

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 44 & 45/VIZ/2016
(Asst. Year : 2010-11 & 2011-12)**

ITO, Ward-3,
Srikakulam.

vs. M/s. Baggu Sarojini Devi Hospitals,
Illisipuram West, Srikakulam.

(Appellant)

PAN No. AAIFB 3342 G
(Respondent)

Assessee by : Shri C. Subrahmanyam – FCA.

Department By : Shri M.K. Sethi – Sr.DR

Date of hearing : 29/06/2017.

Date of pronouncement : 23/08/2017.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

These are the appeals filed by the revenue against common order of Commissioner of Income Tax (Appeals)-2, Visakhapatnam, dated 16/11/2015 for the Assessment Years 2010-11 to 2011-12.

2. Facts of the case, in brief, are that the assessee is a firm engaged in running hospital and rendering medical service, filed its return of income for the Assessment Year 2010-11 & 2011-12, originally declared total income of ₹ 23,56,370/- & ₹ 50,75,256/- on 21/09/2010 & 16/09/2011 respectively. Subsequently, a survey under section 133A was conducted on 28/03/2012 in the assessee's premises. During the course of survey, the assessee made voluntary disclosure to offer

additional income of ₹ 32,44,195/- for the Assessment Year 2010-11 and ₹ 47,29,928/- for the Assessment Year 2011-12. Subsequently, the assessee filed revised return declaring total income of ₹ 56,00,580/- for Assessment Year 2010-11 and ₹ 98,04,184/- for Assessment Year 2011-12 on 19/04/2012 by offering additional income of ₹ 32,44,204/- and ₹ 47,28,928/- for Assessment Years 2010-11 & 2011-12 respectively as agreed during survey. The Assessing Officer subsequently issued notice under section 148 for the Assessment Years 2010-11 & 2011-12 on 18/06/2012. The Assessing Officer has initiated the assessment proceedings for the Assessment Year 2010-11 and has accepted the total income returned in revised return subject to meagre addition of ₹ 12,101/- towards interest income. Thereafter, the Assessing Officer has initiated penalty proceedings under section 271(1)(c).

3. In response to the notice issued by the Assessing Officer, the assessee has filed a letter dated 12/08/2014 and submitted that the assessee himself offered additional income during the course of survey operation, he is in a state of mental agony and stress without proper guidance and accounting knowledge. It was also submitted that the additional income was offered before the Department voluntarily and the Assessing Officer could detect any concealed income. It was further submitted that the assessee had cooperated with the Department to completion of assessment and payment of tax on additional income and

hence a lenient view may be taken and requested the Assessing Officer to drop the penalty proceedings initiated under section 271(1)(c) of the Act.

4. The Assessing Officer after considering the explanation of the assessee is of the opinion that the assessee had offered additional income only after revenue noticed about the low rate of profit declared by the assessee. He further noted that, as the assessee firm could not furnish the basic receipts for the expenditure debited to profit & loss account, the assessee's option for declaration of profit at 31.5% has been accepted. The Assessing Officer by following the decision of the Hon'ble Supreme Court in the case of *MAK Data Pvt. Ltd., Vs. CIT* (358 ITR 593) held that voluntary disclosure does not release the assessee from the mischief of penal proceedings. Accordingly, the Assessing Officer levied penalty under section 271(1)(c) for concealment of income at ₹10,02,000/- and ₹ 14,61,000/- respectively for the Assessment Years 2010-11 & 2011-12.

5. On being aggrieved, assessee carried the matter in appeal before the Id. CIT(A). It was submitted before the Id. CIT(A) that there is no single iota of evidence unearthed by the survey team except noting of self-made vouchers maintained for certain expenditure which was already recorded in the books of account of the assessee. It is further submitted that the Department did not impound any books of account

and no material was found to show that the assessee has concealed the income. It was submitted that penalty may be deleted.

6. The Id. CIT(A) after considering the explanation of the assessee and also by considering the penalty order, deleted the penalty levied by the Assessing Officer. For the sake of convenience, the relevant portion of the order is extracted as under:-

“5. The only issue for consideration is whether the impugned penalty is exigible in the facts and circumstances of the case. In this regard, I have considered the submissions and details filed. I have also perused the assessment folder and survey folder. From the perusal of the survey folder, it is evident that sworn statement was recorded from the Managing Partner on 29/03/2012 & 30/03/2012. The perusal of the sworn statements indicate that the assessee was questioned on the low profit declared for Assessment Years 2010-11 & 2011-12. The assessee has explained that the profit was declared as per bills & vouchers maintained. It was also explained that the hospital was showing profit due to the Arogyasri Receipts, and that but for the Arogyasri receipts the hospital was incurring loss. It was also explained that the Arogyasri receipts are given in respect of in-patients, and that it does not cover the expenses incurred towards the out-patients. The assessee was questioned about self-made vouchers for the expenses, to which the assessee had explained that due to the nature of expenditure it was not possible to obtain receipts from each and every person and hence self-made vouchers were maintained, and to cover any discrepancies voluntarily offered income at the rate of 21.5% of Arogyasri receipts and later to 31.5% and offered to tax the said additional income. Subsequently, the assessee on his own filed revised returns for Assessment Years 2010-11 & 2011-12, returning the additional income for tax.

5.1 It is further noted that the assessee on his own filed revised returns of income before issue of any notice by the Department. During the reassessment proceedings, the AO had scanned for the books of account and bank statement and after verification of the same the revised income offered to tax was accepted. The AO has not referred to any incriminating material or discrepancies in the books of account in the assessment orders passed. Even in the impugned penalty orders, there is no reference to any incriminating material or as to detection of any concealment by the Department. Therefore, I find merit in the assessee's contention that the additional income was offered voluntarily

without reference to any incriminating material and without detection of any concealment by the Department. Besides, it is pertinent to note that the assessee has voluntarily filed the revised return offering additional income before issue of any notice u/s.148. This also goes to show that the additional income was offered to tax voluntarily.

5.2 In the above factual background, it has to be seen whether penalty u/s.271(1)(c) is exigible in the assessee's case, The AO has relied on the decision of the Hon'ble Supreme Court in the case of MM Data Pvt. Ltd. Vs. CIT 358 ITR 593. It has to be seen whether the ratio laid down in that case is applicable to uphold the impugned penalty. It would be appropriate to refer to the relevant extract of the judgment.

7. The Assessing Officer, in our view, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', amicable settlement', etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income. The burden is thereon the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amt in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs. 40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defence under the explanation 1 to section 271(1)(c) of the Act . It is trite law that the voluntary disclosure does not release the appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in 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. AG during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds

duty signed, have been impounded in the course of survey proceedings under Section 133P conducted on 16.12.2333, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income Inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessed had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income Wed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of Income and is liable for penalty proceedings under Section 271 reed with Section 274 of the Income Tax Act, 1961.

5.3 It is noted that facts in the case of MPK Data are different. In that case, a survey took place in the assessee's sister concern wherein certain incriminating documents such as blank transfer deeds for shares duly signed, share application forms etc. pertaining to assessee were found. When the assessee was questioned on this incriminating information during the assessment proceedings, the assessee surrendered additional income after taking into account income already surrendered by the promoter-director. The assessee has not offered any explanation as to incriminating material. It was also noted that though the assessed filed the return of income for the subject year subsequent to survey operation it did not include the said additional income. It was only when the assessee was questioned during the assessment proceedings with reference to the incriminating material, the assessee surrendered additional income but without explanation to incriminating information found. Thus In the absence of any explanation from the assessee, the Courts took the view that Explanation 1(A) to Section 271(1)(c) has to be invoked, The Hon'ble Courts also took the view that the surrender is not voluntary as it was made after questioning by the Department with reference to incriminating material and as it was made voluntary while filing the return of income.

5.4 In the assessee's case, the factual matrix is different. The Department did not come across any incriminating material. The only discrepancy noted was that some of the vouchers for expenses were self-made. The assessee was questioned for showing low profit without reference to any incriminating material. The assessee has satisfactorily explained that the expenditure was claimed as per bills & vouchers manned, and that some of the vouchers were self-made due to the nature of expenses. The assessee has also explained the basis for the profit declared by it, however to cover any discrepancies towards self-made vouchers, additional income was offered. It is also noted that the assessee voluntarily filed returns of

income offering the additional income on 194.2012, soon after the survey operations dated 283.2012 and before the issue of notice u/s. 148 dated 18.6.2012, During the assessment proceedings, the AD had called for the production of books of accounts & vouchers and did not point to any discrepancy, but accepted the revised income offered. Thus it could be seen that the assessee has offered satisfactory explanation and the explanation given by the assessee was not found to be false. There is no reference or finding in the assessment order or In the penalty orders, that the expenditure claimed was bogus or not genuine. Thus it is evident that facts are distinguishable from that in the case of MAX Data Pvt. Ltd.

5.5 It is also relevant to note that the Hon'ble ifAT, New Delhi in the case of Vinay Sharma in ITA No. 871/Del/2013 (Indiankanoon.Org/doc/122570787) on similar factual position deleted penalty levied u/s.271(l)(c). The Hon'ble ifAT, Hyderabad in the case of Smt. B.Raiyashree (ITA No.1741 of 2013 dated 1.8.2014) after finding that the factual matrix was different from Max Data Pvt. Ltd., held that the Apex Court decision will not apply when the income was surrendered voluntarily and deleted the penalty. The Hon'ble Madras High Court in the case of CIT VS Cafco Syndicate Shipping Co. (2009, 40 SITC 366 Mad), took the view that non-production of supporting vouchers cannot be ipsofacto be ground to levy concealment penalty, and the ratio of the Apex Court in Dilip N. Shroff was followed. Similar view taken by the Hon'ble ITAT, Mumbai in the case of OUT Vs. Eagle Iron & Metal Industries Ltd. (11 ITR 384 2011). The Hon'ble Gujarat High Court in the case of CIT Vs. Jyoti Ltd. (Indiankanoon.org/doc/116354383) held that penalty is not exigible when the expenditure disallowed was not found to be bogus.

5.6 To sum up, in the assessee's case the offer of additional income is found to be voluntary without reference to any incriminating material. The assessee had given satisfactory explanation for maintaining serf-made vouchers for some expenses, and such expenditure was not found to be bogus The additional income is found to be offered with reference to certain percentage and the adoption of such percentage was not based on any incriminating material evidence. In view of the above factual position and in the light of the legal position discussed in the case laws referred. I consider that the conditions stipulated in Sec. 271(1)(c) are not fulfilled and this Is not a 'fit case to levy penalty u/s.271(1)(c). Accordingly, the AO is directed to cancel the impugned levied for A.Y,2010-11 & A.Y.2011-12."

- 7.** On being aggrieved, assessee carried the matter in appeal before the Tribunal.
- 8.** The Id. Departmental Representative has submitted that because of survey conducted, the assessee has offered additional income,

therefore, the additional income offered by the assessee is a concealed income and submitted that the Assessing Officer has rightly imposed penalty under section 271(1)(c) of the Act. He strongly supported the order of the Assessing Officer.

9. *Per Contra*, learned Authorized Representative for the assessee has submitted that the department has not found any material to show that the assessee has concealed the income. Therefore, penalty under section 271(1)(c) cannot be levied. The assessee himself offered an income to buy a peace and whatever income offered by the assessee is accepted and assessment is completed, hence, no penalty can be levied. It was further submitted that Assessing Officer had not brought any evidence on record to show that what is the income concealed by the assessee. The Assessing Officer simply initiated the penalty proceedings by following the decision of the Hon'ble Supreme Court in the case of *MAK Data Pvt. Ltd.*, (supra), therefore, he prayed that penalty levied by the Assessing Officer may be deleted and he strongly supported the order passed by the Id. CIT(A).

10. We have heard both the sides, perused the material available on record and orders of the authorities below.

11. There is a survey in the case of the assessee and the statement of Managing Director of the assessee has been recorded on 29/03/2012 & 30/03/2012. In the course of survey, the Managing Director was questioned about the declaration of low profit for the Assessment Years

2010-11 & 2011-12. The Managing Director of the assessee has explained that the profit is declared as per bills and vouchers maintained. It is also submitted that because of Arogyasri scheme, the hospital is able to show profit, otherwise it is running on loss. The Managing Director is also questioned about the self-made vouchers for expenses, to which he has explained that it is not possible to obtain receipts for each and every expenses and self-made vouchers are maintained to cover up discrepancies and voluntarily offered income @ 21.5% of Arogyasri receipts and later it was to 31.5%, and offered to tax the said additional income. Subsequently, the assessee on his own filed revised returns for the Assessment Year 2010-11 & 2011-12, taxes are paid accordingly. The revised returns filed by the assessee are accepted by the Assessing Officer without making any addition. The Assessing Officer has also not referred any incrementing material or discrepancies in the books of account in the assessment order passed. Even in the impugned penalty order, there is no reference to any incriminating material or detected any concealment by the Department. The only defect pointed out by the Assessing Officer is self-made vouchers. For that, the assessee has already explained that due to nature of expenditure, it is not possible to obtain for each and every expense and to cover up the discrepancies, self-made vouchers were prepared and additional income is offered by the assessee. The Assessing Officer accepted the explanation given by the assessee. It is

not the case of the Assessing Officer that the explanation given by the assessee neither false nor *bonafide*. The Assessing Officer not made any investigation or found any discrepancies in the books of account maintained by the assessee. He accepted the revised return of income filed by the assessee. In the penalty order, the Assessing Officer has relied on the order of the Hon'ble Supreme Court in the case of *MAK Data Pvt. Ltd. (supra)* and held that voluntary disclosure does not release the assessee from mischief of penal proceedings. We find that the case law relied on by the Assessing Officer in the case of *MAK Data Pvt. Ltd., (supra)* is entirely different from the instant case. In the *MAK Data Pvt. Ltd., (supra)* a survey took place in the assessee sisters concern, wherein certain incriminating documents such as blank share transfer deeds duly signed and share application forms etc. pertaining to the assessee were found and the assessee was questioned on these incriminating information during the course of assessment proceedings, the assessee surrendered the additional income. The above judgment of the Hon'ble Supreme Court has considered by the Hon'ble Madras High Court in the case of *CIT Vs. M/s.Gem Granites (262 ITR 426)* and observed that the Hon'ble Supreme Court while considering the Explanation to section 271(1)(c) held that the question would be whether the assessee had offered an explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the Explanation to Section 271(1) raises a presumption of concealment,

when a difference is noticed by the Assessing Officer between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence and when the initial onus placed by the explanation, has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted their income and not otherwise. Factually, we find that the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. Therefore, if the department did not agree with the explanation, then the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. In the present case, the assessee has given detailed explanation before the Assessing Officer and offered additional income and the same is accepted. It is not the case of the Assessing Officer that the explanation given by the assessee is neither false nor *bonafide*. Therefore, in our opinion, the assessee has discharged burden cast upon him and if at all the Assessing Officer is not agreed with the explanation given by the assessee, he has to make a positive enquiry in respect of additional income offered by the assessee and has to give a finding that the additional income offered by the assessee is a concealed income or furnished in accurate particulars of income. In the present case, in the penal proceedings, the Assessing Officer has not made any such enquiry and no such finding has been given, hence, the judgment of the Hon'ble Supreme Court in the case of

MAK Data Pvt. Ltd., (supra) has no application to the facts of the case. In the penalty order, the Assessing Officer has observed that the assessee offered additional income only after revenue noticed low rate of profit declared by the assessee. The Hon'ble Delhi High Court in ITA No. 1058/2009 in the case of *CIT Vs. M/s. Sas Pharmaceuticals*, dated 08/04/2011, has observed that *"no doubt the discrepancies were found during the survey. This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under the provisions of section 271(1)(c) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during the survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Section 271(1)(c) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment of non-disclose as the assessee had made a complete disclosure in the income tax return and offered the surrendered amount for the purpose of tax."* With the above observation, the Hon'ble Delhi High Court has upheld the order passed

by the Id. CIT(A) as well as the Tribunal and decided the issue in favour of the assessee.

12. From the above decision of the Hon'ble Delhi High Court, it is very clear that on account of survey, if the assessee has offered additional income, it cannot be a ground to impose penalty under section 271(1)(c) unless Assessing Officer is able to strictly proved that the income offered by the assessee is either concealed or filed in accurate particulars of income, otherwise section 271(1)(c) cannot be imposed. Keeping in view of the facts and circumstances of the case and by following the judicial pronouncements, we are of the opinion that this is not a fit case to impose penalty us 271(1)(c) of the Act. In view of the above, we find no infirmity in the order of the Id. CIT(A). Thus, this appeal filed by the revenue is dismissed.

ITA No. 45/VIZ/2016

13. Since the facts and circumstances involved in ITA No. 44/VIZ/2016 pertaining to the Assessment Year 2010-11 are exactly similar to the appeal for the assessment year 2011-12 decided above, our decision (supra) shall, *mutatis mutandis*, apply to this appeal also.

14. In the result, both the appeals filed by the Revenue are dismissed.

Order Pronounced in the open Court on this 23rd day of August, 2017.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated : 23rd August, 2017.

vr/-

Copy to:

1. *The Assessee - M/s. Baggu Sarojini Devi Hospitals, Illisipuram West, Srikakulam.*
2. *The Revenue - ITO, Ward-3, Srikakulam.*
3. *The CIT-2, Visakhapatnam.*
4. *The CIT(A)-2, Visakhapatnam.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.