

IN THE INCOME TAX APPELLATE TRIBUNAL  
BANGALORE BENCH " B "

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND  
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T.A. No.1202/Bang/2014  
(Assessment Year : 2007-08)

Smt. Nagamani K.T.  
Prop. Maruthi Ceramics,  
10<sup>th</sup> Main, 100 Ft. Road,  
HRBR Layout, Banaswadi, Bangalore-560 033. .... Appellant  
PAN AAJPN 3502H

Vs.

Income Tax Officer,  
Ward 6(2), Bangalore. .... Respondent.

Appellant By : Smt. Prathibha R, Advocate.  
Respondent By : Dr. P.K. Srihari, Addl. CIT (D.R)

Date of Hearing : 23.3.2015.  
Date of Pronouncement : 10.4.2015.

O R D E R

Per Shri Jason P. Boaz :

This appeal by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-III, Bangalore dt.24.6.2014 for Assessment Year 2007-08 confirming the levy of penalty under Section 271(1)(c) of the Income Tax Act, 1961 (herein after referred to as 'the Act') imposed by the Assessing Officer.

2. The facts of the case, briefly, are as under :-

2.1 The assessee, Propx. of Maruti Ceramics and engaged in the business as a dealer in ceramic tiles, filed the return of income for Assessment Year 2007-08 on 26.10.2007 admitting income of Rs.14,21,220. A survey under Section 133A of the Act was conducted at the assessee's business premises on 14.9.2006. The return was processed under Section 143(1) of the Act and the case was taken up for scrutiny. The assessment was completed under Section 143(3) of the Act vide order dt.18.12.2009 wherein the assessee's income was assessed at Rs.14,69,892 as against the returned income of Rs.14,21,220 in view of the Assessing Officer resorting to a disallowance of Rs.48,672 under Section 40A(3) of the Act. While passing the order of assessment, the Assessing Officer simultaneously initiated penalty proceedings under Section 271(1)(c) of the Act by issue of notice under Section 274 rws 271 of the Act dt.18.12.2009.

2.2 From the details on record, it transpires that in the course of survey proceedings, conducted at the assessee's business premises on 14.9.2006, certain discrepancies were noticed in the stock maintained by the assessee. The assessee admitted the excess stock amounting to Rs.10,35,000 and admittedly offered the same for tax in the return of income for Assessment Year 2007-08 filed on 26.10.2007. The Assessing Officer who initiated penalty proceedings under Section 271(1)(c) of the Act by issue of notice under Section 274 rws 271 of the Act dt.18.12.2009, proceeded to levy penalty of Rs.4,34,738 under Section 271(1)(c) of the Act @ 100% of the tax sought to be evaded on the excess stock of Rs.10,35,000 found in the course of survey under Section 133A of the Act; which in the opinion

of the Assessing Officer would not have been admitted by the assessee but for the survey conducted at the assessee's business premises.

2.3 Aggrieved by the order levying penalty of Rs.4,34,738 under Section 271(1)(c) of the Act vide dt.5.5.2010, for Assessment Year 2007-08, the assessee preferred an appeal before the CIT (Appeals) - III, Bangalore. The learned CIT(A) vide the impugned order dt.24.6.2014 dismissed the assessee's appeal and concurring with the view of the Assessing Officer confirmed the levy of Rs.4,34,738 under Section 271(1)(c) of the Act.

3.0 Aggrieved by the order of the CIT (Appeals) - III, Bangalore dt.24.6.2014, for Assessment Year 2007-08, the assessee is now in appeal before this Tribunal raising the following grounds :-

- 1. On the facts and in the circumstances of the case, the learned CIT (Appeals) erred in passing the order in the manner he did.*
- 2. The learned CIT (Appeals) erred in affirming the levy of penalty under Section 271(1)(c) of the Act as made by the Assessing Officer.*
- 3. On the facts and in the circumstances of the case, the learned CIT (Appeals) ought to have appreciated that the impugned addition was accepted during the course of survey by the appellant only to buy peace which has resulted in initiating penalty proceedings by the Appellant only to buy peace which has resulted in initiating penalty proceedings by the Assessing Officer, though there was no concealment or furnishing of inaccurate particulars of income by the appellant.*
- 4. On the facts and in the circumstances of the case, the learned CIT (Appeals) ought to have appreciated the fact that the appellant has agreed to declare the difference in stock for the Assessment Year 2007-08 (which was found during survey) in addition to the normal income based on books of account declared in the return voluntarily and the appellant has also co-operated with the Revenue and accordingly the learned CIT (Appeals) ought to have refrained from affirming the levy of penalty under Section 271(1)(c) of the Act.*
- 5. The learned CIT (Appeals) ought to have appreciated the various judgments cited by the appellant as they were applicable to the facts of the appellant's case and thus ought to have deleted the penalty under Section 271(1)(c) of the Act.*

6. *Without prejudice, the levy of penalty under Section 271(1)(c) as affirmed by the learned CIT (Appeals) is arbitrary, excessive and ought to be deleted in toto.*
7. *For these and other grounds that may be urged at the time of hearing of the appeal the appellant prays that the appeal may be allowed."*

4.1 Before us, the learned Authorised Representative submitted that in respect of the income admitted and offered by the assessee in the return of income for Assessment Year 2007-08 filed on 26.10.2007, there cannot be any penalty leviable under Section 271(1)(c) of the Act as the assessee cannot be said to have concealed particulars of income or furnished inaccurate particulars of income therein. According to the learned Authorised Representative, the starting point for imposition of penalty is the return of income and when income is declared in the return of income, that cannot be ignored. It was submitted by the learned Authorised Representative that the facts of the case on hand were that pursuant to the survey under Section 133A of the Act on 14.9.2006, the excess stock of Rs.10,35,000 admitted therein was declared and offered to tax as part of the income of Rs.14,21,220 in the return of income for Assessment Year 2007-08 filed on 26.10.2007 and no separate addition was made in this regard as can be seen from the order of assessment for Assessment Year 2007-08 dt.18.12.2009. The learned Authorised Representative submits that in these factual circumstances, the assessee cannot be said to have concealed particulars of her income to warrant the levy of penalty under Section 271(1)(c) of the Act. In support of this proposition, the learned Authorised Representative cited and placed reliance on the decision of the Hon'ble Apex Court in the case of *CIT V Reliance Petroproducts (P) Ltd.* (2010) 322 ITR 158 wherein at page 164 of the ITR, the Hon'ble Apex Court has held that a penalty for concealment has to

be with reference to the return of income filed by the assessee. The learned Authorised Representative also placed reliance on the decision of a co-ordinate bench of this Tribunal in the case of Vasavi Shelters V ITO in ITA Nos.499 & 500(Bang)/2012 dt.22.2.2013 wherein it was held that there can be no justification for the levy of penalty under Section 271(1)(c) of the Act in respect of income offered in the return of income for the concerned assessment year. The learned Authorised Representative prayed that in view of the above referred judicial pronouncements (supra), the levy of penalty of Rs.4,34,738 on the amount of excess stock of Rs.10,35,000, which was admitted in the return of income for Assessment Year 2007-08 as part of the returned income of Rs.14,21,220, was not warranted and ought to be deleted.

4.2 Per contra, the learned Departmental Representative relied on the orders of the authorities below.

4.3.1 We have heard the rival submissions and perused and carefully considered the material on record, including the judicial pronouncements cited and placed reliance on by the assessee. On perusal, we find that, inter alia, a similar issue was before the co-ordinate bench of this Tribunal in the case of Vasavi Shelters (supra); viz. the justification of the imposition of penalty under Section 271(1)(c) of the Act on income disclosed / offered for taxation in the return of income filed for the concerned year. In this regard, the co-ordinate bench held that there is no justification for levy of penalty under Section 271(1)(c) of the Act on income admitted and offered for taxation in the concerned assessment year.

4.3.2 The relevant portion of this order in the case of Vasavi Shelters (supra) at paras 10 to 15 thereof is extracted hereunder :

“ 10. As far as the first part is concerned, viz., the justification of imposition of penalty on the income offered in the return of income by the Assessee for both the A.Ys., we are of the view that there cannot be any penalty on income which is declared in a return of income, on the facts and circumstances of the present case. Penalty u/s.271(1)( c) of the Act is imposed for “concealing particulars of income or furnishing inaccurate particulars of income”. When an income which is ultimately brought to tax is declared in a return of income, there can be no question of treating the Assessee as having “concealed particulars of income or furnished inaccurate particulars of income”. The starting point of determining concealment for imposing penalty is the return of income. If the return of income declares income which is ultimately brought to tax there can be no complaint by the revenue that the Assessee is guilty of “concealing particulars of income or furnishing inaccurate particulars of income”. This legal position would be implicit if one reads Sec.271(1)( c) of the Act together with Expln.3, 5 and 5A of the Act, which carves out exception for the legal position as stated above.

“Sec.271 (1) (c ): Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person—

(a) .....

(b) .....

(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,—

(d) .....

(i) .....

(ii) .....

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, 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 fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits:

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) or the Commissioner 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 sub-section be deemed to represent the income in respect of which particulars have been concealed.

Explanation 3 : Where any person, fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1989, and, until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

Explanation 5 : Where in the course of a search initiated under section 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,—

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date, or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search; then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless,—

(1) such income is, or the transactions resulting in such income are, recorded,—

(i) in a case falling under clause (a), before the date of the search; and

(ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date; or

(2) he, in the course of the search, makes a statement under subsection (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax together with interest, if any, in respect of such

income. Explanation 5A : Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,—

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.”

11. Explanation-3 is an exception to the rule that when an income which is ultimately brought to tax is declared in a return of income, there can be no question of treating the Assessee as having “concealed particulars of income or furnished inaccurate particulars of income”. Explan.-4(b) to Sec.271(1) of the Act makes this clear. Explan.-4 to Sec.271 (1) of the Act lays down what is “the amount of tax sought to be evaded” on which penalty can be imposed and clause (b) lays down in any case to which Explanation 3 applies, means the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self assessment tax paid before the issue of notice under section 148. This means that the income declared in the return of income can be ignored and penalty can be imposed even in respect of such income. Explanation 3 of section 271(1)(c)(iii) applies also in the case of assesseees, who have not been assessed as yet. According to this section, if a person fails, without reasonable cause, to furnish a return of his income voluntarily under section 139 within the period specified under section 153(1), i.e., within two years from the end of the assessment year in which the income was first assessable, he shall be deemed to have concealed the particulars of his income in respect of such assessment year if he has taxable income for that year. But this is subject to two limitations — firstly, it applies to assessment year 1989-90 and subsequent years and secondly, no notice under section 142(1) or 148 was issued within the said period of two years. In other words, Explanation 3 shall have no application if a notice under section 142(1) or 148 was issued within two years. But if an assessee files a return of his income after the period of two years in response to a notice under section 148, he would be caught within the mischief of this Explanation.

12. In the present case, Explan.-3 to sec.271(1) of the Act will not apply because, as we have seen the Assessee filed return of income on 31.3.2010 for both the Assessment years which is within a period of 2 years from

the end of AY 07-08 and 08-09. Moreover the notice u/s.148 had been issued in the present case on 22.2.2010 within two years from the end of AY 07-08 & 08-09. Therefore Explanation 3 will not apply to the present case.

13. There can be no concealment or non-disclosure, as the assessee had made a complete disclosure in the IT return and offered the surrendered amount for the purposes of tax and therefore no penalty under s. 271(1)(c) could be levied. The words 'in the course of any proceedings under this Act' in Sec. 271 (1)(c) of the Act are prefaced by the satisfaction of the AO or the CIT(A). When a survey is conducted by a survey team, the question of satisfaction of AO or the CIT(A) or the CIT does not arise. One has to keep in mind that it is the AO who initiates penalty proceedings and directs the payment of penalty. He cannot record any satisfaction during the course of survey. Decision to initiate penalty proceedings is taken while making assessment order. It is, thus, obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the IT return filed by it. The assessee can furnish the particulars of income in his return and everything would depend upon the IT return filed by the assessee. This view gets supported by Explanations 4 as well as 5 and 5A of s. 271. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Sec. 271(1)(c) has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or nondisclosure as the assessee had made a complete disclosure in the IT return and offered the surrendered amount for the purposes of tax.

14. Expln.5 and 5A are also an exception to the rule that when an income which is ultimately brought to tax is declared in a return of income, there can be no question of treating the Assessee as having "concealed particulars of income or furnished inaccurate particulars of income". Those Explanations will also not apply in the present case because those Explanations are applicable only when there is a search u/s.132 of the Act and to a case of Survey u/s.133A of the Act.

15. For the reasons given above we hold that there can be no justification for imposition of penalty on the income offered in the return of income by the Assessee for both the A.Ys., because there cannot be any penalty on income which is declared in a return of income, on the facts and circumstances of the present case."

4.3.3 Following the decision of the co-ordinate bench of this Tribunal in the case of Vasavi Shelters (supra) on this issue, which is in a similar factual matrix as the case on hand, we hold that there can be no justification for the imposition of penalty of Rs.4,34,738 under Section 271(1)(c) of the Act on income of Rs.10,35,000 admitted and offered for taxation as part of

the income of Rs.14,21,220 in the return of income for Assessment Year 2007-08 filed on 26.10.2007. Consequent to this finding of ours, we cancel the penalty of Rs.4,34,738 levied under Section 271(1)(c) of the Act for Assessment Year 2007-08.

5. In the result, the assessee's appeal for Assessment Year 2007-08 is allowed.

Order pronounced in the open court on 10<sup>th</sup> April, 2015.

Sd/-  
**(RAJPAL YADAV)**  
Judicial Member

Sd/-  
**(JASON P BOAZ)**  
Accountant Member

\*Reddy gp

Copy to :

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2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
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By Order

Asst. Registrar, ITAT, Bangalore