

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F": MUMBAI**

**BEFORE SHRI D MANMOHAN, VICE PRESIDENT
AND SHRI RAJENDRA SINGH, ACCOUNTANT MEMBER**

ITA No.4996/Mum/2007

Assessment years 1996-97

Harish P Mashruwala, HUF
78, Vithalwadi,
Mumbai -400 002
PAN AADPM 0812 H

Vs Asstt Commissioner of Income-tax
-15(1),
Matru Mandir, 1st Floor,
Grant Road,
Mumbai -400 007

(Appellant)

(Respondent)

For appellant : Shri V G Ginde
For respondent : Shri S K Mohanty

ORDER

PER RAJENDRA SINGH, AM

1. This appeal by the assessee is directed against the order dated 1.5.2007 of the CIT (A) for the assessment year 1996-97. The dispute raised by the assessee relates to penalty imposed u/s 271(1)(c) for concealment of income.

2. Briefly stated, the facts of the case are that during investigation carried out by the Investigation Wing of the Department, it was found that the assessee along with two other HUFs whose Karta's were brothers had shown gifts from NRIs through sources non-resident internal account totaling to Rs 69 lakhs. The Chartered Accountant of the assessee, authorized by the family members deposed before the Investigation Wing in statement made u/s 131 that such gifts were bogus and offered amount of Rs 69 lakhs involved in these gifts as additional income in the hands of different HUF assesses.

The statement had been recorded on 26.2.1996. In case of the assessee HUF, gift was received was to the tune of Rs 17 lakhs much had been declared as undisclosed additional income. However, in the return of income for the assessment year 1997-98 filed on 24.6.1996, the assessee declared total income of Rs 17 lakhs under the head 'long term capital gain' arising from transfer of tenancy rights and the assessee accordingly paid tax @ 20%. The assessee did not declare additional income on account of bogus gifts, as stated before the Investigation Wing. The Assessing Officer, therefore, reopened the assessment u/s 147 by issuing a notice u/s 148. The assessee submitted before the Assessing Officer that it had received a sum of Rs 17 lakhs in cash from transfer of tenancy rights and the same amount had been channelised in the form of NRI gift. The assessee had accordingly declared the capital gain and paid tax @ 20%. The Assessing Officer, however, did not accept the claim. It was observed by him that agreement for surrender of tenancy right had been entered into on 7.10.1995 whereas, the drafts through which the gifts had been received were made during April to July 2005. The agreement did not confirm either payment or receipt of consideration. The assessee neither filed any confirmation nor produced the party, from whom the amount is said to have been received for surrender of tenancy right. Assessing Officer, therefore, treated the said sum of Rs 17 lakhs as undisclosed income of the assessee and taxed it @ 30%. The finding of the Assessing Officer was confirmed by the CIT (A) and also by Tribunal by order dated 31.1.2006 in ITA No.4338/Mum/2002.

2.1 The Assessing Officer had also initiated penalty proceedings for concealment of income u/s 271(1)(c). The assessee submitted that it had neither concealed any particulars of income nor furnished inaccurate particulars of income. The assessee also pointed out that ground for initiating penalty proceedings were not precise and the notice was vague and, therefore, no penalty could be imposed. It was

also submitted that the penalty could not be imposed on the ground of furnishing of inaccurate particulars when the proceedings had been initiated on ground of concealment of particulars of income. The Assessing Officer, however, did not accept the contention raised by the assessee. It was observed by him that the claim of the assessee that it had received Rs 17 lakhs on surrender of tenancy right was not supported by any evidence. The assessee neither filed any confirmation nor produced the person from whom the cash is said to have been received. The Assessing Officer also observed that there was concealment of particulars of income for which the penalty was leviable. As regards the merit of the case, he observed that the income had been rightly assessed as income from other sources which had also been confirmed by the Tribunal. He, therefore, imposed penalty u/s 271(1)(c) @ 100% of tax sought to be evaded.

3. The assessee disputed the order of the Assessing Officer and argued before CIT (A) that penalty was legally invalid as Assessing Officer had not recorded any satisfaction of concealment in the assessment order. It was also submitted that the returned income and the assessed income were the same and, therefore, Explanation 1 to section 271(1)(c) was not attracted in the case of the assessee as there had been no addition made in the assessment. CIT (A) rejected the argument of the assessee that the Assessing Officer had not recorded any satisfaction of concealment. As regards the applicability of Explanation 1 to section 271(1)(c), CIT (A) observed that the Explanations only harmonized the main provision for avoiding ambiguities and the Explanation cannot be construed to widen the substantive provisions. The explanation only clarified the existing law to clear any ambiguity surrounding the meaning of the provision and these cannot be treated as substantive provision. CIT (A) referred to several judgments in this regard. It was held by him that the assessee in this case had concealed particulars of income for which, the penalty

was leviable under the main provision of section 271(1)(c) and not under the Explanations. The assessee also argued that the Explanation 4, which explained the meaning of the phrase "amount of tax sought to be evaded" was not workable as there was no difference between returned income and the assessed income and, therefore, it was pointed out that machinery provision for working out of concealment failed and on this ground also no penalty could be imposed in view of the judgment of the Hon'ble Supreme Court in case of B C Srinivas Shetty (128 ITR 294). CIT (A) rejected this argument also on the ground that the case of the assessee was covered by the main provision and not the Explanation 4. As regards the argument relating to the merit of the case, CIT (A) referred to the decision of the Tribunal in the quantum case in which the Tribunal in Para 21 held that the claim of the assessee that the cash received on account of surrender of tenancy of right was brought back as NRI gift was not acceptable as it was not proved that the assessee had received any such money. The Tribunal also observed that the surrender agreement was dated 17.10.1995 whereas drafts NRI gifts were purchased between June 1995 to August 1995. The Tribunal also observed that it was of the view that undisclosed income in purchase of NRI gifts ought to have been assessed in addition to long term capital gain. CIT (A), accordingly, held that penalty was leviable and confirmed the order of the Assessing Officer, aggrieved by which, the assessee is in appeal before the Tribunal.

4. Before us, the Learned Authorized Representative for the assessee did not press the argument relating to non-recording of satisfaction in view of the retrospective amendment made in the provisions. On other hand, the submissions made before the CIT (A) were reiterated. The Learned Authorized Representative, particularly emphasized the argument that the Assessing Officer had issued show cause for concealing particulars of income but penalty had been

imposed for furnishing of inaccurate particulars of income. Thus, the penalty imposed was on a ground different from the ground on which the penalty had been initiated and, therefore, the penalty was vitiated and should be deleted. He placed reliance on the following decision in support of his case :

- i) 193 ITR 379 (Guj) in case of K M Bhatia (Quarry)
- ii) 122 ITR 306 (Guj) in case of Manu Engineering Work
- iii) 85 ITR 77 (Guj) in case of Lakhdhir Lalji

4.1 On the other hand, the Learned Departmental Representative strongly supported the orders of the authorities below and placed reliance on the findings given in the respective orders.

5. We have perused the records and considered the rival contentions carefully. Dispute is regarding leviability of penalty for concealment of income u/s 271(1)(c). The assessee had shown gifts of Rs 17 lakhs from an NRI and investigation made by the Investigation Wing of Department showed the gifts were bogus and this fact was admitted by the assessee who offered the same as undisclosed income in the statement given on 26.2.1996. However, in the return of income filed for assessment year 1996-97 on 24.6.1996, the assessee declared the income of Rs 17 lakhs as long term capital gain arising from transfer of tenancy right and paid tax @ 20% applicable to long term capital gain. As the assessee had not declared the income of Rs 17 lakhs as income from undisclosed sources for which tax payable was @ 30% as admitted before the Investigation Wing, the assessment was reopened and the income was assessed as income from other sources and tax was levied @ 30%. Penalty proceedings were initiated u/s 271(1)(c) and penalty was imposed @ 100% of tax sought to be evaded. CIT (A) confirmed the penalty.

6. The assessee has challenged the levy of penalty on three grounds. Firstly, the assessee has argued that the penalty proceedings have been initiated for concealing the particulars of income but the penalty has been imposed for furnishing inaccurate particulars of income and, therefore, penalty is legally invalid. Reliance has placed on several judgments of Hon'ble High Court of Gujarat, as mentioned in Para 4 earlier. We are unable to accept the argument advanced because the Hon'ble High Court of Gujarat in the judgments cited held that penalty imposed on the ground different from the ground on which it was initiated was not proper because in such a case it could not be said that the assessee had been given reasonable opportunity of hearing in relation to the ground on which penalty had been imposed. The position in the present case is different. In this case the assessee had been given opportunity. In fact, the assessee had itself raised this ground before the Assessing Officer during the proceedings u/s 271(1)(c) and, therefore, it cannot be said that the assessee had no opportunity in the matter. Secondly, it has been argued that Explanation 1 to section 271(1)(c) and is not applicable as there is no addition to the total income and thirdly it has been submitted that the Explanation 4 relating to computation of tax sought to be evaded is also not applicable as the returned income and assessed income remained the same. On careful consideration we do not find any merit in these arguments. We agree with the view taken by the CIT (A) that the various Explanations only explain the ambiguity in the provisions relating to imposition of penalty and merely because the case of the assessee is not covered by any particular Explanation, does not mean that penalty cannot be imposed when there is no difficulty in determining the tax sought to be evaded. Under the provisions of section 271(1)(c) penalty is prescribed for concealing the particulars of income or for furnishing inaccurate particulars of income and quantum of penalty is based on tax sought to be evaded. In this case, tax sought to be evaded is very clear as

the tax rate applicable is 30% whereas the assessee has paid 20%. The tax sought to be evaded was because of the lower rate of tax paid and not because of any addition to the income and, therefore, provisions of Explanation 1 are not applicable. The penalty is imposable under the main provision and there is no need to refer to any Explanations. As regards the merit of the case, the claim of the assessee that amount paid for receiving the gift was from the cash received on surrender of tenancy right is not supported by any evidence. The gifts had also been received much before the surrender of tenancy. The amount has therefore been rightly assessed as income from other sources attracting tax rate of 30%, which has also been affirmed by the Tribunal in the quantum appeal. The assessee had sought to evade tax by paying tax at lower rate. The penalty in our view is imposable as held earlier under the main provisions of section 271(1)(c).

7. In view of the foregoing discussion, we see no infirmity in the order of CIT (A) in confirming the penalty and the same is, therefore, upheld.

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

Order pronounced on 30th day of March 2010.

Sd/-
(P MADHAVI DEVI)
JUDICIAL MEMBER

Sd/-
(RAJENDRA SINGH)
ACCOUNTANT MEMBER

Mumbai, Date: **30th March, 2010.**

Copy to

1. The Appellant.
2. The Respondent

4. CIT(A)-XXIV, Mumbai.
5. CIT -MC-VIII, Mumbai.
6. D R "F" Bench, Mumbai.
7. Guard File.

// True Copy //

*Chavan/-

By Order

Asst. Registrar,
ITAT, Mumbai Benches
MUMBAI

SNo		Date	Initials	
1	Draft dictated on	15-03-2010 25.03.2010		Sr.P.S
2.	Draft Placed before author	17-03-2010 23-03-2010 30-03-2010		Sr.P.S
3.	Draft proposed & placed before the Second Member			V.P.
4.	Draft discussed/approved by Second Member			A.M
5.	Approved Draft comes to the Sr.PS/PS			Sr.P.S
6.	Kept for pronouncement on			Sr.P.S
7.	File sent to the Bench Clerk			Sr.P.S
8.	Date on which file goes to the Head Clerk			
9.	Date of Dispatch of Order			