

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH ' B', NEW DELHI)**

BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND SHRI KULDIP SINGH, JUDICIAL MEMBER

I.T.A. No.4250 /Del/2011

Assessment year : 2007-08

ACIT, Circle I,
Faridabad

Vs.

M/s. Carzy Developers P. Ltd.,
C-3/260, Janak Puri,
New Delhi

GIR / PAN:aaccc6556G

(Appellant)

(Respondent)

Appellant by : Ms. Kesang Y. Shirpa, Sr. DR
Respondent by : Sh. Ashish Goel, CA
Sh. Pranjal Srivastava, Av.

Date of hearing : 28.10.2015

Date of pronouncement : 30.11.2015

ORDER

PER KULDIP SINGH, JM:

The appellant, ACIT, Central Circle I, Faridabad (hereinafter referred as 'revenue'), by filing the present appeal, sought to aside the impugned order dated 04.07.2011 passed by Ld. CIT(A) I, Ludhiana qua the assessment year 2007-08, on the grounds inter alia that:

"1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred both on facts and in law, in cancelling the penalty of Rs.13,46,400/- levied u/s 271(1) (c) by the A.O. even when the assessee deliberately concealed its income by not disclosing his income voluntarily prior to the date of search.

2. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred both on facts and in law, in cancelling the penalty by

ignoring the provisions of explanation SA of section 271(1)(c) of I. T. Act, 1961 which are squarely applicable to this case and where it is clearly mentioned that income declared in any return of income furnished on or after the date of search, assessee shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income for the purposes of imposition of penalty under clause (c) of sub - section (l) of section 271.”

2. Briefly stated, the facts of this case are that a search and seizure operation was conducted at the corporate/administrative office premises as well as other business premises of the company Orris Group at house No.C-3/260, Janakpuri, New Delhi, and a survey u/s 133 of the Act was also conducted. The assessee filed return of income on 24.03.2008 declaring 'nil' income and consequently notice u/s 153C was served upon the assessee and in response thereto, he has filed return declaring income of Rs.39,76,600/- on 05.11.2009.

3. During search and seizure operation, it has come on record that by virtue of one agreement to sell, the assessee's group has received a cash of Rs.1,15,00,000/- against sale of some land at Rewari. On calling upon his explanation, the assessee surrendered the cash of Rs.1,15,00,000/- as undisclosed income in the hands of aforesaid three companies of Orris group.

4. During assessment proceedings, assessee was called upon to furnish necessary details and to explain in respect of aforesaid transaction and has filed reply and claimed that aforesaid companies have sold the aforesaid land in September 2006 and have taken the income at Rs.40,00,000/- in M/s. Crazy Developers Pvt. Ltd. on 15.03.2008 showing in the books of account as on 31.03.2008 as miscellaneous income with proper note in the books of accounts and filed its return of income for the assessment year 2007-08.

From the report, it has come on record that assessee has not voluntarily surrendered the amount of Rs.40,00,000/- but only after he was cornered by the search team during search operation. Consequently, notice u/s 271(1)(c) of the Act was served on the assessee who has filed reply after availing numerous opportunities. Penalty officer on the basis of record and reply furnished by the assessee, came to the conclusion that the assessee has no explanation for concealing the income/furnishing inaccurate particulars of income to the extent of Rs.40,00,000/- and subsequently, imposed minimum penalty of Rs.13,46,400/- i.e. 100% of the tax evaded. The assessee challenged the penalty order before Ld. CIT(A) who has allowed the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

5. Ld. D.R. Challenging the impugned order, contended that since the quantum in this case has already been confirmed, having not been challenged by the assessee, the Revenue is justified in imposing the penalty and relied upon the penalty order.

6. On the other hand, Ld. A.R. to repel the argument addressed by the Ld. D.R. relied upon the order passed by Ld. CIT(A) and contended inter alia that there is no concealment of income rather assessee surrendered the income to buy peace of mind and to avoid protracted litigation; that since the surrendered amount itself is not being eligible to tax, there cannot be any question of concealment or furnishing of inaccurate particulars of income and relied upon the judgement cited as **CIT Vs Suresh Chandra Mittal, 251 ITR 09 (S.C.) and CIT Vs Harh Talwar (2011), 335 ITR 200 (Del.) and CIT Vs SAS Pharmaceuticals (2011) 335 ITR 259 (Del.)**.

7. The sole question arises for determination is, “*as to whether Ld. CIT(A) has erred in quashing the penalty of Rs.13,46,400/- imposed by the A.O. u/s 271(1)(c) of the Act*”.

8. We have heard Authorized Representatives of the parties, gone through the material placed on record in the light of facts and circumstances of the case and orders of tax authorities below.

9. Undisputedly, during the search and seizure operation conducted by the Revenue on 30.03.2008 at the premises of Orris group companies an amount of Rs.1,15,00,000/- was found to have been received in cash by the company of the assessee by virtue of agreement to sell out of which, assessee has surrendered an amount of Rs.40,00,000/- which was added to his taxable income; that in pursuance to notice u/s 153C, the assessee filed return declaring income of Rs.39,76,600/- on 05.11.2009.

10. Ld. CIT(A) in para 6 & 7 of the impugned order came to the conclusion that since the surrendered amount of Rs.40,00,000/- was received by the assessee company in the form of forfeiture of advance amount as sale has not been culminated and advance received against the sale of land, treated as forfeiture in Assessment Year 2008-09, it would not constitute taxable income and, therefore, “the disclosure of the same is merely an act in good faith and no concealment could be established”. Ld. CIT(A) has also arrived at the conclusion that the impugned amount of cash has become income only on the basis of the statement made by the Director of the assessee company and an independent factual /legal appreciation of the facts of the case lead only to the logical conclusion that there was no income on account of cash received in pursuance of agreement to sell for financial year

2006-07 and as such, there cannot be any concealment of the same. Ld. CIT(A) in the impugned order, has concluded as under:

“ I have considered the facts of the case and the basis upon which the AO proceeded to impose penalty u/s 271(1)(c) and also the arguments of the AR on the issue. It is apparent that the assessee company had filed its return of income for the A/Y 2007-08 declaring Nil income on 24.03.2008 and the amount disclosed during the course of search operation had been returned in a return of income filed in response to notice issued by the AO u/s 153C and therefore, the provisions of explanation SA read with S.271(1)(c) do seem to apply to the facts of the case. However, the AR of the appellant has taken the arguments that the receipt of cash in pursuance of an agreement to sell the land of the assessee company did not amount to generation of income for the A/Y 2007-08 It has been claimed that what was received was merely 'an advance and the transactions of sale of land to the buyer did not take place till date. The AR has filed copies of account of the Balance Sheet, wherein, the impugned piece of land stands reflected in the Stock-in-Trade of the company. This only means that first it needs to be deliberated upon 'as to whether the receipt of cash in pursuance of agreement to sell would amount to income or not. During the course of appellate proceedings, the AR was asked to explain as to how the agreement to sell did not culminate into transaction of sale for so many years and the amount received as advance also remained with the assessee. It was apparent that the impugned advance received by the assessee company in fact belonged to the assessee company in the form of forfeiture of the same. It was also suggested that since no evidence of forfeiture of the said amount in the F/Y 2009-10 had been filed it could be easily concluded that the said forfeiture actually happened in F/Y 2006-07 and same was in the knowledge of Shri Vijay Gupta and that is why he agreed to disclose the same as income for the F/Y 2006-07 as on the date of Search i.e. 13th March, 2008. The AR in response to this submitted his arguments that neither the receipt of advance nor its forfeiture constituted taxable income as the receipt of advance on account of proposed sale would remain the liability of the assessee till the transaction of sale actually takes place. It was submitted that in the event of forfeiture in the A/Y 2007-08 itself, the amount of advance received would lead to reduction in the work-in-progress and at the time of actual sale only

the amount of advance received would automatically become the profit and hence income arid therefore, the timing of forfeiture did not materially effect the taxable income. The AR placed reliance upon the provisions of 5.51 of the LT. Act in support of his arguments. The AR therefore concluded his argument that since no sale actually took place therefore, the advance received in terms of agreement to sell did not constitute taxable income and therefore disclosure of same during search operation was only meant to buy peace and therefore can only be described as voluntarily in nature.

7. *I am in agreement with the arguments of the AR that the advance received against sale of land even if treated as forfeiture in A/Y 2007-08 would not constitute taxable income and therefore, the disclosure of the same is merely an act in good faith and no concealment could be established as the income returned by the assessee company is purely an act to settle the issues. The impugned amount of cash has become income only' on the basis of a statement made by the Director of the assessee company and an independent factual/legal appreciation of the facts of the case lead only to one logical conclusion that there was no income on account of cash received in pursuance of agreement to sell for F/Y 2006-07 and therefore, there cannot be any concealment of same. It needs to be understood that to prove concealment of income firstly the existence of taxable income will have to be established. It is clear that there was no income on the basis of the facts of the case and the amount returned by the appellate company in its return of Income in response to notice u/s 153C is only intended to honor the disclosure made during the course of search operation even if the same was not warranted as per the facts of the case. The Hon'ble Supreme Court in the case of Abraham (C.A.) Vs LT.O. (1961) 41 LT.R. 425 (SC) has held that penalty proceedings is part of machinery for assessment and penalty partakes character of additional tax. It should be possible for the taxpayer to question the validity of assessment / re-assessment on merits, but limiting the claim for relief to cancellation of penalty, since a valid assessment/re-assessment is foundation for a valid penalty. In the present case the mount declared/surrendered for taxation by the assessee company is not at all taxable. The said amount was treated as taxable income by the Assessing Officer just due to the reason that the same was declared as income by the*

assessee company in its return of income filed in response to notice u/s 153C of the LT. Act 1961. The Assessing Officer has failed to notice and bring on record the fact that the same is not taxable and accordingly it cannot form the basis for initiating / levying penalty u/s 271 (1) (c) of the LT. Act, 1961.

8. It would also be relevant to refer to the judgement of Hon'ble Apex Court in the case of CIT Vs. Suresh Chandra Mittal 251 ITR 9(SC), wherein, the assessee had originally filed returns showing meager income. After search u/s 132 and notice for re-opening, revised returns were filed showing higher income. In penalty proceedings under section 271, assessee claimed that he had offered additional income to purchase peace and avoid litigation. Penalty orders were passed and Commissioner (Appeals) confirmed the orders. The Tribunal held that the department had not discharged its burden of proving concealment and no penalty can be levied. The High Court held that no penalty could be levied for concealment on the facts found by the Tribunal. On further appeal the Supreme Court dismissed the appeals by the department.

The facts of the case clearly shows that the assessee agreed for inclusion of an item as income and there is no material besides the factum of disclosure by the assessee to show that the amount in question constituted income much less undisclosed income. The admission on part of the assessee that the amount received belongs to him did not mean that it was his income for the relevant year. As such, I don't consider this case to be fit for imposition of penalty u/s 271(1)(c) and the same is deleted.”

11. Ld. CIT(A) relied upon the judgement in the case of CIT Vs Suresh Chandra Mittal (supra). Hon'ble Apex Court has decided the identical issue in the case cited as CIT Vs Suresh Chandra Mittal (supra), the operative part of which is reproduced as under:

“PENALTY – CNCEALMENT OF INCOME-ASSESSEE INITIALLY FILING RETURNS WITH MEAGRE INCOME- FILING REVISED RTURNS SHOWING HIGHER INCOME AFTER SEARCH AND NOTICE FOR REOPENING ASSESSMENT, TO PURCHASE PEACE

AND AVOID LITIGATION – APPELLATE TRIBUNAL – HOLDING THAT BURDEN OF PROVING CONCEALMENT NOT DISCHARGED AND PENALTY CANNOT BE LEVIEED- PROPER- INCOME TAX ACT, 1961, ss.132, 271.

The assessee had originally filed returns showing meager income. When, after action under section 132 of the Income tax Act, 1961, a notice under section 148 was served on him, he filed revised returns showing higher income. Eventually, assessment orders were passed and the returns submitted regularized under section 148. In penalty proceedings under section 271, the assessee claimed that he had offered additional income to buy peace of mind and avoid litigation. Penalty orders were passed and the Commissioner (Appeals) confirmed the orders. But the Appellate Tribunal held that the Department had not discharged its burden of proving concealment and had simply rested its conclusion on the act of voluntary surrender done by the assessee in good faith, and that penalty could not be levied. On a reference, the High Court held that no penalty could be levied for concealment (see (2000) 241 ITR 124). The Department preferred appeals to the Supreme Court. The Supreme Court dismissed the appeals holding that no interference with the order of the High Court was called for.”

12. The ratio of judgement cited as CIT vs Harish Talwar (supra) and CIT Vs SAS Pharmaceuticals (supra) delivered by Hon’ble Jurisdictional High Court is that, *“to proceed with the imposition of penalty u/s 271(1)(c), the A.O. has to prove that there was concealment of particulars of income or assessee has furnished inaccurate particulars of such income”*.

13. Undisputedly, penalty proceedings as well as assessment proceedings are to be decided independently and the penalty proceedings are not to be influenced by the assessment proceedings. In the instant case, no doubt, assessee has surrendered the income of Rs.40,00,000/- during search and seizure operation but Hon’ble Apex Court in the judgement CIT Vs Suresh Chandra Mittal (supra) held that in this case, *“the assessee initially filed*

return with meager income and subsequently filed revised return showing higher income after search and seizure operation, for reopening of assessment, in order to buy peace of mind and to avoid protracted litigation, the Appellate Tribunal has rightly held that burden of proving concealment into discharge, the penalty cannot be levied". But in the instant case, Ld. CIT(A) has gone a step further by holding that surrender of income of Rs.40,00,000/- during the assessment year 2007-08 was in fact not generated during the year under assessment rather it being a forfeiture of sale amount as income for the assessment year 2006-07, assessee has bona fide surrendered the same.

14. So, as a sequel to the discussion made in the preceding paragraphs, we are of the considered view that the A.O. has failed to make out the case of concealment of particulars of income or furnishing of inaccurate particulars of such income by the assessee, rather, it was a case of voluntary surrender of income of Rs.40,00,000/- for tax purpose in order to buy peace of mind and to avoid vexed litigation and Ld. CIT(A) has legally and rightly passed the impugned order. Finding no illegality or perversity in the impugned order, we hereby dismiss the present appeal filed by the Revenue.

16. Order pronounced in the open court on 30th Nov., 2015.

Sd./-

(N. K. SAINI)
ACCOUNTANT MEMBER

Date:30.11. 2015

Sp

Sd./-

(KULDIP SINGH)
JUDICIAL MEMBER

Copy forwarded to:-

1. The appellant
2. The respondent
3. The CIT
4. The CIT (A)-, New Delhi.
5. The DR, ITAT, Loknayak Bhawan, Khan Market, New Delhi.

True copy.

By Order

(ITAT, New Delhi).

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	26/11		Sr. PS/PS
2	Draft placed before author	27,27/11		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS	30/11/2015		Sr. PS/PS
6	Kept for pronouncement	30/11		Sr. PS/PS
7	File sent to Bench Clerk	30/11		Sr. PS/PS
8	Date on which the file goes to Head Clerk			
9	Date on which file goes to A.R.			
10	Date of Dispatch of order			