

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCH 'A', JAIPUR

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

आयकर अपील सं./ITA No. 1087/JP/2019
निर्धारण वर्ष / Assessment Year : 2016-17.

Shri Rajendra Shringi, 537-39, Mahima Trinity, New Sanganer Road, Swej Farm, Jaipur.	बनाम Vs.	The DCIT, Central Circle, Kota.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AGWPS 2359 E		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya (Advocate)

राजस्व की ओर से / Revenue by : Shri Varinder Mehta (CIT)

सुनवाई की तारीख / Date of Hearing : 11/11/2019.

घोषणा की तारीख / Date of Pronouncement : 29/11/2019.

आदेश / ORDER

PER VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 23rd July, 2019 of Id. CIT (A)-2, Udaipur arising from penalty order passed under section 271(1)(c) of the IT Act for the assessment year 2016-17. The assessee has raised the following grounds :-

"1.The impugned penalty order u/s 271(1)(c) dated 23.07.2019 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be quashed.

2. Rs. 1,03,86,055/-: The Id. CIT (A) erred in law as well as on the facts of the case confirming the penalty imposed u/s 271(1)(c) of the Act. The penalty so

imposed by the AO and confirmed by the Id. CIT (A), being totally contrary to the provisions of law and facts kindly be deleted in full.

3. That the show cause notice issued u/s 274 and the consequent impugned penalty order dated 23.07.2019, is quite vague and does not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated and/or imposed i.e., whether for concealment particulars of income or furnishing of inaccurate particulars of income. The impugned penalty order being contrary to the judicial principle laid down kindly be quashed.

4. The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing.”

2. The assessee is an individual and derives income from business and profession. There was a survey under section 133A of the IT Act on 4th March, 2016 at the business premises of the assessee. During the course of survey, a diary was found and impounded marked as Annexure-A Exhibit-1. The said diary contains certain entries of advances given to various persons by the assessee to the tune of Rs. 3 crores. In the statement recorded under section 133A of the IT Act on 5th March, 2016 the assessee admitted the above amount of Rs. 3 crores as his undisclosed income. The assessee thereafter filed his return of income on 17.10.2016 declaring total income of Rs. 3,16,85,480/- including the income surrendered during the course of survey under section 133A of the Act. The assessment was completed under section 143(3) whereby the AO has accepted the returned income except an addition on account of short rental income of Rs. 10,565/- was made by the AO. The AO then initiated the proceedings for levy of penalty under section 271(1)(c) in respect of the income surrendered by the assessee of Rs. 3 crore as well as Rs. 10,565/- the addition made during the course of assessment framed under section 143(3). The assessee objected to the levy of penalty and relied upon various decisions in support of the contention that

when there is no addition to the returned income, then the penalty under section 271(1)(c) cannot be levied on the income which was surrendered during the survey prior to the end of the financial year relevant to the assessment year under consideration. The AO did not accept this contention of the assessee and levied the penalty of Rs. 1,03,86,055/- being 100% of tax sought to be evaded. The assessee challenged the action of the AO before the Id. CIT (A) but could not succeed.

3. Before us, the Id. A/R of the assessee has submitted that when the assessee has declared the income of Rs. 3 crores in the return of income filed under section 139(1) of the Act and no addition was made by the AO on this account while completing the assessment under section 143(3), then it cannot be said that the assessee has furnished inaccurate particulars of income or concealed the particulars of income for attracting the penalty under section 271(1)(c) of the Act. The Id. A/R has further contended that as per the provisions of section 271(1)(c), the concealment of particulars of income or furnishing of inaccurate particulars of income is considered only in respect of the difference between the income declared by the assessee in the return of income and the total income finally assessed by the AO. Where there is no such difference, then question of imposing the penalty under section 271(1)(c) does not arise. The Id. A/R has further contended that the AO has applied Explanation 5A to section 271(1)(c) which is not attracted in the case of the assessee as there was no search and seizure action but a survey was carried out under section 133A before the close of the financial year and, therefore, when the assessee has declared the income in the return of income, the said Explanation 5A is not applicable for deeming the

said surrender/declaration of income in the return of income as concealment of particulars of income. In support of his contention, he has relied upon the decision of Hon'ble Delhi High Court in case of CIT vs. S.A.S. Pharmaceuticals, 335 ITR 259 (Del.) and submitted that the Hon'ble High Court has held that when the assessee has declared the income including the amount surrendered by it during the course of survey, then the assessment framed including the surrendered amount without making any addition would not amount to furnishing of inaccurate particulars of income or concealment of particulars of income. It is necessary that concealment of particulars of income or furnishing inaccurate particulars of income has to be in the income tax return filed by the assessee. Therefore there is no concealment of income as in the return of income filed by the assessee the said income was duly declared. He has also relied upon the following decisions :-

AO vs. Shri Harbanslal Sethi
In ITA No. 455/JP/2017 for A.Y. 2011-12.

Harish Kumar Raimalani vs. ITO
In ITA No. 834/JP/2013 and 770/JP/2013.

4. On the other hand, the Id. D/R has submitted that there was an incriminating material impounded during the course of survey containing the entries of unaccounted/undisclosed income of the assessee. Therefore, the surrender was not voluntary but due to the reason of discovery of undisclosed income in the course of survey conducted at the business premises of the assessee. Hence notwithstanding the income declared in the return of income the particulars of the instant income were not accounted by the assessee in the books

of account. Therefore, it is a clear case of concealment of particulars of income by the assessee which were detected during the course of survey. He has relied upon the orders of the authorities below.

5. We have considered the rival submissions as well as the relevant material on record. A survey under section 133A of the IT Act was carried out on 4th March, 2016 at the business premises of the assessee. During the course of survey proceedings, a diary was impounded containing certain entries against the names of certain persons. In the statement recorded under section 133A, the assessee surrendered the said income of Rs. 3 crore as recorded in the diary on account of advances to certain persons. In the return of income the assessee declared the said income and offered to tax. In the assessment framed under section 143(3), the AO has not disturbed the income returned by the assessee so far as Rs. 3 crore is concerned. The AO has made the addition of Rs. 10,565/- on account of short declaration of rental income. Thus there is no dispute on the point that the income of Rs. 3 crore as surrendered during the survey was duly declared in the return of income filed under section 139(1) of the Act. Further, the entries in the diary in itself are not representing the income of the assessee but these are the advances given by the assessee. Therefore, these transactions are not representing any source of income or income itself but these transactions at the best is the funds available with the assessee given to various persons. Since the assessee surrendered the said income and also offered to tax in the return of income filed under section 139(1), therefore, the question of nature of these transactions and disclosing the undisclosed income of the assessee for the year under consideration is not open either in the assessment proceedings or in

the penalty proceedings. The only question arises for our consideration is when the assessee has declared the said income of Rs. 3 crore in the return of income filed under section 139(1) and the AO has not disturbed the returned income to that extent, then whether it would amount to concealment of particulars of income or furnishing inaccurate particulars of income for attracting provisions of section 271(1)(c) of the Act. We find that the AO while levying the penalty on this amount has given much emphasis to the Explanation 5A to section 271(1)(c) of the Act. The relevant part of the order of the AO passed under section 271(1)(c) in para 7 is as under :-

"7. The provisions of section 271(1)(c) of the I.T. Act and relevant explanation is under:-

271(1)(c): If the Assessing Officer in the course of any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, it may direct that such person shall pay by way of penalty in addition to any tax payable by him, a sum which shall not less than but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income:

Explanation 5A-Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(1) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year,

Which has ended before the date of search and,-

- (a) *where the return of income for such previous year has been furnished before the said date but such, income has not been declared therein; or*
- (b) *the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,*

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

The above provisions of section 271(1)(c) read with its explanation- 5A make it clear that if the Assessing Officer is satisfied that any person has concealed the particulars of income or furnished inaccurate particulars of such income, or where in respect of any facts material to the computation of the total income of any person fails to offer an explanation or offers an explanation which is found by the Assessing Officer to be false, or 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 person, then the case of the Assessee comes within the purview of section 271(1)(c) of the Act, 1961. The case of the assessee is covered in aforementioned provisions.

In view of totality of the facts and circumstances of the case, the provisions of section 271(1)(c) of the Act and in the light of above discussion, I hold the assessee is defaulter for concealing particulars of his income and find his to be a fit case for imposition of penalty as provided for in section 271(1)(c) of the Act."

Thus it is clear that the AO has levied the penalty by invoking the Explanation 5A to section 271(1)(c) of the Act. At the outset, it is to be noted that the

Explanation 5A is relevant only when there is a search and seizure action under section 132 of the Act carried out after 1st June, 2007 and consequently during the course of search and seizure action if assessee is found to be owner of money, bullion, jewellery and other valuables or any income based on the entries in the books of account etc. then notwithstanding that such income is declared by the assessee in the return of income furnished on or after the date of search for the purpose of section 271(1)(c), he shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of income. Therefore, the applicability of Explanation 5A is exclusively in the case of search and seizure action under section 132 of the Act and the said deeming provision cannot be applied in the case of survey conducted under section 133A of the Act. When there is no difference in the returned income as well as the assessed income so far as the amount of Rs. 3 crore is concerned, then it would not amount to concealment of particulars of income or furnishing of inaccurate particulars of income in the return of income filed by the assessee. It is settled proposition of law that except in the case of search and seizure where the Explanation 5 or 5A to section 271(1)(c) are applicable, the concealment of particulars of income or furnishing inaccurate particulars has to be considered only in the context of the income declared and particulars furnished in the return of income filed by the assessee. The Coordinate Bench of this Tribunal in case of AO vs. Shri Harbanslal Sethi (supra) while considering an identical issue has held in para 4 as under :-

"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)."

Similarly, the Hon'ble Delhi High Court in case of CIT vs. SAS Pharmaceutical (supra) has also considered this aspect and held in para 12 to 16 as under :-

"12. *After considering the respective submissions of the learned counsel for the parties, we are of the view that the argument of the learned counsel for the assessee has to prevail as it carried substantial weight. It is to be kept in mind that section 271(1)(c) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Sub-section (1) of section 271 stipulates certain contingencies on the happening whereof the Assessing Officer or the Commissioner (Appeals) may direct payment of penalty by the assessee. We are concerned herewith the fundamentality provided in clause (c) of section 271(1) of the Act, which authorizes imposition of penalty when the Assessing Officer is satisfied that the assessee has either;*

- (a) *Concealed the particulars of his income; or*
- (b) *Furnished inaccurate particulars of such income.*

13. *It is not the case of furnishing inaccurate particular of income, as in the income-tax return, particulars of income have been duly furnished and the surrendered amount of income was duly reflected in the income-tax return. The question is whether the particulars of income were concealed by the assessee or not. It would depend upon the issue as to whether this concealment has reference to the income-tax return filed by the assessee, viz., whether concealment is to be found in the income-tax return.*

14. *We may, first of all, reject the contention of the learned counsel for the revenue relying upon the expression 'in the course of any proceedings under this Act' occurring in sub-section (1) of section 271 of the Act and contending that even during survey when it was found that the assessee had concealed the particular of his income, it would amount concealment in the course of 'any proceedings'. The words 'in the course of any proceedings under this Act' are prefaced by the satisfaction of the Assessing Officer or the Commissioner of Income-tax (Appeals). When the survey is conducted by a survey team, the question of satisfaction of Assessing Officer or the Commissioner (Appeals) or the Commissioner does not arise. We have to keep in mind that it is the Assessing Officer who initiated the penalty proceedings and directed the payment of penalty. He had not recorded any satisfaction during the course of survey. Decision to initiate penalty proceedings was taken while making assessment order. It is, thus, obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings, in this case.*

15. *It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income-tax return filed by it. There is sufficient indication of this in the judgment of this Court*

in the case of CIT v. Mohan Das Hassa Nand [1983] 141 ITR 203 / 13 Taxman 328 and in Reliance Petroproducts (P.) Ltd. (supra), the Supreme Court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income-tax return filed by the assessee. This view gets supported by Explanation 4 as well as Explanations 5 and 5A to section 271 of the Act as contended by the learned counsel for the respondent.

16. *No doubt, the discrepancies were found during the survey. This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under the provisions of section 271(1)(c) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Section 271(1)(c) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the income-tax return and offered the surrendered amount for the purposes of tax."*

Thus the Hon'ble High Court has held that the concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in the income tax return filed by it. Even if some discrepancies were found during the survey resulting in surrender of income by the assessee, once the assessee has declared the said income in the return of income filed under section 139(1) of the Act, then the penalty cannot be levied on the surmises, conjectures and possibilities that the assessee would not have disclosed the income but for survey. Accordingly, following the earlier decision of this Tribunal as well as the decision of Hon'ble Delhi High Court in case of CIT vs. SAS Pharmaceuticals (supra), the penalty levied by the AO and confirmed by the Id. CIT (Appeals) in respect of the amount of Rs. 3 crore is not sustainable, the same is deleted.

As regards the penalty levied by the AO in respect of the addition of Rs. 10,565/- on account of non disclosure of the rental income, since it is a clear case of concealment of particulars of his income, therefore, the penalty levied by the AO to the extent of addition of Rs. 10,565/- is upheld.

6. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29/11/2019.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-

(विजय पाल रॉव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 29/11/2019.

das/

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

1. अपीलार्थी / The Appellant-Shri Rajendra Shringi, Jaipur.
2. प्रत्यर्थी / The Respondent-The DCIT, Central Circle, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File {ITA No. 1087/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

