

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL (IT) NO. 805 OF 2018

Pr. Commissioner of Income Tax - 17 ... Appellant

Versus

Jehangir H. C. Jehangir ... Respondent

Mr. Suresh Kumar for Appellant.

Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for Respondent.

CORAM K. R. SHRIRAM &
DR. N. K. GOKHALE, JJ.

DATED: 6th September 2023

P.C. :

1. The following substantial questions of law are proposed :

A. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting penalty of Rs. 3,11,37,351/- levied under Section 271(1)(c) of the Act for furnishing inaccurate particulars of income and concealment of income by merely stating that limb was not clear for which penalized instead of adjudicating the same on merits ?

B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was correct in holding that limb/exact charge was not clear for which penalized without appreciating the fact that the assessee had never raised this issue before the Assessing Officer ?

C. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was correct in deleting the penalty without appreciating the fact that the assessee has made false claim which was withdrawn only after objection raised by the Assessing Officer ?

D. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT is correct in

deleting penalty holding that the limb/exact charge was not clear without considering the fact that it is clear from the assessment order under Section 143(3) and the penalty order under Section 271(1)(c) that the AO has levied penalty for both the limbs i.e. furnishing inaccurate particulars of income and concealment of income ?

2. This is the Appeal filed by appellant challenging the order dated 17th May 2017 passed by the Income Tax Appellate Tribunal (“**ITAT**”), thereby allowing the Appeal filed by Respondent/assessee. Assessee is engaged in development of land by construction of residential/commercial premises. Assessee filed return of income on 31st October 2006 declaring total income of Rs. 18,95,66,240/- for the Assessment Year 2006-2007, which was processed under Section 143(1) of the Income Tax Act, 1961 (“**the Act**”) and subsequently, the case was selected for scrutiny. The Assessing Officer (“**AO**”) passed an order dated 30th December 2008. Assessee was also saddled with penalty by AO vide an order dated 30th June 2009 under Section 271(1)(c) of the Act.

3. Being aggrieved, assessee contested the penalty without any success before the Commissioner of Income Tax (Appeals) (“**CIT(A)**”). Assessee impugned the order of CIT(A) before the ITAT. Before the ITAT, the preliminary issue raised was that AO did not fulfil the jurisdictional requirement of arriving at a clear

finding and satisfaction for the levy of penalty in the quantum order, because in the show-cause notice issued under Section 274 read with Section 271(1)(c) of the Act, the charges were “.....*have concealed the particulars of your income or furnished inaccurate particulars of such income.*” Finally, the penalty was imposed by AO by stating “.....*in view of the above facts, I am satisfied that the assessee has filed inaccurate particulars of income and hence, concealed the income.*” Admittedly in this case, AO had not deleted the relevant portion.

4. The ITAT concluded that the same reflects non-application of mind on the part of AO because AO himself was not sure about the limb/exact charge for which assessee was being penalized. The ITAT relied on the judgment of Apex Court in the case of ***Dilip N. Shroff v. JCIT***¹. The ITAT also relied on various judgments.

5. A similar issue had come up before the Division Bench of this Court in the case of ***CIT v. Smt. Kaushalya***² where the Division Bench held that assessee fully knew in detail the exact charge of the Revenue against her by virtue of the assessment order and therefore, there was no breach of the principles of natural justice on the ground of absence of opportunity.

1. 291 ITR 519.

2. 216 ITR 660 (Bom.).

6. The aforesaid judgment and other judgments came up for consideration before the Full Bench of this Court in the case of *Mohd. Farhan A. Shaikh v. Deputy Commissioner of Income Tax, Central Circle 1, Belgaum*³ where the following three questions were decided by the said Full Bench with the answers mentioned below :

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(1)(c), does a mere defect in notice – not striking off irrelevant matter – would vitiate penalty proceedings ?*

Ans.: *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.*

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.

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

3. [2021]125 taxmann.com 253 (Bombay).

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' ?*

Ans. : *Indeed, Smt. Kaushalya Case (supra) 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 on to 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". Smt. Kaushalya Case (supra) 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".*

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 Smt. Kaushalya Case (supra). In fact, for one assessment year, it set aside the penalty proceedings on the grounds of non-application of mind and prejudice.

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 Case (supra) on the issue of non-application of mind when the irrelevant portions of the printed notices are not struck off ?*

Ans.: *In Dilip N. Shroff Case (supra), 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 Case (supra), 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.*

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 Case (supra) 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.

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”.

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] 27 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 statute contravenes the principles of natural justice, it may also be held ultra vires Article 14 of the Constitution.

As a result, we hold that Dilip N. Shroff Case (supra) 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.

7. Therefore, it is clear from the law as laid down that if one of the irrelevant matters is not struck off, it would mean that AO himself was not sure while issuing the show-cause notice whether he had proceeded on the basis that assessee had concealed his income or he had furnished inaccurate particulars. If without being sure as to what was the basis on which he was planning to impose the penalty on assessee, such a notice, in our view, would indicate non-application of mind and the notice would be not valid.

8. A similar view has been taken by the Co-ordinate Bench of this Court in the case of ***Ganga Iron & Steel Trading Co. v. Commissioner of Income-tax***⁴.

4. [2022]135 taxmann.com 244 (Bombay).

9. In the circumstances, we see no reason to interfere.

10. Appeal dismissed.

(DR. N. K. GOKHALE, J.)

(K. R. SHRIRAM, J.)

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