IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI M BALAGANESH, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 3559/Mum/2019

(A.Y: 2007-08)

DCIT (IT) – 3(3)(2) 16th Floor, Room No. 1634, Air India Bldg, Nariman Point, Mumbai – 400020.	Vs.	Shri Venu Raman Kumar, Flat No. 2, Hermes House-III, Worli Sea Face, Mumbai – 400025.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : ABAPK9122E		
Appellant	..	Respondent

Appellant by :	Shri.Achal Sharma. CIT. DR
Respondent by :	Shri.Vijay Mehta.AR

Date of Hearing	01.06.2022
Date of Pronouncement	13.06.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The revenue has filed the appeal against the order of the Commissioner of Income Tax (Appeals) – 57, Mumbai passed u/s 271(1)(c) and 250 of the Income Tax Act, 1961. The revenue has raised the following grounds of appeal.

1. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting penalty of Rs. 4,39,16,910/- without appreciating the fact that as Section 5(2) of the Act provides for taxation of "all income from

whatever source derived' which accrues or arises or is deemed to accrue or arise in India in case of a non-resident, the quantum addition was in accordance with law and as the assessee had offered no explanation about the source and nature of deposits in its HSBC accounts, this was a case of concealment of income and therefore the penalty levied u/s 271 (1)(c) was also as per law?"

2. " Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting penalty of Rs. 4,39,16,910/- without appreciating the fact that the assessee failed to provide a copy of the bank account statement in case of account maintained in HSBC Bank, Geneva, Switzerland and also failed to provide the explanation of the source of deposits in the same, and therefore the quantum addition was in accordance with law, and in view of failure to provide details this was a case of concealment of income and the penalty levied u/s 271 (1)(c) was also as per law ?"

3. " Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting penalty of Rs. 4,39,16,910/- without taking into account the decision of a Constitution Bench of the Hon'ble Supreme Court in the case of GVK Industries Ltd & Ar Vs The Income Tax Officer & An in Civil Appeal No. 7796 of 1997, where extra territorial nexus of Indian law has been held to be valid and in view of the same as the assessee failed to disclose details of its taxable income, it was also a case of concealment of income and therefore the penalty levied u/s 271(1)(c) was also as per law ?

4. " Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting penalty of Rs. 4,39,16,910/- without taking into account that under similar circumstances, where petitioner had not provided the requisite details of his HSBC a/c, the Hon'ble Bombay High Court dismissed WP(L) No. 3172 of 2015 in the case of Signee R Kothari, by observing that in the normal course of human conduct, if a person has nothing to hide and serious questions are being raised about

the funds, a person would put to rest all questions which seem to arise in the minds of the authority, and in the instant case the conduct of the assessee also establishes concealment of income and therefore the penalty levied u/s 271(1)(c) was also as per law?'

5. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting penalty of Rs. 4,39,16,910/- without taking into account the provisions of Section 114(g) of the Indian Evidence Act, 1872, while dealing with the issue of non-submission of bank account statement of the assessee, and therefore income was assessable to tax as well as penalty u/s 271(1)(c) levied for concealment of income was in accordance with law?'

6. "The Appellant prays that the order of the Ld. CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored."

7. "The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

2. The brief facts of the case that, the assessee is a non-resident(NRI). The assessee has filed the return of income on 31/10/2007 disclosing a total income of Rs.79,36,613/-.The Assessing officer (A.O.) based on the information received by the Government of India from the French Government under the Double Tax Avoidance Agreement (DTAA) in respect of the assessee bank accounts with HSBC Bank, Geneva find that the amount in the bank account was not considered by the assessee in his return of income

filed for the said assessment year and the A.O. has reason to believe that the income has escaped assessment and issued notice U/sec148 of the Act. The assessee has filed objections on the validity of reassessment proceedings and were disposed off. The assessee has filed the submissions on the disputed issue of bank account balances, but the A.O. was not satisfied with the explanations and observed that the assessee has not provided the bank account statement, the consent waiver form and the source of deposits in the HSBC accounts. Finally the A.O. considered the amounts deposited in HSBC bank account are sourced from India and held the peak amount appearing in the base note of the assessee HSBC account of Rs. 4,78,39,775/- as income of the assessee received/accured or deemed to be received and assessed the total income of Rs.5,57,76,388/- and passed order u/sec143(3)r.w.s147 of the Act dated 31-03-2015.

3. Subsequently, the penalty proceedings u/s 271(1)(c) of the Act was initiated, the A.O considered the findings of the scrutiny assessment, submissions of the assessee and was not satisfied with the

explanations and has observed at Para 9.6 to Para 17 and passed the order u/s 271(1)(c) of the Act dated 30.09.2015 as under:

> *9.6 If the case of the assessee is examined in light of the legal principles mentioned above, it is clear that the revenue has discharged its burden of proving the existence of fact that there is a bank account in the name of the above mentioned assessee and even the assessee has not denied the existence of such bank account. The " base note', a copy whereof was provided to assessee which has the personal details which match with the personal details of the assessee, cannot be doubted and hence the basis of conclusion of income credited in bank account of assessee is not merely on presumption and surmises as contended by the assessee. The said 'base note' was obtained by Govt of India from Govt of France via official protocols and hence its authenticity cannot be disputed. Once these facts are proved by revenue, the burden was on the assessee to prove the source of the said credits in its account with credible evidence. Since the assessee has not produced the details of his HSBC bank accounts and the source of deposits thereof, even though he could have been obtained all the details/evidences for the same, the only corollary that could be drawn is that the assessee has decided to withhold the information as if producing it would have gone against him. This as per the provisions of sec. 114 of the Indian Evidence Act 18/2 also, it needs to be held at this stage that the information/details not furnished were unfavorable to the assessee and therefore, relying on various judicial pronouncements, the assessing officer has treated the source of the money deposited in the HSBC account as from undisclosed and sourced from*

India by adding the peak amount as appearing in the Base Note of the assessee's HSBC account for the year under consideration being Rs.3,65,85,330/-.

10. Further, the assessee chose not to produce the bank statements and the source of deposits made in the account even after various opportunities were given during the assessment proceedings. During the penalty proceedings, the assessee has expressed his willing to give the necessary consent to the department to verify his account in Geneva but has not actually yet given the consent waiver form.

11. In this case, the source of money deposited in the HSBC, Geneva Account has not been explained with material evidences, then in absence of anything contrary shown by assessee the only logical conclusion that can be drawn that that the amounts deposited are unaccounted deposits sourced from India and therefore taxable in India. Explanation 1 to sec. 271(1) states that where a person fails to offer an explanation or offers an explanation which is found to be false or where a 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 and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purpose of the clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed. Therefore, by operation of the explanation 1 to section 271 (1)(c), the onus squarely lies on the assessee and the findings given at the time of assessment are relevant and have much probative value. Where the

assessee offered no explanation / details in such cases, it cannot be said that the assessee has discharged the onus even by a preponderance of probabilities. In this case the assessee has not furnished any cogent explanations/details/submissions during the assessment proceedings or penalty proceedings. In the instant case it is very clear that the assessee has not been able to rebut the presumption or discharge the burden with an explanation which could be said a bonafide explanation in the facts and circumstances of the case. The assessee's case therefore squarely falls within the ambit of the provisions of section 271 (1)(c) r/w explanation 1 thereto attracting penal action for the above.

12. Reliance is also placed on the recent Hon'ble Supreme Court judgment in the case of Union of India Vs Dharmendra Textiles Processors & Others (2008) reported in 306 ITR 277 (SC) that "the object behind the enactment of S. 271(1)(c) read with the Explanations indicates that the said Section has been enacted to provide for a remedy for loss of revenue and it is also held that willful concealment is not an essential ingredient for levying penalty u/s 271(1)(c) of the Income Tax Act, 1961. Supreme Court also held in the case of Chairman SEBI v. Shriram Mutual Fund, (2006) 5 Supreme Court cases 361. "mens rea is not essential for imposing civil penalties under the SEBI Act and regulations".

13. In addition to the above statutory position, the legal principles governing the penalty w/s271(1)(c) emerge from some of the landmark decisions of the judicial authorities such as the following:

a. In the case of K.P.Madhusudan Vs. CIT 251 ITR 99 (SC) the Apex Court has held that it is for the assessee to prove that his failure to return the correct income was not due to fraud or negligence. If he fails to do so, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and consequently liable for penalty provided by the section.

b) Further in the case of IT v. Musaddilal Ram Bharose (165 ITR 14), the Apex Court has held that after insertion of Explanation, the responsibility of rebuttal lies on the assessee.

c) In the recent case of Mak data P Ltd 306 IT 277(SC) it has held that the explanation I of271(1) (c) raises a presumption of concealment, when a difference is noticed by the AO. between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

d) Further, in the judgement in the case of Raghuvir Soni Vs. ACIT 258 ITR 239 (Rai), the Hon' ble High Court has held that the provisions relating to levy of penalty for concealment of income have been materially altered with effect from April 1. 1976. It is now clearly postulated that where any amount is added in computing the income of the assessee and in the penalty proceedings the assessee fails to offer an explanation or offers an explanation Which is found to be false or where on furnishing an explanation he is not able to substantiate the same, and

fails to prove that such explanation is bona fide, then for the purposes of clause (c) the said addition or deduction has to be deemed to represent the income in respect of which particulars have been concealed. Thus it is a deeming provision for reaching a conclusion and not for starting an enquiry with a presumption against the assessee.

14) I am therefore satisfied that the assessee has concealed the particulars of his income as discussed above. I am further of the view that the assessee's case squarely falls within the ambit of explanation 1 to section 271(1)(c).

15) In view of the above mentioned facts and circumstances of the case and relying upon the above mentioned Supreme Court and High Court judgment, I am satisfied that this is a fit case for levy of penalty u/s. 271 (1)(c) of the Income Tax Act, 1961. Therefore, the penalty leviable W/s. 271(1)(c) on total escaped income of Rs. 4.78.39.775/- is worked out as under:-

Income sought to be evaded - Rs.4,78,39,775/-

Tax thereon @30% -Rs.1,43,51,932

Education Cess @2% - Rs. 2,87,038

Tax Payable Rs.1,46,38,970

Minimum Penalty @ 100% Rs.1,46.38.970

Maximum Penalty @, 300% Rs. 4.39.16,910

16. In view of the facts & circumstances of the case, I am satisfied that this is a fit case for levying penalty for concealment of income and accounts @, 300% as there

has been a design by some persons including the assessee to open account outside India to park the black money in a country where due to secrecy laws its detection would have been very difficult under normal course and secondly the assessee during the course of assessment proceedings as well as penalty proceedings has deliberately withheld the evidences to itself by not providing the necessary details to prevent the establishment of case of concealment. Even in the recent black money bill also passed by parliament, the penalty for holding undisclosed income/assets abroad has been fixed @300%, looking to the seriousness of such cases. Therefore, I hereby levy a penalty @, 300% of tax sought to be evaded which comes to Rs. 4,39,16,910/- W/s 271(1) (c) of the I.T. Act.

17). From the above I levy a penalty of Rs. 4,39,16,910/- (Rupees Four Crore Thirty Nine Lacs Sixteen Thousand Nine Hundred and Ten only) being 300% of the tax sought to be evaded. This order is passed with prior approval of the Joint Commissioner of Income tax (IT), Range-3(3), Mumbai, vide letter dated 29-09.2015 as required u/s.274(2)(b) of I.T. Act, 1961.

4. Aggrieved by the order, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) considered the grounds of appeal, submissions of the assessee, findings of the AO and dealt on the provisions of the Act and observed at Para 3 & 4 of the order and directed the A.O. to delete the penalty levied u/s 271(1)(c) of the Act read as under:

3. Appellant submissions

1. On behalf of our above mentioned client and as per his instructions, we state and submit as under.

2. Present appeal is against the order passed by the learned DDIT (IT)-1(1) (1), Mumbai, levying penalty of Rs. 4,39,16,910/- for concealment of income and for furnishing inaccurate particulars of income.

3. We would like to state that your honour has deleted the additions made by the learned DDIT (IT)-1(1) (1), Mumbai, vide order dated -07/02/2018 (Copy enclosed) after considering the following submissions & observations:-

"Thus, on the merit of the case I have also gone through numerous judicial decision relied upon by the AR in his submission and considered applicable legal provision of the Act. Thus, In my opinion and [10:21 am, 06/06/2022] Ravi kumar Kaveti: respectfully following the decision of several High Courts and tribunals, when the assessee is a non- resident having connected to bank account in a foreign country and with the income not finding any foreign country and with the Income not finding any evidence of it being received or deemed to be received or accrued in India cannot be asked to pay taxes on the same in India. In view of the above and considering the facts and circumstances of the case and respectfully following the decisions discussed herein above, I am unable to subscribe to the views taken by the AO in making the addition of the peak amount appearing in various bank accounts. Considering the facts I am inclined to accept the arguments of the appellant and accordingly the addition of Rs 4,78,39,775/- made in this case is hereby deleted and appeal is allowed in favour of the appellant. "

4. However, the Deputy Commissioner of Income Tax (International Taxation) 3(3)(2) proceeded, without looking into the fact that the quantum appeal was pending for disposal before the learned Commissioner of Income Tax (A), and levied penalty @300% on the applicable taxes on the difference between the returned Income & Assessed Income. And it is against this order the appellant is in appeal before Your Honour on the following grounds:

1. On the facts and in the circumstances of the case and in law, the Assessing Officer grossly erred in levying penalty u/s. 271 (1)(c) of the Income Tax Act, 1961 [the Act].

2. The Deputy Commissioner of Income Tax (International Taxation) 3(3)(2),Mumbai (hereinafter referred to as the AO) erred in passing an order u/s. 271 (1)(c) of the Income Tax Act, 1961 for Assessment Year 2007-08 which is ultra virus, illegal and contrary to the provisions of law. The appellant prays that the penalty so levied and the resultant order passed may KINDLY be held as bad in law.

3. The AO erred in levying penalty u/s. 271 (1)(c) of Rs. 4,39,16,910/- on the grounds that the appellant had concealed his income and furnished inaccurate particulars of his income, in respect of A.Y.2007-08.

4. The Appellant submits that the penalty levied u/s. 271 (1) (c) of the Income Tax Act, 1961 by the AO is not warranted on the facts and circumstances of the case and the same ought to be deleted.

5. The Appellant vide the above grounds challenges the legality of the order passed us. 271 (1)(c) of the Income Tax Act. 1961 on the facts of the case and under the provisions of the Act.

6. The AO failed to appreciate:

(i) That the quantum appeal in this case is still pending before the CIT (A).

ii. Without considering the facts and circumstances of the case, excessive penalty at a draconian rate of 300% has been levied.

iii. Penalty @, 300% has been levied without any application of mind.

7. The appellant craves leave to add, alter/amend and/or delete any or all of the above grounds of appeal.

Though the grounds of appeal are elaborate and argumentative in effect challenge the levy of penalty and the same is dealt in following paragraph and also discussed hereinabove.

5. Since the additions so made were deleted by your honour question of laving penalty does not arise at all and hence considering the facts and circumstances on the merits of the case and the orders passed by the Hon'ble Commissioners of Income-tax (A) in the cases of assesses placed in similar situation and in the case of the assessee himself wherein quantum additions was deleted, the impugned penalty deserves to be deleted.

6. Supporting letters, notices, documents & orders etc. referred hereinabove has already been filed before your honour during the quantum appeal proceeding.

7. In case your honour desires to have any further information and / or clarification, we shall be pleased to made compliance on hearing.

4. Decision:

I have gone through the penalty order and also grounds of appeal. As the quantum appeal has been allowed by me vide order dated 07.02.2018 all the addition have been deleted, the levying of penalty us. 271 (1)(c) does not

stand and hence appellant's appeal is allowed and penalty levied u/s. 271(1)(c) is hereby deleted.

Aggrieved by the order of the CIT(A), the revenue has filed an appeal before the Hon'ble Tribunal.

5. At the time of hearing, the Ld. DR submitted that the CIT(A) has erred in deleting the penalty without appreciating the facts that the assessee has failed to submit the copy of bank account statements and requisite details in the Assesseement proceedings and prayed for allowing the revenue appeal.

6. Contra, the Ld. AR submitted that the quantum appeal for the said assessment year was heard and was decided in favour of the assessee by the Honble Tribunal and furnished the copy of the ITAT order dismissing the revenue appeal. Further, the Ld. AR supported the order of the CIT(A) in deleting the penalty.

7. We heard the rival submissions and perused the material available on record. Prima-facie the sole crux of the disputed issue is with respect to the CIT(A) deleting the penalty considering the facts & provisions. We find the Hon'ble Tribunal in the

assessee's own case in quantum appeal, filed by the revenue in ITA No.2978/Mum/2018 A.Y 2007-08 DCIT Vs. Venu Raman Kumar dated 05.05.2022 has observed at page 5 Para 6 to Para 10 of the order which is read as under:

> *6. Being aggrieved, the Revenue is in appeal before us. During the course of hearing, Shri S.N. Kabra, learned Departmental Representative ("learned D.R."), vehemently relied upon the order passed by the Assessing Officer. However, the learned D.R. also fairly submitted that similar issue has been decided in favour of the assessee by the Co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2006 – 07.*
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> *7. On the other hand, Shri Vijay Mehta, learned Authorised Representative appearing for the assessee submitted that similar findings of learned CIT(A) in preceding assessment year were upheld by the Coordinate Bench of the Tribunal in assessee's own case.*
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> *8. We have considered the rival submissions and perused the material available on record. We find that the Co-ordinate Bench of the Tribunal in assessee's own case in DCIT v/s Venu Raman Kumar, in ITA No. 2977/Mum/ 2018, vide order dated 19/06/2019, for assessment year 2006–07, dismissed the appeal filed by the Revenue and upheld the deletion of similar addition made on the basis of similar information received for assessment year 2006–07, by observing as under:*
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> *"14. In this background, we have examined the factual findings which have been arrived at by the CIT(A). In the earlier part of this order, a portion of the said finding has also been extracted by us. As per the CIT(A) there is no*

material or evidence to say that the assessee was connected with the bank accounts in ITA No.2977/Mum/2018 Venu Raman Kumar question so as to justify an inference that any income thereof was received or deemed to have been received or accrued or deemed to have accrued in India. A perusal of the Grounds of appeal raised by the Revenue before us reveal that none of the findings recorded by the CIT(A) have been assailed on the basis of any material or evidence. In fact, the entire case of the Revenue, which had been adverted to at the time of hearing before us, is based on the presumption that the assessee has routed the money sourced from India through the three entities into the bank accounts in question. It is a well-settled proposition that a presumption, howsoever, strong cannot substitute an evidence and, therefore, in our view, the CIT(A) made no mistake in deleting the addition. At this stage, we may also refer to the reliance placed by the AO as well as the CIT-DR on the judgment of Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT [214 ITR 801] to defend the addition made on the test of human probability. No doubt, the test of human probabilities is an acceptable test to decide the genuineness or otherwise of a particular transaction. So, however, what is required is to weigh and consider all evidences and material which are available on record. Considering the facts of the instant case and noting that there was complete absence of material, as noted by the CIT(A) too, we find that the application of test of human probabilities to sustain the addition would be unjustified. Therefore, the reliance placed on the judgment of Hon'ble Supreme Court in the case of Sumati Dayal (supra), is not applicable to the facts of the instant case.

15. Before parting, we may also refer to the fact that there is no negation to the fact recorded by the CIT(A) that

the circumstances of the case are similar to those ITA No.2977/Mum/ 2018 Venu Raman Kumar in the case of Shri Hemant Mansukhlal Pandya (supra). Even in the Grounds of appeal filed before us, the Revenue has not canvassed to the contrary. In fact, at the time of hearing, the learned representative referred to the Grounds of appeal raised in the case of Shri Hemant Mansukhlal Pandya (supra) and stated that two of the Grounds in the present appeal are identically worded. Considering that our co- ordinate Bench in the case of Shri Hemant Mansukhlal Pandya (supra) has also considered an identical issue in similar circumstances, we find no reasons to depart from the aforesaid decision and, accordingly, on this ground also we affirm the ultimate decision of the CIT(A) in deleting the addition."

9. The learned D.R. could not show us any reason to deviate from the aforesaid order and no change in facts and law were alleged in the relevant assessment year. Thus, respectfully following the order passed by the Co–ordinate Bench of the Tribunal in assessee's own case cited supra, we find no infirmity in the impugned order passed by the learned CIT(A). Accordingly, grounds raised by the Revenue in present appeal are dismissed.

10. In the result, appeal by the Revenue is dismissed.

8. We find the Honble Tribunal has up held the decision of the CIT(A) in deleting the additions and dismissed the revenue appeal. Since the quantam appeal was decided in favour of the assessee by the CIT(A) and affirmed by the Hon'ble Tribunal and therefore the penalty cannot be sustained. We find

the CIT(A) has dealt on facts, provisions of the Act and predecessor decision and deleted the penalty. Accordingly, we do not find any infirmity in the order of the CIT(A) deleting the penalty and upheld the same and dismiss the grounds of appeal of the revenue.

9. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 13. 06.2022.

Sd/-	Sd/-
(M BALAGANESH)	(PAVAN KUMAR GADALE)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated 13.06.2022

KRK, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)