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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 03 September 2024**

Judgment pronounced on: 22 November 2024

\+ **ITA 90/2020**

PR. COMMISSIONER OF INCOME TAX – 04

……Appellant

Through: Mr. Zoheb Hossain, Sr. SC with Mr. Sanjeev Menon, Jr. SC.

versus

M/S GRAGERIOUS PROJECTS PVT. LTD.

…… Respondent

Through: Mr. Ajay Vohra, Sr. Adv with Mr. Rohit Jain, Mr. Aniket D. Agrawal and Mr. Samarth Chaudhari, Advs.

\+ ITA 109/2023, CM APPL. 8845/2023

PR. COMMISSIONER OF INCOME TAX-7 ……Appellant

Through: Mr. Puneet Rai, Sr. SC with Mr. Ashivini Kumar and Mr. Rishabh Nangia, Advs.

versus

SARA SAE PVT LTD …… Respondent

Through:

\+ ITA 392/2023

PR. COMMISSIONER OF INCOME TAX, DELHI-7

…… Appellant

Through: Mr. Puneet Rai, Sr. SC with Mr. Ashivini Kumar and Mr. Rishabh Nangia, Advs.

versus

VIRTUAL SOFTWARE AND TRAINING PVT. LTD.

…… Respondent

Through: Dr. Rakesh Gupta, Mr. Somil Agarwal and Mr. Dushyant Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. These are three appeals by the Revenue against the impugned orders passed by the Income Tax Appellate Tribunal [**"ITAT"**].

2. ITA 90/2020 is directed against an order passed by ITAT in ITA No. 112/Del/2019 for the Assessment Year [**"AY"**] 2015-16, ITA No. 109/2023 is directed against an order passed by the ITAT in ITA No. 9058/Del/2019 for the AY 2008-09 and ITA No. 392/2023 is directed against an order passed by ITAT in ITA No. 3926/Del/2019 for the AY 2001-02.

3. The common issue sought to be urged by the Revenue in all these appeals is whether the ITAT was justified in deleting the penalty under Section 271(1) (c) of the Income Tax Act, 1961 [**"Act"**] by ignoring the fact that the Assessee had claimed inaccurate expenses imposed by the Assessing Officer [**"AO"**] on the Assessing Company for the reason that in the notice under Section 274 read with Section 271(1) (c), the AO has not marked the specified limb for which the penalty notice is issued, although, penalty was also imposed for furnishing inaccurate income as per the penalty order by the AO.

4. For the sake of convenience, it will be apposite to refer to the facts of ITA No. 90/2020. Shorn of all necessary details, the facts are that assessee filed return on 01.10.2015, declaring loss of Rs. 476,35,92,302/-.

5. On 19.03.2016, a notice under Section 143 (2) of the Act was issued and served upon the assessee company.

6. On 28.03.2017, the original return was revised and the assessee declared a loss of Rs. 354,34,84,148/-, which included loss from Business or Profession amounting to Rs. 5,00,14,046/-. The income from short term capital gain Rs. 97,02,942/- and long term capital loss Rs. 350,31,73,044/- was claimed as exempt.

7. During the assessment proceedings, it was noticed that the assessee had claimed advances written off under the head “other expenses” in the P & L and loss from business was primarily due to this.

8. Assessment Order under Section 143(3) of the Act was passed on 23.05.2017, vide which, an addition of Rs. 5,00,00,000/- was made on account of alleged advance given to M/s. TAIDIA Construction and written off in the year under consideration. The AO while disallowing the alleged business expenditure noted that the assessee company had failed to file any agreement or supporting evidence in respect of the advance.

9. AO further adjusted the business loss of Rs. 14,046/- with the income from short term capital loss and assessed the total income at Rs. 96,88,900/- as against loss of Rs. 5,00,14,046/-, claimed in the ITR.

10. Penalty proceedings u/s 271(1)(c) were initiated by the AO and after recording his satisfaction, notice u/s 274 read with 271(1)(c) was issued, whereby, the assessee was asked to show cause as to why penalty u/s 271 (1) (c) may not be imposed upon it.

11. On 29.11.2017, after considering the reply of the assessee, a penalty order u/s 271(1) (c) was passed and penalty at the rate of 100%

of the tax sought to be evaded under Section 271(1) (c) amounting to Rs. 1,54,50,000/- was imposed.

12. Feeling aggrieved, assessee preferred an appeal before Commissioner of Income Tax (Appeal) ["CIT (A)"] against the penalty order. However, the appeal of the assessee was dismissed vide order dated 01.11.2018.

13. Aggrieved by the order of CIT (A), assessee preferred an appeal before the ITAT. The appeal of the assessee was allowed holding that the notice was vague as there was no specific charge for initiation of penalty proceedings which the assessee could explain. The relevant paragraphs of the order are reproduced below:-

> "7. We have carefully considered the arguments of both the sides and perused the material placed before us. We will first deal with the assessee's contention that the levy of penalty is illegal because in the penalty notices, no specific charge was levied. We find that the first show cause notice issued to the assessee was dated 23'd May, 2017 and the relevant portion of which reads as under :-
>
> > *"Where in the course of proceeding before me for the assessment year 2015-16 it appears to me that you:-*
> >
> > **have without reasonable cause failed to comply with a notice under section 142(1)/143(2) of the Income Tax Act,1961 dated*
> >
> > **have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1,2,3,4 and 5.*
> >
> > *You are requested to appear before me at 11:30 AM/PM on 23.06.2017" ·"*
>
> 8. From the above, it is evident that the notice was absolutely vague. There is no specific charge for initiation of penalty proceedings which the assessee could explain. The penalty notice mentions the failure of the assessee to comply with the notice under Section 142(1)/143(2). It also mentions about the concealment of particulars of income or furnishing of inaccurate particulars of

income in terms of Explanation 1,2,3,4 and 5. The subsequent notice dated 3rd November, 2017 is only a reminder with reference to the first notice. In the assessment order, the Assessing Officer has discussed the addition in paragraph 4 of the order, which reads as under:-

> *"4. The contention of the assessee has been examined. From perusal of the profit and loss account of the assessee company, it was noticed that the assessee company has only dividend income which has been received from the investment made in equity shares and mutual funds. Assessee company did not execute any work/project according to its nature of business. It has no business income, not only in this year but in the preceding year as well. During the year the assessee company has reportedly advanced Rs.5 cr to M/s TAIDIA Conconation Ltd and written off the same in the year under consideration and claimed it in P & L account. The company has failed to file any agreement or supporting evidence in respect of advance given to M/s TAIDIA Conconation Ltd. In view of all these, this alleged advance written off cannot be allowed as expense in P & L account. Therefore, an amount of Rs.5 cr claimed as business expenditure is hereby disallowed and added back to the income of the assessee company. "*

9. In the above paragraph, the Assessing Officer has not pointed out any furnishing of inaccurate particulars by the assessee. He simply arrived at the conclusion that the advance written off cannot be allowed as expense in the profit & loss account. Thus, in the whole body of the order, no satisfaction has been recorded for initiating penalty proceedings. Only at the end of the computation of income, the Assessing Officer has recorded "Keeping in view the facts of the case, I am satisfied that it warrants the initiation of penalty proceedings u/s 271(1)(c) of the I.T. Act". Thus, no specific charge is specified either in the assessment order or in the penalty notices. On these facts, the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) would be squarely applicable. The above decision has been followed by ITAT, Delhi Benches in the case of Dr. Sita Bhagi (supra), TA Steels Pvt. Ltd. (supra). Sanraj Engineering Pvt.Ltd. (supra). OSE Infrastructure Ltd. (supra) and Mindmill Software Limited (supra).

10. In view of the above, respectfully following the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and

Ginning Factory and Others (supra) and the above decisions of ITAT, we hold that the levy of penalty under Section 271(1)(c) of the Act in the case of the assessee was not valid.

11. Even on merits also, the decision of Hon'ble Apex Court in the case of CIT Vs. Reliance Petroproducts Pvt.Ltd. - (2010) 322 ITR 158 (SC) would be squarely applicable, wherein their Lordships held as under:-

> *"Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 27l(l)(c}. A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."*

12. In the case of the assessee, though the Assessing Officer has levied the penalty for furnishing inaccurate particulars of income but he has not specified which particular furnished by the assessee was incorrect, erroneous or false. In fact, in the assessment order, when the Assessing Officer has discussed the addition, there is no mention about furnishing of inaccurate particulars. He simply disallowed the claim made by the assessee. Hon'ble Apex Court in the above case has clearly mentioned that merely because a claim made in the return of income is not accepted cannot amount to furnishing of inaccurate particulars."

14. Learned counsel for the Revenue submits that the ITAT has misdirected itself by taking a hyper technical view that there is no specific charge in the notice for which penalty has been imposed. He has argued that the purport and import of the notice issued under Section 274 read with Section 271 of the Act is clearly discernable from the assessment order and the AO recorded the necessary satisfaction to initiate penalty proceedings.

15. The other main contention of learned counsel for the Revenue is that there is an overlap between the two phrases namely "concealment

of particulars of his income" and "furnished inaccurate particulars of such income" and therefore effectively there is no prejudice to the assessee in terms of them not being put to notice.

16. The finding in the assessment proceedings is not conclusive and final for the purpose of imposition of the penalty under Section 271(1)(c) of the Act, inasmuch as, such findings may constitute good evidence in the penalty proceedings but it does not mean that penalty for concealment under Section 271(1)(c) is mandatory whenever an addition of disallowance is made. In assessment proceedings, the only concern is with the assessment of the income, quantification and computation of total income as per the provisions of the Act, whereas, in penalty proceedings, the primary concern is with the conduct of the assessee. Penalty is imposed not because an addition is made but because there is concealment or furnishing of inaccurate particulars by the assessee. It would be apposite here to refer to relevant portion of Section 271 (1)(c), which is reproduced as under:-

> "—271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—
> Xxxxxxxxxxx (c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

17. While dealing with the difference between the two phrases. In the case of **NEW HOLLAND TRACTORS (INDIA) PRIVATE LIMITED v. THE COMMISSIONER OF INCOME TAX, DELHI-V, 2014 SCC OnLine Del 4927,** the Predecessor Coordinate Bench of this Court observed as under:-

> "The word "conceal" inherently and per-se refers to an element of mens rea, albeit the expression "furnishing of inaccurate particulars" is much wider in scope. The word "conceal" implies intention to

> hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other (See CIT vs. A. Subramania Pillai [1997] 226 ITR 403 (Mad). The word "conceal" means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word "concelare" which implies "con" & "celare" to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. The word "inaccurate" in Webster's Dictionary has been defined as "not accurate; not exact or correct; not according to truth; erroneous; as inaccurate statement, copy or transcript". The word "particular" means detail or details of a claim or separate items of an account (see CIT v. Reliance Petroproducts P. Ltd. [2010] 322 ITR 158(SC). Thus, the words "furnished inaccurate particulars" is broader and would refer to inaccuracy which would cause underdeclaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of account etc. (See CIT v. Raj Trading Co. [1996] 217 ITR 208 (Raj.)). Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that ad hoc addition per se without other or corroborating circumstances may not reflect "furnished inaccurate particulars". Lastly, at times and it is fairly common, the charge of concealment and "furnishing of inaccurate particulars" may overlap.

18. It is thus apparent that ordinarily the two phrases i.e. "conceal" and "furnishing of inaccurate particulars" are separate and distinct. Concealment of income and furnishing of inaccurate particulars of income in Section 271(1) (c) of the Act carry different meanings and connotation.

19. On principle where the penalty proceedings are said to be initiated by the Revenue under Section 271(1) (c) of the Act, the specific ground which forms the foundation thereof needs to be spelt out in clear terms. Otherwise, the assessee would not have proper opportunity to put forth his defence. The proceedings for initiating the penalty are penal in nature, which may result in imposition of penalty ranging from 100 to 300% of the taxability and therefore the charge

must be unequivocal and unambiguous. Where the charges are either of concealment of particulars of income or furnishing of inaccurate particulars thereof, revenue must specify as to which one of the two is sought to be pressed into service and cannot be permitted to club both.

20. The decision of the ITAT that in the penalty notice there is no specific charge, on the basis of which penalty was sought to be levied, is covered by the following decisions which includes the decision rendered by the Coordinate Bench of this Court.

> "(i) ***CIT and Anr. v. M/s. SSA's Emerald Meadows***, passed in ITA No. 380/2015, dated 23.11.2015.
> (ii) ***Commissioner of Income Tax v. Manjunatha Cotton and Ginning Factory*** (2013) 359 ITR 565 (Kar.)
> (iii) ***PCIT vs. M/s Sahara India Life Insurance Company Ltd.***, passed in ITA No. 475/2019, dated 02.08.2019.
> 7.1. To be noted, the Special Leave Petition filed against the Judgment in ***SSA's Emerald*** (mentioned above) was dismissed via order dated 05.08.2016."

21. The High Court in the case of **Principal Commissioner of Income Tax vs. Sahara India Life Insurance Co. Ltd., (2021) 432 ITR 84 Delhi**, followed the decision of the Karnataka High Court in **CIT v. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Kar.)** and 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 ITAT. It followed the decision of the Karnataka High Court in ***CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar)*** and observed that the notice issued by the AO would be bad in law if it did not specify 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 judgment in the subsequent order in ***Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 Taxman.com 241 (Kar)***, the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order date 5th August, 2016."

22. An identical issue came up for consideration before the Bombay High Court (Full Bench at Goa) in **Mr. Mohd. Farhan A. Shaikh v. 2021 SCC OnLine Bom 345**, wherein, the Court while dealing with the aspect of prejudice ruled as under:-

> "Question No. l: 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(l)(c), read with section 274 of Income-tax 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.
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> 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, Kaushaiya 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 the 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 [2006] 287 ITR 91 (SC); (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, the 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."

23. Following the decision of the Karnataka High Court in the case of CIT v. Manjunath Cotton and Ginning Factory (*supra*) and the other decisions of different High Courts, the ITAT rightly held that the levy of penalty under Section 271(1)(c) of the Act in the case of the assessee was not valid.

24. We are unable to find any error having been committed by the ITAT. No substantial question of law arises.

25. The appeals are accordingly dismissed.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

November 22, 2024/RM