

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH “SMC”: NEW DELHI**

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No. 139/DEL/2022
[Assessment Year: 2010-11]

Shyam Sunder Kansal, 1, D M Colony Road, Prkrati Vihar, Opp. LIC Building, Bulandshahr-203001 PAN- ACRPK9840P	<u>Vs</u>	Income-tax Officer, Ward-3(2), Bulandshahr.
APPELLANT		RESPONDENT
Appellant by	Sh. Avkash Sharma, CA	
Respondent by	Sh. Om Prakash, Sr. DR	
Date of hearing	23.05.2022	
Date of pronouncement	27.05.2022	

ORDER

PER KUL BHARAT, JM:

This appeal, by the assessee, is directed against the order of the learned Commissioner of Income-tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 29.11.2021, pertaining to the assessment year 2010-11. The assessee has raised following grounds of appeal:

- “1. Hon’ble CIT (Appeals) is wrong in confirming the penalty on the addition by disallowing the expenditures on estimated basis which are not specific.
2. Hon’ble CIT (Appeals) is wrong in confirming the penalty imposed on additions made on the basis of deeming provisions under section 50C when

after valuation by DVO Hon'ble CIT (Appeals) deleted major part of addition of AO and this addition is not an specific addition one.

3. Hon'ble CIT (Appeals) is wrong in confirming the penalty on additions of FDR interest which the assessee sue moto surrendered as income before making any query by AO in this regard while the penalty has not been imposed in AY 2011-12 on the same addition.

2. The only effective ground is against sustaining the penalty of Rs. 69,601/- and Rs. 2,08,803/- u/s 271(1)(c) of the Income-tax Act, 1961 ("the Act").

3. Facts giving rise to the present appeal are that for the assessment year 2010-11, the Assessing Officer assessed the assessee's income at Rs. 30,43,691/- against the returned income of Rs. 1,53,000/-. While completing the assessment, the Assessing Officer, inter alia, made following addition to the returned income of the assessee:

- (i) Addition of Rs. 1,01,184/- on account of excessive and unverified expenses ;
- (ii) Addition of Rs. 47,980/- on account of income from other sources, not declared in the return of income filed;
- (iii) Addition of Rs. 27,06,370/- on account of long term capital.

4. The Assessing Officer also initiated penalty proceedings u/s 271(1)(c) against the assessee and vide penalty order dated 05.06.2018 imposed a penalty of Rs. 2,00,000/- for concealment of particulars of assessee's income to the extent of Rs. 3,92,370/-.

5. Aggrieved against it the assessee preferred appeal before the learned CIT(Appeals), who after considering submissions, restricted the penalty to 100% of the tax sought to be evaded as against 287.5% imposed by the Assessing Officer. Aggrieved against it, now the assessee is in appeal before this Tribunal.

6. At the outset learned counsel for the assessee reiterated the submissions as made in the written submissions. For the sake of clarity, submissions of the assessee are reproduced as under:

“GROUND NO. 1 Regarding penalty u/s 271(1Hc) on addition made by disallowing expenditures on percentage basis

Ld CIT reduced the penalty u/s 271(1)(c) imposed by AO from 287.5% to 100 %. The penalty was imposed on the addition made by AO by disallowing 50% of expenses of Rs. 202367/- further reduced to 40% by Ld CIT when an appeal was filed before him against the order u/s 143(3).

The addition was on estimate basis . No specific concealment has been unearthed . The estimation is purely guess work of the AO . Although books of accounts have been maintained and expenses ledger attached with submissions to AO but Ld. CIT assuming no books of accounts maintained confirmed partly addition . It is submitted that for non-maintenance of the books of accounts separate penalty u/s 271A of the Act is prescribed. The addition has been made only on estimated basis and it is a settled law that penalty on ad hoc disallowance or addition made on estimate basis is not attracted.

The Hon’ble Delhi High Court in CIT vs. Aero Traders Pvt. Ltd., reported in 322 ITR 316 (Del), has held that no penalty u/s 271 (1)(c) can be imposed when income is determined on estimate basis. Similar view has been taken by the Hon’ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT reported in 258 ITR 85 (P&H) and the Hon’ble Gujarat High

Court in the case of CIT vs. Subhash Trading Company reported in 221 ITR 110 (Guj). In view of the foregoing precedents including the one from the Hon'ble Jurisdictional High Court, it is apparent that when the bedrock of instant penalty is the estimate of net profit, the same cannot be sustained.

In support of our submission Laxman Trimbak Gule Vs. ITO, ITA No. 348/PUN/2018 ITAT (Pune) Assessment Year: 2011-12 may be referred

Brief Facts: *The assessee is an individual who filed his return for A.Y. 2011-12 declaring income of Rs. 6,72,940/- under the head long term capital gain. During the assessment, the AO verified the claim of commission of Rs. 2,50,000/- and improvement expenditure of Rs. 50,000. The AO asked the assessee to produce documentary evidences regarding the claim made by the assessee. That the matter being old, the assessee could not produce the evidences and as such the AO estimated the disallowance at 50% being Rs. 9,90,685/- and added the same to the total income of the assessee and also initiated penalty proceedings u/s 274 r.w.s. 271(1)(c) of the Act for concealing the particulars of income or furnishing inaccurate particulars of income. The Ld. CIT(A) upheld the levy of penalty. Aggrieved, the assessee preferred further appeal with Tribunal.*

Submission before ITAT:

The Ld. AR for the assessee submitted that these were the disallowances made by the AO on estimation basis and it is the settled legal position that there cannot be any imposition of penalty u/s 271 (1)(c) of the Act in respect of disallowances made on estimation basis.

He further submitted that the assessee had made bona-fide disclosures through all the necessary particulars in the return of income. Mere disallowance of a claim made bona-fide would not amount to concealment of particulars of income or furnishing inaccurate particulars of such income to warrant imposition of penalty u/s 271 (1)(c) of the Act.

To support such contention, he has placed reliance on the following decisions:

- 1. CIT Vs. Reliance Petrol Products Pvt. Ltd. 322 ITR 158 (SC)*
- 2. Ventura Textiles Limited Vs. CIT-Mumbai City-11, ITA No. 958 of 2017*
- 3. Mohd. Farhan Shaikh Vs. Deputy Commissioner of Income Tax, ITA Nos. 51 & 57 of 2012 (2021) 110 CCH 0125 MumHC*

Observation of Tribunal:

It is a basic need of the provisions of law that definite finding is required to be recorded by the AO 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 u/s 271 (1)(c) of the Act.

More so, when the disallowances have been enforced by the Ld. CIT(A) on estimation basis, in such scenario, the settled legal position is that no penalty u/s 271(1)(c) of the Act cannot be imposed. We find strength from the following decisions of the Hon'ble High Courts: -

- 1. CIT Vs. Aero Traders Pvt. Ltd. 322 ITR 316 (Del):** *No penalty u/s 271(1)(c) of the Act can be imposed when the income is determined on estimate basis. Penalty being a quasi-criminal proceeding there is a duty cast on the AO to establish the guilt of the assessee in concealing the income or furnishing of inaccurate particulars of such income.*
- 2. CIT Vs. Subhash Trading Co. 221 ITR 110 (Guj.):** *Where income is assessed on estimate basis after rejecting book results, penalty u/s 271(1)(c) cannot be imposed by mere application of explanation thereof in the absence of any evidence to conclude a positive finding that there was concealment of income.*
- 3. Harigopal Singh Vs. CIT, 258 ITR 85 (P&H):** *Provisions of section 271(1)(c) are not attracted to cases where income of an assessee is assessed on estimate basis and additions are made therein on that basis.*

Verdict of Tribunal: *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 and thus, it is not a fit case of levying penalty.*

Copy of judgment of Laxman Trimbak Gule Vs. ITO, ITA No. 348/PUN/2018 ITAT (Pune) is attached . Also copy of case law of ITAT Delhi Bench Mamta Bakshi vs DCIT Central Circle Delhi ITA No. 1359& 1360/Del/2018 Assessment Years 2009-10 & 2010-11 is enclosed

Ground No. 2: Regarding penalty u/s 271(1)(c) on addition made on the basis of Section 50C

Ld.CIT Appeals reduced the penalty under section 271(1)(c) from 287.5% to 100% imposed . Original addition was made in the assessment u/s 143(3) under section 50C on account of variation between the stamp value and actual consideration received of property sold of Rs.2706370/- which was reduced by Ld CIT on the basis of DVO report when appeal filed against the order to Rs. 283370 /- hereby deleted addition of Rs. Rs. 2423000/-.

Section 271(1) (c) of Income Tax Act says to impose the penalty if assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. There being no conclusive evidence to prove the fact that assessee has received any amount over and above the sale consideration mentioned in the sale deed, imposition of penalty under section 271(1)(c) is not imposable. It is further submitted that the provision of section 50C being a deeming provision, it cannot be used for the purpose of imposition of penalty under section 271 (1)(c).

*In support of our contention following case is hereby referred
Case Name : Bhavya Anant Udeshi Vs The Income Tax Officer
(International Taxation) (ITAT Hyderabad)
Appeal Number: ITA.No.565/Hyd/2015
Date of Judgement /Order: 04/09/2015*

In the case of Bhavya Anant Udeshi Vs ITO (International Taxation) it was held by ITAT Hyderabad that provision of section 50C being a deeming provision, it cannot be used for the purpose of imposition of penalty under section 271(1)(c) unless it is proved that Assessee has received any amount over and above the sale consideration mentioned in the sale deed or it can be imposed if there is a failure on the part of the assessee to disclose all the detail correctly. Relying upon the decisions in cases of identical nature, whereby penalty u/s 271(1)(c) was deleted, the Bench pronounced that since the assessee had not suppressed any material fact from the notice of the A.O. in these circumstances, the imposition of penalty under section 271(1)(c) of the Act alleging furnishing of inaccurate particulars of income or concealment of income is not appropriate.

Copy of judgment of Bhavya Anant Udeshi Vs The Income Tax Officer (International Taxation)(ITAT Hyderabad) and of Darshnaben Vs ITO Ward 13 A Surat of Ahamdabad Bench are enclosed

GROUND NO. 3 REGARDING PENALTY ON BONAFIDE SURRENDER OF BANK INTEREST

Ld.CIT Appeals confirmed penalty under section to 100% from 287.5% imposed by AO on addition of bank interest of Rs. 47980/- which was assessee himself surrendered as income before raising any query by AO in this regard .

Assessee during the course of assessment submitted in the point number 7 of reply dated 30/06/2014 that although return has been filed due to heavy pressure from AO for notice compliance under section 148 but exact detail of each entry in bank is not possible because of non-availability these old bank statements in a short period . The reply was as under:

Regarding your query of bank deposit . assessee will be able to provide detail on next date when the statement will be received from bank . However it is to inform you during the year. a plot situated at Panni Naoa, Bulandshahr. was sold on 3rd Seotember2009 for the total consideration of Rs. 26 Lacs. This whole amount was received in cash and was deposited in IDBI savings Account and this whole amount was utilized in constructing residential house at 1-Prakriti-Vihar, P.M. Road, Bulandshahr. Further full detail of bank statement was not available with assessee . income of saving bank interest for Rs. 37906/- left while calculating income . so assessee is ready to surrender the same for tax. Intention of assessee is not malafide, it happened just because the period is very old and bank could not provide statement in short period.

Assessee during the course of assessment in the 3rd point of his 2nd reply dated 11/08/2014 bonafidely surrendered bank interest income which was left to take into consideration while calculating income due to non-availability of bank statement. The text of reply is as under:

It is also submitted that at the time of filing income tax return bank statements were not available with assessee but due notices of department assessee filed the return and after that he requested bank to provide the same . Now banks have given bank statements or traced by assessee . It was found actual saving bank interest is 44773/- and interest on FDR sweep account realized Rs.838/-. So assessee is ready

to surrender the same for tax . Intention of assessee is not malafide , it happened just because the period is very old and bank could not provide statement in short period.

The above replies were submitted sue moto and not against any query of AO on 30/06/2014 and on 11/08/2014 while order was passed on 30/12/2014 .

On a similar issue the Hon'ble Karnataka High Court in the case of CIT Vs M. M. Gujamgadi 290 ITR 168 (supra) held as under:

"A reading of sections 271 and 271(1)(c) of the Income Tax Act, 1961, and the Explanation appended thereto manifestly makes it clear that every addition of income by the Income-tax Officer will not automatically attract levy of penalty. It is clear from Explanation 1(B) to section 271(1)(c) of the Act that while computing the total income of an assessee, if the assessee fails to prove that such explanation is bonafide then there will be a deemed concealment by the assessee."

In the case of Mohd Irshad vs ITO Muzaffarnagar ITA No. 4994/Del/2013 : Asstt. Year : 2007-08 Hon'ble Delhi ITAT deleted the Penalty under section 271(1)(c) imposed on the income bonafidely surrendered by the assessee.

It was held in the above case that

The explanation offered by the assessee was available on record. Bona fide failure on the part of the assessee in not substantiating his claim was also available on record. The Income-tax Officer, while passing the order of penalty under section 271(1)(c) of the Act, had not considered the available explanation of the assessee and whether the explanation so offered was bonafide or not. The cancellation of penalty was justified."

We, therefore, considering the totality of the facts as discussed hereinabove are of the view that the penalty u/s 271(1)(c) of the Act was not leviable in the present case. Accordingly, the penalty confirmed by the Id. CIT(A) which was levied by the AO u/s 271(1)(c) of the Act is deleted.

There was no intentionally concealment of any income of bank interest therefore penalty under section 271(1)(c) is not imposable and be deleted

PRAYER

In light of the aforementioned facts and circumstances of the titled matter, this Hon'ble ITAT Delhi in the ultimate interest of justice humbly be pleased to allow the appeal in favour of appellant.”

7. Per contra, learned D.R. strongly opposed these submissions and submitted that impugned order is well reasoned and all submissions have been considered. Hence, there is no infirmity into the order.

8. I have heard the rival contentions and perused the material available on record. In this case the Assessing Officer had imposed penalty of Rs. 2,00,000/- on additions confirmed by the learned CIT(Appeals). It is contention of assessee that the additions are purely based on estimation and one of the additions is related to sale consideration of capital asset adopted as per section 50C of the Act and another addition was made purely on ad hoc basis. Therefore, it is contended that in the light of binding precedents, penalty deserves to be deleted. It is well settled that the quantum proceedings and penalty proceedings are two different and distinct proceedings. It is also well settled that merely an addition is made would not ipso facto attract the levy of penalty. If the assessee is able to prove that the conditions envisaged u/s 271(1)(c) of the Act are not satisfied in that event no penalty would be leviable.

9. In the case in hand the Assessing Officer levied penalty, firstly, on the addition made by taking sale consideration on the basis of value prescribed under

the Stamp Valuation Act by invoking the provisions of Section 50C and secondly, on the addition made on account of disallowance of 50% expenses on estimate basis.

10. The learned counsel for the assessee has relied upon various case laws to buttress the argument that no penalty would be leviable where addition into income is made on the basis of deeming provisions and disallowance of expenses on estimation basis. For the second proposition that no penalty is leviable where the income is determined on estimate basis, reliance is placed on the judgment of Hon'ble Delhi High Court rendered in the case of CIT Vs. Aero Traders Pvt. Ltd. 322 ITR 316 (Del), as under:

“5. Against this order, the assessee filed an appeal before the CIT(A), who deleted the penalty imposed vide order dated 07.09.2007, holding that the addition made by the Assessing Officer on the basis of estimated profit cannot be a subject matter of penalty for concealment of income. The CIT(A) further found that penalty was not imposable in view of the substantial deduction given by the Tribunal and observed as under:

"I have considered the submissions of the assessee and perused the facts that are ruling in the instant case. There is no doubt that there are certain discrepancies noticed in the course of special audit as brought out in their report. However, such discrepancies by itself ipso facto lead to the conclusion that the assessee has concealed the income. Ultimately the AO has to resort to estimated addition only. He could not point out any specific item of any addition with any conclusive evidence. Even the addition made by the AO on estimated basis is substantially reduced by the CIT (A) after considering the various facts and figures and circumstances of the case. The said

action of the CIT (A) has become final consequent to the decision of the Honble ITAT in dismissing the department appeal. Resultantly the income of Rs.1,02,980/- is on the basis of estimated profit ratio only. It is not on account of any specific item of addition or disallowance. Such an addition made on the basis of guess work cannot be subjected matter of penalty for concealment of income. Penalty being a quasi criminal proceeding there is a duty cast on the AO to establish the guilt of the assessee in concealing the income or furnishing of inaccurate particulars of such income. As stated the seizure of the books of the police is not an act of the assessee. No motives can be attributed to the non- availability of books of accounts to examine and verify the various claims made by the appellant."

6. *Aggrieved by this order, the revenue filed an appeal before the Tribunal. The Tribunal, after hearing the submissions made on behalf of the revenue, came to the conclusion that the CIT(A) had taken the correct decision in deleting the penalty. The operative portion of the impugned order dated 04.12.2008 is as follows:*

"As the facts emerge the substantial quantum relief was given by the CIT (A) which has been confirmed by the Tribunal, the balance pertains to estimated rate of profit applied on the turnover of the assessee which in our view does not amount to concealment or furnishing inaccurate particulars. In our view, the CIT (A) has taken right decision in deleting the penalty which is upheld."

7. *The appeal is filed against the abovementioned order of the Tribunal dated 04.12.2008. The finding arrived at by the Tribunal does not warrant interference from this Court as it is purely a finding of fact. No perversity has been pointed in such a finding. Consequently, no substantial question of law arises for consideration. As a result, the appeal is dismissed."*

11. In the light of binding precedence, the penalty levied on addition made by making disallowance on the basis of estimation cannot be sustained. Therefore, Assessing Officer is hereby directed to delete the penalty imposed on the addition

made by disallowing 50% expenses on estimation basis. Another issue penalty levied on the addition made on the basis of DVO report is also covered in favour of the assessee by the decision of Division Bench of Tribunal in ITA no. 5078/Del/2016. Therefore, the impugned penalty levied u/s 271(1)(c) of the Act is hereby deleted. The grounds raised in the appeal are allowed.

12. Appeal of assessee is allowed.

Order pronounced in open court on 27.05.2022.

Sd/-

(KUL BHARAT)
JUDICIAL MEMBER

MP

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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