

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

श्री एन.के.सैनी, उपाध्यक्ष एवं श्री संदीप गोसाई, न्यायिक सदस्य के समक्ष
BEFORE: SHRI N.K. SAINI, VICE PRESIDENT & SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No. 146/JP/2021
Assessment Year: 2013-14

Shri Jai Hind Agarwal, 70-A, Near Valmiki Bhawan, Gupta Garden, Ajmer Road, Jaipur.	बनाम Vs.	I.T.O., Ward 5(4), Jaipur.
PAN No.: ABEPA 3189 P		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar (Adv)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 29/11/2021
उदघोषणा की तारीख / Date of Pronouncement : 27/12/2021

आदेश / ORDER

PER: SANDEEP GOSAIN, J.M.

The present appeal has been filed by the assessee against the order of the Id. CIT(A), National Faceless Appeal Centre, Delhi (NFAC) dated 13/09/2021 for the A.Y. 2013-14. The assessee has raised following grounds of appeal:

- "1. Under the facts and circumstances of the case, the Id. CIT(A) has erred in confirming the action of the Id.AO in passing the order U/s 271(1)(c) of the Act which is against the principles of judicial consistency and therefore, bad in law.*
- 2. The order passed by the Id. A.O. u/s 271(1)(c) of the Income Tax 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.

3. *Under the facts and circumstances of the case, the Id. CIT(A) has erred in confirming the penalty of Rs. 2,65,630/- u/s 271(1)(c) of the Income Tax Act, 1961 imposed by the Id. A.O.*
4. *The assessee craves your indulgence to add, amend or alter all or any grounds of appeal before or at the time of hearing."*

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. The brief facts of the case are that the assessee is an individual and proprietor of M/s Molto Bello Gems Enterprises and is engaged in the business of trading of diamond studded silver and gold jewellery. The assessee filed return of income declaring income of Rs. 6,39,190/- on 30.09.2012. The A.O. completed assessment u/s 143(3) of the Income Tax Act, 1961 (in short, the Act) on 30/03/2016 determining total income at Rs. 49,90,425/- inter-alia making the addition of Rs. 11,12,645/- on account of alleged bogus purchases @ 25% on total purchase of Rs. 44,50,581/- and addition of Rs. 32,38,590/- u/s 41(1) of the Act on account of cessation of liability of trade creditors. Thereafter, the A.O. initiated penalty proceedings U/s 271(1)(c) of the Act and imposed the penalty of Rs. 2,65,630/- on the addition made.

4. Being aggrieved by the order of the A.O., the assessee carried the matter before the Id. CIT(A) (NFAC), who after considering the submissions of the parties as well as material placed on record, upheld the action taken by the A.O.

5. Against the order passed by the Id. CIT(A), (NFAC), the assessee has preferred the present appeal before the ITAT on the grounds mentioned above.

6. All the grounds taken by the assessee has interrelated and interconnected and relates to challenging the order of the Id. CIT(A), (NFAC), in confirming the penalty imposed U/s 271(1)(c) of the Act. In this regard, the Id. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the Id. CIT(A) and also relied upon the written submissions filed before the Bench and the same is reproduced below:

"1. Show cause notice issued on 30/03/2016 is routine - The perusal of this notice reveal the following: -

(i) The notice has been issued in a very routine matter without application of mind. It no where specifies the concealed/inaccurate particular of income on which assessee is required show cause. In fact in the show cause notices the Learned Assessing Officer has not given any

ground for levy of penalty for which the assessee could put his defense.

- (ii) *Although the show cause notices did not contain any particular of concealed income/ inaccurate particulars of income with reference to which penalty was leviable. But subsequently while levying penalty the Learned Assessing Officer has observed in the last page no. 3 of the penalty order that "In view of the totality of the facts and keeping in view of the provisions of section 271(1)(c), the assessee is found guilty for furnishing of inaccurate particulars of income of Rs. 9,97,906/- within the meaning of section 271(1)(c), therefore, this is a fit case for the levy of penalty u/s 271(1)(c)." Thus it would be seen that whereas show cause notice did not contain any ground whereas penalty has been levied on the ground of concealment. In this regard it is submitted that the Karnataka High Court in the case of CIT vs. Manjunath Cotton and Ginning Factory 359 ITR 565 has held that notice u/s 274 of the Income Tax Act, 1961 should specifically state whether penalty is being proposed to be imposed for concealment of income or for furnishing inaccurate particulars of income. In the case of the assessee the Learned Assessing Officer has not done so. In view of this the very initiation of penalty proceedings is vitiated. Accordingly the levy of penalty was not justified. On similar grounds the Hon'ble ITAT Bangalore following the decision of Karnataka High Court cited above as deleted penalty in the case of H. Lakshminarayana vs. ITO (2015) 41 ITR 465 order dated 03.07.2015. The Hon'ble Tribunal deleted the penalty on the sole ground that the show cause notice was defective as it did not spell out*

specifically the ground on which the penalty was sought to be imposed. The Hon'ble Tribunal further held that such defect was not curable u/s 292BB. In view of these facts the penalty in the case of the assessee also deserves to be deleted.

- (iii) *It is further submitted that the Karnataka High Court has specifically held that in the case of CIT vs. Manjunath Cotton and Ginning Factory 359 ITR 565 that the assessee should know the grounds which he has to meet specifically otherwise the principles of natural justice are offended. On the basis of such notice no penalty could be imposed.*

In view of the aforesaid facts it is obvious that the notice was not legally and lawfully perfect. Levy of penalty on the basis of such notice is unlawful, illegal and unjustified. The Learned CIT(A) is therefore requested to delete the penalty. The case of the assessee gets support from the following decision of the Gujarat High Court quoted below: -

NEW SORATHIA ENGINEERING CO. vs. COMMISSIONER OF INCOME TAX (HIGH COURT OF GUJARAT) (2006) 202 CTR 0188 : (2006) 282 ITR 0642 : (2006) 155 TAXMAN 0513

Penalty under s. 271(1)(c)—Validity—Absence of specific finding—Addition vis-a-vis cash credit upheld by Tribunal—There was no clear-cut finding in the penalty order or the order of the CIT(A) as to whether there was concealment of income or furnishing of inaccurate particulars by the assessee—Tribunal too failed to appreciate this legal issue—Penalty not sustainable—Tribunal having failed to take into consideration and deal with decision of the jurisdictional High Court, it committed an error in law—

CIT vs. Manu Engineering Works (1979) 8 CTR (Guj) 141 : (1980) 122 ITR 306 (Guj) followed.

It is also worthwhile to mention that subsequently the SLP was also dismissed by the Hon'ble Apex Court in the case of SSAS Emerald Meadows in CC No. 11485 of 2016 order dated 05.08.2016 in which the same law was confirmed by approving the judgment of the Karnataka High Court.

The Rajasthan High Court is also following the above judgments. The Latest judgment of the Rajasthan High Court in the case of Sheveta Construction Company Pvt Ltd in DB IT Appeal No. 534/2008 order dated 06.12.2016 wherein it has been held that the Assessing Officer has to give a notice as to whether he proposes to levy penalty for concealment of income or furnishing inaccurate particulars. He cannot have both the conditions and if it is so he has to say so in the notice and record a finding in the penalty order, otherwise levy of penalty is illegal.

Therefore the above judgments of Jurisdictional High Court and Supreme Court are binding in nature and the penalty deserves to be deleted.

(2) *Addition sustained of Rs. 3,89,586/- out of Rs. 11,12,645/-*

In this case of the Learned Assessing Officer made the addition of Rs. 11,12,645/- on account of alleged bogus purchases @ 25% on total purchase of Rs. 44,50,581/-. After considering the various decision of Gujarat High Court and other the Learned CIT(A) has applied the GP rate of 16% as against 15.23% declared by the assessee to estimate the income of the assessee. The learned CIT(A) has not given any specific finding in this regard. He has only mentioned that to

plug to leakage of the revenue and in the interest of justice he applied 16% GP rate in the given circumstances. Therefore it is a case of estimation only where the learned AO has estimated the profit and these estimates were further reduced by learned CIT(A). There is no specific finding with regard to the concealment of income. There are number of cases of jurisdiction high court as well as Jurisdictional ITAT.

- (3) *No penalty can be levied on disallowance made alleging unverifiable purchases (Jurisdictional High Court of Rajasthan)-*

In the case of CIT Vs. Malpani House of Stones order dated 01/03/2017 in ITA no. 341 of 2005 it has been held that on the basis of bogus purchases/enhancement of GP rate and the addition was made in quantum proceedings cannot be made basis for levy of penalty u/s 271(1)(c) of the IT Act, 1961. Copy of High Court order is enclosed herewith.

In other case of Kamlesh Dangayach vs. ACIT Jaipur in ITA no. 18/JPR/2012 it has been held that where addition has been made by disallowing purchases alleging not verifiable. No penalty u/s 271(1)(c) can be imposed. Copy of same order is also enclosed.

Therefore by considering the Jurisdictional High Court and ITAT judgement. The penalty levied deserves to be deleted.

- (4) *No penalty can be levied on estimated additions –*

In this case the Learned Assessing Officer has disallowed 25% of unverifiable purchases and the learned CIT(A) has restricted to 15% only. 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 by disallowing 25% of unverifiable purchases. 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, (ITSSA 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 cannot 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. *ACTT 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. *ACTT Vs. Gan Pat Lal Goyal, 32 TW 91 (JP)*

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

Addition sustained of 5,90,320/- out of Rs. 32,38,590/-

- (5) *The second addition sustained by the learned CIT(A) on account of this addition by mentioning following –*

I have considered the above mentioned facts of the case. It has been found that Rs.26,48,270/- out of Rs.32,38,590/- were paid through banking channels and only an amount of Rs.5,90,320/- were paid in cash and can be termed as doubtful to that extent. Therefore, going by the factual matrix of the case and also the evidences filed during appellate proceedings the addition u/s 41(1) of the Act is reduced to Rs.5,90,320/-. Accordingly, the appellant's ground of appeal on the issue is partly allowed.

In this case of the Learned Assessing Officer made the addition of Rs. 32,38,590/- u/s 41(1) of the Income Tax Act, 1961 on account of cessation of liability of trade creditors by treating the payments as doubtful. Subsequently on verification the learned CIT(A) found that most of the payments are made in cheque. The cash payment amount of

Rs. 5,90,320/- was sustained by him. In this account the learned CIT(A) has not given any specific finding with regard to the concealment of income or it has not been established that the payments were not genuine. The purchases made were accepted against which these cash payments were made. When purchases are not doubtful and they have been accepted so there is no reason to doubt on the payments. The learned CIT(A) has wrongly sustained this addition. Since this was a small issue, therefore the assessee has not agitated further. But in penalty proceedings lenient view should be taken and no penalty should be levied on the quantum addition which has been sustained only on doubts and surmises and nothing has been brought on the record to prove the concealment of income or furnishing of inaccurate particulars of income. We further rely on the following propositions on this regard –

6. *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 121 (Mad.)

7. *No concealment of any fact/ income — penalty not leviable*

It is humbly submitted that it is a case where the assessee has disclosed all the material facts for the purposes of assessment. The Learned Assessing Officer has applied the provision of section 145(3) merely on ground of non maintenance of stock register or kachha bills. Kachha bills are subject to verification. However despite this the Learned Assessing Officer rejected the books of account and applied GP rate of 10%. The Learned Assessing Officer has failed to point out in the assessment order any item of income which was concealed by the assessee. The Learned Assessing Officer himself has resorted to estimate for making addition. Thus this is not a case where there was any specific item of income which is concealed by the applicant. In the circumstances penalty is not leviable. Supreme Court decision is quoted below for support –

Dilip N-Shroff Vs. Jt. CIT (2007) 161 Taxman 218/291 ITR 519 (SC)

Primary burden of proof is on revenue; even when burden is required to be discharged by an assessee, it would not be as heavy as in prosecution cases; before a penalty can be imposed, the entirety of circumstances must reasonably point to conclusion that disputed amount represented income and that assessee had consciously concealed the particular of his income or had furnished inaccurate particulars thereof (Assessment Year 1998-99)

8. *Penalty cannot be imposed in case of rejection of explanation: -*

It would be seen that the facts of the case disclosed that in this case addition was made purely on account of estimate. No penalty is warranted on addition sustained on estimate basis. It is a case where the explanation of the assessee has been rejected. The assessee fully explained why income was not disclosed at the time of return filing. The addition has been made by rejecting a plausible explanation. It is settled position of law that no penalty is leviable where additions have been made by rejecting the explanation of the assessee.

9. *Favourable case laws: -*

The judicial decisions are to the effect that such proceedings are penal in nature and burden to prove the mens rea and that the receipt in the hands of assessee constitutes income is on the revenue. The assessee is not required to prove his innocence. This was held, considering the old provisions of section 28(1)(c) of Indian I.T. Act, 1922, by the hon'ble Bombay High Court in the case of Gokuldas Harivallabhdas 34 ITR 98 which was approved by the apex court in the case of Anwar Ali 76 ITR 696 SC. It was also held by the apex court that penalty proceedings are independent proceedings and, therefore, findings recorded in assessment proceedings, though may be relevant, but would not be conclusive. Mere rejection of explanation of assessee in assessment proceedings would not be sufficient for levy of penalty. The view taken in the case of Anwar Ali has been followed in Khoday Eswarsa and sons 83 ITR 369 SC, in Anantharam Veerasighaiah & co 123 ITR 457 SC, in T.Ashok Pal 292 ITR 11 SC and in Dilip N. Shroff 291 ITR 519. It is to be noted that the provisions of sec 271(1)(c) as considered by the apex court in the case of Anwar Ali (supra) were identical to the provisions under the old Act of 1922. In the case of Sir Shadilal Sugar & General Mills 168 ITR 705 SC, it was held that penalty could not be imposed merely because the 'A' agreed to be assessed on a particular income. The decision of the apex court was based on the provisions as they were originally enacted.

The view taken by the division bench in the case of Dilip N. Shroff was doubted and overruled in UOI-v-Dharmendra Textiles Processors 306 ITR 277 SC by holding that penalty under the above provision is a civil liability and therefore willful concealment is not an essential ingredient for attracting the civil liability. It was pointed out that the division bench in the case of Dilip N Shroff failed to notice conceptual and contextual difference between sec 271(1)(c); and sec 271C. Further, it approved the other decision of the division bench in the case of Chairman SEBI (2006) 55CC 361.

It is pertinent to note that the decisions rendered earlier in the cases: Anwar Ali, Hindustan Steels and Ananthram Veerasinghiah were also rendered by the benches of three judges. In all these cases it was clearly held that proceedings under section 271(1)(c) are quasi criminal in nature.

However, if such onus is discharged then assessee would be out of the mischief of the Explanation unless the deptt is able to establish afresh that assessee had in fact concealed the particulars or furnished inaccurate particulars of income. This view has been approved by the apex court in Musadilal Ram Bharose 165 ITR 14 SC, CIT-v-K.R.Sadayappan 185 ITR 49 SC and in Chuharmal 172 ITR 250 SC.

At this stage, it would be appropriate to refer the latest decision of SC in the case of Dharmendra Textiles (supra) wherein it has been held-(i) the Explanations appended to section 271(1)(c) indicate the element of strict liability,(ii) the object behind the enactment shows that it provides for remedy for loss of revenue,(iii)that penalty under the section is civil liability,(iv)willful concealment is not an essential ingredient for attracting penalty (v) no discretion with the authority imposing penalty. Hence, revenue is not required to prove the element of mens rea on the part of assessee. This decision was understood to mean that levy of penalty is automatic.

The above decision has been explained by the SC in subsequent decision in the case of UOI-v- Rajasthan Spg & Wyg Mills 224 CTR 1 SC wherein it is explained that levy of penalty is not automatic. If the conditions specified in the section are satisfied then alone, penalty is leviable. Facts of each case would determine whether such conditions are satisfied or not.

In the case of ACIT-v- VIP Industries 122 TTJ 289 (Mum), the effect of above decision was considered by the tribunal. It was opined that SC has not held that in all cases where addition is made, the penalty shall automatically follow. The true effect is that mens rea is not to be proved by the revenue. If the 'A' can

successfully prove his bona fide by tendering a valid explanation then, penalty cannot be levied. Hence, in case of genuine difference between AO and 'A', penalty cannot be levied. Same view has been taken by Pune bench in the case of Kanbay Software India 122TTJ 721.

In the case of CIT-v- Sidhanha Enterprises 184 Taxman 460 PH, the 'A' suffered loss on sale of machinery which was set off against other incomes. AO disallowed such claim & initiated penalty proceedings u/s 271. Tribunal deleted the penalty. The HC held that Dharmendra's case cannot be read as laying down that in every case where particulars are inaccurate, penalty must follow. What has been held is that the qualitative difference between criminal liability u/s 276C and penalty u/s 271(1)(c) must be kept in mind. The concept of penalty has not been changed by the said decision. Penalty is imposed only when there is some element of deliberate default and not when there is merely a mistake or bona fide claim.

Considering the above case laws it is clear that the explanation offered by the assessee was possible one which were rejected by the revenue authorities without assigning any reason or without examining the evidences submitted by the assessee. The Learned Assessing Officer has not proved any mens rea of the assessee in this regard. Therefore penalty is not leviable under the given circumstances and facts of the case of the assessee."

In view of the above facts and circumstances your honor is requested to delete the penalty and oblige."

7. On the contrary, the Id. DR has vehemently supported the orders of the lower authorities.
8. We have considered the rival contentions and carefully perused the material placed on record. As per facts of the present case, we noticed

that the A.O. made addition of Rs. 11,12,645/- on account of bogus purchases @ 25% on total purchase of Rs. 44,50,581/-. After considering the various decisions of different High Courts, the Id. CIT(A) applied G.P. rate of 16% as against 15.23% declared by the assessee for estimation the income of the assessee. In this way, the Id. CIT(A) has restricted the addition. Although, according to the Id. AR, the Id. CIT(A) has not given any specific finding in this regard and has only mentioned that to plug to leakage of the revenue and in the interest of justice the Id. CIT(A) applied 16% GP rate in the given circumstances and thus, according to the Id. AR, it is a case of estimation only where the AO has estimated the profit and these estimates were further reduced by Id. CIT(A). After analyzing the order of the A.O. as well as the Id. CIT(A), we also found that both the lower authorities had made respective additions on the basis of estimation and it is settled law that no penalty can be levied on disallowance made on the ground of unverifiable purchases. In this regard, the Hon'ble Jurisdictional High Court in the case of **CIT Vs. Malpani House of Stones** vide order dated 01/03/2017 passed in ITA no. 341 of 2005 has categorically held that on the basis of bogus purchases/enhancement of GP rate and the addition was made in quantum proceedings cannot be made basis for levy of

penalty u/s 271(1)(c) of the Act. Similarly the Coordinate Bench of this Tribunal in the case of **Kamlesh Dangayach vs. ACIT Jaipur in ITA no. 18/JPR/2012** it has also been held that where addition has been made by disallowing purchases alleging not verifiable then in that eventuality, no penalty u/s 271(1)(c) of the Act can be imposed. We draw strength from the decision in the case of **Gulraj Vaswani Vs. ACIT, (ITSSA 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.

In the case of **Smt. Bitoli Devi Vs. ACIT (2007), 110 TTJ (Luck) 735** wherein it has been held that "Unless any positive concealment is found, no penalty is leviable on basis of addition made on estimate". In the case of **CIT V. P.H.I. Seeds India Ltd. 159 Taxman 9 (Delhi)** wherein it has been held that "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.”

9. Considering the totality of facts and circumstances of the case, we found merit in the contention raised by the Id. AR and no new facts and circumstances has been put forth by the Id. DR to controvert or rebut the contentions made by the Id. AR, therefore, we direct to delete the penalty.

10. The second issue with regard sustenance of addition U/s 41(1) of the Act on account of cessation of liability of trade creditors by treating the payments as doubtful, we observed that the cash payment amount of Rs. 5,90,320/- was sustained by the Id. CIT(A). In this count the Id. CIT(A) has not given any specific finding with regard to the concealment of income or it has not been established that the payments were not genuine. The purchases made were accepted against which these cash payments were made. When purchases are not doubtful and they have been accepted so there is no reason to doubt on the payments. Since

this was a small issue, therefore the assessee has not agitated further. But in penalty proceedings lenient view should be taken and no penalty should be levied on the quantum addition which has been sustained only on doubts and surmises and nothing has been brought on the record to prove the concealment of income or furnishing of inaccurate particulars of income. In 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. In this regard, we draw

strength from the decision in the case of CIT VS. K.R. Chinni Krishna Chetty (2000) 246 ITR 121 (Mad.).

11. We also observed that it is a case where the assessee has disclosed all the material facts for the purposes of assessment. The A.O. has applied the provision of section 145(3) merely on ground of non maintenance of stock register or kachha bills. Kachha bills are subject to verification. However despite this the A.O. rejected the books of account and applied GP rate of 10%. The A.O. has failed to point out in the assessment order any item of income which was concealed by the assessee. The A.O. himself has resorted to estimate for making addition. Thus this is not a case where there was any specific item of income which is concealed by the assessee. In the circumstances penalty is not leviable. In this regard, we draw strength from the decision of the Hon'ble Supreme Court in the case of **Dilip N-Shroff Vs. Jt. CIT (2007) 161 Taxman 218/291 ITR 519 (SC)** wherein it has been held that "Primary burden of proof is on revenue; even when burden is required to be discharged by an assessee, it would not be as heavy as in prosecution cases; before a penalty can be imposed, the entirety of circumstances must reasonably point to conclusion that disputed amount represented income and that assessee had consciously

concealed the particular of his income or had furnished inaccurate particulars thereof (Assessment Year 1998-99).” From the above, it can be seen that the facts of the case disclosed that in this case addition was made purely on account of estimate. No penalty is warranted on addition sustained on estimate basis. It is a case where the explanation of the assessee has been rejected. The assessee fully explained why income was not disclosed at the time of return filing. The addition has been made by rejecting a plausible explanation. It is settled position of law that no penalty is leviable where additions have been made by rejecting the explanation of the assessee. The judicial decisions are to the effect that such proceedings are penal in nature and burden to prove the mens rea and that the receipt in the hands of assessee constitutes income is on the revenue. The assessee is not required to prove his innocence. This was held, considering the old provisions of section 28(1)(c) of Indian I.T. Act, 1922, by the Hon'ble Bombay High Court in the case of **Gokuldas Harivallabhdas 34 ITR 98** which was approved by the Apex Court in the case of **Anwar Ali 76 ITR 696 SC**. It was also held by the Apex Court that penalty proceedings are independent proceedings and, therefore, findings recorded in assessment proceedings, though may be relevant, but

would not be conclusive. Mere rejection of explanation of assessee in assessment proceedings would not be sufficient for levy of penalty. The view taken in the case of Anwar Ali has been followed in **Khoday Eswarsa and sons 83 ITR 369 SC, in Anantharam Veerasighaiah & co 123 ITR 457 SC, in T.Ashok Pal 292 ITR 11 SC and in Dilip N. Shroff 291 ITR 519**. It is to be noted that the provisions of sec 271(1)(c) as considered by the Apex Court in the case of Anwar Ali (supra) were identical to the provisions under the old Act of 1922. In the case of **Sir Shadilal Sugar & General Mills 168 ITR 705 SC**, it was held that penalty could not be imposed merely because the 'A' agreed to be assessed on a particular income. The decision of the Apex Court was based on the provisions as they were originally enacted. The view taken by the division bench in the case of **Dilip N. Shroff** was doubted and overruled in **UOI-v-Dharmendra Textiles Processors 306 ITR 277 SC** by holding that- penalty under the above provision is a civil liability and therefore willful concealment is not an essential ingredient for attracting the civil liability. It was pointed out that the division bench in the case of Dilip N Shroff failed to notice conceptual and contextual difference between sec 271(1)(c); and sec 271C. Further, it approved the other decision of the division

bench in the case of Chairman SEBI (2006) 55CC 361. It is pertinent to note that the decisions rendered earlier in the cases: **Anwar Ali, Hindustan Steels and Ananthram Veerasinghiah** were also rendered by the benches of three judges. In all these cases it was clearly held that proceedings under section 271(1)(c) are quasi criminal in nature. However, if such onus is discharged then assessee would be out of the mischief of the Explanation unless the depts is able to establish afresh that assessee had in fact concealed the particulars or furnished inaccurate particulars of income. This view has been approved by the Apex Court in **Musadilal Ram Bharose 165 ITR 14 SC, CIT-v-K.R.Sadayappan 185 ITR 49 SC and in Chuharmal 172 ITR 250 SC.**

12. At this stage, it would be appropriate to refer the latest decision of SC in the case of **Dharmendra Textiles** (supra) wherein it has been held-(i) the Explanations appended to section 271(1)(c) indicate the element of strict liability,(ii) the object behind the enactment shows that it provides for remedy for loss of revenue,(iii)that penalty under the section is civil liability,(iv)willful concealment is not an essential ingredient for attracting penalty (v) no discretion with the authority imposing penalty. Hence, revenue is not required to prove the element of mens rea on the

part of assessee. This decision was understood to mean that levy of penalty is automatic. The above decision has been explained by the SC in subsequent decision in the case of **UOI-v- Rajasthan Spg & Wvg Mills 224 CTR 1 SC** wherein it is explained that levy of penalty is not automatic. If the conditions specified in the section are satisfied then alone, penalty is leviable. Facts of each case would determine whether such conditions are satisfied or not. In the case of **ACIT-v- VIP Industries 122 TTJ 289 (Mum)**, the effect of above decision was considered by the tribunal. It was opined that SC has not held that in all cases where addition is made, the penalty shall automatically follow. The true effect is that mens rea is not to be proved by the revenue. If the 'A' can successfully prove his bona fide by tendering a valid explanation then, penalty cannot be levied. Hence, in case of genuine difference between AO and 'A', penalty cannot be levied. Same view has been taken by Pune bench in the case of **Kanbay Software India 122 TTJ 721**. In the case of **CIT-v- Sidhanha Enterprises 184 Taxman 460 PH**, the 'A' suffered loss on sale of machinery which was set off against other incomes. AO disallowed such claim & initiated penalty proceedings u/s 271. Tribunal deleted the penalty. The HC held that Dharmendra's case cannot be read as laying down that in every case where particulars

are inaccurate, penalty must follow. What has been held is that the qualitative difference between criminal liability u/s 276C and penalty u/s 271(1)(c) must be kept in mind. The concept of penalty has not been changed by the said decision. Penalty is imposed only when there is some element of deliberate default and not when there is merely a mistake or bona fide claim. Considering the above case laws it is clear that the explanation offered by the assessee was possible one which were rejected by the revenue authorities without assigning any reason or without examining the evidences submitted by the assessee. The A.O. has not proved any mens rea of the assessee in this regard. Therefore penalty is not leviable under the given circumstances and facts of the case of the assessee. Considering the totality of the facts and circumstances of the case, we direct to delete the penalty made and confirmed by the Id. CIT(A).

13. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 27th December, 2021.

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

जयपुर / Jaipur

Sd/-
(संदीप गोसाईं)
(SANDEEP GOSAIN)
न्यायिक सदस्य / Judicial Member

दिनांक / Dated:- 27/12/2021

*Ranjan

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

1. अपीलार्थी / The Appellant- Shri Jai Hind Agarwal, Jaipur.
2. प्रत्यर्थी / The Respondent- The I.T.O., Ward 5(4), Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 146/JP/2021)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar