

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

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.5049/Del./2013
(ASSESSMENT YEAR : 2007-08)**

Shri Sushil Kumar Trehan, vs. DCIT,
C/o Vinod Kumar Bindal & Co., Central Circle 25,
Chartered Accountants, New Delhi.
Shiv Sushil Bhawan,
D – 219, Vivek Vihar Phase-I,
New Delhi – 110 095.

(PAN : ACGPT8017J)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Sanjeev K. Bindal, CA
REVENUE BY : Smt. Paramita M. Vishvash, CIT DR

Date of Hearing : 26.05.2016
Date of Order : 31.05.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Shri Sushil Kumar Trehan (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned order dated 07.06.2013 passed by the Commissioner of Income-tax (Appeals)-1, New Delhi qua the assessment year 2007-08 confirming the penalty levied u/s 271(1)(c) on the grounds inter alia that :-

“The Ld. Appellate Authority erred in law and on facts in confirming the penalty levied u/s 271(1)(c) on cash of Rs.16,16,881/- found at the residence during the search in an arbitrary manner by wrongly interpreting the explanation of the appellant and not considering the recognized principle of telescoping. Thus, the penalty so levied confirmed must be cancelled.

2. The appellant craves leave to add, substitute, modify, delete or amend all or any ground of appeal either before or at the time of hearing.”

2. Briefly stated the facts of this case are : during the search operation conducted on 22.11.2006 under section 132 (1) of the Income-tax Act, 1961 (for short ‘the Act’), a cash amount of Rs.27,31,000/- was recovered and out of which, amount of Rs.27,00,000/- was seized. Assessee, in order to explain, filed cash flow statement. Out of which, AO found deficit of cash of Rs.11,14,119/- in M/s. Kirti Trading Co. on date of search and AO also came to the conclusion that assessee had made large scale payments in cash for unaccounted purchases. Finding explanation made by the assessee not sustainable, AO added back the cash seized during search operation as unexplained cash u/s 69 of the Act and thereby, made an addition of Rs.27,31,000/-.

3. On the basis of assessment order, penalty proceedings were initiated. During the relevant year under assessment, assessee filed return of income on 31.03.2008 declaring income at Rs.9,09,537/-, which was completed u/s 143(3) on 31.12.2008 to the tune of total

income of Rs.36,40,537/- by making addition of Rs.27,31,000/- on account of unexplained cash. On account of furnishing inaccurate particulars of income, penalty proceedings were initiated and notice u/s 274 read with section 271(1)(c) of the Act was issued. Assessee filed his explanation in the penalty proceedings for the assessment completed u/s 153A for AY 2001-02 to 2007-08. After considering the submissions made by the assessee and by agreeing with the order passed by the AO, the Id. CIT (A), affirmed by the ITAT, New Delhi, penalty to the tune of Rs.28,20,900/- @ 300% has been imposed.

4. Assessee carried the matter before the Id. CIT (A) who has partly allowed the appeal by reducing the penalty from maximum rate of 300% to 100% on the amount evaded by the assessee i.e. 16,16,881/- (Rs.27,31,000/- - Rs.11,14,119/-, deleted being the amount belonging to M/s. Kirti Trading Co.) Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. The ld. AR for the assessee challenging the impugned order contended inter alia that the assessee has duly explained source of impugned cash of Rs.16,16,881/- available out of additional income declared in the return of income filed u/s 153A qua assessment years 2001-02 to 2006-07 and this contention has been continuously put forth before the revenue authorities as well as ITAT during quantum proceedings as well as penalty proceedings; that during the search, no document has been seized showing undisclosed transactions for the AY 2007-08 and as such, no income was offered by the assessee during AY 2007-08; that the assessee has duly explained availability of cash found during the search out of the available cash balance of Rs.3,95,00,000/- under the bonafide belief on the basis of telescoping; that the assessee is entitled for the benefit of principle of telescoping.

7. However, the ld. DR has relied upon assessment order passed by the AO, affirmed by the ld. CIT (A) and ITAT, and the penalty orders as well as order passed by ld. CIT (A) and relied upon the judgment of Hon'ble Supreme Court in Mak Data Pvt. Ltd. vs. CIT-II – 2013-TIOL-58-SC-IT

8. Undisputed facts, necessary for adjudicating the controversy at hand are, inter alia, that on the basis of search and seizure operation, cash amount of Rs.27,31,000/- was seized on the basis

of which addition of Rs.27,31,000/- was made qua the AY 2007-08 u/s 143(3); that the quantum proceedings qua the addition of Rs.27,31,000/- stands already finalized, on the basis of which penalty of Rs.28,20,900/- @ 300% has been imposed u/s 271(1)(c); that Id. CIT (A) by partly allowing the appeal accepted the contention of the assessee to the extent that amount of Rs.11,14,119/- belongs to M/s. Kirti Trading Co. and deleted the penalty on the said amount, whereas confirmed the penalty on amount of Rs.16,16,881/-; that the assessee declared additional income to the tune of Rs.4,88,43,493/- by filing the return u/s 153A/143(3) qua the block period 2001-02 to 2006-07 which has been accepted; that penalty u/s 271(1)(c) has been imposed on the assessee on the sole ground that the quantum proceedings have already been terminated against the assessee.

9. 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 and the findings recorded in the assessment order are not conclusive for levy of penalty u/s 271(1)(c) of the Act.

10. In the backdrop of the aforesaid undisputed facts, arguments addressed by the Id. AR and Id. DR in the light of the case laws relied upon, we are of the considered view that the penalty order

passed by the AO and impugned order passed by the Id. CIT (A) is not sustainable in the eyes of law for the following reasons :-

- i. that bare perusal of the provisions contained u/s 271(1)(c) of the Act goes to prove that to impose penalty upon the assessee under the relevant provisions of the Act, two conditions are required to be fulfilled one: that the assessee must have furnished inaccurate particulars of income and two: the assessee must have concealed particulars of income from the tax authorities.
- ii. that in the case cited as CIT vs Harsh Talwar – 335 ITR 200 (Del.) and CIT Vs SAS Pharmaceuticals – 335 ITR 2359 (Del.) delivered by Hon’ble Jurisdictional High Court held 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”*.
- iii. that since all the transactions incorporated in the seized documents and loose paper recovered in the search operation on 22.11.2006 from the residence of the assessee are in consonance with the cash flow

statement prepared for computing the undisclosed income on the basis of which additional income to the tune of Rs.3,95,00,000/- offered by the assessee u/s 153A qua the block period 2001-02 to 2006-07 has been accepted by the revenue, the revenue cannot be allowed to accept the cash flow statement on piecemeal basis by denying the benefit of telescoping of income from the earlier years;

- iv. that the AO had merely made an addition of Rs.27,31,000/- by finding the explanation of the assessee unsatisfactory on the ground that assessee had made large scale payment in cash for unaccounted purchases without disputing unaccounted cash purchase recorded in the cash flow statement and this fact goes to prove that the penalty imposed in this case is not for furnishing inaccurate particulars of income rather by rejecting the explanations offered by the assessee;
- v. that even otherwise, when Id. CIT (A) by accepting the cash flow statement lying at pages 1 to 14 of the paper book extended the relief of Rs.11,14,119/- being belonging to M/s. Kirti Trading Co., the revenue

authorities are estopped from denying the relief of telescoping of income and passing the penalty order;

- vi. that in the quantum proceedings, the CIT (A) has also proceeded on the basis of conjectures and surmises that carry forward of available cash from the undisclosed income, undisputedly declared and accepted qua the block period 2001-02 to 2006-07, could not be correlated with the cash found during search as the wealth-tax return showing the said cash balance had not been filed for those years;
- vii. that it is apparently clear that Id. CIT (A) and ITAT in the quantum proceedings have merely proceeded on the basis of non-acceptance of the explanation furnished by the assessee and there is not an iota of evidence of furnishing of inaccurate particulars of income by the assessee;
- viii. that during the appellate proceedings, qua the assessment order, the CIT (A) raised the presumption u/s 132(4A) on the ground that assessee has failed to correlate the cash with the undisclosed income of earlier years and as such, the date of acquisition is presumed to be date of search. So, again we are of the

considered view that this is not a case of furnishing of inaccurate particulars which is a basic requirement to invoke provisions contained u/s 271(1)(c) of the Act;

- ix. that when undisputedly the assessee has admitted that the cash amount recovered during search operation was earned from undisclosed sources and has already offered for taxation during the year under assessment, pertaining to the earlier years regarding which cash flow statement has been filed and accepted by the revenue authorities while completing the assessment u/s 153A/143(3), the question of imposition of penalty does not arise;
- x. that the AO to prove the charge of inaccurate particulars against the assessee has not collected any evidence rather preferred to proceed on the basis of particulars furnished by the assessee by rejecting his explanation;
- xi. that page 12 of the paper book, which is part of the cash flow statement, otherwise accepted by the revenue authorities, apparently shows that the assessee has cash balance of Rs.4,13,28,821/- as on 14.11.2005;

- xii. that as per entries of the cash book recorded at page 40 of the paper book, the assessee has balance of Rs.3,95,24,249 as on 01.04.2006, meaning thereby the amount seized during search operation was part and parcel of the cash amount available with the assessee, qua which return of income has already been filed and accepted by the revenue;
- xiii. that perusal of the assessment order dated 31.12.2008 on the basis of which penalty proceedings have been sought to be initiated, apparently shows that the AO has proceeded on the basis of wrong figures by recording that, "*the assessee has filed a cash flow statement which shows that the cash available of Rs.29,02,730/- as on 14.11.2005, whereas cash flow statement filed by the assessee with cash balance as on 14.11.2005 was Rs.4,11,40,749/-.*" This mistake on the part of the AO further perpetuated during the appellate proceedings qua the assessment order before the Id. CIT (A) to the detriment of the assessee;
- xiv. that the penalty in this case has merely been imposed on the ground that the assessee has failed to explain and justify as to how the cash amount of

Rs.16,16,881/- pertains to the earlier years whereas this fact is to be examined in the light of “cash flow statement”, which is an undisputed document believed by the revenue while accepting the return of income u/s 153A/143(2) of the Act. Even otherwise, there is not an iota of evidence on the file to prove that this is a case of furnishing of inaccurate particulars;

- xv. that the decision of **Mak Data Pvt. Ltd.** (supra), relied upon by the Id. DR, is not applicable of the facts and circumstances of the case because the said case was apparently of concealment of particulars of income or furnishing of inaccurate particulars of income, whereas the present case is only qua the non-acceptance of the explanation rendered by the assessee as to the availability of cash balance in question available with him being part and parcel of Rs.4,39,00,000/- ;
- xvi. that without any cogent evidence on record that the assessee has concealed or has furnished inaccurate particulars of income, provisions contained u/s 271(1)(c) cannot be invoked;

xvii. that Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. – 322 ITR 158 (SC) while examining the applicability of section 271(1)(c) has held that, *“Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”*, which is applicable to the facts and circumstances of the case.

11. In view of what has been discussed above, we hereby accept the present appeal filed by the assessee and the penalty order dated 04.10.2012, partly affirmed by the Id. CIT (A), is hereby set aside.

Order pronounced in open court on this 31st day of May, 2016.

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

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Dated the 31st day of May, 2016/TS

Copy forwarded to:

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

AR, ITAT
NEW DELHI.