

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

**BEFORE SHRI. N. K. SAINI, ACCOUNTANT MEMBER
AND SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

ITA No.2404/Del/2016
Assessment Year:2007-08

Arun Goel, Ram House, Station Road, Bijnor	vs	ACIT, Income-tax Office, Najibabad, Bijnor.
PAN AHTPG8513C		

(Appellant)

(Respondent)

Appellant by:	Shri P.C. Yadav, Advocate		
Respondent by:	Ms Ashmia Neb, Sr. DR		
Date of hearing:			10.10.2018
Date of pronouncement:			31.10.2018

ORDER

PER NARASIMHA K. CHARY, JM

Aggrieved by the order dated 18.2.2016 in Appeal No.1270/ACIT/NJD/2012-13 of the Id. Commissioner of Income-tax (Appeals), Moradabad for sustaining the penalty, assessee preferred this appeal.

2. Brief facts of the case are that the assessee filed the return of income on 9.10.2007 declaring a total income of Rs.25,02,356/- comprising of house property capital gain and income from other sources which shall include the agricultural income of Rs.14,97,229/-. The assessment was completed u/s 143(3) of the Act at a total income of Rs.30,60,801/- by making addition of Rs.2,59,000/- on account of income u/s 56(vi) representing gifts claimed not

taxable and received at the time of wedding anniversary and Rs.2,99,445/- which was treated as unexplained expenditure u/s 69C of the Act.

3. In so far as the expenditure relating to the agricultural income is concerned, the ledger maintained by the assessee contains an account with the heading "Agricultural Income" wherein the sums to the tune of Rs.14,97,229/- but failed to reduce such expenditure from the total expenditure, as such, the learned AO estimated agricultural expenditure at 20% of the income and thereby disallowed a sum of Rs.2,99,445/- and added it back to the income of the assessee u/s 69C of the Act as unexplained expenditure. On this aspect, the learned CIT(A) restricted the addition to Rs.2,25,000/-.

4. Likewise in the original assessment, the assessee had shown a sum of Rs.2,59,000/- in the ledger account under the head "Gifts received" on the occasion of the wedding anniversary. Learned AO added this amount u/s 56(vi) of the Act. In appeal, learned CIT(A) found that out of the total gifts amounting to Rs.2,59,000/-, sums aggregating to Rs.1,18,300/- represented gifts received from relatives and could not be added to the income of the assessee. He, therefore, confirmed the addition only to the extent of Rs.1,40,700/-.

5. Subsequently, learned AO issued notice u/s 24.4.2012 u/s 2712\1(c) of the Act and the assessee contended that no penalty is leviable in respect of the additions made on estimate basis by placing reliance on certain judicial pronouncements. However, learned AO held that there is an element of furnishing of inaccurate particulars of income inasmuch as the assessee had disclosed a taxable part of the income in the garb of non taxable gifts and also made some unaccounted expenditure in earning the agricultural income, as such, the case of the assessee squarely falls within the ambit of Explanation 1 to Section 271(1)(c) of the Act. On this premise, while distinguishing the

judicial pronouncements submitted by the assessee and by placing reliance on the decisions of the Hon'ble Kerala High Court in the case of CIT vs K.P. Madhu Sudanan (2006) 246 ITR 218 (Ker) and some other decisions, learned AO proceeded to levy a penalty of Rs.1,25,000/- u/s 271(1)(c) of the Act.

6. In appeal, learned CIT(A) upheld the penalty as levied by the AO. Hence, the assessee is in appeal before us stating that the impugned order is bad on facts and in law and it is the result of non appreciation of the facts and circumstances in their proper perspective.

7. It is the argument of the learned AR that in so far as the gifts are concerned though the learned AO added a sum of Rs.2,59,000/-, learned CIT(A), in appeal, against the quantum addition on appraisal of the material available on record held that out of Rs.2,59,000/-, gifts to the tune of Rs.1,18,300/- was presented by the relatives and fall within Explanation to Section 56(vi), as such, the learned CIT(A) deleted the quantum to the extent of Rs.1,18,000/- while confirming the balance. He submitted that at best it is a case of the assessee's inability to prove the source of gifts but not a case of concealment of income or furnishing of inaccurate particulars thereof. He placed reliance on the decision of the jurisdictional High Court of Delhi in the case of CIT vs Oasis Hospitalities P. Ltd. (2011) 333 ITR 119 in support of this contention.

8. In respect of the alleged unexplained expenditure to earn the agricultural income, it is the submission of the learned AR that the learned AO had estimated had estimated the same at 20% whereas according to the learned CIT(A), such an estimate would be at Rs.2.25 lacs. Learned AR, therefore, submits that in a case of estimation of the expenditure by the authorities differently, no question of income or furnishing of inaccurate particulars arises. He placed reliance on the decision of the Transport Corporation of India vs ACIT (2013) 158 TTJ (Hyd)(UO) 0069, it is a sine qua

non that the assessee must have failed to offer an explanation or offers an explanation which is found by the learned AO to be false or the assessee offers an explanation, which the assessee is not able to substantiate and fails to prove such an explanation as bonafide and that all the facts relating to the same and material to the tune of his total income have been disclosed by him. He submits that all these conditions are conspicuously absent in this case inasmuch as the assessee had offered the explanation and it was not found to be false by the AO or by the learned CIT(A) but what authorities below had stated that there is proof only to the extent of part of the gifts. As such, for failure of the cumulative conditions enunciated Clause B of Explanation 1, no penalty u/s 271(1)(c) is attracted. Learned AR placed reliance on a decision of the Mumbai bench of the Tribunal in the case of M/s Pfizer Limited vs DCIT, ITA No.155/Mum 2010 in support of his contention.

9. He further placed reliance on the decision in the case of ITO vs Rakesh Gupta (2007) dated 18.1.2007 and S.K. Embroidery P. Ltd. Vs DCIT, ITA No.3702/Del/2012 for the principle that addition by operation of deeming provisions by itself cannot justify penalty in the absence of any finding that the assessee had furnished inaccurate particulars with a malafide intent to evade tax or the explanation given by the assessee was not bona fide or false.

10. Per contra, it is the submission of the learned DR that it is not a case of addition on the basis of estimate but the disallowance was properly calculated by the authorities below. According to the learned DR Clause A to Explanation 1 to Section 271(1)(c) is applicable to the facts of the case since the explanation offered by the assessee is found to be false by both the authorities below. She further submitted that as is evident from the order u/s 271(1)(c), the assessee received the notice dated 24.2.2012 in respect of proposed penalty but he did not offer any valid explanation except stating that no penalty is leviable in respect of additions made on estimate basis. Learned DR,

therefore, prays to dismiss the appeal and sustain the penalty as levied by the AO.

11. On a careful consideration of the matter, we find that the learned AO brought the case of the assessee under Explanation 1 to Section 271(1)(c) of the Act. It is not a case where the assessee did not offer any explanation in respect of the proposed addition at the time of assessment u/s 143(3) of the Act. Even on the aspect of gifts though the learned AO added the entire sum of Rs.2,59,000/- found in the ledger maintained by the assessee under the head "Gifts received", on a reappraisal of the matter, the learned CIT(A) found that out of the above amount, the gifts to the tune of Rs.183,000/- were given by the relatives thereby taking the case to Explanation 2 to Section 56(2)(vi) of the Act. This fact could have been verified but was not done. Be that as it may, it is a case of the assessee not being able to prove the source of gifts to the extent of Rs.14,700/- but not a case of concealment of income or furnishing of inaccurate particulars. For that matter in Oasis Hospitalities (P) Ltd. (supra), the Hon'ble jurisdictional High Court held that though the assessee could not discharge its onus u/s 68, it cannot be said that it is a case of concealment of income by the assessee. It is a fact to be noted that learned AO came to know that assessee had received the gifts to the tune of Rs.2,59,000/- only on the information furnished by the assessee in the shape of ledger maintained by him.

12. In respect of the alleged unexplained expenditure to earn the agricultural income, record speaks that the learned AO estimated the expenditure at 20% and reached the figure of Rs.2,99,445/- as the amount to be added to the income of the assessee whereas on an appraisal of the record, learned CIT(A) in the quantum appeal came to a different conclusion that the amount to be added was only Rs.2,25 lacs. It is only a matter of estimate. In the case of Transport Corporation India (supra), it was held that in the case of disallowance of expenditure by resorting to estimate, the assessee cannot be

said to have concealed the income. It was further held that when the basis of the disallowance for adding any amount is the material furnished by the assessee himself, the assessee cannot be said have furnished inaccurate particulars of income.

13. Now coming to the decision in the case of M/s Pfizer Limited (supra) relied upon by the learned AR, para 10 to 14 thereof are relevant and they read thus:-

10. It is important to note that the main provision of clause (c) of section 271(1) covers the cases of concealment of income and furnishing of inaccurate particulars of such income in a general way. Apart from that, there have been enshrined certain Explanations, some of which contain the cases of deemed concealment. These include the situations in which there may not be concealment etc. within the parameters of main provision but by the legal fiction contained in such Explanations, it is deemed as concealment of income. It is nobody's case that any Explanation, other than Expl. 1, applies to the facts of the instant case. Explanation 1, which, therefore, assumes significance, is reproduced as under
"Explanation 1. - Where in respect of any facts material to the computation of the total income of any person under this Act, -
 (A) *such person fails to offer an explanation or offers an explanation which is found by the [Assessing] Officer or the [Commissioner (Appeals)] [or the Commissioner] to be false, or*
 (B) *such person offers an explanation which he is not able to substantiate [and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him], then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

11. A cursory look at the-mandate of this Explanation transpires that the following elements must be present in order to bring a case with in the charge of concealment

- (a) the person fails to offer an explanation, or
 - (b) he offers the explanation which is found by the concerned authority to be false, or
 - (c) the person offers an explanation which he is not able to substantiate and further fails to prove that such explanation is valid and that all the facts relating to same have been disclosed by him.
- Whereas the above (a) and (b) are covered within clause (A) of the Explanation, (c) is enclosed in clause (B).

12. If the case falls in any of these three categories, then the deeming provision is activated and the amount added or disallowed in computing the total income is considered as the income in respect of which particulars have been concealed as per clause (c) of section 271(1). Only in such circumstances the penalty follows. If however the assessee succeeds in proving that none of these three conditions are satisfied in his case, then obviously the

addition made by the Assessing Officer shall not constitute income in respect of which particulars have been concealed for the purposes of section 271(l)(c).

13. We will proceed to examine the facts of this case to determine as to whether it is falling in any of these three categories. First category consists of cases where the assessee fails to offer an explanation in respect of the addition made. Obviously it is not the situation here inasmuch as the assessee has furnished complete justification for its claim of capital receipt before the Assessing Officer in quantum as well as penalty proceedings. Second category comprises of cases in which the assessee offers an explanation which is found by the authority to be false. The case of the assessee is not covered under this category as well. Third category consists of cases where the assessee offers explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same were disclosed by him. Here it is relevant to mention that the above bracketed portion of clause (B) of the Expl. was inserted en bloc by the Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986 w.e.f. 10.09.1986. On reading of the clause (B) of the Expl. I, it is clear that in order to encompass a case within its purview, the following two conditions must be satisfied:-

- (i) assessee offers explanation which he is not able to substantiate; and
- (ii) he fails to prove that such explanation is bona fide; and all the facts relating to the same have been disclosed by him.

14. At this juncture it would be relevant to take note that conjunction "and" has been used by the legislature between these two essential conditions of clause (B) of Explanation (1) to section 271(1)(c). It shows that both the above referred conditions must be cumulatively satisfied so as to bring a case within the mischief of this clause. If only one condition is satisfied and the other is not, the penalty would not follow. In other words, if the person offers an explanation which he is not able to substantiate [being condition(i) above] but succeeds in proving that such explanation is bona fide and that all the material facts relating to the same were disclosed by him, [being condition (ii) above], the penalty would not be attracted."

14. In view of the above factual and legal situation, we are of the considered opinion that the assessee cannot be visited with the penalty and there is no concealment of income or the furnishing of inaccurate particulars within the meaning of Explanation to Section 271(1)(c) of the

Act. We accordingly while allowing the appeal of the assessee, quash the penalty proceedings.

15. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 31/10/ 2018.

Sd/-
[N. K. SAINI]
ACCOUNTANT MEMBER

Sd/-
[K. NARASIMHA CHARY]
JUDICIAL MEMBER

DATED: 31st October , 2018

VJ

Copy forwarded to:

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

Draft dictated on	10.10.2018
Draft placed before author	12.10.2018
Draft proposed & placed before the second member	31.10.2018
Draft discussed/approved by Second Member.	31.10.2018
Approved Draft comes to the Sr.PS/PS	31.10.2018
Kept for pronouncement on	31.10.2018
Date of uploading order on the website	2.11.2018
File sent to the Bench Clerk	2.11.2018
Date on which file goes to the AR	
Date on which file goes to the Head Clerk.	
Date of dispatch of Order.	

