

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

**BEFORE SHRI A.T. VARKEY, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.868/Del./2013
(ASSESSMENT YEAR : 2009-10)**

Shri Dheer Chand Sharma,
SD – 487, Shastri Nagar,
Ghaziabad.

vs. ITO, Ward 1 (2),
Ghaziabad.

(PAN : BDLPS0502C)

(APPELLANT)

(RESPONDENT)

ASSEESSEE BY : Dr. Rakesh Gupta, Advocate and
Shri Somil Aggarwal, CA
REVENUE BY : Ms. Susan George, Senior DR

ORDER

PER A.T. VARKEY, JUDICIAL MEMBER :

This is an appeal preferred by the assessee against the order of the CIT (Appeals), Ghaziabad dated 24.12.2012 for the assessment year 2009-10.

2. The sole issue involved in the appeal filed by the assessee is as under :-

“That having regard to the facts and circumstances of the case, ld. CIT (A) has erred in law and on facts in not deleting the penalty of Rs.1,47,02,805/- fully as levied by Ld. AO @ 300% and has further erred in sustaining the penalty to that extent @ 150% and that too without any basis and without considering the submissions of assessee and by recording incorrect facts and findings.”

3. The facts, in brief, are that the assessee had filed return on 30.09.2009 disclosing income at Rs.5,82,490/- which was selected for scrutiny. The

assessee is engaged in the business of supply of earth soil to various builders and contractors wherever the same was required for the purposes of earth filling. During the course of assessment proceedings, the assessee furnished purchase vouchers, sale vouchers, payment sheets, bank statements, etc. The AO noted that the turnover of the assessee was increased considerably in comparison to the earlier year and he noted that the vouchers produced by the assessee were not fully verifiable since mostly the payments were shown to have been paid by cash and expenses as well as purchases were not fully verifiable. Therefore, he proposed to the assessee why the income of the assessee be not estimated @ 2% of the total receipt/turnover. For that, the assessee replied that assessee had already produced complete books of accounts, bills and vouchers and advance of making payment to the farmers for the purchase of earth soil besides complete evidence of purchase and sale of shares. According to the assessee, it was also stated that gross profit rate is to the tune of 0.36% on the consolidated turnover of Rs.79,05,21,239/- as against the total sales of Rs.37,44,15,104/-. The assessee pleaded that the margin is not to that extent. However, the assessee offered voluntarily to be assessed at a net profit figure of Rs.1,50,00,000/- inclusive of the income declared in the return which works out to approximately 2% of the consolidated sales provided no penalties are levied. The AO completed the assessment on total income of Rs.1,50,00,000/-

3.1 The AO assessed the income of the assessee at Rs.1,50,00,000/- and also issued notice of penalty u/s 271(1)(c) of the Act. The AO in the penalty proceedings pointed out that the tax sought to be evaded was Rs.49,00,935/-and

the maximum penalty @ 300% on the tax sought to be evaded came to Rs.1,47,02,805/- and the said penalty u/s 271(1)(c) of the Act was levied by the AO.

4. Being aggrieved, the assessee carried the matter to the Id. CIT(A) who also confirmed the penalty levied by the AO but reduced the same to 150% of the tax sought to be evaded instead of 300% levied by the AO.

5. The assessee, being aggrieved, is in appeal before us.

6. The Id. Counsel for the assessee at the very outset stated that in identical facts, the similar penalty was levied in the case of Smt. Vinay Sharma belonging to the same group to which the assessee belongs. It was further stated that in the said case also, the income was estimated by the AO and penalty was levied @ 200% of the tax sought to be evaded and the Id. CIT(A) reduced the penalty to 150% and the assessee preferred an appeal to the ITAT, Delhi Bench H, New Delhi in ITA no.871/Del/2013 for the assessment year 2009-10 wherein vide order dated 30 August, 2013 the penalty levied by the AO u/s 271(1)(c) of the Act and confirmed by the Ld. CIT(A) was deleted. Against the said order of the Tribunal, the department preferred an appeal to the Hon'ble Jurisdictional High Court in ITA no.187 of 2014 wherein vide order dated 02.05.2014 the order of the Tribunal was confirmed. Ld. Counsel for the assessee furnished the copies of the aforesaid orders in the case of Smt. Vinay Sharma which are placed on record. The Id. Sr. DR although supported the orders of the authorities below but could not controvert the aforesaid contention of the Id. Counsel for the assessee.

7. We have considered the submissions of both the parties and perused the material available on the record, it is noticed that in identical circumstances, similar penalty u/s 271(1)(c) of the Act was levied in the case of Smt Vinay Sharma (Supra) however, the said penalty was deleted by the ITAT, vide order dated 30th August, 2013 in ITA no. 871/Del/2013 for the assessment year 2009-10 by observing as under :-

“It is a settled law that penalty proceedings are separate and independent and a finding in the assessment order may be an evidence which can be relied but it cannot be conclusive by itself for imposition of penalty. Besides in this case the finding in assessment order is not of concealed income but that of a voluntary surrender and hence cannot be made a sole basis for imposing penalty. Thus, the finding in the assessment order itself does not militate against the stand taken by the assessee that it was a voluntary surrender. In view of the above facts and circumstances we have no hesitation to hold that the assessee made this surrender offer voluntary in peculiar circumstances of this case. Assessing Officer himself accepted it as voluntary offer, reproduced the same in his order and assessed the income on exactly the same amount. There is no reference to any investigation or adverse material. Thus, the assessee’s offer is to be held as voluntary surrender, accepted by the department accordingly. There being no adverse material available on record or any reliance thereon, the observations of assessing officer and CIT(A) about concealment or inaccurate particulars are not borne from the record and the same are contradictory to each other. In view thereof, we delete the penalty imposed on the assessee.”

8. Against the order of the Tribunal the department preferred an appeal to the Hon’ble High Court in ITA no. 187 of 2014 wherein their lordship vide order dated 2.5.2014 upheld the order dated 30.08.2013 passed by the ITAT for deleting the penalty u/s 271(1)(c) of the Act, by observing in para 8 as under :-

“8. In the present case, as observed earlier, the Tribunal has relied upon rulings of several High Courts where the voluntary nature of surrender of income to buy peace and the circumstances in which the surrender income could be accepted legitimately, was discussed. In the present case, the assessee did produce all the relevant material in

the form of books of account, bank statements, vouchers, sale bills etc. During the course of further enquiry in the assessment proceedings. The assessee voluntarily offered a sum of 75lacs for assessment stating that even though all the material existed, yet in order to buy peace it was offering the amount to tax. The facts of this case are clearly such that the decision in MAK Data (Supra), in the opinion of this Court, cannot be attracted. The assessee at no point seem to have accepted the revenue's contentions that such claimed expenditure was bogus and that it was not allowable, he offered the amount only to buy peace. There is also no finding by the AO that the appellant had failed to offer an explanation in respect of the income returned or had failed to disclose material particulars."

9. Since the facts of the present case are identical to the facts involved in the case of Smt Vinay Sharma (Supra), so respectfully following the ratio laid down by the Hon'ble Jurisdictional High Court vide order dated 02.05.2014 in the aforesaid referred case, we delete the penalty levied by the AO u/s 271(1)(c) of the Act and confirmed by the ld. CIT(A).

10. In the result, the appeal filed by the assessee is allowed.

Order pronounced in open court on this 11th day of March, 2016.

**Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(A.T. VARKEY)
JUDICIAL MEMBER**

**Dated the 11th day of March, 2016
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Ghaziabad.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**