

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

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठोड कमलेश जयन्तभाई, लेखा सदस्य के समक्ष  
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 968/JP/2019  
निर्धारण वर्ष / Assessment Year : 2009-10

Shri Suresh Mal Lodha 75, Suraj Nagar West, Civil Lines Jaipur – 302 006	बनाम Vs.	The ACIT Circle-6 Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ABGPL 0612 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahenda Gargiyea, Advocate  
Shri Devang Gargiyea, Advocate  
राजस्व की ओर से / Revenue by: Shri A.S. Nehra, Addl. CIT-DR

सुनवाई की तारीख / Date of Hearing : 30/11/2022  
उदघोषणा की तारीख / Date of Pronouncement: 12/01/2023

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This is an appeal filed by the assessee against the order of the Id. CIT(A)-2, Jaipur dated 26-09-2019 for the assessment year 2009-10 raising therein following grounds of appeal.

“1. The impugned penalty order u/s 271(1)© of the Act dated 26-06-2019 is bad in law and on facts of the case for want of jurisdiction and various other reasons and hence the same may kindly be quashed.

2. Rs.7,93,130/-. The Id. CIT(A) erred in law as well as on the facts of the case in confirming the order of AO dated 27-03-2012 imposing penalty u/s 271(1)( c) of the Act of Rs.7,93,130/-. The penalty so imposed and confirmed, is being totally contrary to the provisions of law and facts, hence the same kindly be deleted in full.

3. That the show cause notice issued u/s 274 r.w.s.. 271(1)( c) of the Act is quite vague and did not at all specify which limb of section 271(1)( c) of the Act, the penalty proceedings had been initiated i.e. whether for concealment particulars of income or furnishing of inaccurate particulars of income. The impugned penalty based on such a notice being contrary to the provisions of law and facts kindly be quashed.”

2.1 During the course of hearing, the Id. AR of the assessee has not pressed the Ground No.3. Hence, the same is dismissed being not pressed.

3.0 Brief facts of the case are that the assessee filed the return of income for the assessment year under consideration on 30-03-2010 at a total income of Rs.80,56,970/-. Subsequently, the assessee revised return on 31-03-2011 declaring income of Rs.1,03,90,360/-. Hence, the case of the assessee was completed u/s 143(3) of the Act on 31-10-2011 at a total income of Rs.1,03,90,360/-. However, the Id. CIT(A) vide order dated 21-04-2015 dismissed the appeal filed by the assessee.

3.1 During penalty proceedings u/s 271(1)© of the Act, the AO noted that the assessee declared income from salary from Essar Investment Ltd. and claimed interest u/s 24(b) of Rs.1,50,000/- on self occupied property. The AO noted that in revised return the assessee declared income from house property, interest from

FDRs and consultancy fees also. According to the AO, since the original return was not filed u/s 139(1) by the assessee, therefore, no cognizance of revised return filed on 31-03-2011 could be taken. The AO noted that after issuance of notice u/s 143(2) of the Act, the assessee filed the revised return declaring income of Rs.23,33,440/- which was treated as concealment of income by the assessee. Hence, the AO initiated the penalty proceedings u/s 271(1)(c) of the Act by issuance of notice dated 31-10-2011. It is noteworthy to mention that in appellate proceedings, the Id. CIT(A) dismissed the appeal filed by the assessee. With regard to the penalty proceedings notice, the AO vide letter dated 17-03-2017 provided opportunity of hearing to the assessee to file the reply, Id. AR filed the reply on 21-03-2017. In response, the reply filed by the Id. AR of the assessee was not found satisfactory by the AO. The AO further noted that the original return was not filed by the assessee u/s 139(1) for the A.Y. 2009-10 which was filed on 30-03-2010. Therefore, the assessee was not entitled to file revised return and the assessee's revision of return after issuance of notice u/s 143(2) of the Act on 18-08-2010 and return was revised on 31-03-2011 is not in accordance with law. The observation of the AO is that in case the case of the assessee was not selected for scrutiny u/s 143(3) of the Act then this amount of income would have escaped. Thus the assessee's plea that he did not conceal the income is not acceptable for which the AO relied upon various case laws.

1. Samson Maritime Ltd. vs CIT (Bombay High Court dated 7-03-2017)
2. Mak Data 258 ITR 593 (SC)
3. Dharmendra Textiles Processors (2007) 295 ITR 244
4. CIT vs Vidyagauri Natwar Lal, 238 ITR 91 (Guj)

Taking all these facts into consideration, the AO was satisfied that the assessee had concealed income of Rs.23,33,440/- and the assessee is liable for penalty u/s 271(1)© of the Act. Thus the AO computed the penalty amount of Rs.7,93,130/- and levied the same upon the assessee u/s 271(1)© of the Act.

3.2 In first appeal, the ld. CIT(A) has confirmed the penalty by observing as under:-

*“2.3. I have perused the facts of the case, the penalty order and the submissions of the appellant. Ground No. 01 to 03 are being taken up together as they are interrelated. On perusal of overall facts, it is seen that the Assessing Officer treated the income to extent of Rs. 23,23,440/.7 as concealed income for reason that this income was declared in the revised return filed on 31.03.2011 whereas notice under section 143(2) was already issued on 18.10.2010. Ld. Authorized Representative argued that declaration of income was voluntarily made. Notice under section 143(2) only required the assessee to submit evidence in support of return. No specific query with reference to non-declaration of the various income was ever raised.*

*2.3.1 On perusal of overall facts, it is seen that the appellant has filed revised return only after issue of notice under section 143(2). If this notice was not issued, the appellant would not have revised his return. In fact, he revised return on 31.03.2011 though notice under section 143(2) was issued on 18.10.2010 i.e. only after 5 months. Therefore, it cannot be said that revised return was filed voluntarily by assessee.*

*2.3.2 Further, Assessing Officer in assessment order initiated penalty by specifically mentioning that assessee has concealed income and finally imposed penalty on concealment of income. This shows the clear finding on Assessing Officer's part regarding concealment of income by the assessee. Looking to these facts, the penalty levied by the Assessing Officer is confirmed. These grounds of appeal are dismissed. 3. Ground No. 4 is general in nature and does not require any adjudication, hence dismissed.*

*4. In the result, the appeal is dismissed.”*

3.3 During the course of hearing, the Id. AR of the assessee prayed that the Id. CIT(A) has wrongly sustained the penalty on the assessee u/s 271(1)(c) of the Act for which the Id. AR filed the following written submissions as well as case laws.

**1. Assessment and penalty - separate proceedings:** It is pertinent to note that the AO has levied the penalty for concealment of income only & only on the basis of findings recorded by the AO in the assessment order. It is settled that assessment and penalty proceedings are separate and distinct from each other. **Kindly refer Durga Kamal Rice Mills v/s CIT (2004) 265 ITR 25 (Cal.), CIT & Anr. v/s Anwar Ali (1970) 76 ITR 696 (SC), CIT v/s Ishtiaq Hussain (1998) 232 ITR 673 (All).** In the case of **CIT & Anr. v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn)**, the Hon'ble court has summarized the legal position after taking note of various decisions. **However**, the AO merely alleged but failed to bring any material whatsoever by making independent inquires to support the finding of concealment of income. His rejection of revised ROI was merely on technical ground yet he used same material for the assessment.

**The declaration of income was voluntary- No Prior Detection: 2.1** At the outset, it is submitted that the declaration of additional income of Rs.23,33,440/- being the interest on FDR of Rs.10,43,740/-, Consultancy Fees Rs. 1,70,000/- and Income from House Property of Rs.9,69,696/- were declared voluntarily, suo moto and in good faith before any detection made, even remotely. Moreover, **the AO did not ask for any details at the time of issuing notice u/s 143(2)** (Refer AO Pg-1 **(PB-13)** in which the AO categorically stated that notice u/s 142(1) and query letter was dated 06.09.2011) **and simply required the assessee to submit evidence** in support of the ROI filed. However, **no specific query w.r.t. the non-declaration of the subjected items of income was ever raised.** The notice u/s 142(1) was issued only on 06.09.2011 i.e. much later to the date of filing of the revised ROI 31.03.2011. Hence the question of detection of the discrepancy by the AO does not arise in the instant case.

The assessing officer in the assessment order as also in the **penalty order, if any, nowhere recorded any finding and nor referred any specific query raised** by him nor it was a case of survey / search **or a case of getting information from a third party**) and it was the assessee itself who, on its own declared the income. The Id. CIT(A) did not judicially appreciate such contention.

**2.2** Legally speaking, the revised computation / return of income might not be admissible for technical reasons yet **it was a good material** admittedly available on the record of the AO showing the fact that the **assessee had included and always intended to include such income** in its taxable total income and **it is only such material, which has been made a basis and is**

**the starting point** by the AO. The AO has proceeded only w.r.t. such material. He has not only accepted the figures mentioned in the revised computation / return of income but also assessed the same. It is not disputed that the entire amount of the **tax becoming payable on such a revision was duly deposited by way of the Self-assessment tax and TDS and was duly accepted by the AO** as well. Admittedly, there is no upward variation made by the AO in the declared income. Interestingly, on one hand the AO is relying upon the very material submitted by the assessee (and it is **not a case of the AO that he obtained these details directly from the respective sources being the bank, the client or the tenant**) however, ignoring the same, at the same time also charging the assessee of the blame of concealment, on the other.

### **3. Supporting case laws on detection:**

**3.1** In the case of **CIT v/s Agrawal Round Rolling Mills Limited (2013) 85 CCH 0510 (Chatt) (DPB 1-2)**, it was held that:

*“Penalty-Penalty u/s 271(1)(c)-Concealment of income-Addition of share application money-Assessee, a company manufacturing iron and steel re-rolled products filed its return showing loss-Subsequently, notice u/s 143(2) was issued and query was asked regarding share application money received by Assessee-Assessee filed its reply mentioning therein that it had received share application money through cheques and drafts which was cleared by banks-However, in case of 12 applicants for which detailed list was separately enclosed, necessary documents were not there and as such a sum representing the share application money of those 12 applicants was surrendered with a request not to initiate any penalty proceedings-AO passed an order u/s 143(3) adding the surrendered amount u/s 68 and also ordered for initiation of penalty proceedings and imposed penalty at 150% of tax sought to be evaded by assessee-CIT(A) and ITAT both ruled in favour of assessee-Held, it is not disputed by the Department that the sum which was added u/s 68 was one which was surrendered by Assessee itself-Both the authorities below had recorded finding that there was neither any detection nor any information in the possession of Department except for the amount surrendered by Assessee and in these circumstances it cannot be said that there was any concealment-This is a finding of fact-There is no illegality in same-The tax case has no merit and hence dismissed.”*

In that case also, a notice u/s 143(2) was issued asking the assessee regarding share application money and the same was agitated also, by the assessee but later on he made a surrender w.r.t 12 share applicants. But it appears, no enquiry was made by the AO prior thereto. Thus, **all the facts of our case are similar** to the said case.

**3.2** In the case of **CIT v/s Shankerlal Nebhumal Uttamchandani (2009) 311 ITR 0327 (Guj) (DPB 3-6)**, it was held that:

*“Penalty under s. 271(1)(c)—Concealment—Revised return filed before detection of concealment—Tribunal has found that though certain queries were raised and put to the assessee, no particular item of concealed income was specifically pinpointed—As a matter of fact **the process of detection was not complete till the date when the assessee filed revised returns surrendering the amounts** reflected in various bank accounts in the names of his family members as his own income from undisclosed sources—There is no material on record to indicate that the aforesaid finding of the Tribunal is incorrect in any manner whatsoever—Further, **Tribunal has also found that very same amounts have already been assessed** along with interest in the hands of the family members and those family members have never admitted that they were benamidars of the assessee—Hence, even the Department is not certain, as to who is the right person*

*assessable to tax qua the said income—Therefore, penalty under s. 271(1)(c) is not leviable.”*

**3.3 CIT vs Suresh Chandra Mittal (2001) 251 ITR 9 (SC), CIT vs. SAS pharmaceuticals (2011) 335 ITR 0259 (Del) and CIT vs. Pushendra Surana (2013) 96 DTR 0231 (Raj) (DPB 7-10).**

**4. Justifiable reasons behind not declaring income in original ROI:**

**4.1** It is submitted that the assessee is a salaried class person and has been frequently undertaking foreign / domestic journeys in connection with his profession hence was not able to pay much attention to his accounts and being salaried class, he is otherwise not maintaining regular books of account. He was aged 61 at that time and always remained under a bonafied belief that once tax has already been deducted (paid on his behalf), he is not violating any provision. For the tax purposes he has to share relevant information to his C.A. himself or used to instruct his staff to do so in his absence. The C.A. being stationed at Jaipur and the assessee at Mumbai, there was a lack of face to face detailed discussion and therefore, there were all the chances of lack / miscommunication between the two. On the other hand, the ld. C.A. at Jaipur was dependent on whatever information he could obtain from the assessee / his subordinate staff.

**4.2** Pertinently, during the F.Y. 2008-09 (A.Y. 2009-10), the practice of uploading Form-26AS was not fully and efficiently operational and the deductor still used to send hard copy of TDS Certificate –Form-16 & 16A. It is a matter of common knowledge that the various payers / **deductors** (like banks etc.) **used to delay sending of Form-16/16A and the correct & complete details** to the assessee, in absence of which, it is not easy to compile, reconcile and complete all the details of the income to ensure filing of a correct and complete declaration of income. **The varying figure uploaded by the Lakshmi Vilas Bank Ltd at different point of time is a classic example**, who informed the assessee vide their letter dated 21.10.2011 admitting mistake. Copy of the Bank Letter is enclosed with this w/s as **Annexure-1**

**4.3** Therefore, the ld. C.A. **could prepare the computation on whatever details / material was best available or could be gathered**. Although in this case some deductor might have uploaded the transactions in the TDS return like rental income, consultancy etc. but due to non-access to such online details and because of late receipt of TDS certificates, related income could not be noticed or sometime it may also be inadvertent error of the ld. C.A. In these circumstances thus, it is difficult to conceive that in absence of the relevant details how the assessee can be charged with the blame of the concealment. The assessee accordingly, after waiting for the uploading of the Form-26AS could file the original return only on 30.03.2010 (**PB 1-3**) i.e. before the due date u/s 139(4). It is only at a later point of time, when the assessee could obtain TDS certificates, he revised his ROI immediately. The revised ROI was filed on 31.03.2011 (**PB 4**) when additional income of Rs. 23.33 Lakh was declared, consisting of the interest on FDR of Rs.10,43,740/- (interest of Rs.2,71,133/- from ING Vysya Bank Ltd.(**PB-22**), Interest of Rs.56,491/67 from

the Lakshmi Vilas Bank Ltd and Rs.7,18,122/- is maturity amount wrongly offered) apart from rental and other income which was noticed from Form-26AS reflecting the entries uploaded by the Deductors / Payers in their TDS returns. Fortunately, again in the revised TDS returns the Lakshmi Vilas Bank the figure of Rs.7,72,571/73 was replaced by of Rs.56,491/67 as per Form-26AS **(PB-45)**.

**5.1 Strikingly Interest of FDR income of Rs.7,18,122/- was not at all taxable / includible in total income:** It will be surprising to note that the interest on FDR, which was declared in the revised ROI filed on 31.03.2011 by the A/R of the assessee at Rs.7,72,570/- as against actual interest on FDR of Rs.54,748/- (Correct Rs.56,491/- as per latest Form-26AS), the **interest atleast to the extent of Rs.7,18,122/- was wrongly taxed in as much as it was not at all an income but it was a capital receipt** being the amount received on the Maturity of FDR.

**5.2 Various evidences of wrong taxing:** The contention that the amount of Rs.7,18,122/- is a capital receipt and not being interest income and was at all taxable, got **further supported when form-26AS** was seen recently as per Data Uploaded till 20.03.2020 (PB 42), it is found that the interest income the Lakshmi Vilas Bank Ltd. shown is only to the extent of Rs.56,491/67 **(PB 45)** and not Rs.7,72,571/73 as was earlier uploaded by the said bank in Form-26AS **(PB 23)**. Thus, **as against the correct interest income of FDR of the Lakshmi Vilas Bank Ltd. of Rs.56,491/67 (PB 45) the amount of Rs.7,72,571/73 (PB 23) was wrongly offered and was also taxed** and even penalty has been imposed. In **support of above contention copy of the form-26AS as presently available at ITD Portal as per Data Uploaded** till 20.03.2020 is placed **(PBII-42)** which shows the interest income of FDR for A.Y. 2009-10 from Lakshmi Vilas Bank Ltd. of Rs.56,491/67 **(PB 45)** as against the incorrect amount of Rs.7,72,571/73 **(PB 23)** wrongly uploaded earlier and reflected in Form-26AS **(PB 23)** and was further **supported by the letter dated 21.10.2011 issued by the Bank** reproduced above.

**5.3** The Id. C.A. when noticed that total amount of interest of Rs.7,72,570/- has been shown by the Lakshmi Vilas Bank Ltd., he could take the entire amount of Rs.7,72,570/- (included in Rs.10,43,740/-) in the revised ROI which includes interest of Rs.2,71,133/- from ING Vysya Bank Ltd.**(PB-22)**. Unfortunately, however, later on it came to notice that an amount of Rs.7,18,122/- (Out of Rs. 7,72,570/-), was a capital receipt being the amount received on the maturity of some FDR. In support of the same **we are filling a duly sworn affidavit of Shri Suresh Chandra Gour, CA** and the Tax Consultant, who prepared and filed the revised ROI of the assessee containing the wrong amount the interest on FDR of Rs.7,18,122/-.

**5.4** This was informed to the AO also during assessment proceeding on 25.10.2011 (PB-21), but the AO ignored. **Accordingly, the Id. C.A. also filed an application for rectification u/s 154 of the I T Act** before the AO on 21.11.2011 to get the mistake rectified by reducing the income wrongly declared to the extent of 7,18,122/- (Rs.7,72,570/- less Rs.54,448/-) but still remains pending till date to the best of our knowledge.

**5.5 Once, there was no income at all of Rs.7,18,122/- there cannot be any question of imposition of penalty u/s 271(1)(c) w.r. thereto**

We may clarify that revision of income was not at all necessitated because of the issuance of the notice u/s 143(2) on dated 18.08.2010 (refer AO order u/s 143(3) Pg-1) because there was no specific query raised by the AO upto that point of time so as to make the assessee wiser but it was an move taken by the Id. C.A. himself.

**6. TDS suffered income is not concealed income: 6.1** Pertinently, **the entire amount was subject to TDS** and even the payers / deductors of such incomes to the assessee have **duly made Tax Deduction at Source being Rs.2,17,620/- on Rent, Rs.19,261/- on consultancy fee, Rs.33,932/- on FDR Interest respectively.** Once such income appears in the TDS statement in Form-26AS and tax has been deducted how it can be a case of undisclosed income. At the worst, it is only a bonafied mistake committed by the assessee or his Tax Consultant who prepared the computation but no one can smack of malafide intention of concealment w.r.t. such items of income.

**6.2 Supporting Case Laws:**

**6.2.1 DCIT vs. Smt. Prabhavathi Dharam Singh [2009] 34 SOT 125 (Bang)**

*“When the tax has already been deducted and paid to the Government and the relevant certificate has also been issued, it is not possible to sustain the view that the assessee concealed his income or furnished inaccurate particulars thereof. He has stated during the assessment as well as penalty proceedings that the omission of the salary income from the return was due to inadvertence or mistake. No deliberate or conscious intention on the part of the assessee has been proved so that his plea that the omission was due to inadvertence can be rejected. The CIT (Appeals) has rightly relied on the order of the Kolkata Bench of the Tribunal in the case of Anandamoy Bhattacharjee v. ITO [2007] 105 ITD 365, where it was held that when the employer has deducted the tax from the salary, the employee by not including the salary in his return cannot be said to have concealed his income. We therefore agree with the CIT (Appeals) that the penalty was not justified.”*

**6.2.2 Anandamoy Bhattacharjee vs. ITO [2007] 107 TTJ 671 (Kol.)**

*“Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 1995-96 - Assessee, ex-Chief Justice of High Court, having income from salary and royalty, failed to file his return for assessment year under consideration - Since assessment was due to be barred by limitation, assessment under section 144/147 was completed - **Assessing Officer also imposed penalty on assessee under section 271(1)(c), holding that assessee did not voluntarily file his return disclosing income from various sources and had deliberately concealed particulars of income** - Commissioner (Appeals) upheld penalty imposed on assessee - Assessee **contended that matter of filing returns did not come to his mind, as for last 20 years as a Judge, his returns used to be taken care of by his office staff, accounts officer, etc., and thereafter, he was confined to bed and could not file his return** - Whether since revenue could not controvert assessee’s plea and **further assessee had paid TDS on salary and advance tax on his royalty income** and after adjusting same, balance amount of tax along with interest was also deposited, it could be held that assessee **had not concealed particulars of his***

**income - Held, yes - Whether therefore, penalty imposed on assessee was to be deleted - Held, yes”**

**6.2.3 PCIT vs. Trisha Krishnan [2019] 111 taxmann.com 97 (SC) (DPB 11)**

“Section 4, read with section 271(1)(c), of the Income-tax Act, 1961 - Income - Chargeable as (Advances) - Assessment year 2010-11 - Assessee was a Cine artist - For relevant year, assessee filed her return declaring certain taxable income - Subsequently, assessee filed a revised return admitting additional income - Difference between income originally declared and total income admitted in revised return represented advance received by assessee in said assessment year from various cinema producers towards work to be done by her - In course of assessment, **Assessing Officer opined that assessee filed revised returns only after revenue issued notice under section 143 and, therefore, it should be construed that assessee was guilty of deliberate concealment of income** - Assessing Officer further noted that assessee had made payments of audit fee, professional charges and commission etc. **on which tax was deducted at source but no proof of remittance of same into Government account was produced - He, thus, disallowed** said payments - Assessing Officer also passed penalty order under section 271(1)(c) in respect of aforesaid two issues - As regards amount received by assessee as advance, Tribunal found that **since said amount had been shown in balance sheet annexed to original return, there was no intention on part of assessee to conceal - With regard to disallowance qua TDS on account of non-deposit of same with Government, Tribunal opined that it was an inadvertent error on part of accountant** - Tribunal, thus, set aside impugned penalty order - High Court by impugned order held that, on facts, no substantial question of law arose from Tribunal's order and, thus, same deserved to be upheld - Whether Special leave petition filed against impugned order was to be dismissed - Held, yes [Paras 3 and 4] [In favour of assessee].”

**6.2.4 Price Waterhouse Coopers Pvt. Ltd. vs CIT (2012) 348 ITR 306 (SC) held that:**

"19. The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The caliber and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars”

**7. Past History does not suggest:** Another aspect establishing the bonafied and absence of any intention of the assessee not to declare income is also proved from the fact that the declared figure of interest on FDR in A.Y. 2006-07 stood at Rs.38,325/- (**PB 35**), in A.Y. 2007-08 it was Rs.`Nil` (**PB 32**)

and in A.Y. 2008-09 it was of Rs.2,21,497/- (**PB 27**), as against Rs.3,27,624/75 in the year under consideration i.e. A.Y. 2009-10. Thus, **the income from interest on FDR never reached the whopping figure of Rs.10,43,740/- (PB 6)**. Similarly, there was no consultancy in earlier years and the rental income was only upto Rs.2 Lakh.

**8. Initially no TDS claimed by the assessee:** The bonafide of the contention of the assessee and the fact that the assessee never intended to conceal any income at all, is fully **established from a bare perusal of computation at the time of filling original ROI (PB 2-3) wherein, the assessee did not at all made any claim of TDS** or the computation did not contain any details of TDS, (deducted by Bank, SJVN Ltd and Isolux Ingenieria) for the simple reason that the assessee did not claim any such income which is being declared now. In other words, **had the assessee knew such income he would have certainly declared the same and claimed TDS credit**. It is not the case of the AO of the Id. CIT(A) that though the assessee claimed TDS earlier but such additional income has been declared now. It is only when the assessee filed revised ROI, declaring additional income of 23,33,440/-, it also claimed TDS of Rs.2,69,584/-. From the above fact & events, it is **evidently clear that there was no prior detection** at all w.r.t the additional income shown by the assessee nor intended to be concealed. **The suspicion of the Id. CIT(A) that had there not been any issuance of notice u/s 143(2), the assessee would not have disclosed the subjected income is thus, baseless and mere suspicion only.**

**Penalty so imposed being totally contrary to the provisions of law:**

**9.** The order imposing penalty is quasi-criminal in nature and, thus, heavy **burden lies on the department** to establish that the assessee had concealed his income. Since the burden of proof in penalty proceeding varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income or that a deduction has wrongly been claimed, cannot automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceeding. In the penalty proceedings, thus, the AO is required to bring positive material showing intentional concealment.

However, in this case the AO did not at all made any enquiry failed to bring any positive evidence on record to show that the assessee really intended to conceal the subjected items of income. The AO accepted what the assessee declared in the revised ROI and without any variation the AO even assessed the same. Therefore, the onus lay upon the AO has not been discharged.

**10.1** The word “concealment” inherently carried with it the element of mens rea. To impose a penalty u/s 271(1)(c), it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. **The said principle has been reiterated in Virtual Soft Systems Ltd. vs. CIT (2007) 207 CTR (SC) 733: (2007) 289 ITR 83 (SC)** held that

*“24. Sec.271 of the Act is a penal provision and there are well established principles for the interpretation of such a penal provision. **Such a provision has to be construed***

*strictly and narrowly and not widely or with the object of advancing the object and intention of the legislature.”*

**10.2** In the peculiar facts this case, the decision in the case of **CIT v/s Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC)** is quite useful in as much as in that case it was held that w.r.t. return

*“Penalty under s. 271(1)(c)—Concealment—Disallowance of claim for deduction—In order to attract the provisions of s. 271(1)(c), there has to be concealment of income or furnishing of inaccurate particulars of his income by the assessee—In the instant case, assessee claimed deduction of interest on loans taken by it for purchase of shares—AO disallowed such interest—**Admittedly, no information given in the return was found to be incorrect or inaccurate—Hence, the assessee cannot be held guilty of furnishing inaccurate particulars—**Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars—Merely because the assessee claimed deduction which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted—If the contention of the Revenue is accepted, the assessee would be liable for penalty under s. 271(1)(c) in every case where the claim made by the assessee is not accepted by the AO for any reason—That is clearly not the intendment of the legislature.”*

Applying this ratio on the present case, it will be found that the appellant had already disclosed the subjected income in the ROI filed on dated 31.03.2011 and the assessed income when compared with this returned income, there is no occasion for a difference and imposition of penalty.

In view of the above submissions, the impugned penalty may kindly be deleted in full.”

3.4 On the other hand, the ld. DR supported the order of the ld. CIT(A) as to sustenance of penalty of Rs.7,93,130/- u/s 271(1)(c ) of the Act and reiterated the arguments recorded in the order of lower authorities.

3.5 We have heard both the parties and perused the materials available on record. In this case, initially return of income was filed at a total income of Rs. Rs.80,56,970/-, however thereafter, a revised return of income was filed on 31.03.2011 declaring total income of Rs. 1,03,90,410/- wherein additional income of Rs. 23,33,440/- was declared being income from house property of Rs.11,19,700/-, interest from FDRs of Rs.10,43,740/- and consultancy fee of Rs.1,70,000/-. The authorities below however rejected the revised return saying

that the original return of income was not filed u/s 139(1). Moreover, it was not a case of voluntary disclosure but it was only after issuance of notice u/s 143(2), the assessee came forward and declared the additional income. However, we did not find ourselves in agreement with such contentions raised by the department in as much as the notice u/s 142(1) along with query letters were issued on 06.09.2011 whereas the revised return was already filed on 31.03.2011, showing the additional income. The notice u/s 143(2) is normally a formal notice showing the selection of the case for scrutiny and to comply with the limitation provision. Nothing was brought on record by the revenue if the assessee was specifically asked or investigation was made with reference to all the three items of income additionally declared. Otherwise also, the revenue may be technically correct in not considering the later return of income as a revised return but it cannot be denied that additional income was shown by the assessee himself and it is not the case of the revenue that they unearthed the additional income by carrying out investigations. In addition, we find force in the contention by the Ld. AR that there were justified reasons behind delayed declaration of additional income from these sources. Hence, it was not improbable if the original return could have been filed beyond the due date of Section 139(1) waiting for the correct and complete information of income to be included, necessitating an upward revision of income. Further had the assessee woke up only after issuance of notice u/s 143(2), he could have filed the revised

return immediately but not after a long gap of 5 months i.e. on 31.03.2011. Undisputedly, the assessee is aged 61 years mainly deriving salary income and stationed at Mumbai whereas his chartered accountant was situated at Jaipur. It was a period when there was less or no automation and the department also could not bring on record that every income suffering TDS was being shown through form 26AS in time nor it is shown that Form 16A if issued by all those parties providing income to the assessee, were timely given to the assessee. The contention of the revenue that additional income suffered TDS and, therefore, the assessee should have declared for the income in the original return itself, is far from the ground realities which prevailed at the relevant point of time. It was a quite usual practice for the deductor to issue certificate in form 16A or to upload the same in form 26AS lately. It cannot be denied that the assessee must have been under a bona fide impression that all such incomes were subjected to TDS and therefore, he is not concealing any income from the department. The decisions cited in the penalty order do not help the revenue being rendered in different factual context. In the past also, the income from all the three sources have never been to this extent. The consultancy income was for the first time. The rental income was maximum upto Rs.2,00,000/- till A.Y 2008-09 and first time only this went upto Rs. 11,19,700/- (net). The interest on FDR which was additionally declared at Rs. 10,43,740/- was maximum upto Rs. 2,21,000/- in AY 08-09. It is

noticed that Lakshmi Vilas Bank Ltd earlier reported the interest payment to the assessee in form 26AS dated 10.08.2013 at Rs. 7,72,571/73 as against the correct amount of Rs. 56,491/67 only (copy placed at page 23 of assessee's paper book) however, later on, the same very bank accepting this mistake of wrongly showing much higher amount, admitted the correct amount of income at Rs. 56,491/67 only as per form 26AS uploaded till 20.03.2020 at page 45 of the assessee's paper book. This was agreed by the bank also vide its letter dated 21.10.2011 copy of which is available on record. Though the ld. AR contented that the assessee also accordingly wrongly declared the FDR interest at Rs. 10.43 lacs as an additional income (included in Rs. 23.33 lacs) as against the correct interest of Rs. 54,491/67 only however, this not being subject matter of appeal, before us, we are unable to deal with such contention and grant relief but, prima facie the assessee appears to have wrongly paid tax on such excess income. Also it is evident that there are chances of incorrect reporting by the deductor and therefore, the assessee cannot be held responsible for not showing income correctly and timely. There is no difference between the assessed income and the income declared in the revised return. It is not denied that the additional income from all the three sources, was subjected to TDS and we find force in the contention of the ld. AR that once the additional income has suffered TDS it cannot be said to be undisclosed income of the assessee. We have gone through the decisions cited by the ld. AR and find that

they support the case of the assessee. A cumulative consideration of all the facts and circumstances clearly establish that it was not a case of concealment of income with respect to the declaration of the additional income. It is well settled principle of interpretation of penal provisions that the same has to be construed strictly and no penalty cannot be imposed unless the case strictly fall within the legal parameters. We, therefore, direct the AO to delete the penalty imposed u/s 271(1)(c) under challenge.

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

Order pronounced on 12-01-2023

Sd/-

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

Sd/-

( राठोड कमलेश जयन्तभाई )  
(Rathod Kamlesh Jayantbhai)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 12 /01/2023

\*Mishra

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

1. The Appellant- Shri Suresh Mal Lodha, Jaipur
2. प्रत्यर्थी / The Respondent-The ACIT, Circle-6, Jaipur
3. आयकर आयुक्त / The Id CIT
4. आयकर आयुक्त(अपील) / The Id CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No.968/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar