IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEALS NO.51 & 57 OF 2012

TAX APPEAL NO.51 OF 2012

Mr. Mohd. Farhan A. Shaikh
Satellite Complex, GFB No.1
Koppikar Road,
Hubli – 580 020. .... Appellant

VERSUS

The Deputy Commissioner of
Income Tax, Central Circle 1
Belgaum. .... Respondent

AND

TAX APPEAL NO.57 OF 2012

Mr. Mohd. Farhan A. Shaikh
GFB No.1, Satellite Complex,
Koppikar Road,
Hubli – 580 020. .... Appellant

VERSUS

The Assistant Commissioner of
Income Tax, Central Circle 1
Belgaum. .... Respondent

Shri S.R. Rivankar, Senior Advocate with Shri Rama Rivankar, Advocate for the Appellant.
Ms. Amira Abdul Razaq, Standing Counsel for the Respondent.

Coram :- DAMA SESHADRI NAIDU,
BHARATI DANGRE,
SMT. M.S. JAWALKAR, JJJ.

Reserved on: 4 FEBRUARY 2021
Pronounced on: 11 MARCH 2021

ORDER : (*Per DAMA SESHADRI NAIDU, J.*)

Introduction:

A learned Division Bench of this Court at Goa has faced a precedential cleavage on an issue. That issue is, does an income tax authority's "mere failure to tick mark the applicable grounds" in the notice

issued under Section 271 of the Income Tax Act, 1961 ("IT Act") vitiate the entire penalty proceedings?

2. These decisions, according to the Division Bench, have answered that question in the affirmative—the failure vitiates the notice: *(1) The Commissioner of Income-Tax-11 v. Shri Samson Perinchery*[1]; (2) *The Principal Commissioner of Income-Tax (Central) Bengaluru v. Goa Coastal Resorts and Recreation Pvt. Ltd.*[2]; *(3) The Principal Commissioner of Income-Tax, Panaji v. New Era Sova Mind*[3] (TXA Nos.70/2019 & Ors, dated 18.6.2019); and (4) *The Principal Commissioner of Income-Tax, Panaji v. Goa Dourado Promotions Pvt. Ltd.*[4].

3. On the other hand, an earlier decision by another co-equal bench, according to the referring Division Bench, has taken a contrary view: *Commissioner of Income-Tax v. Smt. Kaushalya*[5].

4. In the end, the Division Bench has found a direct conflict between *Goa Dourado Promotions* and *Kaushalya*. So, through an order dated 28 February 2020, it has placed the matter before the Hon'ble the Chief Justice under Chapter 1, Rule 8 of the Bombay High Court Appellate Side Rules, 1960.

5. While placing the matter before the Hon'ble the Chief Justice for issue-resolution by a larger Bench, the learned Division Bench has framed this question for reference:

> "[In] the assessment order or the order made under Sections 143(3) and 153C of the IT Act, [when] the Assessing Officer has clearly recorded satisfaction for the imposition of penalty on one or the other, or both grounds mentioned in Section 271(l)(c), [would] a mere defect in the notice of not striking out the relevant words […] vitiate the penalty proceedings?

1] TXA No.1154/2014 & Ors. dtd. 05.01.2017
2] TXA No.24/2019 dtd. 11.11.2019
3] TXA Nos.70/2019 & Ors. dtd. 18.06.2019
4] TXA No.18/2019 dtd. 26.11.2019
5] 216 ITR 660 (Bombay)

6. Besides, the Division Bench has also desired the larger Bench to consider two more aspects: (a) "the impact of non-discussion on the aspect of 'prejudice' in the [first set of decisions]"; (b) and "the effect of the decision of the Hon'ble Supreme Court in case of *Dilip N. Shroff v. Joint Commissioner of Income-Tax*[6] on the issue of non-application of mind where the relevant portions of the printed notices are not struck off".

7. This is how the Hon'ble the Chief Justice constituted this Full Bench for resolving the precedential tangle if any.

The Background:

8. Only to contextualise the issue, let us take the facts of one case under reference: Tax Appeal No.51 of 2012. In July 2006, there was search and seizure under section 132 of the IT Act in a company's premises at Belgaum and at Goa. The appellant was one of the main transporters of that company. So the appellant's case stood covered under section 153C of the IT Act. To be explicit, section 153C provides that where the search is conducted on a person and undisclosed assets/documents indicating undisclosed income are found as belonging to or pertains to "other person" other than "searched person", then in that case, proceedings under section 153C would be initiated against the "other person".

9. The appellant, on his part, initially filed a return of income in November 2008, declaring a total income of Rs.39,67,790. But because of the search and seizure proceedings against the company, the appellant was put on notice under section 153A/153C of the IT Act. Then, the appellant filed another return declaring the same taxable income as returned in his original return of income. This return was revised to include Rs.50,00,000/- on account of the declaration given during the search, which was earlier erroneously offered to tax for AY 2007-08. Subsequently, "on advise by the AO the same was offered to tax by

6] (2007) 291 ITR 519 (SC)

revising the return for AY 2006-07". On 22/12/2008, the AO passed an order under section 143, read with section 153C, of the IT Act.

10. As a result, the amount of Rs.50 lakhs was treated as undisclosed income, and penalty proceedings under section 271(1)(c) were initiated. In response to the show-cause notice issued, the appellant contended that FY 2005-06 was the second year of his business. As he was inexperienced, he was unaware of the accounting and taxation formalities. Besides that, he has taken various other pleas. But, unimpressed by the reply, the AO imposed the penalty. On appeal, the Id. CIT(A) deleted the penalty. On further appeal, the Income Tax Appellate Tribunal has restored the AO's order of penalty. Aggrieved, the appellant-assessee has filed the Tax Appeal No.51 of 2012. The other Tax Appeal No.57 of 2012, too, has reached this Court with the same factual backdrop.

The Appellants:

11. After taking us through the record and what seem to be conflicting judgments, Shri Rivankar, the learned Senior Counsel for the appellants, has submitted that *Kaushalya* is the only decision from this Court that has taken a contrary view. All other decisions, according to him, have taken a consistent view that a vague notice under section 274 r/w 271(1)(c) of the IT Act, in a printed form without a tick mark to the relevant ground, would vitiate the penalty proceedings. The learned Senior Counsel has also contended that *Kaushalya* has overlooked the two ingredients to be satisfied by AO before his issuing notice under section 274 r/w 271 (1)(c): (a) that the Assessee has concealed the particulars of his income, or (b) Furnished inaccurate particulars of such income. Both these ingredients, Shri Rivankar points out, are in contradistinction to each other.

12. To support his contentions, Shri Rivankar has relied on *CIT v. Reliance Petro products P. Ltd.*[7] and *CIT v. Manjunatha Cotton and Ginning Factory.*[8].

13. Shri Rinvankar has also submitted that the penalty proceedings are distinct from assessment proceedings; they are independent of each other. In penalty proceedings, the assessee may lead fresh evidence to prove that there was no concealment or that the particulars furnished were accurate and true. In support of that contention, he has relied on Manjunath Cotton.

14. On the facts, Shri Rivankar has pointed out that the notice issued to the appellants by the AO contained both the ingredients. And the notice, therefore, discloses non-application of mind. That is, the AO is not sure or categoric about which of the two ingredients applies to the case.

15. Again, drawing our attention to *Kaushalya*, Shri Rivankar has submitted that the Division Bench has erred in holding that the assessee in *Kaushalya* suffered no prejudice. The assessee may have known the charge against him from the assessment proceedings. But, that said, the assessment proceedings and penalty proceedings are two different and independent proceedings under section 143(3) and 271(1) of the IT Act. They are, further, based on different documents or evidence.

16. In sum, the learned Senior Counsel argues that a composite notice would create confusion in the assessee's mind and disables him from defending his case effectively. Thus, it results in the denial of a right to adequate opportunity and fair hearing under section 274. In law, it is not permissible to presume, according to Shri Rivankar, that the assessee knows the charge, more so when proceedings are punitive. The learned Senior Counsel stresses that penal laws must be construed strictly, according to the language used in the statute. Section 274 clearly mandates that the assessee must have a reasonable opportunity of hearing

7] (2010) 322 ITR 158 (SC)
8] 359 ITR 565 (Kant)

before the authority's passing an order imposing penalty. In other words, the notice cannot be treated as a mere formality; it, in fact, requires strict compliance.

17. In his arguments, Shri Rivankar has relied on these decisions: (1) *Ashok Pai v. CIT*[9]; (2) *CCIT v. Manjunath Cotton*[10]; (3) *Muninga Reddy v. ACIT*[11]; (4) *CIT v. SSA Emerald Meadows*[12]; (5) *PCIT v. Smt. Baisetty*[13]; (6) *CIT v. Samson Pericherry*[14]; (7) *PCIT v. Goa Coastal Resorts*[15]; (8) *PCIT v. Goa Dorado*[16]; (9) *PCIT v. New Era Sova Mine*[17]; (10) *NN Subramanium Iyer v. UOI*[18]; (11) *Kishori Mohan Bora v. St. Of W.B.*[19]; (12) *UOI v. Dharmendra Textile*[20]; (13) *CIT v. Reliance Petro Products*[21]; (14) *CIT v. Kaushalya*[22].

Respondent:

18. Ms. Amira Razaq, the learned Standing Counsel for the Revenue, submits that section 271 provides for imposition of penalty on an assessee's failure to furnish returns, comply with notices, conceal income, and son on. And if the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner, in any proceedings under the Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, the penalty can be levied.

19. Ms. Razaq's specific submission is that the words "in the course of any proceedings" would cover various proceedings, including search

---

9] (2007 292 ITR (SC) (Para 19)
10] (2013) 359 ITR 565 (Kant) (para 34,59,60,63)
11] (2017) 396 ITR 398 (Kant) (para 7-11)
12] (2013) 386 ITR (ST) 13
13] 2017 (0) SUPREME (AP) 274, para 7,8,10,15,17
14] ITA/1154/2014 (Bom)
15] TXA/24/2019 (Bom)
16] TXA/18/2019 (Bom)
17] TXA/70/2019 (Bom)
18] (1974) 97 ITR 228(Ker) (Para 1,5,6)
19] AIR 1972 SC 1749 (para 5-8, 10)
20] (2008) 13 SCC 369 (SC), (para 15,16,20)
21] (2010) 322 ITR 158 (SC) (para 9)
22] (1994) 75 Taxman 549 (Bom), (p-2,4,5,6,7,8,10)

proceedings to unearth any incriminating material against the assessee. Then, the authority can impose penalty if he is satisfied that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. Section 274, according to Ms. Razaq, sets out the procedure to be followed before the Revenue imposes that penalty. It only contemplates the observance of the principle of natural justice.

20. The mandate of law, Ms. Razaq points out, is that no penalty shall be imposed unless the assessee has been heard or has been given a reasonable opportunity of being heard. She agrees that the principles of natural justice stand ingrained in the section. According to her, the penalty proceedings have their foundation in the assessment proceedings. In other words, when the stage for imposition of penalty is reached, the assessee already comes to know the charge against him: whether he is being penalised for concealing the particulars of his income or for furnishing inaccurate particulars of the income.

21. According to Ms. Razaq, the authority concerned applies his mind when he passes the assessment order. So, the form in which the notice is issued for imposing penalty looses its significance. As an example of an 'extreme case', she would submit that if a notice is perfect but it fails to disclose the mind of the assessing authority, the otherwise perfect notice serves no purpose. In this context, Ms. Razaq submits that there is no particular form prescribed for the notice to be issued under section 274 of the IT Act. Only by way of abundant caution, does the Revenue circulate the format. And merely because a particular clause has not been ticked off or struck out, it does not, and should not, result in any prejudice, offending the principles of natural justice. Relying on a plethora precedents, Ms. Razaq submits that unless prejudice or injustice is pointed out, mere technical infraction of law would not vitiate an enquiry or any order or result of any proceedings. And in judging the question of prejudice, according to Ms. Razaq, the Court must act with a broad vision.

22. To support her contentions, after her painstaking presentation, Ms. Razaq, too, has relied on a plethora of precedents. Among these decisions, majority have been commonly relied on by both the parties, and they have already been listed above. We will, now, refer to the other ones: (1) *Commissioner of Income-tax, Bangalore v. SSA'S Emerlad Meadows*[23]; (2) *State Bank of Patiala v. S.K. Sharma*[24]; (3) *Union of India v. Dharamendra Textile Processors*[25]; (4) *Ventura Textiles Ltd. v. Commissioner of Income Tax, Mumbai City-II*[26]; (5) *Gangotri Textiles Ltd. v. Deputy Commissioner of Income Tax, Corporate Circle 2, Coimbatore*[27]; (6) *Sundaram Finance Ltd. v. Assistant Commissioner of Income-Tax*[28]; (7) *Sundaram Finance Ltd. v. Deputy Commissioner of Income-tax*[29]; (8) *Commissioner of Income-tax-V v. Rampur Engg. Co. Ltd.*[30]; (9) *Commissioner of Income-tax v. S.V. Angidi Chettiar*[31]; (10) *Commissioner of Income-tax v. ECS Ltd.*[32]; (11) *K.P. Madhusudhanan v. Commissioner of Income –Tax*[33]; (12) *State of U.P. v. Sudhir Kumar Singh.*[34]

Discussion:

23. Indeed, Shri Rivankar, the learned Senior Counsel for the appellants, and Ms. Amira Abdul Razaq, the learned Standing Counsel for the Revenue, to their credit, have advanced very elaborate arguments, most of which centre on the merits of the matter. But our remit here is limited; we were asked to answer a reference. So, the individual or the intrinsic merit of the appeals does not fall for our consideration. For that reason, we will confine our discussion only to the precedential cleavage the learned Division Bench has perceived between *Kaushalya* on the one

23] (2016) 73 taxmann.com 241 (Karnataka)
24] (1996) 3 SCC 364
25] (2008) 306 ITR 277 (SC)
26] (2020)117 Taxmann.com 182 (Bombay)
27] (2020) 212 taxmann.com 171 (Madras)
28] (2018) 93 taxmann. Com 250 (Madras)
29] (2018) 99 taxmann.com 152 (SC)
30] (2009) 176 Taxman 211 (Delhi) (FB)
31] (1962) 44 ITR 739 (SC)
32] (2010)194 Taxman 311 (Delhi)
33] (2001) 118 Taxman 324 (SC)
34] 2020 SCC OnLine SC 847

hand and *Goa Dourado Promotions*, with its cohort of cases, on the other hand.

24. We will summarise the issues the learned Division Bench has referred to us:

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), will a mere defect in the notice—not striking off the irrelevant matter—vitiate the penalty proceedings?

2. Has *Kausalya* failed to discuss the aspect of 'prejudice'?

3. What is the effect of the Supreme Court's decision in *Dilip N. Shroff* on non-application of mind when the irrelevant portions of the printed notices are not struck off?

25. Let us, first, appreciate which part of the statute governs the issue before us. For our purpose, sections 271 and 274 of the Income Tax Act, 1961, are material. To the extent relevant, section 271 reads:

> 271. *Failure to furnish returns, comply with notices, concealment of income, etc.*— (1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person—
> (a) *Omitted*
> (b) has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty—
> (i) *Omitted*
> (ii) in the cases referred to in clause (b), in addition to any tax payable by him, a sum which shall not be less than one thousand rupees but which may extend to twenty-five thousand rupees for each such failure;
> (iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed three times the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.
> *Explanation 1.*— Where in respect of any facts material to the computation of the total income of any person under this Act,—
> (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) to be false, or

> (B) such person offers an explanation which he is not able to substantiate and 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, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this subsection, be deemed to represent the income in respect of which particulars have been concealed."

26. Now, let us extract section 274, which prescribes the procedure to be followed for an authority to impose a penalty under Chapter XXI. It reads:

> "274. *Procedure.*— (1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard.
> (2) No order imposing a penalty under this Chapter shall be made —
>
> (a) by the Income-tax Officer, where the penalty exceeds ten thousand rupees;
> (b) by the Assistant Commissioner or Deputy Commissioner, where the penalty exceeds twenty thousand rupees, except with the prior approval of the Joint Commissioner.
> (3) An income-tax authority on making an order under this Chapter imposing a penalty, unless he is himself the Assessing Officer, shall forthwith send a copy of such order to the Assessing Officer.

27. We must admit that length and breadth of the arguments on either side stand suffused with numerous precedents. So the issue-resolution is essentially precedent-centric. Therefore, we cannot avoid dwelling deep into the decisional dynamics of each case cited at the bar.

28. For the appellants, the flagship is *Manjunatha Cotton*, though it is neither from the Supreme Court nor from this Court. It has persuasive value, but one line of judgments from this Court has felt persuaded by *Manjunatha Cotton* and, in fact, followed it. So, our discussion shall begin with that.

Manjunatha:

29. In *Manjunatha Cotton and Ginning Factory* ("Manjunatha"), a Division Bench of Karnataka High Court has dealt, in its own words, with different facets of section 271 of the IT Act. If we take one tax appeal in *Manjunatha* to set the stage for discussion, we notice that the assessee, a

partnership dealing in mining, processing, and exporting iron ore, filed its return of income for the AY 2003-04. The Revenue processed the return and completed the assessment under section 143(1) of the IT Act. Later, it conducted a survey under section 133A of the Act and collected information under section 133(6) of the Act.

30. Based on the information collected, the Revenue notified the assessee under section 148 of the Act to reopen the assessment. It then completed the assessment under section 143(3) read with section 147 of the Act. Simultaneously, the Revenue initiated proceedings under section 274 read with section 271(1)(c) of the Act. When the assessee appealed against the assessment order, it was partly successful. The assessee did not challenge the appellate order further. Then, the assessing authority went ahead with the penalty proceedings and imposed penalty. Aggrieved, the assessee appealed but without success. Further aggrieved, it appealed to the Tribunal.

31. The Tribunal perused the notice issued under section 274 of the Act and noted that the assessing authority used a standard proforma. Before issuing the notice, the AO neither struck off nor deleted the "inappropriate words and paragraphs". That is, the AO was not sure whether she had "proceeded on the basis that the assessee has either concealed its income or has furnished inaccurate details". According to the Tribunal, the notice did not comply with the statutory mandate and, therefore, was vague. This vagueness betrayed the AO's non-application of mind. The other facets of the Tribunal's reasoning do not concern us, though. Aggrieved, the Revenue appealed to the High Court of Karnataka.

32. The substantial question of law before the Karnataka High Court is this: Was the notice issued under section 271(1)(c), read with section 274, in the printed form was valid, though it did not specifically mention whether the proceedings were initiated because of the assessee's concealing income or of furnishing inaccurate particulars?

33. *Manjunatha* exhaustively analyses the issue and holds that section 271 of the IT Act is a specific provision providing for imposing penalties. It is a complete code in itself, regulating the procedure for imposing penalties prescribed. The proceedings have, therefore, to be conducted under that provision, subject always to the rules of natural justice. The provisions for the assessment and levy of tax, according to *Manjunath*, will not apply to the penalty proceedings. That is, if there is a specific provision, proceedings should be taken only under that provision. So, the validity of penalty proceedings must be tested only from the perspective of section 271.

34. Under the caption "procedure for imposing penalty", *Manjunatha* holds that once a penalty proceeding is validly initiated, then under section 274(1), an obligation is cast on the person initiating the proceedings to issue a notice to the assessee. That notice issued, it is open to the assessee to contest the accusation that he has concealed income or he has furnished inaccurate particulars. As there is an initial presumption of concealment, it is for the assessee to rebut that presumption.

35. Then, under the caption "notice under section 274", *Manjunatha* acknowledges that the penalty proceedings can be initiated on various grounds as set out under section 271. If the order passed by the authority categorically mentions any grounds why the penalty proceedings must be initiated, the notice under section 274 may conveniently refer to that order which contains the authority's satisfaction. But suppose the order of, say, the assessment officer does not divulge those grounds. In that case, the notice may get its justification from the deeming provision in Explanation 1 or in Explanation 1(B) of section 271.

36. In either event, the assessee must be notified of the grounds on which the Revenue intends to impose a penalty. For section 274 clarifies that the assessee has a right to contest the penalty proceedings and, therefore, should have full opportunity to meet the Revenue's case. The

assessee may show that the conditions stipulated in section 271(1)(c) do not exist, and so he is not liable to pay the penalty.

37. Pertinently, *Manjunatha* refers to the Revenue's practice of sending a printed form where all the grounds mentioned in section 271 are mentioned. According to it, such an omnibus notice does not satisfy the statutory requirement. It is more particularly so because the assessee has the initial burden, and his failure to discharge that burden has serious consequences: He may end up paying a penalty from 100% to 300% of the tax liability. In other words, as section 271 needs to be strictly construed, the notice under section 274 should satisfy the grounds which the assessee has to meet specifically. Otherwise, the principles of natural justice are offended on the grounds of vagueness. As a corollary, no penalty could be imposed based on a defective or vague notice.

38. *Manjunatha* goes onto explain that Clause (c) of section 271 deals with two specific offences: concealing particulars of income or furnishing inaccurate particulars of income. Indeed, some cases may attract both the offences and some other cases may have an overlapping of the two offences. Then, in such cases, too, the penalty proceedings must be for both offences. "But drawing up penalty proceedings for one offence and finding the assessee guilty of another offence or finding him guilty for either the one or the other cannot be sustained in law".

39. First, the satisfaction regarding the grounds mentioned in section 271(1)(c) is essential for the Revenue to initiate the penalty proceedings. Second, the penalty proceedings must be confined only to those grounds specifically stated in the notice so that the assessee could meet those grounds. It is not open to the authority, to impose a penalty on the grounds other than what the assessee was called upon to meet.

40. *Manjunatha* relies on *Ashok Pai* and holds that concealing income and furnishing inaccurate particulars of income carry different connotations.

41. Finally, *Manjunatha* illustratively holds that when the Assessing Officer proposes to invoke the first limb—that is, the concealment—then the notice has to be appropriately marked. Similar is the case for the second limb—that is, the inaccurate particulars of income. The standard proforma without striking of the relevant clauses will lead to an inference as to non-application of mind. Then, on the facts, *Manjunatha* has affirmed the Tribunal's finding that the entire proceedings were vitiated as the notice issued was not under the law.

Kaushalya:

42. From among the judgments cited at the Bar, *Kaushalya* is this Court's earliest Division Bench decision, decided on 14 January 1992. One of the substantial questions of law in *Kaushalya* was whether the Income-tax Officer imposed penalties for the AYs 1968–69 and 1969–70 without giving the assessee a reasonable opportunity of being heard.

43. Briefly stated, the Revenue opened the assessments for AYs 1967–68 and 1968–69 under section 147 of the IT Act. In response to the notice under section 148, the assessee filed revised returns of income disclosing income also from some other business for both AYs. The Income-tax Officer reassessed the income and, by order under section 143(1), indicated that the penalty proceedings under section 271(1)(c) would be initiated. The penalty imposed, the assessee appealed but could not succeed. In a further appeal, the Tribunal ruled in the assessee's favour.

44. The Tribunal, in fact, held that the assessee had not been given a reasonable opportunity of hearing because the show-cause notices were ambiguous. The "material portion of the show-cause notice" informed the assessee that he "concealed the particulars of [his] income or deliberately furnished inaccurate particulars of such income". The notice for the second AY, too, contained the same allegation: "you have concealed the particulars of your income or furnished inaccurate particulars of such income."

45. On the Revenue's appeal, this Court has noted that the Tribunal has focussed only on the use of the word "or" between the two groups of words "concealed the particulars of your income" and "furnished inaccurate particulars of such income". This has led the Tribunal to conclude that the penalties were founded upon ambiguous and vague show-cause notices.

46. This Court in *Kaushalya* has found a difference between the notice for AY 1967-68 and that for AY 1968-69. According to it, the Tribunal was right in holding that the notice for AY 1967–68 was vague, but it was wrong in holding so for the AY 1968– 69. *Kaushalya* has held that the assessment order for AY 1968-69 already spelt out the grounds for initiating the penalty proceedings. So the assessee fully knew the exact charge of the Revenue against him for the AY 1968-69. In this background, *Kaushalya* has faulted the Tribunal's finding. According to it, the notice for AY 1968-69 suffered neither from non-application of mind nor from ambiguity. That is, the assessee suffered no prejudice. In this context, *Kaushalya* has held that after all, section 274 or any other provision in the Act or the Rules prescribed no particular form of notice.

47. *Kaushalya* has also emphasised that "the issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty to enable him to explain as to why it should not be done". A mere mistake in the language used or mere non-striking of the inaccurate portion, it points out, cannot by itself invalidate the notice. "The entire factual background would fall for consideration in the matter, and no one aspect would be decisive".

48. That said, *Kaushalya* was pragmatic in its approach. It has, indeed, acknowledged that "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". To illustrate such an instance of vagueness, *Kaushalya* has referred to the notice for the AY 1967-68.

49. In fact, the authorities issued the show-cause notice for the AY 1967-68 even before they completed the assessment. So, the assessee did not know of the exact charge against him. In the notice, not only is there the word "or" between the two groups of charges, but also there is the use of the word "deliberately". The word "deliberately" did not exist in section 271(1)(c) when the notice was issued. According to *Kaushalya*, the notice clearly demonstrated non-application of mind.

New Era Sova Mine:

50. A Division Bench of this Court has affirmed the Tribunal's stand that the notice under section 274 was vague. According to *New Era Sova Mine*, the Tribunal was correct in holding 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 this context, it has relied on the Karnataka High Court's decision in *CIT v. SSA's Emerald Meadows*[35] to hold thus: "No notice could be issued under Section 274, read with Section 271(1)(c), of the IT Act without indicating which particular limb of Section 271(1)(c) was invoked for initiating the penalty proceedings".

Samson Perinchery:

51. In this case, on appeal, the Tribunal deleted the penalty imposed upon the respondent-assessee. To do so, it has held that "the initiation of penalty under Section 271 (1)(c) of the Act by Assessing Officer was for furnishing inaccurate particulars of the income, while the order imposing penalty was for concealment of income." When taken in further appeal, this Court has observed that while initiating penalty proceedings, the Assessing Officer should be clear about which of the two limbs has been contravened or indicate that both have been contravened. *Samson Perinchery* has further approved the Tribunal's view that the notice issued under Section 274 of the Act should strike off irrelevant clauses. Lest the

35] ITA No. 380 of 2015, dated 23.11.2015, Karnataka High Court.

notice should betray non-application of mind on the Assessing Officer's part.

Goa Dourado Promotions:

52. In this appeal, one of the questions was whether the Tribunal has erred in holding that the penalty proceeding fatally suffered for the AO's failure to tick the relevant box in the show cause notice.

53. A Division Bench of this Court has held that "the issues raised in this Appeal are fully covered not only by order dated 11.11.2019 … but, further, by the decision of this Court in the case of *Commissioner of Income Tax-11 v. Shri Samson Perinchery* and *Principal Commissioner of Income Tax v. New Era Sova Mine*".

54. Thus, *Goa Dourado Promotions* has followed *Samson Perinchery* and *New Era Sova Mine*. It has not, on its own, elaborated on the issue before it but decided bound by the precedent.

Goa Dourado Promotions (Tribunal):

55. We have already noted that this Court's judgment in *Goa Dourado Promotions* is cryptic. If curiosity gets better of us, we may refer to the Tribunal's order, which came to this Court and which stood affirmed.

56. As the record reveals, the Tribunal in its order, dt.03.01.2019, has noted that in the assessment order, the AO has not specified whether he was satisfied that the assessee has furnished inaccurate particulars of income or is guilty of concealment of the particulars of income. In the printed format of the notice under section 274, the relevant limb was not specified.

57. On facts, the Tribunal has noted that the disallowance has been sustained because necessary evidence was not produced. According to it, this is not at all a case of concealing income or furnishing inaccurate particulars of income. All the details, including the identity of the payee, were there. Disallowance has solely been done as the assessee could not produce evidence of expenditure for an advertisement. In this context, the

Tribunal has referred to Apex Court's decision in *Reliance Petroproducts (P.) Ltd.:* If the assessee's claim is rejected, it does not automatically lead to a levy of penalty u/s. 271(1)(c) of the IT Act.

Other Decisions the Appellants have Relied On:

Muninaga Reddy:

58. In *Muninaga Reddy*, a Division Bench of Karnataka High Court has noted that the notice under section 274, read with section 271(1)(c), was in printed form with no specific ground mentioned for imposing penalty. So it has followed *Manjunatha.*

Bassett Revathi:

59. In *Baisetty Revathi*, a Division Bench of the High Court of Telangana and Andhra Pradesh has found from the notice that "the irrelevant contents therein, which had no application to the assessee, were struck out, leaving only one clause". That clause informs the assessee she has "concealed the particulars of [her] income or furnished inaccurate particulars of such income".

60. But when the respondent-assessee submitted her explanation, she did not object to any element of ambiguity in the notice. She contested it on the merits. Only before the Tribunal, for the first time, did she raise an objection. In that context, *Baisetty Revathi* has agreed that the respondent has submitted her explanation on merits without raising a doubt as to what was the precise allegation levelled against her. But, according to *Baisetty Revathi*, what matters is the principle involved and not just the isolated case of its application against the respondent. According to it, the penalty order demonstrates that the Assessing Officer was not even certain as to what was the finding on the strength of which he imposed the penalty. This is clear from the Assessing Officer recording that he was satisfied that the assessee had concealed/furnished inaccurate particulars of income. So *Baisetty Revathi* has held that "in the absence of a clear finding by the Assessing Officer himself, the benefit of the doubt

cannot be given to the revenue merely because the assessee did not complain of vagueness in the show-cause notice earlier".

61. Then, *Baisetty Revathi* has echoed *Manjunatha* and held that when penalty proceedings are sought to be initiated by the Revenue under Section 271(1)(c) of the Act, the specific ground which forms the foundation has to be spelt out in clear terms. Otherwise, an assessee would not have a proper opportunity to put forth his defence. *Baisetty Revathi* has specifically observed that when the charge is either concealment of particulars of income or furnishing of inaccurate particulars of income, the Revenue must specify which one of the two is sought to be pressed into service. The revenue "cannot be permitted to club both by interjecting an "or" between the two.

N. N. Subramania Iyer:

62. In *N. N. Subramania Iyer*, a learned Single Judge of Kerala High Court has found the notice in a printed form, with all possible grounds mentioned. It was under Wealth Tax, though. The notice has not struck off any of those grounds, and there is no indication for what contravention the petitioner was called upon to show cause why a penalty should not be imposed. Even in the counter-affidavit filed by the second respondent, he has not stated for what specific violation he issued it. So, according to *N. N. Subramania Iyer*, "exhibit P-2 is a whimsical notice issued to an assessee without intending anything".

SSA's Emerald Meadows:

63. The Karnataka High Court has held that no notice could be issued under Section 274, read with Section 271(1)(c), of the IT Act, without indicating which particular limb of Section 271(1)(c) was invoked for initiating the penalty proceedings. It has, again, followed *Manjuantha*. Taken in SLP, the Supreme Court dismissed the case at the admission stage.

Kishori Mohan Bera:

64. In *Kishori Mohan Bera*, the District Magistrate, Hooghly, under sub-section (1) read with sub-section (2) of section 3 of the Maintenance of Internal Security Act, 1971, passed an order directing the petitioner's detention. It was "with a view to preventing him from acting in a manner prejudicial to the maintenance of the public order or security of the State". Then, the petitioner was arrested on that very day and detained in Hooghly Jail.

65. In the above factual backdrop, the Supreme Court finds that the detaining authority was satisfied that it was necessary to detain the petitioner to prevent him from acting in a manner prejudicial to "the maintenance of public order or the security of the State." That satisfaction "was on the disjunctive and not conjunctive grounds". It means the District Magistrate was not certain whether he had reached his subjective satisfaction about the necessity of exercising his power of detention on the ground of danger to the public order or danger to the security of the State.

66. In the above context, the Supreme Court has treated it as a well-settled position that “an extraneous ground vitiates the order since it is impossible to predicate whether without it the requisite satisfaction could have been reached, the impugned order cannot be upheld”.

T. Ashok Pai:

67. In *T. Ashok Pai*, the Supreme Court has observed that an order imposing penalty is quasi-criminal. So the burden lies on the Revenue to establish that the assessee has concealed income. Since the burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is an income cannot automatically be adopted in the penalty proceedings. Though a finding in the assessment proceeding constitutes good evidence in the penalty proceeding, it cannot, however, be conclusive. In the penalty proceedings, the authorities must consider the matter afresh as the

question has to be considered from a different angle. According to it, omitting the word "deliberately" may not be of much significance.

68. In the end, *T. Ashok Pai* has held that "Concealment of income" and "furnishing of inaccurate particulars" carry different connotations. Concealment refers to a deliberate act on the assessee' part. A mere omission or negligence would not constitute a deliberate act of *suppressio veri* or *suggestio falsi.*

Dilip N. Shroff:

69. In *Dilip N. Shroff*, the assessee faced the allegation of furnishing inaccurate particulars. The valuation of property, as determined by a registered valuer, as an expert, was disbelieved. The Revenue has concluded that the assessee has furnished inaccurate particulars. Repelling the Revenue's stand, the Supreme Court has held that the assessee cannot be held to have furnished inaccurate particulars merely because the valuation report given by an expert is unacceptable for the Revenue.

70. In that process, the Supreme Court has traced the legal history of section 271(1)(c) of the Act. Then, it has observed that because of such concealment or furnishing of inaccurate particulars alone, the assessee does not *ipso facto* become liable for a penalty. The imposition of penalty is not automatic. Levy of penalty not only is discretionary, but such discretion must be exercised by the Assessing Officer remembering the relevant factors.

71. Primary burden of proof, according to *Dilip N. Shroff*, is on the Revenue. The Assessing Officer must satisfy himself that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars. And this onus is to be discharged by the Revenue. While considering whether the assessee has discharged his burden, the Assessing Officer should not begin with the presumption that he is guilty.

72. Once the Revenue discharges its primary burden of proof, the secondary burden of proof, *Dilip N. Shroff* points out, would shift on to

the assessee. It is because "the proceeding under Section 271(1)(c) is of penal nature in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the Parliament considers to be against the public interest". So, it was for the Revenue "to establish that the assessee shall be guilty of the particulars of income".

Dharmendra Textiles:

73. In *Dharamendra*, the apex court was dealing with the penalty provisions in the Central Excise Act, 1944. The question was whether section 11 AC, inserted by the Finance Act, 1996, should be read to contain *mens rea* as an essential ingredient. And the next question was about the levying of penalty below the prescribed minimum.

74. In fact, the matter was placed before a three-Judge Bench on a reference. The reference was occasioned because of the decisional cleavage perceived between *Dilip N. Shroff* and *Chairman, SEBI v. Shriram Mutual Fund*[36]. During arguments, the assessee referred to Section 271(1)(c) of the IT Act and took a stand that Section 11AC of the Act is identically worded and, in a given case, it was open to the assessing officer not to impose any penalty.

75. So, in that context, *Dharmendra Textile* has taken note of section 271(1)(c) and section 271C of the IT Act. While analysing these provisions, *Dharamendra Textile* has observed that "the conceptual and contextual difference between Section 271(1)(c) and Section 276C of the IT Act was lost sight of in *Dilip Shroff's* case". According to it, the Explanations appended to Section 272(1)(c) of the IT Act reveal an element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing a return. The object behind section 271(1)(e), read with Explanations, indicates that that section has been enacted as a remedy against the loss of Revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability, as is the case in the matter of

36] [(2006) 5 S.C.C. 361]

prosecution under Section 276-C of the IT Act. *Dharamendra Textile*, we must note, hardly helps our discussion because its decisional sphere is confined to section 11AC of the Central Excise Act. Its discussion on section 272(1)(c) of the IT Act is incidental and, perhaps, illustrative—not instructive. That is evident from what could be termed as clarification by a two-Bench decision in *Rajasthan Spinning and Weaving Mills.*

Rajasthan Spinning and Weaving Mills*:*

76. The question, in this case, was about the conditions and the circumstances that would attract penalty under Section 11AC of the Central Excise Act. The Supreme Court, in its disposition, has held that the reason assigned by the Tribunal to strike down the levy of penalty against the assessees is as misconceived "as the interpretation of *Dharamendra Textile* is misconstrued by the Revenue".

77. In that process, *Rajasthan Spinning and Weaving Mills* has felt the need to examine *Dharamendra Textile.* According to it, in almost every case relating to penalty, the Revenue refers to *Dharmendra Textile* as if that case laid down that in every case of non-payment or short payment of duty, the penalty clause would automatically get attracted and that the authority had no discretion in the matter. But *Rajasthan Spinning and Weaving Mills* saw no reason to understand or read *Dharamendra Textile* in that manner.

78. Finally, *Rajasthan Spinning and Weaving Mills* has held that *Dharamendra Textile* must be understood to mean that "though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in that section, once the section is applicable in a case, the concerned authority would have no discretion in quantifying the amount". And penalty must be imposed equal to the duty determined under Sub-section (2) of Section 11A. That is what *Dharamendra Textile* needs to be confined to.

Reliance Petro Products Pvt. Ltd.:

79. Here, the assessee furnished all the details of its expenditure as well as income in its Return. The details, in themselves, were not found to be inaccurate, nor did they conceal any income. The assessee, in fact, claimed expenditure under certain heads, but the Revenue did not accept that claim. In that context, the Supreme Court has held that "it was up to the authorities to accept [the assessee's] claim in the return". According to it, merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that itself would not attract the penalty under Section 271(1)(c).

80. If the contention of the Revenue is accepted, further notes *Reliance Petro Products*, then whenever a claim made in a return is not accepted, the assessee will invite penalty under Section 271(1)(c). That is clearly not the legislative intent. Thus, the mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee.

The Decisions the Revenue has Relied On:

81. To begin with, some of the decisions have been commonly relied on by both the parties—the appellants and the Revenue. They have already been discussed. Now, we will refer to the decisions the Revenue has exclusively relied on.

S. K. Sharma:

82. The case is about disciplinary proceedings taken against a bank officer. The employee's plea is about the employer violating the principles of natural justice. The Supreme Court has referred to much case law on the point and summarised the principles. It has stressed the principle of prejudice. According to it, a substantive provision *normally* has to be complied with, and the theory of substantial compliance or the test of prejudice would not apply.

83. With violation of a procedural provision, the position, according to *S. K. Sharma*, is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer.

They are, generally, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed.

84. Except for cases falling under — "no notice", "no opportunity", and "no hearing" categories, the complaint of violating procedural provision should be examined from the viewpoint of prejudice—whether it affected his chances to defend himself properly and effectively. In this context, *S. K. Sharma* has pointed out that there may be certain procedural provisions of a fundamental character, whose violation is by itself proof of prejudice. The Court, then, may not insist on proof of prejudice in such cases.

Ventura Textiles Ltd.:

85. Here, the appellant has contended that the notice under section 274 read with section 271 of the Act proposing to impose penalty was in a printed format. But the inapplicable portion was not struck off. So, whether a penalty was sought to be imposed on the assessee's concealing particulars of income or on its furnishing inaccurate particulars of income was not indicated in the notice. This is contended to be a fundamental error that goes to the root of the matter and has vitiated the impugned order of penalty. Though this point has been raised for the first time before the High Court, the appellant maintained that this being a pure question of law touching upon the jurisdiction, it can be raised at any stage.

86. A Division Bench of this Court has held that any court can consider a question of jurisdiction even if it has not been raised before the lower fora. According to it, the question relating to omitting the inapplicable portion in a show-cause notice in printed format would go to the root of the *lis*. So, it would be a jurisdictional issue.

87. Then, *Ventura Textiles* notes that though the Karnataka High Court's decision in *SSA's Emerald Meadows* was not interfered with by the Supreme Court, the fact remains that dismissal of an SLP would not lead

to a merger of the High Court's order with the Supreme Court's. In this process, it also refers to *Samson Pernchery*, *Goa Coastal Resorts & Recreation*, and *New Era Sova Mine*.

88. On facts, *Ventura Textiles* holds that in the assessment order, dated 28.02.2006, the Assessing Officer ordered that since the assessee had furnished inaccurate particulars of income, penalty proceedings under Section 271(1)(c) were also initiated separately. Therefore, it was apparent that penalty proceedings were initiated for furnishing inaccurate particulars of income. It has further noted that the statutory show-cause notice under Section 274 read with Section 271 of the Act proposing to impose penalty was issued on the same day when the assessment order was passed.

89. The notice, in printed form, contains at the bottom a direction to the notice-issuing authority to 'delete inappropriate words and paragraphs.' Yet, the Assessing Officer omitted to strike off the inapplicable portion in the notice. *Ventura Textiles* has, indeed, acknowledged that "such omission certainly reflects a mechanical approach and non-application of mind on the part of the Assessing Officer".

90. Finally, *Ventura Textiles* poses unto itself a question: Has the assessee had a notice about why a penalty was sought to be imposed on it?

91. In the factual context of the case, echoing *Kaushalya*, this Court in *Ventura Textiles* has held that if the assessment order and the show cause notice, both issued on the same date, are read in conjunction, what emerges is this: The notice may be defective, but the assessee fully knew the reason why the Assessing Officer sought to impose a penalty. The purpose of a notice is to make the noticee, points out *Ventura Textiles*, aware of the ground(s) of notice. So, it would be too technical and pedantic for the Court to take the view that because in the printed notice the inapplicable portion was not struck off, the order of penalty should be set aside even though in the assessment order it was clearly mentioned

that penalty proceedings under Section 271(1)(c) of the Act had been initiated separately for furnishing inaccurate particulars of income.

92. Of course, in the end, *Ventura Textiles* has held that the assessee declared the full facts. It is, however, another matter that the claim based on such facts was found to be inadmissible. This differs from furnishing inaccurate particulars of income as contemplated under Section 271(1)(c) of the Act.

Gangotri Textiles Ltd.:

93. One of the questions in *Gangotri Textiles* is whether the penalty imposed under section 271(1)(c) of the Act sustains itself despite the defective notice. The Madras High Court dismissed the assessee's appeal. Later, the assessee filed a review application. Then, much of the discussion turns on what grounds must be available for the Court to review its judgment. The High Court has, in fact, found none and dismissed the review petition. We reckon this case helps neither party.

Sundaram Finance Ltd.:

94. In *Sundaram Finance*, the question is whether we can term a notice under section 27(1)(c) of the Act valid if it does not show the default, which the assessee must explain. The assessee has brought to the Madras High Court's notice the Karnataka High Court decision in *Manjunatha*. But, in the end, *Sundaram Finance* has held that the existence of the condition mentioned under section 27(1)(c) of the Act was writ large on the face of the order of the Assessing Officer as well as the first appellate authority. So it has refused to declare the notice invalid. Though this case was taken in appeal, the Supreme Court dismissed the SLP *in limini*.

D. M. Manasvi:

95. In *D. M. Manasvi v. C.I.T., Gujarat*[37], these are the substantial questions of law: (1) Have the proceedings for imposing penalty been properly commenced as required by section 271 of the IT Act? (2) Has

37] [1972] 86 ITR 557 (SC)

there been any material or evidence before the Tribunal to hold that the assessee deliberately concealed particulars of his income or deliberately furnished inaccurate particulars of such income as required by section 271(1)(*c*) of the Act?

96. The Supreme Court has noted that the authority concerned issued a notice under section 274 after passing the assessment order. But that would not, in the Court's opinion, show that there was no satisfaction of the Income Tax Officer during the assessment proceedings that the assessee had concealed the particulars of his income or had furnished incorrect particulars of such income. According to it, what is contemplated by sub-section (1) of section 271 is that the Income-tax Officer or the Appellate Assistant Commissioner should have been satisfied regarding matters mentioned in the clauses of that sub-section. It is, however, not essential that notice to the person proceeded against should have been issued during the assessment proceedings. "Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the Income Tax Officer or Appellate Assistant Commissioner with the actual issue of notice". Notice is a consequence of that satisfaction; and it would be sufficient compliance with the statute if the Income-tax Officer or the Appellate Assistant Commissioner is satisfied with the matters referred to in clauses (a) to (c) of sub-section (1) of section 271 during proceedings under the Income-tax Act, even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently.

97. That said, what clinches issue in *D. M. Manasvi* is the Supreme Court's observation that the appellant "has not produced or got printed in the paper book the notice which was issued to him by the Income Tax Officer in connection with the imposition of penalty". Without that notice, it cannot be said, as suggested by the assessee, that there was no mention in the notice about the income tax officer's satisfaction on the

point that the assessee had concealed the particulars of his income or had furnished inaccurate particulars thereof.

S. V. Angidi Chettiar:

98. This is a case under the Income Tax Act, 1922, decided by a Constitution Bench of the Supreme Court. In the course of assessment proceedings, the Revenue imposed a penalty on the respondent-assessee. Against that penalty order, one partner moved the Commissioner of Income-tax, Madras, in revision but without success. Before the High Court, the assessee succeeded. So the Revenue went to the Supreme Court.

99. *S. V. Angidi Chettiar* has held that old section 28, as it was originally enacted, was somewhat obscure. The penalty which could be imposed in cases referred to in clauses (b) and (c) was to be a sum not exceeding one and a half times the tax, which would have been avoided if the income as returned by such a person had been accepted as the correct income. But the Legislature gave no indication whether the penalty was related to the tax avoided by the partners of the firm or by the firm on the footing that it was to be regarded as an unregistered firm.

100. Then, *S. V. Angidi Chettiar* quoted with approval the Calcutta High Court judgment in *Khushiram Murarilal v. Commissioner of Income-tax, Central, Calcutta*[38]. According to it, even when construed by its own language, the concluding paragraph of S. 28(1) cannot be said to make it a condition precedent that a person must be liable to pay some income-tax or it may also be super-tax if he were to be made liable for a penalty. Clause (b) of the proviso emphasises that the meaning of the concluding paragraph of S. 28(1) assumes that under that provision, a person may be chargeable to penalty although he may not be chargeable to tax.

101. Eventually, *S. V. Angidi Chettiar* has held that "the penalty under section 28 would therefore in the event of the default contemplated by clause (a), (b) or (c) be applicable in the course of assessment of a registered firm". If a registered firm is exposed to liability of paying the

38] 1954-25 ITR 572 (Cal)

penalty by committing any of the defaults contemplated by cl. (a), (b) or (c) by virtue of section 44, notwithstanding the dissolution of the firm, the assessment proceedings are liable to be continued against the registered firm as if it has not been dissolved.

102. On facts, *S. V. Angidi Chettiar* has held that the High Court erred in holding that penalty could not be imposed under Sec. 28 (1) (c) on the firm after its dissolution.

Rampur Engg. Co. Ltd.:

103. In a batch of cases, the Income-tax Appellate Tribunal has either deleted or affirmed the deletion of penalty levied upon the assessee under section 271(1)(c) of the IT Act. It was on the grounds that the authority initiating the penalty proceedings had not recorded its satisfaction regarding concealment of income or furnishing of inaccurate particulars by the assessee.

104. A Division Bench of the Delhi High Court has framed this issue: Can the satisfaction of the officer initiating the proceedings under section 271 of the Income-tax Act be said to have been recorded even in cases where satisfaction is not recorded in specific terms but is otherwise discernible from the order passed by the authority. Doubting another co-equal Bench decision on the point, the latter Division Bench has referred the matter to a Full Bench.

105. The Full Bench has followed the Supreme Court's *D.M. Manasvi*. According to it, it is not essential that notice to the person proceeded against should have been issued during the assessment proceedings. That is, it would be incorrect to equate the officer's satisfaction with the actual issue of notice; the issue of notice is a consequence of that satisfaction.

106. In the end, *Rampur Engg. Co.* has relied on the Supreme Court's *S.V. Angidi Chettiar*, and *D.M. Manasvi*. Then, it has held that the power to impose a penalty under section 271 of the Act depends upon the officer's satisfaction. It cannot be exercised if he is not satisfied and has not

recorded his satisfaction about the existence of the conditions specified in clauses (a), (b) and (c) before the proceedings are concluded. It is true that mere absence of the words "I am satisfied" may not be fatal, but such satisfaction must be spelt out from the assessing authority's order as to the concealing of income or furnishing of inaccurate particulars. Absent a clear finding to that effect, the initiation of penalty proceedings will be without jurisdiction. It has concluded that the first Division Bench's decision needed no interference as it had laid down the correct proposition of law.

Madhushree Gupta:

107. A Division Bench of Delhi High Court has considered the position of law regarding section 271(1)(c) post-amendment by Finance Act, 2008. According to it, the position of law, both pre- and post-amendment, remained the same. It is because the Assessing Officer must arrive at a *prima facie* satisfaction during the proceedings about the assessee's concealing the particulars of income or furnishing inaccurate particulars before he initiates penalty proceedings.

108. According to *Madhushree Gupta*, a bare reading of section 271(1)(c) would show that to initiate penalty proceedings following pre-requisites should be followed:

> (i) The Assessing Officer should be 'satisfied' that: (a) The assessee has either concealed particulars of his income; or (b) furnished inaccurate particulars of his income; or (c) infracted both (a) and (b) above.
>
> (ii) This 'satisfaction' should be arrived at during the course of 'any' proceedings. These could be assessment, reassessment or rectification proceedings, but not penalty proceedings.
>
> (iii) If ingredients contained in (i) and (ii) are present, a notice to show cause under Section 274 of the Act shall issue setting out therein the infraction the assessee is said to have committed.

109. *Madhushree Gupta* holds that the notice under section 274 of the Act can be issued both during or after completing the assessment

proceedings. But the assessing officer's satisfaction that section 271(1)(c) has been infracted should be arrived at before the proceedings pending before the assessing officer could conclude. So, the order imposing penalty can be passed only after assessment proceedings are completed.

110. Relying on *D. M. Manasvi* and *S.V. Angidi Chettiar*, *Madhushree Gupta* has summarised the legal proposition on the point of 'satisfaction'. That is, the 'satisfaction' which the assessing officer had to arrive at during assessment proceedings for initiation of penalty proceedings was '*prima facie*' in nature as against a 'final conclusion'. Then, the notice under Section 274 was to follow. What was important was that 'satisfaction' had to be arrived at during assessment proceedings and not while issuing notice under Section 274 of the Act. According to *Madhushree Gupta*, "due compliance would be required to be made in respect of the provisions of Section 274 and 275 of the Act".

ECS Ltd.:

111. Here, the Delhi High Court was concerned with the validity of the orders passed by the Income-tax Appellate Tribunal. One of the questions before the Delhi High Court is about whether no satisfaction has been recorded in the assessment order. If so, what is its effect?

112. To resolve the above issue, *ECS Ltd.* has held that section 271(1)(c) of the Act has been amended retrospectively with effect from 1 April 1989. Through that amendment, clause (IB) in *Explanation* to section 271(1)(c) has been inserted. As per this clause, it is unnecessary for the Assessing Officer to record his satisfaction while initiating penalty proceedings. *ECS Ltd.* has noted that when the vires of this provision were challenged, the Delhi High Court, through another judgment, upheld the amendment. But, then, the Court felt that the provisions are to be read down. According to it, even after the amendment, if the satisfaction is not discernible from the assessment order, the penalty cannot be imposed. The proceedings for initiation of penalty proceeding

cannot be set aside only because the assessment order states 'penalty proceedings are initiated separately' if otherwise, they conform to the statutory parameters.

113. Accordingly, *ECS Ltd.* has concluded that even when the assessing officer has not recorded his satisfaction in explicit terms, the assessment orders should indicate that the assessing officer had arrived at such a satisfaction. Though the assessment order need not reflect every item, such as addition or disallowance, "yet we have to find out that the order is couched in such a manner", revealing the assessing officer's opinion that the assessee had concealed the particulars of income or furnished inaccurate particulars. In other words, this has to be discerned from the reading of the assessment order.

114. On the facts, *ECS Ltd.* has found from the assessment order that the assessing officer has been influenced by the consideration that not only the assessee interpreted the law wrongly but also did not explain expenditure attributable to such foreign income because of which penalty proceedings under section 271(1)(c) were initiated by him. "Thus, his *prima facie* satisfaction about non-furnishing of particulars/inaccurate particulars is clearly discernible".

K. P. Madhusudhanan:

115. One of the questions before the Supreme Court in *K. P. Madhusudhanan* is whether the Tribunal was right in holding that penalty cannot be levied if the assessing officer in the proposal under Section 271(1)(*c*) has not referred to Explanation 1(B) to Section 271(1)(*c*).

116. On this point, the Supreme Court has disapproved the findings of this Court in *CIT* v. *P.M. Shah*[39] and *CIT* v. *Dharamchand L. Shah*[40]. Then, it has held that the Explanation to Section 271(1)(*c*) is a part of Section 271. When the ITO or the Appellate Assistant Commissioner

39] (1993) 203 ITR 792 (Bom)
40] (1993) 204 ITR 462 (Bom)

issues to an assessee a notice under section 271, he "makes the assessee aware that the provisions thereof are to be used against him". These provisions include the Explanation. The assessee is, therefore, put to notice that the assessee must prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or negligence. Otherwise, he is deemed to have concealed the particulars of his income or furnished inaccurate particulars of the income. Consequently, he is exposed to penalty proceedings. According to *K. P. Madhusudhanan*, no express invocation of the Explanation to section 271 in the notice under Section 271 is necessary before the provisions of the Explanation are applied.

Sudhir Kumar Singh:

117. This case concerns the cancellation of the tender. Entire proceedings leading to the cancellation of the tender were said to have been done behind the tenderer's back. So, the Supreme Court has found that the rule of *audi alteram partem* breached in its entirety, and prejudice has been caused to the appellant.

118. In the above backdrop, a three-Judge Bench of the Supreme Court has noted that natural justice is a flexible tool in the judiciary's hands to reach out in fit cases and remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

119. Where procedural 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. But that criterion does not apply to cases with mandatory provisions of law. And those mandatory provisions must have been conceived not only in individual interest but also in the public interest. No prejudice is caused to the person complaining of the breach of natural justice, according to *Sudhir Kumar Singh*, where such person does not dispute the case against him or it. This can happen from estoppel,

acquiescence, waiver, and by way of non-challenge or non-denial or admission of facts, where the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

120. *Sudhir Kumar Singh* further elaborates on the issue and holds that in cases where facts are stated to have been admitted or not disputed —and only one conclusion is possible—the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case and not by the authority which denies natural justice to a person. The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact or be based upon a definite inference of the likelihood of prejudice flowing from the non-observance of natural justice.

What Applies?

121. In this maze of case law, we may get easily lost. To avoid that, we will examine what actually is a precedent and what binds as a decision for us to determine which decision conflicts with which.

Precedent:

122. It is one thing to say that a precedent should be followed; it is another to say what it means to follow a precedent. And what is a precedent, anyway? Before we answer that question, we need to accept that before a court applies the doctrine of stare decisis to a given case, it must first determine what that previous decision purports to establish. More often than not, the ratio or holding of a case is difficult to gather; it may even remain elusive. So, a precedent's scope of applicability often proves to be a matter of threshold importance.

123. Recently, a Division Bench of this Court in *Gaur Pratibha v. State of Maharashtra*[41], to which one of us (Dama Seshadri Naidu, J.) was

41] (2019) 4 Bom CR 100

a party, has tried to unravel a few precedential tangles. We will, with profit, refer to a few salient aspects of that decision.

What is the Precedent?

124. Salmond defines a precedent as a judicial decision, "which contains in itself a principle. The underlying principle, which thus forms its authoritative element, is often termed the *ratio decidendi*." According to him, it is "the abstract *ratio decidendi* which alone has the force of law as regards the world at large." Professor John Chipman Gray, in his *The Nature and Sources of the Law*[42] stresses that "it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*."

125. Putting both the above views in perspective, Allen in his *Law in the Making*[43], observes that "any judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true *ratio decidendi* was."

126. Oft-quoted are the views of Holt C.J. and Lord Mansfield. In *Cage v. Acton*[44], the former has held that "the reason of a resolution is more to be considered than the resolution itself." Then, the latter has held in *Fisher v. Prince*[45] that "the reason and spirit of cases make law; not the letter of particular precedents." But in contrast is the now-widely-accepted principle that the *ratio decidendi* of a case must not be sought in the reasons on which the judge has based his decision.

127. Professor Morgan of the Harvard Law School[46] has given these propositions: (a) The Court must have applied a rule of law; (b) Its

---

42] (2d ed. 1921) 261
43] (2d ed. 1930) 155
44] 12 Mod. 288, 294 (1796)
45] 3 Burr. 1363, 1364 (1762)
46] Morgan, *The Study of Law*, (1926) 109, as quoted by Prof. Goodhart.

application is a must for determining the issues presented; (c) Only that rule of law as applied to the facts of the case is treated as the ratio.

128. If we consider the recent jurisprudential rumblings on the never-ending debate of which part of judgment will have precedential force, what comes to mind is the articulation advanced by Garner *et al.* In a recent commentary on *stare decisis—The Law of Judicial Precedent*[47]—the learned authors have elaborately treated this principle. According to them, there can be no cavil about what binds of a decision as a precedent. It is the holding.

129. And holding emerges when the ratio—the pure principle of law—is applied to the facts of a case. That is, a holding is what the court decides after combining the facts of a case with the legal principles those facts attract. While holding might be thought to equate more nearly with the court's determination of the concrete problem before it, *ratio decidendi* is normally seen, according to them, "as a genus-proposition of which the concrete holding is one species or instance." They do admit that the distinction is a fine one for those who observe it. In the end, they declare that ratio requires adherence to the extent possible, but the holding compels compliance fully. Thus, *stare decisis* admits of no exception to a 'case holding in the adjudicatory hierarchy.

Why Precedent?

130. What is the justification for precedent? Why should a court be required to follow earlier judicial decisions? No two cases are completely alike, so if precedents are to constrain, they must not do so where there are factual dissimilarities. According to Alexander, as quoted in Llyod's *Introduction to Jurisprudence*, three models justifying precedential constraint can be found in the literature.[48]

131. The "natural model" argues that past decisions naturally generate reasons for deciding cases in the same way as previous ones. Equality and reliance are commonly cited reasons. The second model is

47] Thomson Reuters, 2016, pp.44-46

48] Llyod's Introduction to Jurisprudence, Sweet & Maxwell, 9 ed., p.1561-62

the "rule model". Under this model, the precedent court has authority "not only to decide the case before it but also to promulgate a general rule binding on courts of subordinate and equal rank". The third model is the "result model". According to this model, the result reached in the precedent case, rather than any rule explicitly or simply endorsed by the precedent court, is what binds.

Precedent:

132. Here, we have been buried under an avalanche of case-law. Much of it is beside the point. That said, we cannot brush aside the lawyers' labour; at the same time, we ought to acknowledge the complexity and the confusion of case law. Neil Duxury in his book *The Nature and Authority of Precedent*[49], deals with the "the complexity of case-law". The learned author poses unto himself a question: Why has the concept of the *ratio decidendi* left legal thinkers so confounded? There seem to be six principal answers to this question[50].

133. First, the *ratio decidendi* and *obiter dicta* often blur into one another. *Obiter dicta*, Cardozo remarked, 'are not always ticketed as such, and one does not recognise them always at a glance'[51]. Much the same could be said about the *ratio decidendi*[52]. The second difficulty with the *ratio decidendi* is that in some decisions, it will be impossible to locate, let alone separate from *obiter dicta*. Illustratively, Duxbury cites *Central Asbestos Ltd. V. Dodd*[53]. A Bench of Five Judges decided that case: two concurred and two dissented. The fifth judge, however, joined the dissenting judges in reasoning but approved the concurring judges' conclusion. So it was by a majority of three to two. When *Dodd* was cited as the precedent before the Court of Appeal in *Harper v. NCB*[54], it had

---

49] Cambridge University Press, UK, 2008
50] Ibid, p.68
51] Benjamin N. Cardozo, *The Nature of the Judicial Process, 1921 Ed., p.30*
52] Cambridge University Press, UK, 2008, p.69
53] [1973] AC 518
54] [1974] QB 614

the unenviable task of discerning the majority opinion or case holding in *Dodd*.

134. According to Lord Denning,

> "We cannot say that Lord Reid and Lord Morris of Borth-y-Gest were correct: because we know that their reasoning on the law was in conflict with the reasoning of the other three. We cannot say that Lord Pearson was correct: because we know that the reasoning which he accepted on the law led the other two (Lord Simon of Glaisdale and Lord Salmon) to a wrong [that is, dissenting] conclusion. So we cannot say that any of the three in the majority was correct ... The result is that there is no discernible ratio among the majority of the House of Lords"[55].

135. The conclusion of the Court of Appeal in *Harper v. N. C. B.* was that *Central Asbestos Ltd v. Dodd* yielded no discernible *ratio decidendi* common to the majority of the House of Lords.

136. The third of the six answers as to why the concept of the *ratio decidendi* has proved so perplexing is that "they yield multiple *rationes* rather than no ratio. A decision based on only one judgment may contain more than one ratio"[56]. Duxbury points out that "multiple *rationes* are more usually discernible, nevertheless, in decisions composed of more than one judgment, where an evenly composed court is equally divided, for instance, or where a majority of judges reaches the same conclusion but for different reasons"[57].

137. The fourth way in which the concept of the *ratio decidendi* has perplexed legal thinkers concerns its coming into being. Is the ratio of a case 'the court's own version of the rule of the case' or what the case 'will be made to stand for by another later court'? Nevertheless, there clearly are instances where the matter of what constitutes the ratio of a case is up for grabs and will not be settled until another court has addressed it. (74) In this context, Duxbury makes an interesting proposition about whose word amounts the precedent. Is it that of the judge that has decided the case, or is it that of the judge who interpreted that judgment

55] Cambridge University Press, UK, 2008, p.72
56] Ibid, p.72
57] Ibid, p.73

in a later case? We may quote Jerome Frank[58], who said that for precedential purposes, a case means only what a judge in a later case says it means.

138. The question of whether the ratio is created through the judge's words or through interpreting the judge's words perhaps need not exercise us all that much. The only significant points to emerge from this puzzle, according to Duxbury, seem to be that the ratio can be determined as much by the interpreter as by the speaker and that when judges excavate *rationes* from past decisions, they are likely to influence if not determine how that precedent is conceived as an authority in the future. Certainly, this retrospective determination of *rationes* gives room for manoeuvre [59].

139. The final two difficulties posed by the concept of the *ratio decidendi* go hand in hand. First, there is a definitional problem. So far, this issue has been skirted because 'ratio decidendi' has been taken simply to mean 'reason for the decision' or 'reason for deciding'. But that is by no means the only definition of the *ratio decidendi*, and that to rely on this definition alone is to risk oversimplifying the concept. Second, there is the problem of determining the *ratio decidendi*. By defining the ratio, we settle on what to look for. But this still leaves unaddressed the task of settling on a method by which to look[60].

140. In the same vein goes the observation of Geoffrey Marshall of Oxford in *Interpreting Precedents: A Comparative Study*[61], that there is in one sense no problem in defining the character of *obiter dicta*, since they consist in all propositions of law contained in the decision that are not part of the ratio. But that negative assertion masks several ways in which judicial *dicta* may be related to the holding in a particular case. An opinion as to a point of law may be: (1) relevant to the disposition of a case or to

---

58] Courts on Trial, p.279
59] Ibid, p.75
60] Ibid, p.75
61] Edited by D. Neil MacCormick and Robert S. Summers, Routledge, USA, 1997.

any other important legal issue; (2) relevant to the disposition of the case but unnecessary to the holding; (3) relevant to some collateral issue in the case in question; and (4) relevant to the disposition of other important issues that may arise in other cases.

141. Julian Stone, in his book *Laying Down the Law*, gives us a good example: *Donoghue v Stevenson* [1932]. In that case, the House of Lords held that the manufacturer of a bottle of ginger beer could be liable to the consumer if, before the bottle was sealed, the ginger beer was contaminated by the remains of a snail, and the consumer became ill as a result of drinking it. According to the learned author, strict, and somewhat absurd, view on facts is this: It becomes a precedent only if the next case has these facts: (1) Women, (2) from Scotland, (3) in which harm can only come from snails, (4) in ginger beer bottles, and (5) placed negligently. But logic suggests that the principle should apply, at the least, to all food and drink which is packaged so as to prevent inspection. Then, let us see how we can extend the scope of the facts:

(a) Fact as to the agent of harm can be a dead snails, or any noxious element; (b) fact as to vehicle of harm may be an opaque bottle of ginger beer, or any container of commodities for human consumption; (c) fact as to defendant's Identity can be a manufacturer of goods or anyone dealing with the object; (d) fact as to potential danger from vehicle of harm may be object likely to become dangerous by negligence; (e) fact as to injury to plaintiff may be physical personal injury, or nervous or physical personal injury, or any injury; (f) fact as to plaintiff's identity may be a Scots widow, or any human being, or any legal person; (g) fact as to plaintiff's relation to vehicle of harm may be a purchaser from retailer, or the purchaser from anyone, or any person related to such purchaser.

What Binds?

142. Then, we can adopt Arthur L. Goodhart's assertion[62] that it is not the rule of law "set forth" by the court, or the rule "enunciated",

62] *Determining the Ratio Decidendi of a Case*, Yale Law Journal, Dec., 1930

which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow. Goodhart quotes from Oliphant's *A Return to Stare Decisis* (1927) that the predictable element in a case is "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions."

143. A proposition of law may be false or suspect. But if it gets ensconced in any case as its ratio, it remains precedentially protected. Sometimes courts decide cases, but they avoid stating any general principle of law. They qualify their judgments with the phrases like these: "in the special circumstances of the case", "on the facts," and so on. Sometimes, the principle of a case may have been correctly stated, but the proposition may remain too wide, covering, in isolation, a wider swath than warranted. Some other times, the principle of a case, again, may have been correctly decided, but the proposition may remain too narrow, covering, in isolation, a narrow strip of facts.

144. We will illustrate how a proposition may be narrow or wide. In *Hambrook v. Stokes Bros*[63], the facts are these:

Fact I : A bystander saw a gruesome accident.

Fact II : She died of shock.

Result : The Court decided that a bystander can recover for injury due to shock.

145. Narrow and Wide Propositions: In *Hambrook*, the bystander was the mother of the child who met with the accident. If the court stresses this fact, we have a narrow precedent; if it does not, we have a broad principle.

146. Professor Goodhart's opinion, expressed in 1935, still holds the field. This short, illuminating article betas any weighty tome on the topic. According to him, what the judge does and not what he says matters. The ratio of a case is what the court has done in response to the stimuli of the

63] [1925] 1 K. B. 141

facts of a case before it. Not the judge's opinion, but which way he decides cases. We, however, hasten to add that facts of a case alone do not constitute a precedent, nor does a pure principle of law. Not even the case outcome can be termed a precedent. It is a combination of both fact and law. We find the ratio or holding of a case at the confluence of fact and law.

147. In the end, Professor Goodhart observes that, first, facts are not constant between the cases; they are relative. Second, the judge founds his conclusions upon a group of facts selected by him as material from among a larger mass of facts. Some of those facts might seem significant to a layman, but which, to a legal mind, are irrelevant. This, a judge's task in analysing a case, in fact, is not to state the facts and the conclusion, but to state the material facts—material as seen by him—and conclude the case based on them. It is, therefore, essential to know what the judge has said about his choice of the facts, for what he does has a meaning for us only when considered in relation to what he has said.

148. In other words, to ascertain the material facts on which the judge has based his conclusion, we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent that he has misstated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment. In fact, it is not uncommon that sometimes the court considers a fact but disregards it as immaterial, or it may miss out on a fact as it was not called to its attention by counsel or was for some other reason overlooked. So what matters is what has been stated, not what could have been stated, not what has been in the record but missed out on. Then, a precedent gets its binding force based on only the facts stated. An issue raised not addressed or an issue that has altogether gone *sub silentio* cannot support a precedent.

149. To sum up, we may note that if a fact, however material it is, was not considered by the court, then the case is not a precedent in future cases where a similar fact appears.

150. Let us take the celebrated case of *Rylands v. Fletcher*[64] to demonstrate this point. In that case, the defendant employed an independent contractor to make a reservoir on his land. Negligently, the contractor did not fill up some disused mining shafts. So the water escaped and flooded the plaintiff's mine. The defendant was held liable.

The facts of the case:

Fact I : D had a reservoir built on his land.

Fact II : The contractor who built it was negligent.
Fact III : Water escaped and injured P.
Result : D is liable to P

Material Facts as Seen by the Court:

Facts I : D had a reservoir built on his land.
Fact III : Water escaped and injured P.
Result : D is liable to P.

151. After stating the facts, the judges ignored the fact of the contractor's negligence; they based their conclusions on the fact that an artificial reservoir had been constructed. The negligence of the contractor was, therefore, impliedly held to be an immaterial fact. Thus, by omitting Fact II, the court established the doctrine of "strict liability."

152. Now, we will consider a similar case with a different outcome. In *Nichols v. Marsland*[65]. the material facts were similar to those in *Rylands v. Fletcher*. But it had an additional fact: the water escaped owing to a violent storm. Had the court found that this additional fact was not a material one, then the rule in *Rylands v. Fletcher* would have applied. But as it found that it was a material one, the court was able to conclude differently.

64] L. R. 3 H. L. 330 (1868)
65] 4 L. R. 10 Ex. 255 (1875)

153. Let us take multi-member Bench. All the judges agree on the result but differ in stating the material facts. Then, how can we pick the ratio?

Material Facts: A case, decided by three judges, involves facts A, B and C. For the first judge, fact A is material; for the second judge, fact B is material; for the third judge, fact C is material. All the judges return the same verdict, though. The principle of the case is, therefore, that on the material facts A, B and C, the defendant is liable. In future cases, anyone fact will suffice.

154. In the alternative, the first judge finds facts A, B, and C as material; the second judge finds only fact C as material; the third judge, too, finds fact C alone as material. For future cases, only fact C is material.

155. Finally, let us turn to what is real and what is hypothetical in a case. If a judge in his opinion suggests a hypothetical fact, and then states what conclusion he would reach if that fact existed, he is not creating a principle. The difficulty sometimes is that we are not sure whether the judge is treating a fact as hypothetical or real. In a case, a judge says, "in this case, as the facts are so and so, I reach conclusion X." Even though the judge may be wrong on facts, but the case is a precedent for the facts stated, though wrongly, in that case. It is so because there is no assumption; on the contrary, a non-existing fact is taken as existing—erroneously may be.

156. When a case presents two sets of facts, what should follow? A judge may determine the first set of facts and then conclude on them. The judge may not desire to determine the second set of facts. Any views he may express on the undetermined second set are accordingly *obiter dicta*. If, however, the judge does determine both sets, as he is free to do so, and concludes on both, then the case creates two principles, and neither is an *obiter dictum*. That said, if the first case lacks any material fact or contains any additional ones not found in the second, then it is not a direct precedent for the second case.

157. However, it is necessary for us to know what the judge has said about his choice of the facts, because what he does has a meaning for us only when we know what facts he has relied on. "A divorce of the conclusion from the material facts on which that conclusion is based is illogical and must lead to arbitrary and unsound results." To cap it, we will once again recall how Goodheart sums up a curious mind's quest to ferret out the elusive *ratio decidendi* or holding: If an opinion gives the facts, the first point to notice is that we cannot go behind the opinion to show that the facts appear to be different in the record. We are bound by the judge's statement of the facts even though it is patent he has misstated them, for it is on the facts as he, perhaps incorrectly, has seen them that he has based his judgment.

158. Professor Goodhart summarises the rules for finding the principle of a case:

(1) The principle of a case is not found in the reasons given in the opinion.

(2) The principle is not found in the rule of law set forth in the opinion.

(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.

(4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.

(5) In finding the principle, it is also necessary to establish what facts were held to be immaterial by the judge, because the principle may depend as much on exclusion as it does on inclusion.

159. The rules for finding what facts are material and what facts are immaterial as seen by the judge are these:

(1) All facts of person, time, .place, kind and amount are immaterial unless stated to be material.

(2) If there is no opinion, or the opinion gives no facts, then all other facts in the record must be treated as material.

(3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record.

(4) If the opinion omits a fact which appears in the record, this may be due either to (a) oversight, or (b) an implied finding that the fact is immaterial. The second will be assumed to be the case in the absence of other evidence.

(5) All facts which the judge specifically states are immaterial must be considered immaterial.

(6) All facts which the judge impliedly treats as immaterial must be considered immaterial.

(7) All facts which the judge specifically states to be material must be considered material.

(8) If the opinion does not distinguish between material and immaterial facts, then all the facts set forth must be considered material.

(9) If in a case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of all the facts held material by the various judges.

(10) A conclusion based on a hypothetical fact is a *dictum*. By hypothetical fact is meant any fact the existence of which has not been determined or accepted by the judge.

Summary:

160. From all the judgments we have quoted about the scope of penalty proceedings under section 271 (1)(c), read with section 274, of the IT Act, we gather the following:

(a) Penalty under section 271(1)(c) is a civil liability.

(b) *Mens rea* is not an essential element for imposing penalty for breach of civil obligations or liabilities.

(c) Willful concealment is not an essential ingredient for attracting civil liability.

(d) *Existence of conditions stipulated in section 271(1)(c) is a sine qua non for initiation of penalty proceedings under section 271.*

(e) *The existence of such conditions should be discernible from the assessment order or the order of the appellate authority or the revisional authority.*

(f) Even if there is no specific finding regarding the existence of the conditions mentioned in section 271(1)(c), at least the facts set out in Explanation 1(A) and 1(B) it should be discernible from the said order which would be a legal fiction constitute concealment because of deeming provision.

(g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under section 271(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision in sub-section (IB).

(h) The imposition of penalty is not automatic.

(i) The imposition of penalty even if the tax liability is admitted is not automatic.

(j) Even if the assessee has not challenged the order of assessment levying tax and has even paid tax, that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty.

(k) If the explanation offered, even though not substantiated by the assessee, but is found *bona fide* and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

(l) The direction referred to in Explanation 1(B) to section 271 of the Act should be clear and without any ambiguity.

(m) If the Assessing Officer has recorded no satisfaction or has issued no direction to initiate penalty proceedings, in appeal, if the

appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the assessing authority.

(n) Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. [We must, however, admit that it is a contested conclusion.]

(o) Sending printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law. [This, too, eludes unanimity]

(p) The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice are offended. Based on such proceedings, no penalty could be imposed to the assessee.

(q) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

(r) The penalty proceedings are distinct from the assessment proceedings.

(s) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as *res judicata* in the penalty proceedings. It is open to the assessee to contest the said proceedings on the merits. (italics supplied and elaboration omitted)

161. In fact, these have been admirably summarised by *Manjunatha*. And we acknowledge our debt to the decision that has saved our labour.

162. As aptly pointed out by the referring Division Bench, before this Court there are two sets of cases. One set of cases is led by *Kaushalya*, a decision earliest in point of time. The other set does not have a lead case; they all have been cryptic but stand persuaded by *Manjunatha*. For that reason, we have discussed the Karnataka High Court's decision in detail. Nevertheless, the referring Division Bench has found on one precedential plank these cases: (1) *Shri Samson Perinchery*; (2) *Goa Coastal Resorts and Recreation Pvt. Ltd.*; (3) *New Era Sova Mind*; and (4) *Goa*

Dourado Promotions Pvt. Ltd. On the opposite plank is *Kaushalya*. All by co-equal Benches, though.

163. We have already discussed what constitutes the *ratio decidendi* or case holding and what it takes to be 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*[66] ("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 *Mavilayi Service Co-operative Bank Ltd. v. Commissioner of Income Tax, Calicut*[67]. 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*[68]. 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 co-operative society in order to discover as to whether it was conducting business in accordance with its bye-laws". That sets *Citizen Cooperative* apart, according to *Mavilayi*.

66] 2021 SCC OnLine SC 16
67] 2019 (2) KHC 287
68] (2017) 9 SCC 364

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*[69], 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*[70]. Though it was from the dissenting judgment, *Mavilayi* points out, it remained uncontradicted by the majority:

> [A]ccording 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 (iii) 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[71].

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 what 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*.

69] (1968) 2 SCR 154
70] (1979) 3 SCR 1059
71] R.J. Walker & M.G. Walker: The English Legal System. Butterworths, 1972, 3rd edn., pp. 123-24]

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.
>
> 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 order 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*. Granted, 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(1)(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*)[72].

175. *Kaushalya* has adopted an *ex-post* approach to the issue resolution; *Goa Dourado Promotions*, an *ex-ante* approach. *Kaushalya* 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.

72] The University of Chicago Press, Chicago, 2007

176. Second, not always do we find the assessment proceedings revealing the grounds of penalty proceedings. Assessment order need not contain a specific, explicit finding of whether the conditions mentioned in section 271(1)(c) exist in the case. It is because Explanations 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. *Atul Mohan Bindal*[73], has explained the scope of section 271(1)(c) thus:

> "[*E*]*xplanation 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(1)(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 1*, 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.

73] [2009] 317 ITR 1 (SC)

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(1)(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(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*[74], in which the Apex Court has quoted with approval its earlier judgment in *State of Orissa v. Dr. Binapani Dei*[75]. 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.

(Dama Seshadri Naidu, J.)

(Bharati H. Dangre, J.)

(Smt. M.S. Jawalkar, J.)

NH

74] (2007) 2 SCC 181
75] AIR 1967 SC 1269