

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर  
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "SMC", JAIPUR

श्री रमेश सी शर्मा, लेखा सदस्य के समक्ष  
BEFORE: SHRI RAMESH C SHARMA, AM

आयकर अपील सं./ ITA No. 653/JP/2014  
निर्धारण वर्ष / Assessment Year :2005-06

Manish Goyal, Lokesh Birds P. Ltd. Sitaram Bazar, Kesargunj, Ajmer-305001.	Vs.	D.C.I.T, Central Circle, Ajmer,
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAXPG3879Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by: Shri Manish Agarwal (CA)  
राजस्व की ओर से / Revenue by : Smt. Roshanta Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 15/04/2019  
उदघोषणा की तारीख / Date of Pronouncement : 06/06/2019

आदेश / ORDER

PER: R.C. SHARMA, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Central, Jaipur dated 18/07/2014 for the A.Y. 2005-06 in the matter of penalty order passed U/s 271(1) (c) r.w.s 274 of the Income Tax Act, 1961 (in short, the Act).

2. Grounds of appeal raised by the assessee are as under:

*"Learned Commissioner of Income Tax (Appeals) erred in law and on facts of the case in sustaining the penalty Rs.3,44,509/- (Rupees Three lacs Forty Four Thousand Five Hundred Nine Only) under section 271(1) (c) of the Income Tax Act 1961 imposed by the learned assessing officer (Dy. Commissioner of Income Tax, Central Circle, Ajmer). The order of imposing penalty sustained Commissioner of Income Tax (Appeals), Central Jaipur is totally bad*

*in law, and against the natural justice and against the facts of the case. Hence deserves to be deleted in full.*

*The appellant prays your honour to indulgence, and, amend alter, delete all or any ground of appeal on or before hearing.”*

3. Rival contentions have been heard and record perused. Facts in brief are that search and seizure operations were carried out on 28.07.2004 at the business and residential premises of the assessee group. Incriminating evidence was gathered during the search operations. Notice u/s 153A was issued on 20.12.2004 and in response to this notice, the return declaring income at Rs. 1,46,530/- was filed on 28.4.2006. The assessment u/s 153C r.w.s. 153B/143(3) were completed on 29/08/2006 at the total income of Rs.13,01,050/-. Thereafter, penalty proceedings u/s. 271(1)(c) for concealment of income and furnishing of inaccurate particulars of income were initiated at the time of assessment and a notice u/s 274 r.w.s. 271(1)(c) was issued on 3.2.2010. The assessee preferred an appeal before the CIT(A)(C) and the CIT(A)(C) sustained the addition on account of unexplained investment of Rs.10,60,900/-. Further the ITAT confirmed the finding of the CIT(A)(C) on the same. The AO observed that this was a fit case for imposing of penalty u/s 271(1)(c) since the default was clearly established since the assessee should have disclosed his true facts of his income but he failed to do so. The A.O. held that the assessee deliberately concealed the true and correct income. As per the A.O., the assessee neither disclosed the true and correct particulars of

his income at the time of search nor in the return of income or even during the assessment proceedings. Accordingly, the assessee was held to be guilty of concealment of income and the penalties u/s 271(1)(c) of Rs.3,44,509/- was imposed by the A.O. vide orders dated 26.3.2010.

4. By the impugned order, the Id. CIT(A) confirmed the action of the A.O. imposing penalty of Rs. 3,44,509/- U/s 271(1)(c) of the Act. Against the said order of the Id. CIT(A), the assessee is in further appeal before the ITAT.

5. It was contended by the Id. AR of the assessee that the aforementioned amount of Rs. 10,60,000/- was separately not declared in the return of income filed by assessee for the reason that the same already stood included in the income offered by assessee's uncle Sh. Mahesh Goyal for A.Y. 2005-06 at Rs. 25,01,310/- being peak credit of all cash transactions and since credit of Rs. 23,85,291/- [35,00,000 — 11,14,709] was not taken and otherwise applied in alleged cash payment. Thus, it was claimed that the set-off of the peak of cash credits be allowed to assessee and it is for this reason that the amount of Rs. 10,60,000/- was not declared by assessee as income in as much as the same was subject matter of claim of setoff However, the claim of assessee was not accepted in quantum proceedings and accordingly the assessee paid tax on the addition. Based on such conclusion drawn in quantum proceedings

penalty stood levied without making independent and fresh analysis of the contention raised.

6. As per the Id AR, that there was neither any concealment of income on part of the assessee nor any inaccurate particulars have been furnished. This is a case where assessee had made a bona-fide and legitimate claim of set-off which in the opinion of AO was not allowable and accordingly, he made the addition after disallowing assessee's claim. Though the claim of assessee was legal and most genuine, the appellate authorities also framed the opinion that the claim of assessee was not allowable. However, such sustenance of additions by appellate authorities does not in any manner suggest that the assessee had in any manner tried to conceal his income or furnish inaccurate particulars of income.

7. On the other hand, the Id DR has contended that the assessee was unable to explain the unaccounted investment in land found during the course of search as per the incriminating documents. The assessee has surrendered unexplained investment but did not offer the same either in the return of income or during the assessment proceedings, therefore, the A.O. has correctly levied penalty of concealment of income. As per the Id DR, the finding of fact by the A.O. with regard to the unaccounted investment in land was not only confirmed by the Id. CIT(A) but also by the Tribunal in the quantum

appeal, therefore, the Id. CIT(A) was justified in confirming the penalty so imposed with respect to unaccounted investment in land.

8. I have considered the rival contentions and carefully gone through the orders of the authorities below. I had also carefully gone through the written submissions filed by the Id AR during the course of hearing before the bench with reference to the various judicial pronouncements referred therein. From the record I found that there was a search at the premises of the assessee group. During the course of search, as per incriminating document so found, there was unaccounted payment of Rs. 10,60,900/- for purchase of land which was not offered in the return of income so filed by the assessee after search. Accordingly, the same was added by the A.O. while framing the assessment and confirmed by the Id. CIT(A). The assessee preferred appeal before the Tribunal and the Tribunal also confirmed the findings of the lower authorities with respect to unaccounted investment found in the seized document. The assessee was found to be the owner of the land in which investment had been made from unaccounted income. This unaccounted income was surrendered in the statement recorded U/s 132(4) of the Act but was not disclosed in the return filed U/s 153C of the Act. The addition so made was confirmed by the Tribunal by observing that the investment has been made by the assessee out of unaccounted sources. The plea of the assessee that peak cash credit for the A.Y. 2005-06 amounting to

Rs.25,01,310/- should be considered as an explanation for sufficient availability of cash for payment of unaccounted investment found during the course of search was not accepted by the A.O. nor by the Id. CIT(A) nor by the Tribunal. With regard to such peak credit, it was a concrete finding of the A.O., CIT(A) as well as the Tribunal that the assessee was not able to correlate these cash payments with cash credits found in the diary. I found that even during the appellate proceedings before the AO and the Id.CIT(A) and also before the Tribunal, the assessee was unable to furnish any evidence to rebut this finding of fact. Under these facts and circumstances, there is no infirmity in the orders of lower authorities in imposing the penalty of Rs.3,44,509/- with reference to unaccounted investment in land. While confirming the penalty, the Id.CIT(A) has given following findings:

*“4.3 I have carefully perused the order of the AO and submissions of the AR of the —appellant and do not concur with the submissions of the AR on the following grounds:*

- i) The facts of the case are that search and Seizure operation was carried out on 28.7.2004 at the business and residential premises of the assessee group. During the course of search excess jewellery valued at Rs.1,48,750/- was found, along with documents regarding unaccounted payment of Rs. 10,60,900/- for purchase of land. These documents were annexurized at page-32 at Annex. A-9.*
- ii) In the statement u/s 132(4) the appellant admitted that this land had been purchased for Rs. 19,08,900/- out of which Rs. 8,48,000/- was reflected in the regular books of accounts but payment of Rs.*

10,60,900/- had been made from undeclared sources. The relevant excerpt of the statement is produced here with for ready reference:

पेज न० 4 में हमारे द्वारा खरीदी गई एक जमीन से संबंधित ब्यौरा है जो कि पॉच लोगो से खरीदी गई है। इस जमीन के पेटे हमने इन लोगो को रुपये 8,48,000/- का भुगतान ड्राफ्ट से किया है जो कि हमारी नियमित लेखा पुस्तिकाओं में दर्शाया गया है। इस जमीन के पेटे रुपये 8,48,000/- के ड्राफ्ट भुगतान के अलावा रुपये 10,60,900/- हमारे द्वारा नकद में दिए गए हैं। जिनका इन्द्राज हमारी लेखा पुस्तिकाओं में नहीं किया गया है। इस जमीन से संबंधित तमाम कागज व ब्यौरा आगे आने वाले ऐनेक्सर में आएगा, जिसे मैं देखकर बता दूंगा।

- iii) *The assessee disclosed the jewellery in the return u/s 153C as per the statement u/s 132(4). The assessment order u/s 153C r.w.s. 143(3) was passed on 29.8.2006 wherein penalty u/s 271(1)(c) had been initiated on both these surrendered amounts namely Rs. 1,48,750/- on account of jewellery surrender in these statement u/s 132(4) and also disclosed in the return- filed in response- to, notice u/s 453C by the appellant on 28.4.2006 and the amount of Rs. 10,60,900/- surrendered in the statement u/s 132(4) but not disclosed in return filed. An appeal was preferred by the appellant against this order. The Id. CIT(A) vide his order no. 42/2008-09 dated 13.8.2008 has confirmed the addition made of Rs. 10,60,900/- being unaccounted investment in land. He rejected the submissions of the AR of the appellant that the total surrender of peak cash credits for A.Y. 2005-06 amounting to Rs. 25,01,310/- should be considered as an explanation for sufficient cash availability for payment of Rs. 11,14,709/- being the entries for cash payment found in the diary with reference to this land of Rs. 10,60,900/- and Rs. 30,000/-. He held that this was not a reasonable claim because in spite of opportunity given by the AO and during the appellate proceedings, the AR of the appellant was not able to correlate these cash payments with the cash credits found in the diary. After giving this finding of fact the CIT(A) confirmed the addition.*
- iv) *in second appeal, the Hon. ITAT vide its order ITA No. 1432/JP/2008 in Mara of its order confirmed the finding of fact by Id. CIT(A) in toto by*

observing that the assessee had failed to explain the specific source of cash payment made for investment in land and also because he could not correlate the cash credits on different dates which have been surrendered with these payments benefit of set off could not be given to him.

- v) On perusal of the penalty order it is seen that the AO has not discussed the penalty proceedings initiated in assessment order on the surrender of Rs. 1,48,750/- made by the appellant on account of gold jewellery. However, since the search was on 28.7.2004 and the investment in this asset was disclosed by the appellant while filing return in response to notice u/s 153C the case is covered under clause 2 of Explanation-5 of sec. 271(1)(c) for the purpose of immunity from its provisions.
- vi) Regarding the addition of Rs. 11,45,521/-- wherein a finding of fact has been given by Hon. ITAT in its order in quantum appeal<sup>61</sup> upholding the addition I find that the facts are covered by the provisions of sec. 271(1)(c) and penalty is leviable. The search was conducted before 1.6.2007 i.e. on 28.7.2004. The assessee was found to be the owner of land in which investment had made from unaccounted income. This had been surrendered in the statement u/s 132(4) but was not disclosed in the return filed u/s 153C. The final fact-finding authority i.e. Hon. ITAT, Jaipur had confirmed this addition of Rs. 11,49,521/- by holding that it has been made from unaccounted sources. The facts of the case clearly come within provisions of sec. 271(1)(c).
- vii) The AR of the appellant has relied on several case laws but they are all distinct on facts from the facts of the case of the appellant. For example, in the case of CIT vs. Reliance Petroproducts (P) Ltd. and Price Waterhouse Cooper (P) Ltd. vs. CIT (2012), penalty was imposed for filing of inaccurate particulars of income and not for concealment

of income. Therefore, the observations of the Hon. Apex Court would not be applicable to the facts of the case of the appellant.

Similarly, in none of the other cases relied on were search and seizure operations undertaken as it was done in the case of the appellant. It was during these proceedings that evidence was gathered regarding concealment of income and concealment was admitted by the assessee in his statement u/s 132(4). Subsequently, this amount was not disclosed in the return filed by taking the plea that benefit of set off should be given. However, Hon. ITAT adjudicated in quantum appeal that this could not be given since the assessee had not discharged his onus of linking the credit entries with the payments

The AR has particularly relied on the finding of Hon. ITAT, Jodhpur Bench in the case of Manohar Lal Lakhera vs. ITO wherein the Hon. ITAT has made the following observations:

- "1) That penalty proceedings and assessment proceedings are entirely different from each other;
- 2) Different parameters are applicable for making quantum addition and for levying penalty;
- 3) Imposition of penalty is not automatic. Any addition in quantum will not lead to automatic levy of penalty.
- 4) 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.
- 5) Assessee has provided the details of bad debts and all three authorities have confirmed the quantum addition on different grounds hence the penalty cannot be levied."

Once against the facts of the case relied on are distinct from the facts of the case of the appellant in so far that all three authorities that is The AO, CIT(A) and ITAT have consistently given a finding of fact on

*the basis of incriminating documents found during search that the assessee made undisclosed investment in land.*

*Moreover, even during penalty proceedings and appellate proceedings, the assessee was not able to furnish any evidence to rebut this finding of fact. Thus, the penalty has not been levied automatically in the case of the appellant but because of his failure to discharge his onus even during penalty proceedings. Thus, the findings of the Hon. ITAT, Jodhpur Bench in the case relied upon are not applicable to the facts of the case of the appellant.*

viii) *The facts of the case of the appellant are covered by the following cases laws:*

a) *Hon. Delhi High Court in the case of CIT vs. Usha International Ltd. ITA 1696/2006 dated 5.11.2012. In the said order the Hon. High Court observed that the Tribunal was 'not right in upholding the cancellation of penalty imposed u/s 271(1)(c), since it could not be denied that there were searches and investigations which resulted in the income tax authorities unearthing a concerted design to enable the reduction of the taxable "income of the assessee. It was further observed that the question of concealment of income and whether the revised return was filed voluntarily or not is a question of fact to be examined and decided upon the fact and circumstances of each case. On the basis of these observations it was held that penalty u/s 271(1)(c) was rightly imposed in the case. These observations of the Hon. Delhi High Court are clearly applicable to the facts of the case of the appellant. The discovery of the documents wherein the unaccounted investment in land was made during search. This investment of Rs. 11,45,521/- would not have been disclosed if the Department had not undertaken search operation.*

b) *The Hon. Apex Court has further enunciated the law regarding concealment of income and leviability of penalty us/ 271(1)(c) in the case of Mak Data P. Ltd. vs. CIT (2013) 358 ITR 593 (SC). The Hon. Apex Court in this case has made the following observations which are reproduced below since they are relevant to the facts of the case of the appellant:*

- "7. The AO, 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 sec. 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on 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 amount 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 of avoiding 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 defences wider the explanation-1 to sec. 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 AO 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."

*On the basis of facts discussed above and the law applicable to these facts penalty u/s 271(1)(c) of Rs. 3,44,509/- is confirmed."*

9. We had carefully gone through the findings recorded by the A.O. and the Id. CIT(A) while confirming the penalty. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the Id. AR during the course of

hearing in the context of factual matrix of the case. The Id AR amongst the other cases mainly relied on the decision of the Hon'ble Supreme Court in the case of Sir Shadi Lal Sugar & General Mills Ltd. vs. CIT 168 ITR 705 in support of the proposition that where the assessee agreed to addition to his income it does not follow that the amount agreed to be added was concealed income. However, this decision of the Hon'ble Supreme Court was considered by the Larger Bench of the Hon'ble Supreme Court in the case of K.P. Madhusudhanan Vs CIT 251 ITR 99 and it was overruled and held to be no longer a good law. The Hon'ble Supreme Court observed that the proposition laid down by the Supreme Court in the case of Sir Shadi Lal Sugar & General Mills Ltd. vs. CIT (supra) is not applicable after addition of explanation to Section 271 of the Act. In the instant case, which relates to the A.Y. 2005-06, penalty has been imposed after insertion of explanation to Section 271(1)(c) of the Act. However, the case of Sir Shadi Lal Sugar & General Mills Ltd. vs. CIT (supra) pertains to the A.Y. 1958-59 under the Income Tax Act, 1922, when there was no explanation to Section 271 of the Act.

10. In view of above discussion and after considering the entirety of the facts and circumstances of the case vis a vis judicial pronouncement so referred, we are inclined to agree with the Id. DR that the penalty U/s 271(1)(c) read with Section 274 of the Act has been correctly levied for

unaccounted investment in land found during the course of search as per incriminating materials.

11. In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 06<sup>th</sup> June, 2019.

Sd/-  
(रमेश सी शर्मा)  
(RAMESH C SHARMA)  
लेखा सदस्य / Accountant Member

जयपुर / Jaipur  
दिनांक / Dated:- 06<sup>th</sup> June, 2019

\*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Shri Manish Goyal, Ajmer.
2. प्रत्यर्थी / The Respondent- The D.C.I.T., Central Circle, Ajmer
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 653/JP/2014)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar