.2018, ***Commissioner of Income Tax vs. Samson Pernchery (2017) 98 CCH 0039 (Mum.), Principal Commissioner of Income Tax (Central) vs. Goa Coastal Resorts and Recreation Pvt. Ltd. (2019) 106 CCH 0183 (Mum.)*** and in Tax Appeal Nos.70/2018 with connected appeals (*The Principal Commissioner of Income Tax, Panji vs New Era Sova Mine*) decided on 18.06.2019. It was his contention that the law as laid down by the Hon'ble Supreme Court in ***Dilip N.Shroff Vs. Joint Commissioner of Income-Tax and anr. (2007) 291 ITR 519 (SC)*** as clarified by the Hon'ble Supreme Court in the decision in ***Commissioner of Income Tax vs. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 0158,*** it was necessary for the show cause notice to be specific and clear as to whether there was any concealment of income or furnishing of inaccurate particulars. It was submitted that though the aforesaid contention was not raised before the statutory authorities since it was a pure question of law based on undisputed facts, it was permissible to raise the same even in appeal under Section 260A of the said Act. In that regard the learned counsel placed reliance on the decision of this Court in ***Ventura Textiles Ltd.vs. Commissioner of Income Tax, Mumbai City-II (2020) 426 ITR 478 (Bombay).*** On substantial questions at Serial Nos. I and II it was submitted that there being no concealment of income by the Assessee and the amount of Rs.96 lakhs having been offered to buy peace, the impugned order was liable to be set aside.

5. Shri S.N.Bhattad, learned counsel for the Revenue opposed the aforesaid submissions. He submitted that while issuing the show cause notice

the Assistant Commissioner of Income Tax had recorded his satisfaction as regards the necessity of initiating the penalty proceedings against the Assessee. Such a conclusion having been recorded by the Assistant Commissioner of Income Tax, the show cause notice could not be faulted on a technical ground that a specific assertion as regards concealment of particular income/furnishing of incorrect income had not been specified therein. Referring to the order passed by the Assistant Commissioner of Income Tax dated 31.12.2007 he submitted that the satisfaction recorded was with regard to both the aforesaid aspects as could also be gathered from the order dated 10.03.2010 passed under Section 271(1)(c) of the said Act. Referring to the judgment of the Full Bench in *Mohd. Farhan* (supra) he invited attention to the contentions of paragraph 160 (e), (f) and (s) to urge that the show cause notice could not be faulted on the basis of the contents urged by the learned counsel for the Assessee. He then referred to the judgment of the Hon'ble Supreme Court in ***MAK Data Private Limited vs. Commissioner of Income Tax-II (2014) 1 SCC 674, Commissioner of Income Tax, Delhi vs Atul Mohan Bindal (2009) 9 SCC 589*** and ***Union of India and others vs. Dharmendra Textile Processors and Others (2008) 13 SCC 369*** to substantiate his contentions. According to him, since the decision in *Dilip Shroff* (supra) had been held as not laying down the correct law in *Dharmendra Textile Processors and others* (supra) no reliance could be placed on the decision in *Dilip Shroff* (supra). It was thus submitted that since it was found that the Assessee had concealed income on account of which penalty proceedings had been initiated, there was no reason to interfere with the order passed by the Tribunal.

6. We have heard the learned counsel for the parties at length and we have given due consideration to their respective submissions. At the outset, we may refer the judgment of this Court in *Ventura Textiles Ltd.* (supra) that was relied upon by the learned counsel for the Assessee while urging that even if the question as regards validity of the show cause notice was not raised before the Tribunal, the same could be raised in the present appeal under Section 260A of the said Act. This Court in the aforesaid decision after referring to earlier precedents has held that an appeal under Section 260A of the said Act can be entertained by the High Court on the issue of jurisdiction even if that issue was not raised before the Tribunal. The facts of the case indicate that the question with regard to validity of the show cause notice issued under Section 271(1)(c) of the said Act was permitted to be raised in appeal under Section 260A of the said Act for the first time since the same was a jurisdictional issue going to the root of the lis. In view of aforesaid decision we do not find any reason not to consider a similar jurisdictional issue as raised by the Assessee in the present appeal.

7. Since substantial question of law no. III raises a jurisdictional issue going to the root of the proceedings initiated under Section 271(1)(c) of the said Act we propose to answer that question first for the reason that if it is found that the show cause notice was vitiated on account of failure to expressly indicate as to whether there was any concealment of particulars of income of the Assessee or failure to furnish inaccurate particulars of income or both, answer to the other two substantial questions would be rendered academic.

In the present case show cause notice dated 12.02.2008 issued to the Assessee under Section 271(1) (c) of the said act reads as under:

> *"Whereas in the course of proceedings before me for the AY 2006-07 it appears that you have concealed the particulars of your income or furnished inaccurate particulars of such income."*

(other contents of the notice are not relevant for the present purpose)

The aforesaid notice thus indicates that according to the Assistant Commissioner of Income Tax the Assessee was called upon to show cause why penalty under Section 271 of the said Act should not be imposed as "the Assessee had concealed the particulars of his income or furnished inaccurate particulars of such income".

8. We may at the outset refer to the judgment of the Full Bench of this Court in *Mohd. Farhan* (supra) wherein this precise question was

considered and answered. The said question reads as under:

> *1. If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice-not striking off the irrelevant matter-vitiate the penalty proceedings?*

9. After considering various decisions of the Hon'ble Supreme Court and of this Court including the decision in *Dilip Shroff* (supra) the Full Bench answered the aforesaid question as under:

> *"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 the 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."*

It is thus clear from the law as laid down that even if there was an order recording satisfaction for imposing penalty on one or the other, or on both grounds as mentioned in Section 271(1)(c) of the said Act, if the show cause notice suffers from the vice of vagueness the same would vitiate such notice.

10. We find that the law as laid down by the Full Bench applies on all fours to the facts of the present case as in the show cause notice dated 12.02.2008, the Assistant Commissioner of Income Tax is not clear as to whether there was concealment of particulars of income or that the Assessee had furnished inaccurate particulars of income. We therefore find that issuance of such show cause notice without specifying as to whether the Assessee had concealed particulars of his income or had furnished inaccurate particulars of the same has resulted in vitiating the show cause notice.

Heavy reliance was placed by the learned counsel for the Revenue on the decision in *Mak Data Private Limited* (supra) to urge that the penalty contemplated by Section 271 (1) (c) of the said Act was in the nature of civil liability and *mens rea* was not essential therein. The decision in *Dilip Shroff* (supra) having been held as not laying down good law in *Dharmendra Textile*

Processors Ltd. (supra), it was submitted that the show cause notice issued in the present proceedings was liable to be upheld. It may be noted that all the decisions relied upon by the learned counsel for the Revenue were considered by the Full Bench while answering the issues referred to it on reference. The Full Bench having considered these decisions and having answered the question as regards defect in the notice under Section 271(1)(c) of the said Act resulting in vitiating the penalty proceedings, we find ourselves bound by the answers given by the Full Bench. It would not be permissible for us to disregard this aspect and take a different view of the matter.

Accordingly substantial question of law no. III is answered by holding that since the show cause notice dated 12.02.2008 does not indicate whether there was concealment of particulars of income or furnishing of incorrect particulars of such income, the same would vitiate the penalty proceedings.

11. Since it has been found that the show cause notice dated 12.02.2008 that was issued to the Assessee was vague and the penalty proceedings initiated on that basis were vitiated, it would not be necessary to answer substantial questions of law as framed at serial nos. I and II. This is for the reason that the said substantial questions pertain to the merits of the adjudication of the proceedings under Section 271(1)(c) of the said Act. Once it is found that the show cause notice dated 12.02.2008 issued to the Assessee

was not in accordance with law, the orders passed thereon would automatic cease to operate.

12. In view of the answer given to the substantial question of law no.III, the impugned order passed by the Tribunal in I.T.(SS)A.No.05/Nag/2011 dated 10.07.2015 is set aside. Income Tax Appeal No.5/2016 is allowed with no order as to costs.

(G.A.SANAP, J.) **(A.S.CHANDURKAR, J.)**

Andurkar..