

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 455/JP/2017
निर्धारण वर्ष/Assessment Year : 2011-12.

The ACIT, Circle-1, Kota.	बनाम Vs.	Shri Harbans Lal Sethi, 97, Dushera Scheme, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN No. AJYPS 6625 G		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

राजस्व की ओर से/ Revenue by: Shri Anoop Singh (Addl.CIT)
निर्धारित की ओर से/ Assessee by : Shri Mahendra Gargieya (Advocate)

सुनवाई की तारीख/ Date of Hearing : 28.05.2018.
घोषणा की तारीख/ Date of Pronouncement : 07/08/2018.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the revenue is directed against the order dated 24.03.2017 of Id. CIT (A), Kota for the assessment year 2011-12. The revenue has raised the solitary ground as under :-

“ On the facts and in the circumstances of the case, the Id. CIT (A) has erred in –

- (i) deleting penalty of Rs. 51,49,485/- by ignoring the fact and circumstances of the case and the facts mentioned by the AO in the penalty order ;
- (ii) the appellant craves liberty to raise additional ground and to modify/amend the ground of appeal at the time of hearing.”

2. The assessee is engaged in the business of contract. A survey under section 133A of the I.T. Act was conducted on 9th February, 2011. During the survey proceedings, the assessee surrendered his undisclosed income of Rs. 1,51,50,000/-. However, the assessee did not declare the surrendered income in the return of income filed on 30th March, 2012. During the assessment proceedings, the AO issued show cause notice to the assessee as to why the addition of Rs. 1,51,50,000/- should not be made to the total income of the assessee as the assessee has not disclosed the same in the return of income. In reply to the show cause notice, the assessee submitted that due to oversight and lack of time such income was not shown in the computation of income whereas such income was shown in the capital account and balance sheet of the assessee. Since the tax due on the said income was already paid by the assessee, therefore, the assessee revised its computation of income and offered the same. The AO accordingly made an addition of Rs. 1,51,50,000/- to the total income of the assessee and consequently initiated the penalty proceedings under section 271(1)(c) of the Act. The AO passed a penalty order under section 271(1)(c) on 21st May, 2015 and levied the penalty of Rs. 51,49,485/- being 100% of tax sought to be evaded. The assessee challenged the levy of penalty before the Id. CIT (A) and contended that when the assessee offered the income in the revised return which was regularized, then no penalty is leviable on such income. It was further contended that there was a bonafide mistake for not including the surrendered income in the computation of total income though the assessee already paid the tax on such income. Therefore, even if the AO made the addition, the explanation of the assessee was bonafide one. The Id. CIT (A) accepted the contention of the assessee that the payment of tax made by the

assessee and not claiming refund of the same established that there was inadvertent omission of additional income from computation and subsequently revision through the computation in the course of assessment proceedings show the intention of the assessee to be bonafide. Accordingly, the Id. CIT (A) deleted the penalty levied by the AO.

3. Before us, the Id. D/R has submitted that it is not a voluntary surrender or declaration of income but it was detected during the survey under section 133A by the AO. Despite the assessee surrendered the said income of Rs. 1,51,50,000/-, the assessee did not declare the said income in the return of income and only when the AO issued a show cause notice, the assessee filed a revised computation and agreed to the additional income. Thus the Id. D/R has submitted that it is a clear case of concealment of income which attracts the provisions of section 271(1)(c) of the Act. He has relied upon the order of the A.O.

3.1. On the other hand, the Id. A/R of the assessee has submitted that the assessee had disclosed the additional income during the survey and also paid the advance tax on the said income prior to the end of the financial year which itself show the bonafide of the assessee even if the said income was not included in the computation of income of the assessee. Moreover the entries were passed in the accounts and the surrendered income was duly shown in the capital account and balance sheet which were filed along with the original return of income itself. Thus due to inadvertence and bonafide mistake, the said income could not be included in the return of income filed by the assessee on the last date of limitation. The Id. A/R has thus submitted that there is no attempt by the assessee to either conceal the

particulars of income or furnish inaccurate particulars of income. In support of his contention, he has relied upon the following decisions :-

Brij Mohan vs. CIT
120 ITR 1 (SC)

CIT vs. Onkar Saran & Sons,
195 ITR 1 (SC)

B.N. Sharma vs. CIT
226 ITR 442 (SC)

4. Having considered the rival submissions as well as the relevant material on record, we note that if the assessee has not declared the surrendered income in the return of income and also not filing revised return of income, then the case of the assessee would certainly fall in the category of furnishing incorrect particulars of income in the return of income as the assessee had already declared and surrendered the said income during the course of survey proceedings under section 133A. However, in the case in hand the assessee has paid the due tax on the said income prior to the filing of the return of income and further this amount was duly reflected in the books of account of the assessee. Once the assessee has considered the additional income surrendered during the survey in the books of accounts and also paid the tax on the same, then mere non inclusion of the said income in the return of income due to inadvertence and bonafide mistake would not lead to the conclusion that the assessee has concealed particulars of income or furnishing inaccurate particulars of income particularly when the assessee did not claim any refund of the advance tax paid on such income. The Id. CIT (A) has adjudicated this issue at pages 8 and 18-19 as under :-

" I have gone through assessee's submission and AO's findings.

From the facts it is clear that though the assessee had paid all the taxes due on the additional income offered to tax during the Survey proceedings but had not disclosed it in the computation of Income separately. The tax was paid by March 2011 and remained with the department till the time the return was taken up for scrutiny in November, 2014, when the fact of non disclosure of the additional income was brought up by the AO by issuing a show cause notice."

" On the basis of the decisions relied upon courts have formed a view that –

- a. Penalty is not an automatic consequence of addition to income;*
- b. Penalty under section 271(1)(c) of the Act can come into play only when the conditions laid down under that section are satisfied ;*
- c. Concealment of income cannot be a passive situation and it implies that the person concealing the income is hiding, covering up or camouflaging an income ;*
- d. Penalty is not leviable in case where assessee is able to provide a 'bona fide' explanation ; and*
- e. Penalty is not leviable in cases where assessee made errors, under bona fide beliefs.*

It is not necessary that the claimed bona fide belief must be substantiated with some documentary evidence. The claim of bona fide belief can also be substantiated by circumstantial evidence when possibility of documentary evidence cannot be expected.

Since the entire process in this case has involved voluntary surrender, there was no question of contest before the first appellate authority which has been made a ground by the A.O. while imposing the penalty. The huge amount of taxes paid which were in department's coffers show that the intent of the assessee was not malafide or else

he could have not left it for 2 years in the government account and instead would himself have earned substantial interest on the same.

Thus, in the present case it is clear that the payment of taxes, not claiming refund of the same, inadvertent omission of additional income from the computation and subsequent revision through a computation in the course of assessment proceedings show the intention of the assessee to be bonafide and in my humble view, duly covered under the opinion of the courts as discussed above in this order.

In the absence of bringing out any deliberate and malafide intent behind the omission or alleged concealment the penalty of Rs. 51,49,485/- levied by the AO is not found to be sustainable and is directed to be deleted.

This ground of appeal is treated as allowed."

Accordingly, the facts as discussed and considered by the Id. CIT (A) has not been disputed before us by the revenue that the assessee made the payment of tax before filing of the return and not claimed refund of the same. The non-inclusion of the said income was explained as due to inadvertent omission and bonafide mistake. Therefore, the explanation tendered by the assessee with the supporting facts and details falls in the Clause-B of Explanation-2 to section 271(1)(c) of the Act. Hence we do not find any error or illegality in the impugned order of the Id. CIT (A).

5. In the result, appeal of the revenue is dismissed.

Order is pronounced in the open court on 07/08/2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member
Jaipur
Dated:- 07/08/2018.
Das/

Sd/-
(विजय पाल राँव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- The ACIT, Circle-1, Kota.
2. The Respondent – Shri Harbans Lal Sethi, Kota.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 455/JP/2017)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

