

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "C", MUMBAI

Before Shri P K Bansal, Vice President &  
Shri Pawan Singh, Judicial Member

ITA No. 1438/Mum/2016  
Assessment Year : 2007-08

Shri Rampratap Baijnath Sharma Shivaji Nagar Opp Survey Chawl, Sec 32, Ulhasnagar 421 004  PAN ACKPS5346M  (Appellant)	Vs.	ITO Ward 2(3) Kalyan    (Respondent)
---	-----	---

Appellant By : Shri A Gopalakrishnan  
Respondent By : Shri Rajat Mittal

Date of Hearing : 09.08.2017	Date of Pronouncement : 10.08.2017
------------------------------	------------------------------------

**ORDER**

**Per P K Bansal, Vice-President:**

This appeal has been filed by the assessee against the order of the CIT(A)-3, Thane, dated 02.11.2015 for A.Y. 2007-08, confirming the penalty imposed by the Assessing Officer u/s. 271(1)(c) amounting to ₹ 2,28,969/-.

2. The facts of the case in brief are that the Assessing Officer issued notice u/s. 148 on 06.11.2012. In reply thereto, the assessee submitted that the return for the aforesaid assessment has been filed along salary certificate from the employer and showed total income of ₹ 89,930/-. Subsequently, the assessment has been completed at an income of ₹ 9,14,930/- The Assessing

Officer after issuing show cause notice levied penalty u/s. 271(1)(c) by observing as under:

*"I am therefore, fully satisfied that the assessee has concealed the particular of his income and furnished inaccurate particular of income to Rs 8,25,000/- and committed default. Such default had attracted the penalty u/s 271 (1) (c) of the IT Act. I therefore levy minimum penalty u/s 271 (1) (c) **at Rs 2,28,969/- (Rs. Two lakh twenty eight thousand nine hundred sixty nine only)** which works out 100% of tax sought to be evaded as against maximum penalty leviable at Rs 6,86,907/- (Rs Six lakh eighty six thousand nine hundred seven only) which works out at 300% of tax sought to be evaded.*

#### **PENALTY CALCULATION**

1	Tax on total income (Inclusive of concealed Income )	Rs	2,28,969/-
2	Tax on Income Excluding concealed income	Rs	Nil
3	Difference of 1 - 2	Rs	2,28,969/-
4	Penalty (minimum)(100% of Tax sought to be evaded)	Rs	2,28,969/-
5	Maximum Penalty (300% of Tax sought to be evaded)	Rs	6,86,907/-

3. On appeal, the CIT(A) confirmed the order of the Assessing Officer.
4. We have heard the rival parties along with the orders of the authorities below. Before deciding whether this is a case for levy of penalty u/s.

271(1)(c) of the Act, it is necessary to look into the provisions of s. 271(1)(c) of the Act, which reads as under :

*"271 (1) If the AO or the CIT(A) or the CIT in the course of any proceedings under this Act, is satisfied that any person—*

*(a) ....*

*(b) .....*

*(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or*

*(d) .....*

*he may direct that such person shall pay by way of penalty,—*

*Explanation 1 : Where in respect of any facts material to the computation of the total income of any person under this Act,*

*(A) such person fails to offer an explanation or offers an explanation which is found by the AO or the CIT(A) or the CIT to be false, or*

*(B) such person offers an explanation which he is not able to substantiate and fails to prove such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,*

*then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of cl. (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed."*

From the perusal of the aforesaid section, it is apparent that penalty u/s. 271(1)(c) is leviable if the Assessing Officer is satisfied in the course of any proceedings under this Act that any person has concealed the particulars of his income or furnished inaccurate particulars of the income. In this case, the Assessing Officer levied penalty on the assessee by observing as under:

*I am therefore, fully satisfied that the assessee has concealed the particular of his income and furnished inaccurate particular of income to Rs 8,25,000/- and committed default. Such default had attracted the penalty u/s 271 (1) (c) of the IT Act. I therefore levy minimum penalty u/s 271 (1) (c) **at Rs 2,28,969/- (Rs. Two lakh twenty eight thousand nine hundred sixty nine only)** which works out 100% of tax sought to be evaded as against maximum penalty leviable at Rs 6,86,907/- (Rs Six lakh eighty six thousand nine hundred seven only) which works out at 300% of tax sought to be evaded.*

**PENALTY CALCULATION**

1	Tax on total income (Inclusive of concealed Income )	Rs	2,28,969/-
2	Tax on Income Excluding concealed income	Rs	Nil
3	Difference of 1 - 2	Rs	2,28,969/-
4	Penalty (minimum)(100% of Tax sought to be evaded)	Rs	2,28,969/-
5	Maximum Penalty (300% of Tax sought to be evaded)	Rs	6,86,907/-

5. This is the settled law that the penalty proceedings and assessment proceedings are different. Section 271(1)(c) lays down that the penalty proceedings can be initiated on the basis of either of the two charges i.e., (i) concealment of particulars of income or (ii) furnishing of inaccurate particulars of income. Both the charges are entirely different. If the proceedings are initiated on charge of concealment, then penalty cannot be

levied on the charge of furnishing of inaccurate particulars of income and vice versa. Thus, there / must be a clear finding about the charge for which penalty is imposed or initiated. It is incumbent upon the Assessing Officer to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such findings, the order would be bad in law in the case of New Sorathia Engg. Co. Ltd. v. CIT [2006] 282 ITR 642/155 Taxman 513 (Guj.) Hon'ble Gujarat High Court has held as under:

*"It is incumbent upon the AO to state whether the penalty was being levied for concealment of particulars of income by the assessee or whether any inaccurate particulars of income had been furnished by the assessee.*

*Held, that the penalty order and the order of the CIT(A) showed that no clear-cut finding had been reached. The Tribunal had failed to appreciate this legal issue. The ratio in CIT v. Manu Engg. Works [1980] 122 ITR 306 (Guj.) was applicable and the order of penalty could not be upheld by the Tribunal. The order was invalid."*

6. In the case of CITv. Rajan & Co. [2007] 291 ITR 340 / [2005] 146 Taxman 271 (Delhi), it is held that the provision of s. 271(1)(c) of the IT Act, 1961, would require proper application of mind and recording of at least a bare minimum opinion on the part of Assessing Officer that a case for initiation of penalty proceeding was/made as there was concealment of income or that incorrect particulars had been furnished by the assessee with the intention to avoid payment of taxes. This view is supported by various

decisions of High Court therefore it is not necessary to discuss the other judgment on the issue.

7. The penalty u/s. 271(1)(c) can be levied for either of the charge. The penalty has been levied for both the charges by concluding that the assessee had furnished inaccurate particulars of her income and concealed her income on various issues. Section 271(1)(c)(iii) is explicitly clear that the penalty can be levied for concealment of particulars of income or furnishing of inaccurate particulars of income. It is the particulars of income which is the common subject matter of both the charges. The word 'conceal' as per Webster's Dictionary means "to hide, withdraw, or remove from observation; cover or keep from sight; to keep secret; to avoid disclosing or divulging." That means non-disclosure of particulars of income. On the other hand, where particulars are disclosed but such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income. For example, in case of businessman, if a particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while sale is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of income.

8. The trust of the legislature is upon the particulars of income which are either concealed or furnished inaccurately by the assessee. Therefore, we must understand the meaning of the words "particulars of income". The Tribunal had to consider the meaning of the expression "furnishing of

inaccurate particulars of income" appearing in section 271(1)(c) in the case of Kanbay Software India (P.) Ltd. v. Dy. CIT [2009] 31 SOT 153 (Pune). It was held that the expression 'particulars' refers to facts, details, specifics or the information about someone or something. Thus, the details or information about the income would deal with factual details of income and cannot be extended to areas which are subjective such as status of the taxability of an income admissibility of a deduction and interpretation of law. Accordingly, it was held that mere rejection of a legal claim would not amount to furnishing of inaccurate particulars of income. This view is now fortified by the Supreme Court judgment in the case of CIT v. Reliance Petroproducts '(P.) Ltd. [2010] 322 ITR 158/189 Taxman 322. In this case, the claim of 'Assessee' under section 36(1)(iii) was rejected by the Assessing Officer and the order of Assessing Officer was upheld by the Tribunal. As a result thereof, the penalty u/s. 271(1)(c) was imposed on account furnishing of inaccurate particulars of income. The penalty was held to be illegally imposed by the Tribunal since factual details of income furnished by the Assessee were found to be correct. The matter ultimately reached the Supreme Court and the Hon'ble Court upheld the view of the Tribunal by holding that "mere making of the claim, which is not sustainable in law by itself, will not amounting to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee."

9. We are of the opinion Explanation 1 to section 271(1)(c) cannot be applied where charge against the 'Assessee' is furnishing of inaccurate particulars of income since it provides a deeming fiction qua concealment of particulars of income only and consequently cannot be extended to a case where charge against the 'Assessee' is furnishing of inaccurate particulars of income. While, on the other hand, where charge against the 'Assessee'<sup>1</sup> is concealment of particulars of income, the Assessing Officer has to establish either that 'Assessee'<sup>1</sup> has not disclosed the particulars of income under the main or provisions or the case of 'Assessee' falls within the scope of the deeming fictions created under the Explanations. For example, the 'Assessee' might not disclose particular sales or dividend income or income from any source. Such instances would fall under the main provisions itself. In such cases, the burden is on the Assessing Officer to establish the existence of the charge on the basis of material on record.

10. Explanation 1 to section 271(1)(c) states that the amount added or disallowed in computing the total income of the assessee shall be deemed to be the income in respect of which particulars have been concealed. This deeming provision is not absolute one but is rebuttable one. It only shifts the onus on the assessee. Explanation 1 refers to the two situations in which presumption of the concealment of the particulars of income is deemed. It is not applicable where the charge against the assessee is furnishing inaccurate particulars of the income. The first situation is where the assessee in respect



of any fact material to the computation of his total income fails to offer an explanation or offers an explanation, which is found by Assessing Officer or the CIT to be false. The second situation is where the assessee in respect of any facts material to the computation of his total income offers an explanation, which the assessee is not able to substantiate and also fails to prove that such explanation was bona fide one and that all the facts relating to the computation of total income have been disclosed by him. The presumption available under Explanation to section 271(1)(c), cannot be drawn unless the case of the assessee falls under either of the clause (a) or (b).

11. In this case, the Assessing Officer has not brought out any specific charge for which the penalty has been imposed on the assessee under section 271(1)(c) of the Act. He has not brought out whether the assessee has concealed the particulars of income or whether the assessee has furnished inaccurate particulars of income. Even the Assessing Officer has not initiated the proceedings for any particular charge. The Assessing Officer levied penalty without mentioning any specific charge. In CIT v. Atul Mohan Bindal [2009] 317 1TR 1/183 Taxman 444 (SC), where Hon'ble Supreme Court was considering the same provision, observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. Thus, the satisfaction of the Assessing Officer about the concealment of particulars of

income or furnishing of inaccurate particulars of such income is essential before levying any penalty u/s..271(l)(c). The Assessing Officer as is apparent from the penalty order was not satisfied about the concealment of particulars of/income or furnishing of inaccurate particulars of income on the part of the assessee.

12. We find that the Hon'ble Karnataka High Court in the case of CIT v. Manjunath Cotton & Ginning Factory 359 ITR 565 has taken a view that there must be specific charge for levying the penalty. Similarly, Hon'ble Bombay High Court in the case of CIT vs. Samson Perinchery 392 ITR 4 has also taken a similar view. On this basis itself we delete the penalty by setting aside the order of the CIT(A) and allow the appeal of the assessee.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 10<sup>th</sup> day of August, 2017.

**Sd/-**

(Pawan Singh)

**JUDICIAL MEMBER**

Mumbai; Dated: 10<sup>th</sup> August, 2017

SA

**Sd/-**

(P K Bansal)

**VICE-PRESIDENT**

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai
4. The CIT
5. DR, 'C' Bench, ITAT, Mumbai

BY ORDER,

*#True Copy #*

Assistant Registrar  
Income Tax Appellate Tribunal, Mumbai