

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SUNIL KUMAR SINGH, JM

ITA No.50/Mum/2024
(Assessment Year: 2013-14)

Rita Hemchand Gandhi Ayodhya Apartments, Flat No.101, Ramgali, Kandivali (West), Mumbai-400 067	Vs.	ITO. INT Tax Ward 2(3)(1) 17 th Floor, Air India Building, Nariman Point, Mumbai-400 021
(Appellant)		(Respondent)
PAN No. AKEPG6370P		

Assessee by : Shri Rajesh S. Shah, AR
Revenue by : Smt. Mahita Nair, DR

Date of hearing: 28.05.2024
Date of
pronouncement : 21.06.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Mrs Rita Hemchand Gandhi [the assessee] against the appellate order passed by The Commissioner Of Income Tax (Appeals) – 56, Mumbai (the learned CIT – A) dated 8/11/2023 for assessment year 2013 – 14 wherein the penalty levied by The Income Tax

Officer International Taxation Ward 2 (3) (1), Mumbai (the learned AO) under section 271 (1) (c) of The Income Tax Act 1961[The Act] of Rs. 150,606/- levied by the penalty order dated 27/9/2022 was confirmed.

02. Assessee aggrieved with the same has preferred this appeal raising following grounds:-

"1. On the facts and circumstances of the case, CIT(A) erred in confirming the Penalty levied u/s.271(1)(c) of the Act of Rs.1,50,606.

2. On the facts and circumstances of the case, the penalty levied u/s.271(1)(c) on basis of the assessment order which itself was bad in law since the AO had no power to issue Notice u/s.148 during the financial year 2020-21 and order passed in pursuant to the said notice is bad in law and hence penalty order is also bad in law.

3. a) On the facts and circumstances of the case and in law, the assessment order passed u/s.147 is bad in law since order dated 27/03/2022 is digitally signed only on 30/03/2022 & DIN was taken on unsigned order, which is not permitted & hence order is bad in law.

b) The penalty order passed u/s.271(1)(c) on basis of such assessment order is void ab-initio.

4. *On the facts and circumstances of the case and in law, the CIT(A) erred in confirming the penalty without considering detailed submission and judgements cited during the appeal proceedings. The order passed by the CIT(A) without considering the merits of the case is bad in law.*

5. a) *On the facts and circumstances of the case and in law, there is no concealment of Particulars of Income as the full particulars of Income were available before the department in the Form 26AS and AIS.*

b) *The appellant submits that no addition has been made in the Return of Income filed, therefore, no penalty can be levied.*

c) *The AO erred in not considering several judicial pronouncements where it has been held that Bonafide mistakes do not constitute the concealment of Income."*

03. Brief facts of the case shows that assessee is a non-resident and has not filed any return of income for assessment year 2013 – 14. The case of the assessee was reopened by issue of notice under section 148 of the act on 30/3/2021 after recording of the reasons and obtaining necessary approval. The information was received from AIMS module that assessee has made various transaction of ₹ 19,722,528 on which tax has been deducted at source



under section 194A, has also placed time deposit exceeding Rs 2 lakhs with a banking company and tax has been deducted under section 195 of the act of ₹ 4,55,921. To verify the genuineness of the transaction and letter was sent to the assessee through Portal . As the assessee has not filed any income tax return for the impugned assessment year and as no such response was received from the assessee the reopening was made. In response to notice under section 148 of the act assessee filed return of income on 24/4/2021 declaring total income of ₹ 6,539,260/-. Notice under section 143 (2) of the act was issued to the assessee on 26/11/2021. As the assessee has offered the income mentioned in the reasons for reopening and paid the taxes on it, the assessment order under section 147 of the act was passed on 27/3/2022 at the total income of the assessee at ₹ 6,539,254/-. The learned assessing officer initiated penalty proceedings under section 271 (1) (C) for concealment of income of ₹ 6,539,254 as the assessee offered the income for taxation only after issue of notice under section 148 of the act.

04. During penalty proceedings assessee submitted a reply stating that she is a non-resident Indian settled in UAE since 1978 and possesses tax residency certificate of UAE. For impugned assessment year only source of income was interest on investment. As per The Double Taxation Avoidance Agreement the rate of tax on interest income is 12.5% the tax deduction at source was required to be done from the interest income at the rate of 12.5% but the deductor deducted tax at source on interest income at

the rate of 10% instead of 12.5% resulting into an additional tax of ₹ 1,751,121. She was under the bonafide belief that as the complete tax was detected properly, no additional tax was payable by her and therefore no return of income was required to be filed by her. She further stated that on receipt of the notice under section 148 of the act and ongoing that shortfall has arisen on tax liability, immediately paid tax thereon along with interest and filed the return of income which is accepted as it is after the complete scrutiny. Therefore there is neither a concealment of income and nor furnishing of inaccurate particulars of income and therefore the penalty should not be levied under section 271 (1) (C) of the act.

05. The learned assessing officer was of the view that as assessee has not filed the return of income under section 139 of the act despite having taxable income and having interest income from various investments, assessee was well aware that she is having interest income which is above the maximum taxable income for filing of return of income therefore, the assessee has not only made default of not filing the return of income but also not paid the due taxes on her total income earned during the year. Thus, The assessee has willfully evaded the tax by choosing not filing of return of income. Had the revenue not reopened the case, the total income would have remained untaxed. Therefore he is satisfied that any person who has concealed the particulars of income or furnished inaccurate particulars of such income, the penalty is leviable under section 271 (1) (C) of the act. Therefore he

held that assessee has concealed income of ₹ 6,539,254 and he is satisfied that assessee has furnished the inaccurate particulars of income and thereby concealed the income. He levied the penalty of ₹ 150,606/- by penalty order dated 27/9/2022 passed under section 271 (1) (C) of the act.

06. Assessee aggrieved with the penalty order preferred an appeal before the learned CIT - A who dismissed the appeal holding that the income has been brought to tax by the timely action of the learned assessing officer by selecting the case for scrutiny after analyzing facts are available from non-filers database. If the AO would not have done any scrutiny, there was no way to bring this transaction to tax. Therefore it is clear that the assessee has no intention to declare her true income. Accordingly he held that the learned assessing officer has recorded a categorical finding that he was satisfied that assessee has concealed true particulars of income and is liable for penalty under section 271(1) (c) read with section 274 of the act. He supported his appellate order by the decision of the honourable Supreme Court in case of Mak Datta private limited versus CIT (2013) 38 taxmann.com 448 (SC). Accordingly the penalty order was confirmed.
07. Assessee aggrieved with appellate order preferred this appeal before us. The learned authorized representative Shri Rajesh Shah, CA, submitted a paper book containing 14 pages. He referred to form number 26 AS and submitted that only dispute is with respect to interest

income received from Omkar Realtors and developers private limited deducted interest section 195 at the rate of 10% of interest income instead of 12.5%. He submits that assessee has received interest from that party of ₹ 6,083,333/- tax thereon is deducted at the rate of 10%. The tax demand is also arising only because of 2.5% less tax deducted by the tax deductor. He further submits that in the assessment order the learned assessing officer has not stated whether the assessee has concealed the income or furnished inaccurate particulars of income. However in the show cause notice dated 27/3/2022 the learned assessing officer has mentioned that assessee has concealed the particulars of income. In penalty order in paragraph number 5.2 the AO has invoked both limbs. Whereas in paragraph number eight of the order the AO was satisfied that assessee has furnished inaccurate particulars of income. He submits that the learned CIT – A has confirmed the addition on the decision of the honourable Supreme Court in case of MaK data.

08. He submits that all the details are available with the assessing officer as all the details are exhibited in form number 26 AES there is no error in the income stated in that form. He submitted that inadvertently as the deduct has not deducted proper tax the notice was issued to the assessee. He referred to the provisions of section 115G of the act which provides that return of income is not required to be filed in case of non-resident under section 139 (1) of the act if the income is consisting only of investment income and also tax deductible at source has



been deducted from such income. He states that tax has been deducted on the interest income but at the lesser rate that is tax is required to be deducted at 12.5% but has been deducted at the rate of 10%. It is not the case of the AO that assessee has income on which tax is not deductible and assessee has not offered the same. Even otherwise it is a bona fide error on the part of deductor, but when found that tax is due from the assessee same was paid immediately. This return of income is accepted by the AO. He relied upon the decision of the honourable Bombay High Court in case of CIT versus Hans Christian gassin ITA number 2209 of 2010 dated 22 June 2011 stating that honourable Bombay High Court has confirmed the order of the coordinate bench where the penalty was deleted for the reason that it was a case of a bona fides mistake and there was no intention to evade tax. He further referred to the decision of honourable High Court in ITA number 526 of 2011 dated 9/2/2011 in case of Sania Mirza wherein the penalty was deleted where wherein nothing was found to suggest that the assessee acted in a manner such as to lead to the conclusion that she had concealed the particulars of income or had furnished inaccurate particulars of income. In that case also there was no dispute about the fact that the amount was correctly mentioned and therefore there is also nothing inaccurate in particulars furnished by the assessee. The only error that seems to have been committed was that it was not shown as a capital receipt but as soon this was pointed out the error was accepted



and the amount was surrendered to tax. He further referred to the decision of the honourable Supreme Court in case of CIT versus reliance Petro products Ltd 322 ITR 158 wherein it has been held that in case of bona fides belief penalty cannot be levied. He further referred to the decision of the honourable Supreme Court in case of PricewaterhouseCoopers private limited versus CIT dated 25 September 2012 wherein it has been held that in case of human error it cannot be held that assessee is guilty of either furnishing inaccurate particulars on attempting to conceal its income. Therefore he submitted that the penalty in the case of the assessee should not have been levied and confirmed by the authorities.

09. The learned departmental representative vehemently supported the order of the learned lower authorities and submitted that it was found on the basis of a nonfilers detail available with the lower authority that assessee has on income and has not filed her return of income. On the examination of the return of income it was found that assessee has income on which lesser tax has been deducted. Had the revenue not invoke the provisions of reopening of the assessment, this income would have gone taxed at a lower rate and therefore the penalty has rightly been levied for furnishing inaccurate particulars of income.
010. We have carefully considered the rival contention and perused the orders of the lower authorities. In this case there is no dispute that assessee has earned income from



one party on which tax is deductible at source under section 195 of the act. The payer of the interest has deducted tax at the source at the rate of 10% instead of 12.5%. The assessee as soon as the notice under section 148 was received immediately offered the same income and also paid the balance tax due. Special provisions relating to certain income of non-resident as provided under Chapter XII A of the act is applicable to the assessee. According to provisions of section 115G non-resident assessee is not required to file her return of income under section 139 (1) if total income in respect of which she is assessable under this act during the previous year consisted only of investment income or income by way of a long-term capital gain or both and tax deductible at source under the provisions of chapter XVII B has been deducted from such income. There is no dispute that assessee is a non-resident, she is deriving only investment income and tax is deductible at source on such income. However the only dispute is that tax deductible at source is at the rate of 12.5% whereas the deductor has deducted tax at the rate of 10%, therefore, the return of income was not filed. On detection, on receipt of notice under section 148 of the act, assessee offered that income and also paid the balance tax of 2.5% on that income which is arising due to shortage of tax deducted at source. Therefore the assessment is made at the returned income. But AO considered that there is a concealment of income. We find that there is an error made by the deductor and not the deductee i.e. assessee. For this, the assessee



could not have been penalized for levy of penalty under section 271 (1) (C) of the act. Honourable Supreme Court in case of PricewaterhouseCoopers private limited versus CIT (supra) in reopened assessment proceedings on a genuine mistake or omission, reassessment order was passed on the assessee paid due tax thereon as along with the interest, it was held that absence of due care does not mean that assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income. In that case the contents of the income are already available in the tax audit report. In the present case also the details of the income and tax deducted thereon is already available with the assessing officer in form number 26AS based on which reopening of the assessment was made. Assessee also paid due tax immediately in response to notice under section 148 of the act. In the present case it is also not the error of the assessee but the error of the tax deductor from whom interest income is received. In the case the inadvertent error also gain be on account of the person who paid interest to the assessee of deducting tax at lower rate but not on part of the assessee. Similarly High Court in case of CIT versus Hans Christian Gass. Reliance by the lower authorities on the decision of the honourable Supreme Court in case of Mak data [2013] 38 taxmann.com 448 (SC) is misplaced because in that case The surrender of income on this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that



situation, it cannot be said that the surrender of income was voluntary. Thus the facts in that case are distinguishable

011. in view of above facts and judicial precedents, we find that the learned lower authorities are incorrect in imposing penalty under section 271 (1) (C) of the act of ₹ 150,606/-. The learned AO is directed to delete the same

012. In the result appeal of the assessee is allowed.

Order pronounced in the open court on 21.06.2024.

Sd/-
(SUNIL KUMAR SINGH)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.06.2024

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Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai