

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

श्री एन.के.सैनी, उपाध्यक्ष एव संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: SHRI N.K. SAINI, V.P. & SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No.970 to 974/JP/2018
निर्धारण वर्ष/A.Ys : 2004-05, 2005-06, 2007-08, 2008-09 & 2009-10

Shri Harish Tambi C-33, Sikar House, Outside Chandpole Gate, Jaipur	बनाम Vs.	The DCIT Central Circle-1 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABYPT 8364 K		
अपीलार्थी/ Appellant		प्रत्यर्थी/ Respondent

निर्धारिती की ओर से/ Assessee by : Shri S.L. Poddar, Advocate
राजस्व की ओर से/ Revenue by: Ms. Chanchal Meena , Addl. CIT- DR

सुनवाई की तारीख/ Date of Hearing : 14/09/2020
उदघोषणा की तारीख/Date of Pronouncement: 14/09/2020

आदेश/ ORDER

PER BENCH.

These five appeals have been filed by the assessee against common order of Id.CIT (A)- 4, Jaipur dated 10.07.2018 for the Assessment Years 2004-05, 2005-06, 2007-08, 2008-09 & 2009-10 passed under 271(1)(c) of the Income Tax Act, 1961 on the grounds mentioned hereinbelow.

ITA No. 970/JP/2018 – A.Y. 2004-05

“1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 without striking off the irrelevant portion of the printed show cause notice dated 26-12-2011 viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” is bad in law.

2. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is void ab initio deserves to be quashed as no satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income.

4. In the facts and circumstances of the case the AO has erred in imposing the penalty of Rs. 67,000/- u/s 271(1)(c) of the I.T. Act, 1961

ITA No. 971/JP/2018 – A.Y. 2005-06

“1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 without striking off the irrelevant portion of the printed show cause notice dated 26-12-2011 viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” is bad in law.

2. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is void ab initio deserves to be quashed as no

satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income.

4. In the facts and circumstances of the case the AO has erred in imposing the penalty of Rs. 67, 000/- u/s 271(1)(c) of the I.T. Act, 1961

ITA No. 972/JP/2018 – A.Y. 2007-08

“1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 without striking off the irrelevant portion of the printed show cause notice dated 26-12-2011 viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” is bad in law.

2. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is void ab initio deserves to be quashed as no satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income.

4. In the facts and circumstances of the case the AO has erred in imposing the penalty of Rs. 46,000/- u/s 271(1)(c) of the I.T. Act, 1961

ITA No. 973/JP/2018 – A.Y. 2008-09

“1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 without striking off the irrelevant portion of the printed show cause notice dated 26-12-2011 viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” is bad in law.

2. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is void ab initio deserves to be quashed as no satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income.

4. In the facts and circumstances of the case the AO has erred in imposing the penalty of Rs. 50,000/- u/s 271(1)(c) of the I.T. Act, 1961

ITA No. 974/JP/2018 – A.Y. 2009-10

“1. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 without striking off the irrelevant portion of the printed show cause notice dated 26-12-2011 viz. “furnished inaccurate particulars of income” or “concealed particulars of such income” is bad in law.

2. Under the facts and circumstances of the case and in law the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is against the principles of judicial consistency and therefore, bad in law.

3. That the order passed by the AO u/s 271(1)(c) of the I.T. Act, 1961 is void ab initio deserves to be quashed as no satisfaction was recorded with reference to concealment of income or furnishing inaccurate particulars of income.

4. In the facts and circumstances of the case the AO has erred in imposing the penalty of Rs. 15,000/- u/s 271(1)(c) of the I.T. Act, 1961

2.1 Due to prevailing COVID-19 pandemic condition, the hearing of the appeal is concluded through video conference. First of all, we take up the appeal of the assessee for the Assessment Year 2004-05 for adjudication as per the grounds of appeal raised hereinabove.

3.1 During the course of hearing, the Id.AR of the assessee has not pressed the Ground No. 1 to 3. Hence, the same are dismissed being not pressed.

4.1 The Ground No. 4 raised by the assessee relates to challenging the order of the Id. CIT(A) in confirming the penalty levied by the AO u/s 271(1) (c) of the Act.

4.2 Brief facts of the case are that the assessee is engaged in the wholesale business of sarees and salwar suits under the name and style of M/s Tambi Enterprises. A search and seizure operation was carried out on 23.07.2009 at the residential and business premises of the assessee. Notice u/s 153A of the Income Tax Act, 1961 was issued on 07.12.2009. In response to notice u/s 153A, the assessee has filed returns in the above assessment years. The AO has completed the assessment u/s 143(3)/153A of the Income Tax Act, 1961 inter-alia making trading additions by applying the GP rate of 8% as against GP rate 5.2% declared by the assessee in all the

assessment years and some disallowances were also made out of electricity and other expenses..

4.3 Aggrieved by the order of the AO, the assessee preferred appeal before the Id. CIT(A) who confirmed the G.P. Rate **at 8%** on estimate basis.

4.4 Subsequently, the AO levied the penalty in the above case u/s 271(1)(c) of the Act with respect to addition confirmed by the Id. CIT(A). On appeal, before the Id. CIT(A), he confirmed the penalty levied by the AO.

4.5 Now aggrieved by the order of the Id. CIT(A) regarding confirming the penalty u/s 271(1)(c) of the Act, the assessee has preferred an appeal before us on the ground mentioned hereinabove.

4.6 During the course of hearing, the Id.AR of the reiterated the same arguments as raised by him before the Id. CIT(A) and he also relied on the following written submission submitted before us.

“Ground no. 4 : -
ASSESSMENT YEAR — 2004-05

In the facts and circumstances of the case the Learned Assessing Officer has erred in imposing the penalty of Rs. 67,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

ASSESSMENT YEAR — 2005-06

In the facts and circumstances of the case the Learned Assessing Officer has erred in imposing the penalty of Rs. 67,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

ASSESSMENT YEAR — 2007-08

In the facts and circumstances of the case the Learned Assessing Officer has erred in imposing the penalty of Rs. 46,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

ASSESSMENT YEAR — 2008-09

In the facts and circumstances of the case the Learned Assessing Officer has erred in imposing the penalty of Rs. 50,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

ASSESSMENT YEAR — 2009-10

In the facts and circumstances of the case the Learned Assessing Officer has erred in imposing the penalty of Rs. 15,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

1. Facts of the case:-The Learned Assessing Officer has completed the assessment u/s 143(3)/153A of the Income Tax Act, 1961 for all the assessment years pertaining to block period. The below table shows the addition made and confirmed year wise-

Sr.No.	Assessment year	Addition made by the AO	Addition sustained by the Id. CIT(A)
1	2004-05	251806	241372
2	2005-06	250449	241229
3	2007-08	216786	205480
4	2008-09	179612	179612
5	2009-10	178905	172264

In the original assessment order the addition was made because certain incriminating documents were found in the form of approval memos and blank bill book of a Surat Dealer. But no specific misuse of those material was found. The learned AO under the suspicion has invoked the provisions of section 145(3) of the Income Tax Act, 1961 and applied the GP Rate by enhancing GP Rate made the addition @ 10% against declared GP which is around 8% in all the years.

In the assessment no specific addition was made on the basis of incriminating material found. The addition was only on estimated basis.

2. No penalty can be levied on estimated additions.

In this case the Learned Assessing Officer made addition as per table above on account of application of GP rate of 10%. There is no finding in the assessment order that the assessee has furnished inaccurate particulars of his income. The Learned Assessing Officer has not given any specific finding that the assessee has concealed the income. Simply he has invoked the provision of section 145(3) of the IT Act, 1961 and estimated the income of the assessee on the basis of earlier history of the assessee. Thus it is a case of an estimate against an estimate hence no penalty is leviable in such a case where addition are based purely on estimate basis. The following cases are quoted for support –

(i) Gulraj Vaswani Vs. ACIT, (!TSSA No. 21/JP/06) in Tax World Vol-XXXIX page-35 held that "Before Tribunal it has been submitted that at every level there has been an estimation varying as per difference of opinion from authority to authority and hence penalty cannot be levied on

the estimated addition — Assessee has also submitted that no satisfaction about concealment of income has been recorded by the Assessing Officer during the course of assessment proceedings — Tribunal have considering these facts deleted the penalty —

(ii) *Smt. Bitoli Devi Vs. ACIT(2007), 110 TTJ (Luck) 735* (Unless any positive concealment is found no penalty is leviable on basis of addition made on estimate)

(iii) *Enfield Industries Ltd. Vs. DCIT, (2007) 13 SOT 28 (URO)/107 ITD 1 (Kol.)* (Onus would lie heavily with Department to prove concealment for purpose of imposing penalty under section 158 BFA(2))

(iv) *CIT V. P.H.I. Seeds India Ltd. 159 Taxman 9 (Delhi):-* The act does envisage or explicitly provide that in every case where return is not accepted as correct and assessment is framed at a higher income than that presented, penalty proceedings u/s 271 (1)(c) must be initiated. Section 271(1)(c) is attracted only when the assessee has concealed his income.

When two opinions are possible, adopting one of them can scarcely be viewed as malafide, with intent to evade the payment of income tax.

(v) Penalty can not be levied only estimated addition and reliance is placed on the following decisions: -

- 1.** *CIT Vs. S. Rahamat Khan Birbal Khan Badruddin & Party, 240 ITR 778 (Raj.)*
- 2.** *ACIT Vs. Bansiwala Iron & Steel Re-rolling Mills, 21 TW 533 (JP)*
- 3.** *CIT Vs. Subhash Trading Co., 221 ITR 110 (Guj.)*

4. *Harigopal Singh Vs. CIT, 258 ITR 85 (P&H)*
5. *ACIT Vs. Ganpat Lal Goyal, 32 TW 91 (JP)*

In view of the aforesaid facts it is a case most justified for deletion of the penalty.

3. Definite Finding about concealment is necessary -
Under section 271(1)(c) of the Act the authority is given the discretion to levy a penalty if there is concealment of particulars of income and even as regards the quantum of the penalty there is a discretion. Of greater importance is the necessity for a definite finding that there is concealment, as without such a finding of concealment, there can be no question of imposing any penalty. The mere revision of the income to a higher figure by the assessing authority does not automatically warrant an inference of concealment of the expenditure on the construction. The addition to the income of the assessee based on estimate basis. Concealment implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. The fact that the valuer assessed the building at a figure higher than the one reported by the assessee does not by itself lead to the inference that there had been concealment — *CIT VS. K.R. Chinni Krishna Chetty (2000) 246 ITR 111 (Mad.)*

4.7 On the other hand, the Id. DR relied on the orders passed by the Revenue authorities.

4.8 We have heard the Id. counsels for both the parties and we have also perused the materials placed on record, deliberated upon judgements cited by the parties as well as the orders of the Revenue authorities. From the facts, we noticed that the AO had made the addition on account of application of **G.P. Rate of 8%** whereas no findings were recorded by

the AO in the assessment order that the assessee had furnished inaccurate particulars of income or had concealed the income. The AO had invoked the provisions of Section 145(3) of the Act and estimated the income of the assessee on the basis of earlier history of the case. Therefore, we are of the view that it is a case of an estimate against an estimate. Hence, no penalty is leviable in such a case where additions are based purely on estimate basis. We also draw strength from the following case laws.

(i) Gulraj Vaswani Vs. ACIT, (!TSSA No. 21/JP/06) in Tax World VoI-XXXIX page-35 held that "Before Tribunal it has been submitted that at every level there has been an estimation varying as per difference of opinion from authority to authority and hence penalty cannot be levied on the estimated addition — Assessee has also submitted that no satisfaction about concealment of income has been recorded by the Assessing Officer during the course of assessment proceedings — Tribunal have considering these facts deleted the penalty —

(ii) Smt. Bitoli Devi Vs. ACIT(2007), 110 TTJ (Luck) 735 (Unless any positive concealment is found no penalty is leviable on basis of addition made on estimate)

(iii) Enfield Industries Ltd. Vs. DCIT, (2007) 13 SOT 28 (URO)/107 ITD 1 (Kol.) (Onus would lie heavily with Department to prove concealment for purpose of imposing penalty under section 158 BFA(2))

(iv) CIT V. P.H.I. Seeds India Ltd. 159 Taxman 9 (Delhi):- The act does envisage or explicitly provide that in every case where return is not accepted as correct and assessment is framed at a higher income than that presented, penalty

proceedings u/s 271 (1)(c) must be initiated. Section 271(1)(c) is attracted only when the assessee has concealed his income.

When two opinions are possible, adopting one of them can scarcely be viewed as malafide, with intent to evade the payment of income tax.

(v) Penalty can not be levied only estimated addition and reliance is placed on the following decisions: -

- 1.** *CIT Vs. S. Rahamat Khan Birbal Khan Badruddin & Party, 240 ITR 778 (Raj.)*
- 2.** *ACIT Vs. Bansiwala Iron & Steel Re-rolling Mills, 21 TW 533 (JP)*
- 3.** *CIT Vs. Subhash Trading Co., 221 ITR 110 (Guj.)*
- 4.** *Harigopal Singh Vs. CIT, 258 ITR 85 (P&H)*
- 5.** *ACIT Vs. Ganpat Lal Goyal, 32 TW 91 (JP)*

4.9 We are also of the view that u/s 271(1)(c) of the Act, the authority has been given discretion to levy the penalty in case there is a concealment of income or furnishing of inaccurate particulars of income. However, it is a basic need of the provisions of law that definite finding is required to be recorded by the Revenue Officer for reaching to a conclusion with regard to concealment of income or furnishing of inaccurate particulars of income and without any such findings, there cannot be any question of imposition of any penalty. The mere revision of income to a higher figure by the AO does not automatically warrant an

inference of concealment of income by the assessee. The addition to the income of the assessee in this case is based on estimate basis whereas the concealment in our views implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. On this proposition, we draw strength from the decision of Hon'ble Madras High Court in the case of CIT vs K.R. Chinni Krishna Chetty (2000) 246 ITR 121 (Mad). Therefore, keeping in view the totality of the facts and circumstances of the case, we are of the considered view that in this case the additions were made on the basis of estimation and as discussed in the cases referred above, the penalty cannot be levied on the basis of estimated additions. Therefore, we allow this ground of appeal raised by the assessee and delete the penalty levied by the AO and confirmed by the Id. CIT(A). Thus Ground No. 4 of the assessee is allowed.

5.0 As regards the other appeals of the assessee for the Assessment Year 2005-06, 2006-07, 2007-08 & 2009-10, the Id.AR of the assessee during the course of hearing has not pressed the Ground Nos. 1 to 3. Hence, the same are dismissed being not pressed.

5.1 As regards the Ground No. 4 of the assessee for the Assessment Year 2005-06, 2006-07, 2007-08 & 2009-10, the decision taken by the

Bench in the Assessment Year 2004-05 shall apply mutatis mutandis in the case of the assessee for the Assessment Years 2005-06, 2006-07, 2007-08 & 2009-10 being the similar facts and circumstances of the case of the assessee. Thus Ground No. 4 of the assessee in the above Assessment Years is allowed.

6.0 In the result, the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 14 /09/2020.

Sd/-
(एन.के.सैनी)
(N.K. Saini)
उपाध्यक्ष / Vice President

Sd/-
(संदीप गोसाईं)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 14/09/2020.

*Mishra

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

1. अपीलार्थी / The Appellant-Shri Harish Tambi, Jaipur
2. प्रत्यर्थी / The Respondent-The DCIT, Central Circle-1, 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. 970 to 974/JP/2018}
आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar