

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos.368-373/Coch/2017
Assessment Years : 2005-06 to 2010-11

The Deputy Commissioner of Income-tax, Central Circle-2, Ernakulam, Kochi.	Vs.	Shri Sinkaram Chettiar, Arun Niwas, 43/986, Ayyappankavu, Ernakulam, Kochi. [PAN: AHEPM 6323R]
(Revenue-Appellant)		(Assessee-Respondent)

Revenue by	Smt. A.S. Bindhu, Sr. DR
Assessee by	Shri K.K. Chandrasekharan, Adv.

Date of hearing	30/07/2018
Date of pronouncement	02/08/2018

ORDER

Per BENCH

These appeals filed by the Revenue are directed against the common order of the CIT(A)-IV, Kochi dated 14/06/2017 and pertain to assessment years 2005-06 to 2010-11.

2. The Revenue has raised the following grounds:

- 1) The CIT(A) erred in deleting penalty u/s. 271(1)(c) holding that penalty is not leviable on income voluntarily returned by the assessee.
- 2) The CIT(A) overlooked that the assessee did not file returns of income prior to search and the large income admitted in the returns filed u/s. 153A was entirely on account of the concealment detected during search.

3) The CIT(A) overlooked the explanation 5A explicitly allows the Assessing Officer to levy penalty in situations of deemed concealment. This explanation allows levy of penalty if income is returned consequent to search whereas the assessee either did not file returns originally or concealed income was not admitted in the original return.

4) The CIT(A) has overlooked decision of the jurisdictional High Court in P.C. Joseph & Bros. vs. CIT (Ker) 243 ITR 818 (sic) where it was held that filing return of income admitting income after detection by the department does not absolve the assessee from penalty.

3. The facts of the case are that there was a search u/s. 132 of the I.T. Act at the business premises of the assessee on 05/08/2010 which unearthed a large amount of unaccounted money and other assets. On the basis of the findings of the search and examination of the seized material, notice u/s. 153A of the Act was issued on 18/02/2011. Consequently, assessments were framed u/s. 143(3) r.w.s. 153A of the Act. Finally penalty was levied u/s. 271(1)(c) of the Act. For clarity, we reproduce the income returned, income assessed, income after giving effect to the CIT(A) order and the penalty levied as follows:

Asst. Year	Income as per Return	Income fixed by the A.O.	Income fixed after giving effect to the appellate orders	Difference in assessed Income & Returned Income	Penalty imposed
2005-06	16,27,895	54,85,021	16,27,895	NIL	5,18,777
2006-07	19,94,330	60,69,508	20,85,800	91470	6,45,980
2007-08	29,64,325	73,64,157	29,64,325	NIL	9,41,693
2008-09	46,84,619	85,75,725	46,99,745	15126	15,24,931
2009-10	45,07,091	59,16,825	45,07,091	NIL	14,24,324
2010-11	67,85,293	88,86,842	67,85,293	NIL	19,97,776
Total	2,25,63,553	4,22,98,078	2,26,70,149	1,06,596	

4. Against the penalty levied u/s. 271(1)(c) of the Act, the assessee carried the matter in appeals before the CIT(A) and the CIT(A) deleted the penalty by observing as follows:

"I have gone through the penalty order and submission of the appellant. The AO has levied penalty u/s. 271(1)(c) on the assessed income including the income declared in Return of Income filed in response to Notice u/s. 153A. The appellant contends that penalty u/s. 271(1)(c) is not leviable on the income declared in Return of Income filed in response to Notice u/s. 153A.

This issue is now more or less settled as number of judicial pronouncements are in favour of the assessee. One such pronouncement is by Hon'ble Delhi ITAT, Bench G in ITA Nos. 4398 & 4399/Del./2012, dated 1.08.2015 in the case of ITO vs. Ankur Aggarwal. In this case the Hon'ble ITAT examined explanation 5 to section 271(1)(c) at length and decided that where income has been voluntarily declared in the Return of Income filed u/s. 153A penalty u/s. 271(1)(c) is not leviable. Similar decision was given in the case of Deepak Choudhury, Kolkata also. The courts have decided that the concealment is to be decided after the Return of Income filed.

Otherwise also, the AO has passed the penalty order in a routine, mechanical manner without mentioning anything about what was concealed or what inaccurate particular was found in the Return of Income.

In view of the above, the AO is directed to restrict penalty levied u/s. 271(1)(c) to the amount of difference between the Returned Income and assessed income. The table of Returned income and assessed income is as under.

A.Y.	Income as per Return	Assessed Income	Difference
2005-06	16,27,900	16,27,900	Nil
2006-07	19,94,340	20,85,800	91,460
2007-08	29,64,330	29,64,325	Nil
2008-09	46,84,619	46,99,745	15,126
2009-10	45,07,091	45,07,091	Nil
2010-11	67,85,293	67,85,293	Nil

The AO has levied penalty on interest and other components also. The appellant contended that the penalty is leviable only on the amount of tax sought to be evaded. Contention of the appellant is correct. The AO is directed to calculate the tax sought to be evaded and levy penalty on tax component alone.

Since there is no difference between Return Income in A.Ys. 2005-06, 2007-08, 2009-10 and 2010-11 and the assessed income, penalty-levied in these four years are deleted."

5. Against this, the Revenue is in appeal before us. The Ld. DR submitted that in this case, penalty is levied u/s. 271(1)(c) of the Act on the assessee to make good an omission on the part of the assessee to voluntarily disclose the income by filing return of income u/s. 139 of the Act. She submitted that the assessee has not filed the return of income u/s. 139 of the Act and deliberately concealed the income and only consequent to search action u/s. 132 of the Act, the assessee filed the return of income u/s. 153A of the Act and the return filed by the assessee u/s. 153A was not voluntary disclosure but was as a result of detection by the department. Therefore, filing of return of income u/s. 153A of the Act is of no consequence and the filing of return of income u/s. 153A was a veiled attempt to present a mitigating circumstance. Further, it was submitted that return filed u/s. 153A is not to be treated as revised return. That being the position, filing of return u/s. 153A and including the additional income does not constitute a mitigating circumstance and penalty has been rightly levied by the AO. She relied on the judgment of the Jurisdictional High Court in the case of P.C. Joseph & Brothers vs. CIT (243 ITR 818).

6. On the other hand, the Ld. AR submitted that there is no variation between the assessed income and the returned income. As such, there cannot be any levy of penalty u/s. 271(1)(c) of the Act. He has taken the support of the following judgments:

- i) CIT vs. Reliance Petroproducts Pvt. Ltd. (189 taxman 322) (SC).
- ii) CIT vs. Classic Industries (393 ITR 20) (SC).
- iii) CIT vs. SAS Pharmaceuticals (335 ITR 259 (Del.).
- iv) ITO vs. Shri Ankur Agarwal in ITA Nos. 4398 & 4399/Del/2012 (ITAT, Delhi Bench).

6.1 He further submitted that the imposition of penalty was bad in law in view of the defective cause notice without specifying the charges against the assessee. For this purpose he relied on the following judgments:

- 1) CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.
- 2) CIT vs. Shri Samson Perinchery in ITA No.1154 of 2014 dated 05/01/2017.
- 3) CIT vs. Mohandas Hassa Nand (141 ITR 203).

7. We have heard the rival submissions and perused the record. There was a search u/s. 132 of the I.T. Act at the business premises of the assessee on 05/08/2010. Consequent to this, notice u/s. 153A of the Act was issued on 18/02/2011 for filing the return. The assessee filed the returns of income for the above assessment years u/s. 153A of the Act. The assessments were framed u/s. 143(3) r.w.s. 153A of the Act. Finally, penalty was levied u/s. 271(1)(c) of the Act for the above assessment years vide order dated 23/02/2016. The CIT(A) has given relief to the assessee by placing reliance on Explanation 5 to

section 271(1)(c) of the Act. The relevant provision applicable to the case is 271(1)(c) r.w.s. Explanation 5 and in particular clause 2 to Explanation 5 of section 271(1)(c) of the Act which reads as follows:

"Where in the course of a search initiated u/s. 132 before the 1st day of June, 2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing wholly or in part) his income, -

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search, then notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless, -

(1) such income is, or the transactions resulting in such income are recorded, -

(i) in a case falling under clause, before the date of search; and

(ii) in a case falling under clause (a), before the date of the search; and

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified

in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.”

7.1 By reading Explanation 5, if the search is initiated u/s. 132 of the Act before 1st June, 2007, the immunity is available to the assessee and penalty u/s. 271(1)(c) cannot be levied. However, in the present case, the search was conducted at the business premises of the assessee on 05/08/2010. Being so, immunity under Explanation 5 to sec. 271(1)(c) cannot be made available to the assessee as given by the CIT(A) vide para 7 of his order. In the present case, since the search took place on 05/08/2010, Explanation 5A to section 271(1)(c) is applicable which reads as follows:

Explanation 5A. – Where in the course of a search initiated u/s. 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of –

- (i) any money bullion, jewellery or other valuable article or thing (hereafter in the Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year: or,-*
- (ii) any income based on any entry in any books of account or other documents or transactions and he claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which was ended before the date of search and,-*
 - (a) Where the returned income for such previous year has been furnished before the said date but such income has not been declared therein; or*
 - (b) The due date for filing the return of income for such previous year has expired but the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause*

(c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.”

7.2 For searches initiated under section 132 of the Act on or after first day of June, 2007, this Explanation 5A was applicable, which was introduced by the Finance Act, 2007 w.e.f 01.06.2007. The original Explanation 5A provided that where in the course of search, the assessee was found to be the owner of any money, bullion, jewellery, valuable articles or things and the assessee claims that such asset had been acquired by him by utilizing wholly or in part his income for any previous year or any income is based on any entry in books of account or other documents or transactions and he claims that the same represents his income for any previous year, then where the period has ended before the date of search and the due date for filing the return of income for such year has expired and the assessee has not filed the return of income, then notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall for the purpose of imposition of penalty under section 271(1)(c) of the Act, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of income. The said Explanation 5A was substituted by the Finance (No.2) Act, 2009 with retrospective effect from 01.06.2007 with the amendment that where the return of income for such previous year had been furnished before the date of search, but such income had not been declared therein or where the due date of filing

the return of income for other previous year has expired, but the assessee had not filed the return of income, then notwithstanding the fact that the said income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of his income.

7.3 The deeming provisions of Explanation 5A under section 271(l)(c) of the Act are applicable to all the searches initiated under section 132 of the Act on or after first day of June, 2007. The conditions laid down in the Explanation 5A is where during the course of search, the assessee is found to be in possession of any money, bullion, jewellery, valuable articles or things and the assessee claims that such assets have been acquired by him by utilizing wholly or in part his income, for any previous year on any income based on any entries in books of account, or other documents or transactions and he claims that such entries in the books of account or other documents or transactions represent his income for any previous year, then in cases where the return of income for such previous year had been furnished by the assessee prior to the date of search, but the said income had not been declared in the said return of income or the due date for filing the return of income had expired for such previous year and the assessee had not filed the return of income, it is further laid down that notwithstanding the fact that such income which has been discovered due to the search proceedings, is declared by him in any return furnished on or after the

date of search, but irrespective of the same, he would be deemed to have concealed the particulars of income or furnished inaccurate particulars of income. Reading the above said provisions of the Explanation 5A to section 271(1)(c) of the Act, it is noted that the person is deemed to have concealed particulars of his income or furnished inaccurate particulars of such income, which is equivalent to the value of money, bullion, jewellery, valuable articles or things from the possession of the assessee during the course of search conducted on or after first day of June, 2007. Further, where any income is based on any entry in any books of account or other documents or transactions and he claims that all the above said represents his income for any previous year, then the Explanation lays down to that extent, the person would be deemed to have concealed his particulars of income or furnished inaccurate particulars of income. Applying the said proposition to the facts of the present case, we hold that the income offered by the assessee in the income filed pursuant to issue of notice under section 153A of the Act, is the income detected during the course of search and seizure operation. The case of the assessee is squarely covered by the provisions of Explanation 5A to section 271(1)(c) of the Act and the assessee is exigible to levy of penalty on such income which was detected during the course of search and seizure operation, which in turn has been offered by the assessee in return of income filed pursuant to notice issued under section 153A of the Act.

7.4 Since the assessee had not filed the returns of income before the expiry of the due date for filing the returns of income u/s. 139 of the Act in all the assessment years except AY 2010-11, the assessee is liable for levy of penalty u/s. 271(1)(c) of the Act. For assessment year 2010-11 as the assessee declared undisclosed income in the return of income filed u/s. 153A of the Act and not u/s. 139 of the Act. In the returns filed subsequent to the search, the assessee disclosed income to cover the source of various unaccounted money and other assets unearthed by search action. The amounts shown by the assessee were not part of his regular income and it is undisclosed income of the assessee. Had it been there is no search, the assessee would not have disclosed the income in respect of the undisclosed income. Hence such amounts squarely come within the purview of penalty u/s. 271(1)(c) of the Act.

7.5 Further, the argument of the Ld. AR is that the notice issued u/s. 274 of the Act for levy of penalty u/s. 271(1)(c) of the Act is defective and therefore, penalty cannot be levied. This issue was not at all raised by the assessee on an earlier occasion and the assessee has duly appeared before the lower authorities and participated in the penalty proceedings. Being so, the assessee cannot have any grievance on this issue. Therefore, there is no merit in the argument of the assessee on this issue at this stage. This ground of appeals of the Revenue is allowed for all the assessment years.

8. In the result, the appeals filed by the Revenue are allowed.

Order pronounced in the open Court on this 2nd August, 2018.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place:

Dated: 2nd August, 2018

GJ

Copy to:

1. Shri Sinkaram Chettiar, Arun Niwas, 43/986, Ayyappankavu, Ernakulam, Kochi.
2. The Deputy Commissioner of Income-tax, Central Circle-2, Kochi
3. The Commissioner of Income-tax(Appeals)-IV, Kochi
4. The Pr. Commissioner of Income-tax, Central, Kochi
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin