IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. Nos. 253 to 257/Mum/2021
(Assessment Years 2009-10 to 2013-14)

Shoreline Hotel Pvt.Ltd. 29, Dar-Ul-Habib, Marine Drive Churchgate Mumbai-400 020 PAN : AABCS1380B	Vs.	DCIT,CC-1(2) Old CGO building, M. K.Road Mumbai-400 020
(Appellant)		(Respondent)

Assessee by	Shri Vijay Mehta
Department by	Shri B.K.Bagchi
Date of Hearing	22.11.2021
Date of Pronouncement	18 . 01.2022

O R D E R

Per Shri Shamim Yahya (AM) :-

These are appeals by the assessee against respective orders of learned Commissioner of Income Tax (Appeals), wherein penalty under section 271(1)(c) of the I.T.Act has been confirmed.

2. Since the issues are common and connected and the appeals were heard together, these are consolidated for the sake of convenience.

3. Since grounds and orders of authorities below are similar, we are referring to grounds of appeal from AY 2009-10:-

> On the facts and circumstances of the case and in law the Ld.CIT(A) erred in confirming the penalty of Rs. 1032450 u/s. 271(1)(c) of I.T.Act, 1961.

2. the ld.CIT(A) erred in not appreciating the fact that the notice issued doe snot make any specific charge on which penalty proceedings have been initiated and further the penalty being levied on estimate basis the same needs to be cancelled.

4. Brief facts of the case are that in this case AO has made 100% disallowance for bogus purchases without doubting the sales. Upon assessee's appeal Ld.CIT(A) has granted a part relief. Penalty under section 271(1)(c) of the I.T.Act was also levied, which was confirmed by Ld.CIT(A). Assessee has also raised a ground before ld.CIT(A) that in the notice of penalty specific charge has not been identified. But, the Ld.CIT(A) did not adjudicate the same and ignored the ground.

5. Now, assessee is in appeal before us. We have heard both the parties and perused the records. Ld. Counsel of the assessee Shri Vijay Mehta referred to the paper book, wherein the notice issued in this case under section 271(1)(c) of the I.T.Act is attached. He submitted the relevant limb specifying the charge has not been struck off. Thus the assessee has not been conveyed the charge. Hence, placing reliance upon the full bench of the Hon'ble Bombay High court in the case of Mohammed Farhan A. Shaikh Vs. PCIT (125 taxamnn.com 253), he submitted that penalty levied in this case is liable to be quashed on account lack of jurisdiction. Per contra Ld. DR relied upon orders of authorities below. However, he could not distinguish the applicability of Hon'ble Bombay High Court decision as referred by the learned counsel of the assessee.

6. Upon careful consideration, we find that in this case the penalty notice does not identify the charge against the assesee as to whether the notice is meant for the charge against the assessee of furnishing inaccurate particulars of income or concealment of income warranting levy of penalty u/s. 271(1)(c) of the I.T.Act. In identical situation, Hon'ble jurisdictional High court in the case of Mohammed Farhan A. Shaikh Vs. PCIT (supra) has held as under:-

We have already discussed what constitutes the ratio decidendi or case holding and what it takes to b a precedent. Now, we will see what makes a precedent conflict with another.

The Precedential Conflict:

164. To cut the discussion short, we will take aid of the latest Supreme Court judgment on this point. In Mavilayi Service Co-operative Bank Ltd. v. Commissioner of Income Tax[2021 SCC Online SC 16] ("Mavilayi"), the question concerns the deductions a primary agricultural credit society can claim under section 80P(2)(a)(i) of the IT Act, after the introduction of section 80P(4) of that Act. Two Division Benches of Kerala High Court have taken conflicting views the latter decision being unaware of the former one. Finally, that precedential conflict stood resolved through a Full Bench decision in Maviluyi Service. Co-operative Bank Ltd. v. Commissioner of Income Tax, Caticut [2019 (2) KHC 287]. This Full Bench decision was taken to Supreme Court. That is how, on 12 January 2021, a three-Judge Bench of the Supreme Court has decided Mavilayi.

165. Mavilayi has noted that the Full Bench of Kerala High Court has reached its conclusion based on the Supreme Court's judgment Citizen Cooperative Society Ltd. v, Asst. CIT, Hyderabad [(2017) 9 SCC 364]. Indeed, Mavilayi acknowledges that the Kerala High Court's Full Bench did follow Citizen Cooperative. But it holds that in Citizen Cooperative Society Ltd., the counsel for the assessee advanced no argument that "the assessing officer and other authorities under the IT Act could not go behind the registration of the I co-operative society in order to discover as to whether it was conducting business in accordance with its j bye-laws". That sets Citizen Cooperative apart, according to Mavilayi.

166. In this context, Mavilayi holds that only the ratio decidendi of a judgment binds as a precedent. To elaborate on this proposition, Mavilayi refers to State of Orissa v. Sudhanshu Sekhar Misra [(1968) 2 SCR 154], which holds that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein, nor what logically follows from the various observations made in it. Then, it quotes Dalbir Singh v. State of Punjab[1919) 3 SCR 1059]. Though it was from the dissenting judgment, Mavilayi points out, it remained uncontradicted by the majority:

According to the well-settled theory of precedents every decision contains three basic ingredients:

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above."

> For the purposes of the parties themselves and their privies, ingredient (Hi} is the material element in the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi.

167. Then, Mavilayi applied the above principle and held that the ratio decidendi in Citizen Cooperative would not depend upon the conclusion arrived at on facts in that case. For the case is an authority for whaf it actually decides in law and not for what may seem to logically follow from it.
Do Goa Dourado Promotions and Kaushalya conflict?

168. As we have seen Goa Dourado Promotions concludes the case based on the reasoning given in Tax Appeal No. 24/2019 (decided on 11-11-2019), Samson Perincherry, and New Era Sova Mine.

169. The Tax Appeal No. 24/2019, decided on 11-11-2019, relates to The Principal Commissioner of Income-tax (Central) v. Goa Coastal Resorts and Recreation Pvt. Ltd. In that one, the learned Division Bench has held: -

> "6. Besides, we note that the Division Bench of this Court in Samson(supra) as well as in New Era Sova Mine(supra) has held that the notice which is issued to the assessee must indicate whether the Assessing Officer is satisfied that the case of the assessee involves concealment of particulars of income or furnishing of inaccurate particulars of income or both, with clarity. If the notice is issued in the printed form, then the necessary portions which are not applicable are required to be struck off, so as to indicate with clarity the nature of the satisfaction recorded. In both Samson Perinchery and New Era Sova Mine, the notices issued had not struck of the portion which were inapplicable. From this, the Division Bench concluded that there was no proper record of satisfaction or proper application of mind in a matter of initiation of penalty proceedings.
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> 7. In the present case, as well if the notice dated 30/09/16 (at page 33) is perused, it is apparent that the relevant portions have not been struck off. This coupled with the fact adverted to in paragraph (5) of this order, leaves no ground for interference with the impugned order. The impugned orders are quite consistent by the law laid down in the case of Samson Perinchery and New Era Sova Mine and therefore, warrant no interference."

170. Samson Perinchery, too, has held that the notice issued under section 274 of the Act should strike off irrelevant clauses. And New Era Sova Mine has endorsed the Tribunal's view that "the penalty notices in these cases were not issued for any specific charge, that is to say, for concealment of particulars of income or furnishing of inaccurate particulars". In fact, Samson Perincherry relies on Karnataka High Court's SSA's Emerald

Meadows, which, as we have already seen, has followed Manjunatha. So, in a sense, it is a conflict between Kaushalya and Manjunatha if we take comity, rather than stare decisis, as the reckoning factor.

171. That said, as Mavilayi found distinguishing features in Citizen Cooperative; here, too, the fact situation as obtained in Kaushalya has been seen in none of these decisions: Goa Dourado Promotions, Goa Coastal Resorts and Recreation, Samson Perinchery, New Era Sova Mine—not even in Manjunatha pointed, in both sets of cases, the proposition is this: To an assessee facing penalty proceedings, the Revenue must supply complete, unambiguous information so that he may defend himself effectually. This proposition has given rise to this question: Where should the assessee gather the required information from?

172. Goa Dourado Promotions and other cases have held that the information must be-gathered from the notice under section 271(l)(c) read with section 274 of the IT Act. No other source was in the Court's contemplation. In Kaushalya, both the proposition and the question were the same. But it has one extra input: the order in assessment proceedings. So it has held that the notice alone is not the sole source of information the assessment proceedings, too, may shed light on the issue and inform the assessee on the scope of penalty proceedings. Whether assessment proceedings can be a source of information and whether it can complement the notice have not been considered in Goa Dourado Promotions and other Cases.

173. We, however, accept that the Revenue, often, adopts a pernicious practice of sending an omnibus, catch-all, printed notice. It contains both relevant and irrelevant information. It assumes, perhaps unjustifiably, that whoever pays tax is or must be well-versed in the nuances of tax law. So it sends a notice without specifying what the assessee, facing penalty proceedings, must meet. In justification of what it omits to do, it will ask, rather expect, the assessee to look into previous proceedings for justification of its action in the later proceedings, which are, undeniably, independent. It forgets that a stitch in time saves nine. Its one cross or tick mark clears the cloud, enables the assessee to mount an effective defence, and, in the end, its diligence avoids a load of litigation. Is not prejudice writ large on the face of the mechanical methods the Revenue adopts in sending a statutory notice to the assessee under section 271 (1) (c) read with section 274 of the Act? Pragmatically speaking, Kaushalya casts an extra burden on the assessee and assumes expertise on his part. It wants the assessee to make up for the Revenue's lapses.

Ex Post and Ex Ante Approaches of Adjudication:

174. In ex-post adjudication, the Court looks back at a disaster or other event after it has occurred and decides what to do about it or how to remedy it. In an ex-ante adjudication, the Court looks forward, after an event or incident, and asks what effects the decision about this case will have in the future - on parties who are entering similar situations and have not yet decided what to do, and whose choices may be influenced by the

consequences the law says will follow from them. The first perspective also might be called static since it accepts the parties' positions as given and fixed; the second perspective is dynamic since it assumes their behaviour may change in response to what others do, including judges, (for a detailed discussion, see Ward Farnsworth's Legal Analyst: A Toolkit for Thinking about the Law).

175. Kaushalya has adopted an ex-post approach to the issue resolution; Goa Dourado Promotions, an ex-ante approach. Kaushafya saves one single case from further litigation. It asks the assessee to look back and gather answers from whatever source he may find, say, the assessment order. On the other hand, Goa Dourado Promotions saves every other case from litigation. It compels the Revenue to be clear and certain. To be more specific, we may note that if we adopt Kaushalya's approach to the issue, it requires the assessee to look for the precise charge in the penalty proceedings not only from the statutory note but from every other source of information, such as the assessment proceedings. That said, first, penalty proceedings may originate from the assessment proceedings, but they are independent; they do not depend on the assessment proceeding for their outcome. Assessment proceedings hardly influence the penalty proceedings, for assessment does not automatically lead to a penalty.

176. Second, not always do we find the assessment proceedings revealing the grounds of penalty proceedings. Assessment order need not contain a specific, explicit of whether the conditions mentioned in section 271(l)(c) exist in the case. It is because Explanation 1(A) and 1(B), as the deeming provisions, create a legal fiction as to the grounds for penalty proceedings. Indeed, the Apex Court in CIT v. Atu Mohan Binda [2009]317 ITR 1 (SC) has explained the-scope of section 271(l)(c) thus:

> "Explanation 1, appended to section 27(1) provides that if that person fails to offer an explanation or the explanation offered by such person is found to be false, or the explanation offered by him is not substantiated, and he fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, for the purposes of section 271(l)(c), the amount added or disallowed in computing the total income is deemed to represent the concealed income."

177. That is, even if the assessment order does not contain a specific finding that the assessee has concealed income or he is deemed to have concealed income because of the existence of facts which are set out in Explanation 7, if a mere direction to initiate penalty proceedings under clause (c) of sub-section (1) is found in the said order, by legal fiction, it shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under the said clause (c). In other words, the Assessing Officer's satisfaction as to be spelt out in the assessment order is only prima facie. Even if the assessment order gives no reason, a mere direction for penalty proceedings triggers the legal fiction as contained in the Explanation (1).

178. Therefore, in every instance, it is a question of inference whether the assessment order contained any grounds for initiating the penalty proceedings. Then, whenever the notice is vague or imprecise, the assessee assails it as bad; the Revenue defends it by saying that the assessment order contains the precise charge. Thus, it becomes a matter of adjudication, opening litigious floodgates. The solution is a tick mark in the printed notice the Revenue is used to serving on the assessees.

179. Besides, the prima facie opinion in the assessment order need not always translate into actual penalty proceedings. These proceedings, in fact, commence with the statutory notice under section 271(l)(c) read with section 274. Again, whether this prima facie opinion is sufficient to inform the assessee about the precise charge for the penalty is a matter of inference and, thus, a matter of litigation and adjudication. The solution, again, is a tick mark; it avoids litigation arising out of uncertainty.

180. One course of action before us is curing a defect in the notice by referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice—and that prevention takes just a tick mark. Prudence demands prevention is better than cure.

Answers:
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(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 proceeding 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 sect7orT274. 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".
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> 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 [(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.
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> 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."

7. Examining the present case on the anvil of aforesaid case law, we find that the notice in this also is an omnibus show-cause notice as it does not strike off/delete the inappropriate/irrelevant/not applicable portion. Such a generic notice betrays a non-application of mind. Hence, the penalty levied pursuant to such a notice is not legally sustainable in law. Hence following the aforesaid precedent from the Full Bench of the Hon'ble Jurisdictional High Court we hold that the Assessing Officer was bereft of valid jurisdiction as the notice issued to assessee is unsustainable in law.

8. Since, we have already held that the penalty levied is without jurisdiction on account of non identification of charges in the penalty notice, the adjudication of the issue on merits is now only of academic interest, we are not engaging to the same.

9. Since, the grounds and facts of other years are identical except for the amount involved, our above adjudication applies mutatis mutandis to all these appeals.

10. In the result, all these appeals by the assessee stand partly allowed.

Pronounced in the open court on 18.01.2022

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 18 /01/2022
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai