

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

Before Sh. N. K. Saini, Accountant Member

ITA Nos. 6438 & 6439/Del/2016 : Asstt. Years : 2010-11 & 2011-12

ACIT, Central Circle-14, New Delhi-110055	Vs	Smt. Mehar Anand, A-29, Defence Colony, New Delhi-110065
(APPELLANT)		(RESPONDENT)
PAN No. AFEPA9193B		

ITA Nos. 6440 & 6441/Del/2016 : Asstt. Years : 2009-10 & 2011-12

ACIT, Central Circle-14, New Delhi-110055	Vs	Sh. Harveer Singh Kalra, A-29, Defence Colony, New Delhi-110065
(APPELLANT)		(RESPONDENT)
PAN No. AFBPK6171Q		

**Assessee by : Sh. Ved Jain, Adv. &
Sh. Ashish Chadha, CA
Revenue by : Sh. Amrit Lal, Sr. DR**

Date of Hearing : 16.05.2017	Date of Pronouncement : 31.05.2017
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ORDER

These appeals by the department are directed against the separate orders each dated 07.09.2016 of ld. CIT(A)-XXVI, New Delhi.

2. Since, the issues involved are common in all these appeals which were heard together so these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. At the first instance, we will take up the appeal in ITA No. 6438/Del/2016 for the assessment year 2010-11. Following grounds have been raised in this appeal:

“1. The CIT(A) has erred on facts and in law in deleting the penalty of Rs.355/- on account of undisclosed foreign income levied u/s 271(1)(c) of the Act.

2. The appeal is being filed inspite of low tax effect as the case is covered in exception (d) of Para 8 of CBDT Circular No.21/2015 dated 10.12.2015.

3. The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or the during course of the hearing of the appeal.”

4. From the above grounds, it is clear that the only grievance of the department relates to the deletion of penalty of Rs.355/- levied by the AO u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the Act).

5. Facts of the case in brief are that the assessee filed the return of income u/s 139(1) of the Act declaring an income of Rs.4,83,040/-. Subsequently, in response to the notice u/s 153A of the Act, the assessee revised its income at Rs.4,84,190/- by assigning the following reasons:

“that the return filed u/s 139(1) is Rs.483040/-, and u/s 153A is Rs.484190/-, the difference of Rs.1150/- is because of GBP 2.12 on account of interest and dividend from investment in foreign assets (e-trade) amounting to Rs.960/-. The total of foreign income has been rounded off to the higher side i.e. Rs.1150/- and the same has been disclosed in

the return of income filed u/s 153A. As the assessee has failed to furnish the correct particular of her income in her return filed u/s 139(1) of the Act.”

6. The AO considered the amount of Rs.1,150/- as an income in respect of which inaccurate particulars were furnished by the assessee. He, therefore, initiated the penalty proceedings u/s 271(1)(c) of the Act and levied the penalty of Rs.355/-. The reliance was placed on the following case laws:

- *K. P. Madhusudan Vs CIT 251 ITR 99 (SC)*
- *Tirupati Kumar Khemka & Another Vs CIT (2007) 291 ITR 122 (Mad.)*
- *CIT Vs Escorts Finance Ltd. (2010) 328 ITR 44 (Del.)*
- *CIT Vs Zoom Communications Ltd. (2010) 327 ITR 510 (Del.)*
- *CIT Vs Harparshad and Company Ltd. (2010) 328 ITR 53 (Del.)*
- *ACIT-CC-II(5) Vs Smt. J. Mythili (2014) 49 ITD 275 (Chennai)*

7. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted as under:

“1. Your honour, as stated herein above during the course of the search there was no incriminating material or document found pertaining to the assessment year under consideration showing that assessee has any income other than what has been computed as per the books of account. The assessee has declared a higher income of Rs. 4,84,190/- as against the income of Rs. 4,83,040/- declared under original return, the assessment was completed at this higher figure of Rs. 4,84,190/-. The difference in the returned income originally and return filed in response to notice

under section 153A was on account of additional income of Rs. 1,150/- offered as a matter of abundant caution.

2. The extra income of Rs. 1,150/- shown in the return was not on account of any concealment of income or inaccurate particulars of income in the earlier return. The said amount was offered voluntarily in the return of income. No such discrepancy/omission, etc. was found or noticed during the course of assessment as is evident from the assessment order.

3. Your honour will appreciate that a penalty can be levied only when there is any evidence to show that the assessee has earned any extra income which he has not declared in the original return or assessee has claimed an expenditure which was not allowable and claimed in the original return.

4. In the present case there is no such findings that there was any income over and above the income declared in original return of Rs. 1.150/- nor there is any finding that any expenditure claimed in the original return was not genuine. Thus in the original return filed by the assessee there was neither concealment of income nor furnishing of any inaccurate particulars of income.

5. Your honour will also appreciate that levy of penalty under Section 271(1)(c) of the Act is not automatic. Penalty proceedings are independent of the assessment proceedings.

6. Your honour will also appreciate that penalty under section 271(1)(c) is leviable in case of furnishing of inaccurate particulars of income or concealment of income. For levy of this penalty it is to be shown that assessee has concealed income or furnished inaccurate particulars of income. There has to be a finding with regard to the addition made in the assessment order. It is important to

note that provisions of the Income Tax does not provide that penalty shall be leviable under section 271(1)(c) on the difference of income as returned under section 153A or income as originally returned. There is no such deeming provision. The provisions applicable whether it is an assessment under section 153A or a normal assessment under section 143(3) or assessment of a revised return of income for levying penalty are exactly the same. At the cost of repetition we would like to quote the provisions of section 271(1)(c) reads as under:-

"271(1)(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or"

*7. The AO has also discussed a judgment of Chennai Bench of the ITAT in the case of **ACIT, Central Circle-2(5), vs Smt. J. Mithilil 149 ITD 275** to support its penalty order. In this regard it is submitted that it was found during the search that assessee has made investment in immovable properties. This investment the assessee has declared as 'other income' in the return filed under Section 153A. The penalty was levied on such amount. Your honour will appreciate there was identification of the income in this case. The assessee was caught having made the investment out of the undisclosed income. The assessee could not offer an explanation about such investment and that is why penalty was levied.*

8. In the present case there is no finding whatsoever against the assessee in respect of income of Rs.1,150/- offered voluntarily. No document was found during the course of search. There is no allegation of the AO of assessee having any undisclosed income or investment. The over cautiousness on the part of the assessee cannot be imputed and make a basis for levying penalty.

9. *As assessment and penalty proceedings deal with different aspects meaning thereby the assessment proceedings are to assess the income correctly whereas the penalty proceedings are there to deal with the issue of furnishing inaccurate particulars or concealment of income.*

10. *It is a fact that in present assessments, no addition whatsoever was made by the Ld. AO. It is also a fact that in the course of assessment proceedings, the AO did not lay his hands on any item of income, which the assessee had not declared in the return till the assessment, was framed. It is also a fact that the AO has accepted the return as it is.*

11. *As assessment and penalty proceedings deal with different aspects meaning thereby the assessment proceedings are to assess the income correctly whereas the penalty proceedings are there to deal with the issue of furnishing inaccurate particulars or concealment of income.*

12. *It is a fact that in present assessments, no addition whatsoever was made by the Ld. AO. It is also a fact that in the course of assessment proceedings, the AO did not lay his hands on any item of income, which the assessee had not declared in the return till the assessment, was framed. It is also a fact that the AO has accepted the return as it is.*

13. *Your honour, the scheme of section 271(1)(c) visualizes imposition of penalty when the assessee has concealed income or when the assessee has furnished inaccurate particulars of income. In addition to these two situations, penalty can also be imposed when the assessee is deemed to have concealed particulars of income under the Explanation 1 to section 271(1)(c). This Explanation provides that the assessee will be deemed to have concealed particulars of income where in respect of any facts, material to the*

computation of the total income of any person under this Act,

(i) the assessee fails to provide an explanation;

(ii) when the assessee provides an explanation which is found to be false; and

(iii) when the assessee provides an explanation which he fails to substantiate and he fails to prove that the explanation was bona fide and that all the facts necessary for the same and material for computation of income have been duly disclosed by the assessee.

14. The expression 'concealment of income' has not been defined in the Act but the natural meanings of the expression 'concealment' are 'to keep from being seen, found, observed, or discovered'. It would, therefore, follow that the expression 'concealment of income', in its natural sense and grammatical meaning, implies that an income is being hidden, camouflaged or covered up so that it cannot be seen, found, observed or discovered. That was certainly not the case.

15. The assessee filed her return of income declaring the amount of additional income. This income was accepted by the AO. By no stretch of logic, this situation could be treated as a situation in which any income was concealed by the assessee.

16. Concealment of an income by an assessee cannot be a passive situation. It implies that the person concealing the income is hiding, covering up or camouflaging an income - something which essentially requires a conscious effort. On the contrary, the assessee had acted in very transparent and

straight forward manner declaring additional income in her return of income, which was accepted by the AO as such. In such a situation, there could not be any concealment of income.

17. The expression 'furnishing of inaccurate particulars of income' has also not been defined in the Act. The expression 'inaccurate' refers to 'not in conformity with the fact or truth' and that is the meaning which is relevant in the context of furnishing of inaccurate particulars. The expression 'particulars'¹ refers to facts, details, specifics, or information about someone or something. Therefore, the plain meaning of the expression 'furnishing of inaccurate particulars of income' implies furnishing of details or information about income which is not in conformity with facts or truth. The details or information about income deal with factual details of income and this cannot be extended to areas which are subjective, such as status of taxability of an income, admissibility of a deduction and interpretation of law. The furnishing of inaccurate information, thus, relates to furnishing of/actually incorrect details and information about income, so that, that part of income could be covered up by the assessee. In the instant case, what had been treated as furnishing of inaccurate particulars was offering an income on ad hoc basis, i.e. an additional income offered. The A.O. had very apparently proceeded to treat the assessee's additional income so offered as furnishing of inaccurate particulars. What is a correct claim and what is an incorrect claim is a matter of perception, which in the instant case was accepted as such.

18. Expression, 'inaccurate' is something factually incorrect, but once it is accepted as such to be correct, it does not remain inaccurate. Therefore, the instant case could not be

said to be a case of furnishing of inaccurate particulars of income, in its normal sense.

19. There is one more eventuality in which penalty can be imposed and that is the situation in which deeming fiction of the Explanation 1 to section 271(1)(c) comes into play. This deeming fiction comes into play, where in respect of any facts material to the computation of the total income would show that it relates only to the factual aspects. In the instant case, the only controversy was regarding the amount offered and including the same to the returned income. This deeming fiction cannot be invoked in the instant case at all. The deeming fiction of the Explanation 1 to section 271(1)(c) can only be pressed into service in connection with facts material to the computation of income and not in connection with the computation of income per se, which in the instant cases are apparent from the fact that the A.O. did not touch the facts leading to the computation, but initiated penal provisions. In the instant cases, there was no dispute that all the relevant facts, material to the computation of total income were duly furnished by the assessee and no deficiencies in furnishing of such facts were pointed out by the A.O. There was, thus, no cause of action for deeming fiction being triggered by the conduct of the assessee.

20. We are supported by the decision of the coordinate Bench at Bangalore in the case of Muninapa Reddy vs ACIT, 2014 (2) TMI 82-ITAT BANGLORE, where it was held, "There can be no concealment or non-disclosure, as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax and, therefore, no penalty under section 271(1)(c) could be levied. The words 'in the course of any proceedings under this Act'¹ in section 271(1) are prefaced by the satisfaction of the Assessing Officer or the Commissioner [Appeals]. When

a survey is conducted by a survey team, the question of satisfaction of Assessing Officer or the Commissioner (Appeals) or the Commissioner does not arise. One has to keep in mind that it is the Assessing Officer 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 return filed by him. The assessee can furnish the particulars of income in his return and everything would depend upon the return filed by the assessee. This view gets supported by Explanations 4, 5 and 5A of section 271 (1). Obviously no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Section 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 non-disclosure, as the assessee had made a complete disclosure in the return and offered the surrendered amount for the purposes of tax". This is an identical case, where survey operations had taken place and the assessment was reopened u/s 148, the coordinate Bench deleted the penalty.

21. Same view has been held in the case of *Valavi Shelters vs ITO*, reported in [2013] 141 ITD 590, by the Bangalore Bench of the ITAT."

8. The Id. CIT(A) after considering the submissions of the assessee deleted the penalty by observing in para 7 of the impugned order as under:

“7. I have considered the facts of the case, the basis of penalty imposed by the AO and the arguments of the appellant during penalty proceedings as well as appellate proceedings. The difference in the return filed under section 139(1) and the return filed in response to notice issued under section 153A has been only of an amount of Rs.1150 which is in respect of:

- A. Bank interest from HSBC London equivalent of £ 2.12 equivalent to Rs.145(converted at 67.81) and*
- B. \$ 21.25 on account of interest and dividend from investment in foreign assets (E-trade) amounting to Rs.960 (converted at Rs.45.00)*

The assessee had disclosed an income of Rs.4,83,040 under section 139(1) and the omission to include the above said income in the said return has been attributed to an inadvertent error in remembering the small amount of income earned while being in UK/USA. The explanation of the assessee is acceptable as she had been out of India with her husband Shri Harveer Singh Kalra while he was studying in the UK and was non-resident during the said period. The explanation that the impugned income could not be considered because of the residential status being non-resident status in earlier years as well as the insignificant amount involved is acceptable. Therefore, the penalty imposed by the AO is directed to be deleted. In the result the appeal is allowed.”

9. Now the department is in appeal. The ld. DR strongly supported the penalty order passed by the AO and reiterated the observations made in the said order.

10. In his rival submissions the ld. Counsel for the assessee reiterated the submission made before the authorities below and further submitted that the AO had accepted the revised return filed by the assessee u/s 153A of the Act and merely by virtue of the fact that such return shows a higher income, penalty u/s 271(1)(c) of the Act could not be automatically imposed. The reliance was placed on the following case laws:

- *Pr. CIT Vs Sh. Neeraj Jindal and Others (2017) 393 ITR 1*
- *ACIT Vs Bikramjit Singh Kalra in ITA Nos. 6436 & 6437/Del/2016 order dated 28.04.2017*
- *Prem Arora Vs DCIT (2012) 149 TTJ 590 (ITAT Del.)*
- *Pawan Kumar Gupta Vs ACIT in ITA Nos. 4652 to 4655/Del/2011 order dated 25.07.2014*
- *ADIT Vs Nortel Networks Ltd. (2013) 144 ITD 639 (ITAT Del.)*

11. I have considered the submissions of both the parties and carefully gone through the material available on the record. It is noticed that an identical issue has been decided by the Honøble Jurisdictional High Court in the case of *Pr. CIT Vs Sh. Neeraj Jindal and Others (2017) 393 ITR 1 (supra)* wherein their lordships in para 21 has held as under:

“21. Thus, it is clear that when the AO has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under

Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A.

In fact, the second proviso to Section 153A(1) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this subsection pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate." What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not vis-a vis the original return under Section 139."

12. In the present case also the income returned by the assessee u/s 153A of the Act has been accepted by the AO and once the AO accepts the revised return filed u/s 153A of the Act, the original return u/s 139 of the Act abates and becomes non-est. Therefore, in view of the ratio laid down by the Honøble Jurisdictional High Court, the concealment has to be seen with reference to the return which has been filed by the assessee for the purpose of levying penalty u/s 271(1)(c) of the Act, what has to be seen is whether there is any concealment in the return filed by the

assessee u/s 153A and not vis-à-vis the original return filed u/s 139 of the Act. In the present case, the same income has been accepted which was returned by the assessee, therefore, the penalty u/s 271(1)(c) of the Act was not leviable. Accordingly, we do not see any merit in this appeal of the department.

13. In all other appeals, the facts are similar the only difference is in the amount of penalty levied by the AO u/s 271(1)(c) of the Act. Therefore, the findings given in the former part of this order in respect of ITA No. 6438/Del/2016 shall apply *mutatis mutandis* for the other appeals.

14. In the result, the appeals of the department are dismissed.
(Order Pronounced in the Court on 31/05/2017)

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 31/05/2017

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR