

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.1674 to 1678/PUN/2015
निर्धारण वर्ष / Assessment Years : 2005-06 to 2008-09 & 2010-11

Mr. Anant Mate,
Flat No.204, Damodar Residency,
Near Pinnac Memories, Kothrud,
Pune – 411038

.... अपीलार्थी/Appellant

PAN: AFBPM1869F

Vs.

The Dy. Commissioner of Income Tax,
Central Circle 2(2), Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Ketan H. Shah
Revenue by : Shri Ajay Modi, JCIT

सुनवाई की तारीख / Date of Hearing : 26.02.2018	घोषणा की तारीख / Date of Pronouncement: 28.02.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of five appeals filed by the assessee are against consolidated order of CIT(A)-12, Pune, dated 09.10.2015 relating to assessment years 2005-06 to 2008-09 and 2010-11 against levy of penalty under section 271(1)(c) of the Income Tax Act 1961 (in short the 'Act').

2. This bunch of appeals relating to the same assessee on similar issues were heard together and are being disposed of by this consolidated order for the sake of convenience. The issue raised in all the appeals is against levy of penalty under section 271(1)(c) of the Act. However, reference is being made to the facts in ITA No.1674/PUN/2015, relating to assessment year 2005-06 to adjudicate the issues.

3. The assessee in ITA No.1674/PUN/2015, relating to assessment year 2005-06 has raised the following grounds of appeal:-

1. *On the facts and circumstances of the case and in law, the CIT (A) has erred in upholding the levy of penalty u/s 271(1)(c) when there is no finding either in the Assessment Order or in the Penalty Order that the appellant has concealed any income or furnished inaccurate particulars of income and when the Assessing Officer has failed to record his satisfaction for initiating the penal proceedings.*
2. *On the facts and circumstances of the case and in law, the CIT (A) has erred in not considering critical admitted facts*
 - a) *That the returned income filed u/s 153A was accepted and that no addition to income or disallowance of any claim was made.*
 - b) *That there was no detection of any income during the search proceeding or during post search inquiry or during assessment proceeding.*
 - c) *That there was no admission of additional income during the search or after the search.*
 - d) *That there was no seizure of valuables or books of accounts or documents.*
 - e) *That the appellant voluntarily offered higher income in returns filed u/s 153A, in order to correct, the inadvertent omissions in the original return filed before search.*
 - f) *That in the absence of any seizure or any evidence found in the course of search the assessing officer could not have even made any addition to income in assessment / reassessment proceeding u/s 153A.*
3. *On the facts and circumstances of the case and in law, the CIT (A) erred in considering the original return filed before search for levy of penalty*

when the penalty proceeding was initiated against the return of income filed u/s 153A and when as per the provision the proceedings u/s 133A are independent proceedings and returns filed before search are either abated or non-est.

4. *On the facts and circumstances of the case and in law, the CIT (A) erred in holding that inadvertent mistakes can only be considered in the return filed u/s 139(5) and not in the return filed u/s 153A and ignoring the specific mention in sec. 153A that return filed under this section will be deemed as return filed u/s 139 of the Act.*
5. *On the facts and circumstances of the case and in law, the CIT (A) erred in holding that explanation 5A to sec. 271(1)(c) will apply to the case when there was no seizure of any asset or document and that the appellant was not found to be owner of any asset or income in course of search which are the requirements of explanation 5A.*

4. Briefly, in the facts of the case, the assessee had filed return of income declaring total income of ₹ 1,08,900/- on 20.11.2006. Search action under section 132 of the Act was conducted in the case of Dr. Uday Salunke, Director, Prin. L.N. Welingkar Institute of Management Development & Research (LNWIM), Matunga, Mumbai and other connected assessee on 20.11.2010. Since the warrant of authorization was also issued in the case of assessee, notice under section 153A of the Act was issued. In response thereto, the assessee filed return of income on 21.09.2012 declaring total income at ₹ 4,65,638/-. Thereafter, case of assessee was picked up for scrutiny and various information and details were called for. The Assessing Officer noted that the assessee had earlier on 30.03.2010 submitted return of income declaring income of ₹ 4,63,707/- which was submitted in response to notice under section 153A of the Act. The said notice was issued consequent to previous search action in the case on 21.07.2008. Further proceedings were initiated in view of subsequent search action on 20.11.2010. The Assessing Officer noted that in the original return of income, the assessee had only declared income from salary. However, in the return of income submitted on 21.09.2012, the assessee had shown

income from salary, capital gains and other sources. Since the additional income was offered for taxation only after search action in the case of assessee, penalty proceedings were initiated for concealing income and furnishing inaccurate particulars of income. The Assessing Officer thereafter, vide order passed under section 271(1)(c) of the Act levied penalty on account of concealment of income or furnishing of inaccurate particulars of such income on the part of assessee. It may be pointed out that penalty was levied only on additional income disclosed in the return of income.

5. The CIT(A) has upheld the levy of penalty under section 271(1)(c) of the Act, against which the assessee is in appeal.

6. The learned Authorized Representative for the assessee has filed detailed submissions on the ground that no penalty under section 271(1)(c) of the Act is to be levied. The explanation of assessee in this regard is as under:-

“The learned CIT (Appeals) erred on relying upon Explanation 5A to section 271(1)(c) of the Act for upholding the penalty order, when it is apparent from the records that the said Explanation did not apply in the appellant’s case. The primary condition for application of Explanation 5A is not fulfilled as during the course of search, the appellant was not found to be the owner of any asset, money, bullion, jewellery or other valuable article or thing, or any income based on any entry in any books of account or other documents. In fact, there was no seizure, whatsoever in the case of the appellant or any books of account, documents belonging to the appellant were seen. There is no admission of any additional income by the appellant either in the course of search or during assessment proceedings. No questions were asked to appellant regarding his personal affairs or his personal income either during the course of search or in the course of assessment proceedings. In this situation the relying upon Explanation 5A by the learned CIT (Appeals) is erroneous and not supported by the provisions of law. The plain reading of the provision makes the observation of the learned CIT(Appeals) as incorrect.....”

7. The learned Authorized Representative for the assessee thereafter, has explained the provisions of the Act and has relied on the ratio laid down by the

Hon'ble High Court of Delhi in Pr.CIT Vs. Neeraj Jindal reported in 393 ITR 1 (Delhi) and also placed reliance on the decisions of Hon'ble Supreme Court in T Ashok Pai Vs. CIT (2007) 292 ITR 11 (SC), CIT Vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC) and Price Waterhouse Coopers Pvt. Ltd. Vs. CIT & Anr. (2012) 348 ITR 306 (SC). The written submissions filed by the assessee are placed in Paper Book.

8. The learned Departmental Representative for the Revenue on the other hand, pointed out that the issue raised by assessee in written submissions is covered against the assessee by the judgment of Hon'ble Supreme Court in Prasanna Dugar Vs. CIT (2016) 70 taxmann.com 175 (SC), which has upheld the decision of the Hon'ble High Court of Calcutta in CIT Vs. Prasanna Dugar (2015) 371 ITR 19 (Cal.).

9. The second issue which was raised before us was the jurisdictional issue by way of ground of appeal No.1, for which the assessee has not filed any written submissions, is, that the Assessing Officer had failed to record satisfaction on one of the limbs of section 271(1)(c) of the Act while initiating penalty for concealment. Further, there is no finding in the penalty order as to which limb the assessee has failed to comply with.

10. We have heard the rival contentions and perused the record. The issue raised in the bunch of appeals is against levy of penalty under section 271(1)(c) of the Act for concealment. In the facts of the case, search under section 132 of the Act was conducted on 20.11.2010 in group cases and the assessee being

part of the said group, was issued notice under section 153A of the Act. The assessee in response to notice issued under section 153A of the Act offered additional income which was accepted and assessed as such by the Assessing Officer. The relevant details of income as per original return and income offered in response to notice issued under section 153A of the Act and income assessed in the hands of assessee for the respective years is as under:-

Assessment Year	Income as per original return	Income as per 1 st return u/s 153A	Income as per 2 nd return u/s 153A	Income as assessed
2005-06	1,08,900/-	4,63,707/-	4,65,638/-	4,65,640/-
2006-07	1,48,500/-	5,21,950/-	5,21,950/-	5,21,950/-
2007-08	1,27,370/-	16,88,741/-	16,88,741/-	16,88,740/-
2008-09	1,44,400/-	1,79,820/-	1,60,687/-	1,82,690/-
2010-11	1,55,400/-	N.A.	2,67,600/-	2,67,600/-

11. It may be pointed out herein itself that the first return in response to notice under section 153A of the Act was filed in response to search against the assessee conducted on one of the premises of trust on 21.07.2008. However, again search was carried out on the premises of trust on 20.11.2010 and second return was filed in response to notice issued under section 153A of the Act. The additional income so offered by the assessee is accepted as such. However, the Assessing Officer held the assessee to have defaulted within meaning of section 271(1)(c) of the Act and had levied penalty for concealment for the respective years. In this regard, case of assessee is that he was not found to be the owner of any asset, money, bullion, jewellery or other valuable article or thing, or any income based on any entry in any books of account or other documents. Further, there was no seizure, whatsoever in the case of the assessee or any books of account or incriminating documents or any other notings of any documents and additional income was offered on his own motion. Then, in such

circumstances, even if the additional income is added in the hands of assessee, the assessee is not liable for penalty under section 271(1)(c) of the Act. In this regard, reliance was placed on various decisions as referred above. However, the issue now stands settled by the Hon'ble Supreme Court in Prasanna Dugar Vs. CIT (supra). The Hon'ble High Court of Calcutta while deciding the case of levy of penalty under section 271(1)(c) of the Act on identical situation as before us, has upheld the said levy of penalty. In the facts before the Hon'ble High Court of Calcutta, search under section 132 of the Act was conducted at the premises of assessee on 03.02.2009. During the course of search, the assessee made voluntary disclosure under section 132(4) of the Act disclosing sum of ₹ 6 crores even though no incriminating documents suggesting any such undisclosed income were found. No concealed income was established from any of the papers or documents found during the course of search. The entire disclosure was made voluntarily and in good faith. On the basis of said disclosure, the assessee filed the return of income offering sum of ₹ 70,000/- for taxation during assessment year 2008-09. The assessee had not declared the said additional income in earlier return of income and the Assessing Officer imposed penalty under section 271(1)(c) of the Act, which was confirmed by CIT(A). The Tribunal cancelled the same. The Hon'ble High Court on the other hand, held that clause (b) of Explanation 5A to section 271(1)(c) of the Act was not applicable to the case of assessee for the reason that it was not case of assessee that he had not filed the return of income for the assessment year 2008-09. The Hon'ble High Court further held that *clause (b) was not applicable to those cases where the assessee had filed the return but did not disclose the income as the present assessee. His case was covered by clause (a). The assessee was not entitled*

to get the benefit of immunity under clause (b). The Hon'ble High Court further held that where voluntary disclosure was made by the assessee and where the statement was not extorted from him, then meaning of expression 'voluntary' was elaborated to hold the said expression 'voluntary' was in the context that the statement made by him was not extorted from him by applying force. The Tribunal having laid stress on the expression 'voluntary' and deleting the penalty did not find favour with the Hon'ble High Court and the finding of Tribunal was reversed and it was held that the expression 'voluntary' is in the sense of voluntary disclosure made by the assessee that he had not given any statement under pressure and he did not want to rectify or modify the statement made by him. The Hon'ble High Court upheld the levy of penalty for concealment.

12. The Hon'ble Supreme Court in Prasanna Dugar Vs. CIT (supra) after hearing the parties upheld the order of the Hon'ble High Court holding that there was no legal and valid ground for interference and the Special Leave Petition was dismissed. In view thereof, reliance of assessee on the provisions of the Act and its interpretation and the ratio laid down by the Hon'ble High Court of Delhi in Pr.CIT Vs. Neeraj Jindal (supra), wherein the revised return of income filed in response to notice under section 153A of the Act was accepted, then the Hon'ble High Court held that where for the purpose of levying penalty under section 271(1)(c) of the Act, the return that had to be looked into is the one filed under section 153A of the Act and also where once the Assessing Officer accepts the revised return filed under section 153A of the Act, the original return under section 139 of the Act abates and become *non-est*. The Hon'ble High Court held that it is trite to say that concealment had to be seen with reference to the return

that is filed by the assessee i.e. the one under section 153A of the Act and deleted penalty levied under section 271(1)(c) of the Act. However, in view of the ratio laid down by the Hon'ble Supreme Court in Prasanna Dugar Vs. CIT (supra), we hold that the issue stands covered against the assessee on this ground.

13. Now, coming to the jurisdictional issue which is raised by way of ground of appeal No.1. Though the assessee has raised the issue but no written submissions have been filed. However, propriety demands that the issue be decided in accordance with law. The perusal of assessment order reflects that while recording satisfaction for initiating penalty proceedings under section 271(1)(c) of the Act, the Assessing Officer has observed that it is the case of concealing income and furnishing of inaccurate particulars of income. In other words, the Assessing Officer while recording satisfaction for initiating penalty proceedings has failed to come to a finding as to which limb of section 271(1)(c) of the Act has not been fulfilled by the assessee.

14. The Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery in Income Tax Appeal No.1154 of 2014 with other Income Tax Appeals Nos.953 of 2014, 1097 of 2014 and 1226 of 2014, judgment dated 05.01.2017 has held that where initiation of penalty is on one limb and the levy of penalty is on other limb, then in the absence of proper show cause notice to the assessee, there is no merit in levy of penalty. We find that the said satisfaction suffers from *lacuna*. Further, we also find that while levying penalty under section 271(1)(c) of the Act, the Assessing Officer has failed to come to a finding as to which limb of section

has not been fulfilled by the assessee. The Assessing Officer holds that there is thus, concealment of income or furnishing of inaccurate particulars of such income on the part of assessee and levies penalty under section 271(1)(c) of the Act.

15. We find that this issue is squarely covered in favour of assessee by series of decisions of Pune Bench of Tribunal. We make reference to the decision of Pune Bench of Tribunal in M/s. M. Waseeq Cafeteria Vs. ITO in ITA No.08/PUN/2014, relating to assessment year 2005-06, order dated 15.12.2017, wherein the Tribunal has held as under:-

“10. We have heard the rival contentions and perused the record. The first jurisdictional issue raised by the assessee is against recording of satisfaction by the Assessing Officer and consequently levy of penalty under section 271(1)(c) of the Act. The requirement of the Act is that the Assessing Officer while finalizing the assessment has to record satisfaction as to which limb of section 271(1)(c) of the Act has not been fulfilled by the assessee and accordingly, issue show cause notice to the assessee. Penalty under section 271(1)(c) of the Act is leviable where the assessee has concealed its income or furnished inaccurate particulars of income. The two limbs of section 271(1)(c) of the Act are independent and penalty proceedings have to be completed accordingly.

11. In the facts of the present case, consequent to Survey action conducted on the premises of assessee, the assessee filed return of income declaring total income of Rs.1,24,20,250/-. The said returned income was accepted as such by the Assessing Officer. However, addition of Rs.32,09,950/- was made on protective basis in the hands of assessee. The Assessing Officer has dealt with the protective addition in first part of para 4 and no satisfaction has been recorded for initiating penalty proceedings against the same. However, in respect of returned income filed by the assessee declaring total income of Rs.1,24,20,250/-, the Assessing Officer observed that the said transaction in respect of property was required to be disclosed by the assessee in the year under consideration but the assessee failed to do the same and even did not pay any advance tax. Hence, penalty proceedings under section 271(1)(c) of the Act were initiated for concealing particulars of income of Rs.1,24,20,250/-. Thereafter, directions were given to issue notice under section 271(1)(c) of the Act. The CIT(A) in the quantum appeal deleted addition of Rs.32,09,950/- and the returned income of Rs.1.24 crores was assessed in the hands of assessee. The Assessing Officer while levying penalty under section 271(1)(c) of the Act for concealment was satisfied that the assessee has concealed income and furnished inaccurate particulars of income within meaning of said section. Consequently, penalty of Rs.11,74,601/- was levied on concealed income. The Assessing Officer while computing penalty under section 271(1)(c) of the Act considered the tax on total income of Rs.1.24 crores and tax on income

excluding concealed income of Rs.32,09,950/- and observed that on the tax sought to be evaded, penalty under section 271(1)(c) of the Act is leviable at Rs.11,74,601/-.

12. The perusal of assessment order and the penalty order reflects that the Assessing Officer has mismatched the figures. The returned income was Rs.1.24 crores and after making addition on protective basis of about Rs.32 lakhs, the total income assessed was Rs.1.56 crores. However, the Assessing Officer adopted the returned income as total income assessed in the hands of assessee and hence an error in computation. Another point which needs to be considered is the conclusion of the Assessing Officer in coming to finding that the assessee has concealed income and furnished inaccurate particulars of income.

13. The Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery (supra) held that where initiation of penalty is on one limb and the levy of penalty is on other limb, then in the absence of proper show cause notice to the assessee, there is no merit in levy of penalty.

14. Applying the said proposition to the facts of the case, where the assessee was show caused in respect of concealing particulars of income and thereafter, penalty was levied on account of non-satisfaction on both the limbs i.e. concealment of income and furnishing of inaccurate particulars of income, the same is against proposition laid down by the Hon'ble Bombay High Court in CIT Vs. Shri Samson Perinchery (supra). The learned Departmental Representative for the Revenue here strongly opposed the same and pointed out that penalty under section 271(1)(c) of the Act could be levied on both the limbs of said section. We find no merit in the plea of learned Departmental Representative for the Revenue in this regard, wherein the returned income was finally accepted by the CIT(A) / Tribunal and the protective addition made in the hands of assessee was deleted. Accordingly, we hold that penalty order passed in the case suffers from infirmity and the same is invalid in law. Accordingly, we direct the Assessing Officer to delete said penalty under section 271(1)(c) of the Act at Rs.11,74,601/-."

16. Applying the parity of above decision to the facts of present case, where penalty proceedings have been initiated on both the limbs of section 271(1)(c) of the Act and the Assessing Officer having failed to record satisfaction in respect of one of the limbs of section 271(1)(c) of the Act and the penalty having been levied for concealment or furnishing of inaccurate particulars of income i.e. without coming to a finding as to which limb has not been fulfilled by the assessee, then penalty order passed in the case suffers from infirmity. Accordingly, the same is cancelled. The Assessing Officer is directed to delete

the penalty levied under section 271(1)(c) of the Act. The grounds of appeal raised by the assessee are thus, partly allowed.

17. The facts and issues in ITA Nos.1675/PUN/2015 to 1678/PUN/2015 are identical to the facts and issues in ITA No.1674/PUN/2015 and our decision in ITA No.1674/PUN/2015 shall apply *mutatis mutandis* to ITA Nos.1675/PUN/2015 to 1678/PUN/2015.

18. In the result, all the appeals of assessee are partly allowed.

Order pronounced on this 28th day of February, 2018.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 28th February, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-12, Pune;
4. The Pr.CIT(Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune