

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCHE, INDORE**

श्री चन्द्रमोहन गर्ग, न्यायिक सदस्य

तथा

श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI O.P.MEENA, ACCOUNTANT MEMBER**

**ITA No.226 to 230/Ind/2016
Assessment Year: 2005-06, 2007-08 to 2009-11**

Shri Arun Kumar Lila Bhopal	बनाम/ Vs.	ACIT, 1(2), Bhopal
(Appellant)		(Revenue)
P.A. No.AARPL5228N		

Appellant by	Shri M.D. Patwa, & Shri Asish Goyal (AR)
Revenue by	Shri Mohd. Javed Sr.DR
Date of Hearing:	11.07.2017
Date of Pronouncement:	10.08.2017

आदेश / O R D E R

PER CHANDRAMOHAN GARG, J.M:

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax(Appeals)-31, New Delhi, Camp. Bhopal (in short 'CIT'), dated 23.12.2015 passed in the first appeal No.464 to 468/13-14 of the Act, for the A.Y. 2005-06, 2007-08 to 2009-11.

2. The grounds of appeal raised by the assessee for the Assessment Year 2005-06, 2007-08 to 2009-11 are identical issues. The assessee had appealed against the order of Ld. CIT(A) in confirming the imposition of penalty u/s 271(1)(c) of Rs.25,000/-, Rs.1,20,000/-, Rs.3,10,000/- , Rs.3,10,000/- and Rs.5,00,000/- for A.Y. 2005-06, 2007-08 to 2009-11 respectively without accepting the explanation offered and also not taking into consideration the fact that the assessee had returned income as shown in the return filed u/s 153A is accepted and no addition was made in the assessment. Further, the income surrendered in the statement taken u/s 132 (4) during the course of search was made with the understanding that the surrendered income during the course of search would not attract penalty u/s 271(1)(c) for concealment of income or furnishing inaccurate particulars of income will be initiated.

3. For the sake of brevity and completeness we are taking up the case of ITA No.226/IND/2016 for Assessment Year 2005-06. As we have already stated that the grounds raised by the assessee in all 5 appeals are similar and identical except amount of penalty. The grounds raised for Assessment Year 2005-06 reads as under;

“That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred in confirming the imposition of penalty u/s 271(1)(c) of rs.25,000/- without accepting the explanation offered by the assessee and without appreciating the fact that the returned income as shown in the return filed u/s 153A is accepted and no addition was made in the assessment. Further, the income surrendered in the statement taken u/s 132(4) during the course of search was made with the only

understanding that if the income is surrendered during the course of search, no penalty u/s 271(1)(c) for concealment of income or furnishing inaccurate particulars of income will be initiated”.

4. We have heard both the parties and also perused the relevant material placed on the record of the Tribunal. The Ld. Counsel of the assessee first of all submitted that in the penalty order at para-4 it has been mentioned that penalty proceedings u/s 271(1)(c) of the I.T Act 1961 was initiated for “furnishing inaccurate particulars of income” whereas in para 6 at page 2 the AO mentioned that “in view of Act, the treatment accorded by the AO in the assessment order u/s 143(3) of the Act he satisfied that the assessee has concealed particulars of his income and there is a case against the assessee for imposing penalty u/s 271(1)(c) of the Act”. The Ld. Counsel further pointed out that in the 2nd part of page-6 the Assessing Officer mentioned that considering the totality of the case and circumstances of the case penalty is hereby levied for “concealment of income”.

5. After drawing our attention towards above noted facts the Ld.DR vehemently pointed out that the proceedings were initiated for the charge of “furnishing of inaccurate particulars of income” whereas the penalty has been levied for the charge of “concealment of income”, therefore the charge for which penalty was initiated and charge for which penalty has been levied is quite distinct and the same has been changed, therefore, in view of ratio of the decision of ITAT. Indore in the case of ACIT V/s MP Tourism Development Corporation reported as 26 ITJ 225 (ITAT, Indore) the penalty is not valued and sustainable.

6. In the second limb of argument the Ld.Counsel submitted that the concealment of income for imposing penalty has to be seen from the return of income and in the present case return filed by the assessee u/s 153A of the Act has been treated accepted and return u/s 139 of the Act were not additional income offered, tax was paid and the A.O accepted the returned income and in the final order without making any addition, therefore the penalty could not be levied on the assessee. For this proposition the Ld. Counsel placed reliance on the ITAT, Pune in the case of Smt. Pramila D. Ashtekar Vs.ITO (2013) 39 taxmann.com 103 (Pune-Trib.).

7. Lastly, the Ld. Counsel submitted that a search was conducted after 31.05.2007 the provision of section 271(1)(c) of the Act read with explanation 5A shall be applicable which requires that search has to be conducted on order after 1.6.2007; assessee is found to be owner of inter alia, any income were shown in the books/documents/transactions; the assessee claims that such entry in books represents his income and due date for filing return for such year has elapsed and return not filed or return is filed but such income is not offered to tax. The Ld. Counsel further submitted that in such a case even if income is declared by him in return on or after, he shall deemed to have concealed the particulars of his income for furnished in accurate particulars of the income.

8. The Ld. Counsel submitted that in the present case, insurance policies were not found in the name of family members and these persons are separate as they are filing their return of income. The

Ld. Counsel further stated that only in one-two years insurance policies in the name of assessee or in the name of minor children of the assessee were found. The Ld. Counsel strenuously contended that almost all insurance policies found in the name of brothers shall be presumed to be pertains to them and during search the assessee cooperated by the revenue authorities, surrendered income to buy peace of mind inspite of the fact that the real owners and beneficiaries of the policies are other family members in whose names the amount was invested. The Ld. Counsel submitted that the assessee surrendered amount on behalf of family members which was offered in the return and tax paid thereon and the assessee was not owner in the record and books, therefore, penalty cannot be levied against the assessee by taking support of explanation at 5A of the Act.

9. Replying to the above the Ld.DR strongly supported to Assessing Officer and submitted that the assessee himself during the search operation surrendered the amount on which the penalty have been levied and this amount not brought to the notice of the department earlier therefore, the penalty has been levied rightly which is sustainable.

10. On being asked by the bench the Ld.DR fairly accepted that the insurance policies found during the search operation were in the name of family members of the assessee which included his brothers, their wives and their children and the assessee could not to be considered as beneficiary owner of such policies which are

being taken as basis of any entry in books/documents of the transactions.

11. On carefully consideration of rival submissions we observe that the Ld.DR could not be contradict the fact that the penalty proceedings have been initiated on the basis of surrender pertaining to insurance policies of family members on the charge of “furnishing of inaccurate particulars” and in the first part of penalty order para 6 the A.O observed that he is satisfied that the assessee has “concealed particulars of his income” and there a case against the assessee for imposing penalty u/s 271(1)(c) of the Act and finally in the second part of penalty order the assessee observed that “accepting the totality of facts and circumstances of the case, penalty u/s 271(1)(c) amounting to Rs.25,000/-, is hereby levied for Assessment Year 2005-06 for concealment of income”.

12. In this situation, we are inclined to hold that the A.O initiated penalty pertains of allegation of furnishing of particulars by the assessee and whereas in the last para of penalty order it is vivid that the penalty has been levied with a distinct allegation i.e. concealment of income. In this situation the proposition laid by ITAT, Indore in the case of ACTI V/s MP Tourism Development Corporation (supra) comes fit play in favour of the assessee wherein after considering the ratio of relevant decision on the issue is as under;

“2. In all these appeals, either the A.O. has imposed the penalty for furnishing inaccurate particulars while the A.O. has M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 13 imposed the penalty for concealment of income or the A.O. has initiated penalty for concealment of income while the A.O. has levied the penalty for furnishing inaccurate

particulars. Therefore, as per the decisions of Hon'ble Supreme Court and various High Courts, the A.O. must come to the conclusion that the A.O. has to satisfy whether penalty has been imposed for concealment of particulars of income or furnishing inaccurate particulars of income. Thus, satisfaction of the A.O. about concealment of particulars of income or furnishing inaccurate particulars of income is essential before levying any penalty u/s 271(1)© of the I.T. Act, 1961. Ld. DR submitted that with insertion sub-section (1B) in section 271 w.e.f. 1.4.1989, the direction of initiation of penalty proceedings in the order of A.O. shall be deemed to satisfaction. 3. We have heard rival contentions of both parties. We have gone through the provisions of Sec. 271(1)(c). We noted that penalty u/s 271(1)(c) is leviable if AO is satisfied in the course of any proceedings under the Income Tax Act that any person M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 14 has concealed particulars of his income or furnished inaccurate particulars of income. From the assessment order we noted that there is no indication which speaks of AO being satisfied during the course of the assessment that the Assessee has committed default as stipulated u/s 271(1)(c). No doubt, legislature has inserted sub-section (1B) in Sec. 271 by Finance Act, 2008 w.r.e.f. 1.4.1989 provided that direction for initiation of penalty proceedings in the order of assessment shall be deemed to constitute such satisfaction. In the assessment we find that there is no such direction. Direction is given only to the staff to issue 'AO, DN & Challan & Pen. Notice u/s 271(1)(c)'. This, in our opinion, does not tantamount to a direction for initiation of penalty proceedings u/s 271(1)(c) as the AO has not uttered anything in the assessment order in this regard. The action of the AO, in our opinion, is totally illegal and does not meet the requirement of Sec. 271(1)(c) even after the amendment made by the Finance Act, 2008. In the case of Ms. Madhushree Gupta British Airways Plc vs. Union M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 15 of India, 317 ITR 107 (Del), the scope of amendment was explained by the Hon'ble Delhi High Court as under : " In our opinion, the impugned provision only provides that an order initiating penalty cannot be declared bad in law because it states the penalty proceedings are initiated, if otherwise it is discernible from record that the AO has arrived at prima facie satisfaction for initiation of penalty proceedings. The issue is of discernibility of the "satisfaction" arrived at by the AO during the course of proceeding before him.' "The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e. post amendment." "If there is no material to initiate penalty proceedings; an assessee will be entitled to recourse to a court of law." 4. This is the settled law that the penalty proceedings and assessment proceedings are different. The penalty proceedings can be initiated on two charges i.e. i) concealment of particulars of income and ii) furnishing of inaccurate particulars of income. Both the charges are entirely different. If the proceedings are initiated on charge of concealment, then M.P. State

Tourism and others (ITA No.2/Ind/2015 and others) 16 penalty cannot be levied on the charge of furnishing of inaccurate particulars of income and vice versa. Thus, there must be a clear finding about the charge for which penalty is imposed or initiated. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such findings, the order would be bad in law. The case of New Sorathia Engineering Co. Ltd., 282 ITR 642, Hon'ble Gujarat High Court has held as under: - "It is incumbent upon the assessing officer to state whether the penalty was being levied for concealment of particulars of income by the assessee or whether any inaccurate particulars of income had been furnished by the assessee. Held, that the penalty order and the order of the Commissioner (Appeals) showed that no clear cut finding had been reached. The Tribunal had failed to appreciate this legal issue. The ration in CIT V. Manu Engineering Works 132 ITR 306 (Guj) was applicable and the order of penalty could not be upheld by the Tribunal. The order was invalid." In the case of Commissioner of Income Tax V. Rajan and Co., 291 ITR 340 (Del), wherein it is held that the provision of M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 17 section 271 (1) (c) of the Income Tax 1961 would require proper application of mind and recording of at least a bare minimum opinion on the part of AO that a case for initiation of penalty proceeding was made as there was concealment of income or that incorrect particulars had been furnished by the assessee with the intention to avoid payment of taxes. This view is supported by various decisions of High Court therefore it is not necessary to discuss the other judgment on the issue. 5. AO has not made out any specific charge either of concealment of particulars of income or furnishing of inaccurate particulars of income. The penalty u/s 271(1) (c) can be levied for either of the charge. The penalty order simply states that penalty is attracted on this addition as it is mandatory and automatic. It does not state for what default penalty is levied Sec. 271(1) (c) (iii) is expressly clear that the penalty can be levied for concealment of particulars of income or furnishing of inaccurate particulars of income. It is the particulars of income which is the common subject matter of M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 18 both the charges. The word 'conceal' as per Webster's Dictionary means "to hide, withdraw, or remove from observation; cover or keep from sight; to keep secret; to avoid disclosing or divulging. That means non disclosure of particulars of income. On the other hand, where particulars are disclosed but such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income. For example, in case of businessman, if a particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while sale is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of income. 6. It is pertinent to note that thrust of the legislature is upon the particulars of income which are either concealed or furnished inaccurately by the assessee. Therefore,

one must understand the meaning of the words “particulars of income”. The Income Tax Tribunal had to consider the meaning of the expression “furnishing of inaccurate particulars of income” M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 19 appearing in section 271(1) (c) in the case of Kanbay Software India (P) Ltd, 122 TTJ 721 (Pune). It was held that the expression „particular” refers to facts, details, specifics or the information about someone or something. Thus, the details or information about the income would deal with factual details of income and cannot be extended to areas which are subjective such as status of the taxability of an income admissibility of a deduction and interpretation of law. Accordingly, it was held that mere rejection of a legal claim would not amount to furnishing of inaccurate particulars of income. This view is fortified by the Supreme Court Judgment in the case of Reliance Petroproducts, 322 ITR 158 SC. In this case, the claim of ‘Assessee’ u/s 36(1) (iii) was rejected by the AO and the order of AO was upheld by the tribunal. As a result thereof, the penalty u/s 271(1) (c) was imposed on account of furnishing of inaccurate particulars of income. The penalty was held to be illegally imposed by the tribunal since factual details of income furnished by the ‘Assessee’ were found to be correct. The M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 20 matter ultimately reached the SC and the Hon’ble court upheld the view of the Tribunal by holding that “mere making of the claim, which is not sustainable in law, by itself, will not amounting to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee.” 7. Explanation 1 to section 271(1) (c) cannot be applied where charge against the ‘Assessee’ is furnishing of inaccurate particulars of income since it provides a deeming fiction qua concealment of particulars of income only and consequently cannot be extended to a case where charge against the ‘Assessee’ is furnishing of inaccurate particulars of income. 8. On the other hand, where charge against the ‘Assessee’ is furnishing inaccurate particulars of income, the AO has to establish either that ‘Assessee’ has not disclosed the particulars of income under the main provisions or the case of ‘Assessee’ falls within the scope of the deeming fictions created under the Explanations. For example, the ‘Assessee’ might not M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 21 disclose particular sales or dividend income or income from any source. Such instances would fall under the main provisions itself. In such cases, the burden is on the AO to establish the existence of the charge on the basis of material on record. 9. Explanation 1 to section 271(1) (c) states that the amount added or disallowed in computing the total income of the assessee shall be deemed to be the income in respect of which particulars have been concealed. This deeming provision is not absolute one but is rebuttable one. It only shifts the onus on the assessee. Explanation 1 refers to the two situations in which presumption of the concealment of the particulars of income is deemed. It is not applicable where the charge against the assessee is furnishing inaccurate particulars of the income. The first

situation is where the assessee in respect of any fact material to the computation of his total income fails to offer an explanation or offers an explanation, which is found by the AO or the Commissioner to be false. The second situation is where M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 22 the assessee in respect of any facts material to the computation of his total income offers an explanation, which, the assessee is not able to substantiate and also fails to prove that such explanation was bona fide one and that all the facts relating to the computation of total income have been disclosed by him. The presumption available under explanation to section 271(1) (c), cannot be drawn unless the case of the assessee falls under either of the clauses (a) or (b). 10. In the present cases, the AO has not brought out any specific charge for which the penalty has been imposed on the assessee u/s 271(1) (c) of the Act. He has not brought out whether the assessee has concealed the particulars of income or whether the assessee has furnished inaccurate particulars of income. 11. In some of cases, the AO has not initiated the proceedings for any particular charge. The penalty was initiated vide notice as noted above. M.P. State Tourism and others (ITA No.2/Ind/2015 and others) 23 12. The AO in some cases initiated the penalty without any mention of any particular default and levied the same again without mentioning any specific charge. In CIT v. Atul Mohan Bindal (2009) 9 SCC 589, where Hon'ble Supreme Court was considering the same provision, it observed that the assessing officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. Thus the satisfaction of the AO about the concealment of particulars of income or furnishing of inaccurate particulars of such income is essential before levying any penalty u/s 271(1)(c). The AO as is apparent from the penalty order has not satisfied about the concealment of particulars of income or furnishing of inaccurate particulars of income on the part of the assessee. On this basis itself the penalty stand deleted.”

13. In view of above when we logically consider the facts and circumstances of the case, then we find that the penalty has been initiated on the different allegation and penalty has been imposed of on a entirely distinct charge which was not taken at the time of initiation of penalty. In this situation, in our considered view there must be clear befitting observations of the AO about the charge for which penalty proceedings is initiated and the charge on which penalty has been imposed. The assessee should be allowed to refute

the allegations during the penalty proceedings and on the stand taken by AO while initiating penalty proceedings. Where the charge for initiation of the penalty proceedings is distinct one and the assessee is fighting against the charge with their explanation against that charge which was backed up by AO for initiation of the penalty and it is not for A.O to impose penalty by taking up, entirely a distinct charge which was not confronted or show caused to the assessee. The A.O can not be allowed to allege one charge at the time of initiation of penalty and to allege distinct and another charge while imposing the penalty because it would result into imposing penalty on the allegation which was not show caused to the assessee, which would definitely violate the principles of natural justice as has been done by the A.O in the present case. Therefore first limb of submissions of the assessee is accepted and we hold that the penalty imposed by the AO by taking charge of furnishing of inaccurate particulars of income for initiation of penalty proceedings could not be value based and imposing penalty u/s 271(1)(c) of the Act on the charge of concealment of income is not sustainable and hence, the penalty imposed by CIT is **dismissed and deleted.**

14. Since in the earlier part of the order we have found that the penalty proceedings initiated against one allegation and penalty has been imposed of entirely different another addition allegation thus the penalty imposed by the AO is not valid and sustainable as the same is against the principles of natural justice. We, therefore, by following the proposition laid by ITAT, Indore Bench in the case of

MP Tourism Development Corporation (supra) held that penalty is not sustainable. Hence, other arguments of appellant on merits become academic and infructuous and cannot adjudicating upon them as having because infructuous.

15. Further, since both the parties are agreed to be fact that in the very beginning of the hearing and facts and circumstances of the 5 case are identical and similar, therefore our conclusion drawn in ITA 226/2016 for Assessment Year 2005-06 would apply *mutatis mutandis* to ITA No.227 to 230/IND/2016 for Assessment Year 2007-08 to 2010-11 and consequently, the penalty imposed in these four cases are also stand **deleted**. Accordingly, the appeals of the assessee are **allowed**.

Order was pronounced in the open court on 10.08.2017.

Sd/-
(O.P. MEENA)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-
(CHANDRA MOHAN GARG)
न्यायिक सदस्य / JUDICIAL MEMBER

Indore; दिनांक Dated : 10/08/2017

Dev/