

ITA No.6549/Del/14
Assessment Year: 2007-08

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 6549/Del /2014
Assessment Year: 2007-08

Mr. Rohit Kochhar, Unit No.1120-1121, 11 th Floor, DLF Towers, Jasola Distt. Centre, New Delhi-110025 (PAN: AAFPT2953A)	vs	ACIT, Circle-37(1), New Delhi-110002
(Appellant)		(Respondent)

Appellant by : Shri B.S. Sistani, CA
Respondent by : None

Date of Hearing : 04.09.2017
Date of Pronouncement: 04.10.2017

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal filed by the assessee is directed against the order passed by the Ld. CIT(A)-XXVIII, New Delhi dated 10.09.2014 wherein penalty of Rs. 67,320/- imposed u/s 271(1)(c) has been confirmed. The grounds of appeal read as under:-

“1. The learned Commissioner of Income Tax (Appeal)-28 Delhi was not justified in upholding the penalty imposed u/s 271(l)(c) of the Income Tax Act.

2. The learned Commissioner of Income Tax (Appeal)-28 Delhi was not justified in upholding the penalty order in spite of the fact that the learned Assessing Officer did not record his satisfaction in the Assessment Order to the effect that the assessee had concealed the particulars of the income.

3. The Appellant craves leave to add, amend or delete any ground of appeal.

4. It is prayed that penalty of Rs.67,320 be deleted.”

2. An application was received on behalf of the Ld. Senior DR stating that the Ld. Senior DR was absent and adjournment was sought by the department on this ground. However, looking into the facts of the case, we reject the adjournment application and proceed to hear the case ex parte qua the department.

3. Brief facts of the case are that the return declaring a total income of Rs. 4,70,86,580/- was filed whereas the assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called the Act) at Rs. 5,62,60,570/- after making an addition of Rs. 62,90,000/- as income from undisclosed sources on account of unsecured loans not accepted by the Assessing Officer. There were certain other disallowances on account of expenses also. On appeal before the Ld. CIT(A), the Ld. CIT(A) deleted the addition of Rs. 62,90,000/- and only confirmed an

addition of Rs. 2 lakh under this head being loan received from Shri Sarabjeet Singh Jolly. Penalty u/s 271(1)(c) of the Act amounting to Rs. 6,73,290/- was imposed on this remaining amount of Rs. 2 lakh which was confirmed by the Ld. CIT(A).

4. The Ld. Authorised Representative submitted that the Assessing Officer had made an addition since the source of source of funds could not be proved by the assessee. It was submitted that the assessee had filed copy of the bank pass book and the affidavit of Shri Sarabjeet Singh Jolly and had also demonstrated the flow of funds from the account of Shri Jolly to the assessee's account. It was submitted that, thus, the identity was established but the source from which Shri Jolly had obtained the funds i.e. source of source could not be established. It was also submitted that Shri Jolly was also being given interest on the funds loaned by him. It was submitted that the assessee had received an amount of Rs. 10 lakh from Shri Jolly during the year and Rs. 8 lakh had been accepted by the Ld. CIT (A) and only Rs. 2 lakh had been confirmed and, therefore, there was all the more reason that the penalty imposed should be deleted.

5. We have heard the Ld. AR and have also carefully perused the relevant material placed on record. It is seen that the Ld. CIT

(A) has confirmed the addition of Rs. 2 lakh by stating as under:-

“An addition of Rs.2,00,000/- as loan received from Sarabjit Singh Jolly treated by the Assessing Officer as income from undisclosed sources does not appear explained. The Assessing Officer in the remand report has stated that the creditworthiness of Mr. Jolly is in doubt as during the relevant year he has filed a return showing an income of Rs. 1,55,916/- from which he has deducted rebate of Rs.1,00,000/- under Chapter-VI of the income -tax Act. Thus showing an income of Rs.55,916/- in net. During the year he has advanced loan of Rs. 10,00,000/- The has not filed his statement of affairs and balance sheet. In view of the findings of the Assessing Officer in the remand report, I sustain the addition of Rs.2,00,000/- made by the Assessing Officer. This ground of appeal is dismissed.”

6. Thus, it is undisputed that Shri Jolly had advanced an amount of Rs. 10 lakh to the assessee during the year and only Rs. 2 lakh have been confirmed by the Ld. CIT (A). It is also undisputed that Shri Jolly has accepted as having advanced an amount through an affidavit and the assessee has also furnished documents proving the identity of Shri Jolly and also the flow of funds from the bank account of Shri Jolly to the assessee's bank account. However, the creditworthiness could not be established to the satisfaction of the Assessing Officer. It is also noteworthy that the Ld. CIT (A) had accepted Rs. 8 lakh as having been received from Shri Jolly out of Rs. 10 lakh and confirmed only

Rs. 2 lakh as having not been received from Shri Jolly. The Hon'ble Supreme Court, in the case of Hindustan Steel Ltd. v. State of Orissa 83 ITR 26, had laid down the position of law by holding that the Assessing Officer is not bound to levy penalty automatically simply because the quantum addition has been sustained. Also in case of CIT v. Khoday Eswara (83 ITR 369) (SC), incidentally reported in same ITR Volume, it is held that penalty cannot be levied solely on basis of reasons given in original order of assessment. The Hon'ble Supreme Court has reiterated the law in case of Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519 by holding in Para 62 that finding in assessment proceedings cannot automatically be adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. The statute requires a satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the Department. While considering whether the assessee has been able to discharge his burden the Assessing Officer should not begin with the presumption that he is guilty. Since the burden of proof in penalty proceedings varies from that

in the assessment proceedings, a finding in the assessment proceedings that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceedings. In the penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. It is important to keep in mind the fundamental legal proposition that Assessment proceedings are not conclusive. Assessment proceedings and penalty proceedings are separate and distinct. Findings in Assessment proceedings don't operate as *res judicata* in penalty proceedings. For this proposition reliance is placed on the decision in CIT vs. Dharamchand L. Shah (1993) 204 ITR 462 (Bom). In Vijay Power Generators Ltd vs. ITO (2008)6 DTR 64 (Del) it was held that "*It is well settled that though they constitute good evidence do not constitute conclusive evidence in penalty proceedings.*" During penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to

ascertain whether the assessee concealed his income or furnished inaccurate particulars. Thus, under penalty proceedings assessee can discharge his burden by relying on the same material on the basis of which assessment is made by contending that all necessary disclosures were made and that on the basis of material disclosed there cannot be a case of concealment of income or furnishing inaccurate particulars of income. Further if there is any material or additional evidence which was not produced during assessment proceedings same can be produced in penalty proceedings as both assessment and penalty proceedings are distinct and separate. In CIT vs. M/s Sidhartha Enterprises (2009) 184 Taxman 460 (P & H)(HC) it was held that the judgment in Dharmendra Textile cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default.

7. Reverting to the facts of the present case, the penalty order is woefully silent on the issue as to how this satisfaction of concealment was arrived at. The quantum addition on which the

penalty has been imposed pertains to an addition of Rs. 2 lakhs only sustained by the Ld. CIT (A) out of a total addition of Rs. 10 lakhs. It is also noteworthy that this addition was sustained on the ground that the assessee had failed to prove the source of source but how this has resulted in concealment of income/furnishing of inaccurate particulars of income is not discernible from the penalty order. The Ld. CIT (A) has also not examined the issue in detail but has simply confirmed the penalty by relying on the findings of the AO and the confirmation of the addition by the Ld. CIT (A) in the quantum proceedings. Thus, there is no finding by the authorities below on the issue as to how the 'concealment' has come to be established so as to warrant imposition of penalty. Thus, it is apparent that the penalty has been imposed as an automatic outcome of the confirmation of the quantum addition. Considering the entirety of the circumstances, in our view the impugned disallowance does not invite the provisions of Section 271(1)(c) of the Act. We set aside the order of the Ld. CIT (A) and direct the AO to delete the entire penalty.

8. In the final result, the appeal of the assessee is allowed.

The order is pronounced in the open court on 4th October, 2017.

Sd/-

(G.D. AGRAWAL)
PRESIDENT

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 4th October, 2017
'GS'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order

ASSISTANT REGISTRAR