IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "SMC"

Before Shri D. K. TYAGI, JUDICIAL MEMBER

I.T.A. No. 432 / Ahd/2011
(Assessment year 2006-07)

Shri Sanjay S. shah, 7, Arun Society, 1st Floor, Mahalaxmi Char Rasta, Ahmedabad	Vs.	DCIT ,Circle 1, Ahmedabad

PAN/GIR No. : AIGPS0083H

(APPELLANT) .. (RESPONDENT)

Appellant by: Shri Aseem Thakkar, AR
Respondent by: Shri Y C Surti, DR

O R D E R

This appeal by the assessee has been preferred against the order dated 11.01.2011 of CIT(A) VI, Ahmedabad for the assessment year 2006-07. The assessee has taken following ground :

> "The Ld. CIT(A) has erred in confirming the penalty of Rs.64,619/- levied by the A.O. u/s 271(1)(c) of the Income tax Act, 1961."

2. The brief facts of the case are that the assessee is Managing Director of PISIL Glass Ltd. and has shown salary from the company and also interest income and long term capital gain in his return of income filed for the year under appeal. The total income declared was at Rs.2,50,040/-. The assessment u/s 143(3) was completed and the

income was assessed at Rs.4,63,212/-. The addition was made on account of interest income.

3. During the assessment proceedings, it was observed by the A.O. through AIR information that the assessee had shown interest income of Rs.2,39,114/- received from UCO Bank, City Bank and ICICI Bank Ltd. On being enquired, the assessee could not explain the issue and agreed on the proposed addition. The A.O. further observed form the bank statement of City Bank that the assessee had also earned interest income to the extent of Rs.72,058/- but the same was not reflected in its return of income. The assessee accepted his mistake and agreed to the proposed addition.

4. Penalty proceedings were initiated and a show cause notice u/.s 271(1)(c) of the Income tax Act, 1961 was issued to the assessee. In reply, assessee stated as under:

> "Kindly refer to your above mentioned notice issued to our above named clients calling upon them to show cause as to why penalty u/s 271(1)(c) of the Act should not be levied as our above named clients have concealed the particulars of income. In this connection, we are instructed by our clients to submit as under:-
> Our above named clients had not shown the interest income received from banks in the statement of total income for the above assessment year. This was so since the TDS certificates were not received form the bank in time and therefore, the income for the same and also the TDS amount was not considered. The same was to be considered once the TDS certificates were received. Thus, there is no concealment of income and accordingly, no penalty be levied.
> We have, therefore, to request you to kindly drop the proceedings."

5. After taking into consideration these submissions of the assessee, the A.O. imposed the penalty of Rs.64,619/- @ 100% of tax sought to be evaded u/s 271(1)(c) of the Act by observing as under:

"I have considered the arguments of the assessee and facts of the case and I find no force in the contentions of the assessee. Firstly, the assessee has failed to offer interest income. The assessee has been availing facilities of skilled professionals; therefore, such inaccurate particulars filed by the assessee cannot be ignored. Further, by claiming incorrect income, the income to that extent was suppressed. In this regard, the contention of the assessee that there was no concealment/furnishing of inaccurate particulars of income, is also not correct. The statement of the assessee that no TDS certificates were received from Banks in time is also not found correct as the two TDS certificates submitted by the assessee vide letter dtd.18/11/2008 reveal that both the certificates are duplicate and the original certificates had already been issued to the assessee. The duplicate TDS certificate issued by ICICI Bank shows that the original certificate No.0344-05-06-4459067 dtd.30/04/2006 was issued earlier to the assessee. The details of these two certificates are as under:-

Sl. No.	Bank	Amount	TDS	Date of original TDS certificate
1	ICICI Bank	8137	830	30/04/06
2	UCO Bank	94403	9629	26/04/06

It is very clear that the original certificates had already been issued to the assessee before filing return of income. Therefore, contention of the assessee is not correct. Further, the assessee has failed to offer its explanation for the balance interest income not shown in the return of income. It is crystal clear that the assessee has deliberately not offered interest income for taxation. In the case of CIT Vs. Vidyagauri Natverlal, 238 ITR 91(Guj), the Hon'ble High Court has held that:

"The word "concealment "inherently carries with it the element of mens rea. Therefore, the mere fact that some figure of some particulars have been disclosed by itself, even if takes out the case from the purview of nondisclosures, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. In any case, disclosure which has been made in part of the return which is incorrect of false to the knowledge of the

assessee and if that fact is established, such disclosure cannot take it out from the purview of the act of concealment of particulars for the purpose of levy of penalty."
This view finds support from the following case laws :

1. KantilalManilaM 30ITR411(Guj)
2. Suleman Abdul 139 ITR 8(Guj)
3. Manlabhai Bhanabhai 163 ITR 189(Guj)
4. Smt.Vilasben Hasmukhlal Shah 192 ITR 214
5. Abdulgafur Ahmed Wagmar 199ITR 827(Guj)

Recently, the Supreme Court in the case of Union of India & ors. Vs. Dharamendra Textile Processors & Ors., 306 ITR 227 (2008), has held as under:-

"Penalty — Under s. 1 1AC of Central Excise Act — Mens rea — Provisions of s. 1 1 AC inserted by Finance Act, 1996, with the intention of imposing mandatory penalty on persons who evaded payment of tax cannot be read to contain mens rea as an essential ingredient and there is no discretion with the authority competent to impose penalty to levy penalty below the prescribed minimum — If the contention of counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result — Court cannot read anything into a statutory provision or *a* stipulated condition which is plain and unambiguous — A construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided — A casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four comers of the statute itself — At the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be ' construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute—Object behind enactment of s.271(l)(c) r/w Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue—

Penalty under that provision is *a,* civil liability—Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under S.276C — That the levy of penalty is mandatory and no discretion is left with the competent authority is made clear by s. 11 AC introduced by Finance (No. 2) Act, 1996 and para 136 of Union Budget of 1996 and the Notes on clauses thereof"

In view of the above judicial pronouncements, merely the disclosure during the course of hearing will not make the assessee free from the penal provisions. In view of the above narrated facts and in the circumstances, I a satisfied that the assessee has furnished inaccurate particulars of income the extent of Rs.2,11,172/. I, therefore, levy a penalty of Rs,64,619/-@ 10Q of tax sought to be evaded u/s 271 (1)(c) of the Act.
The order is passed after obtaining approval from the Addl. C.I/T., Range-1, Ahmedabad vide letter No.Addl.CIT/R.1/ Pen.approval/SSS/08-09 dated.24/03/2009."

6. Before Ld CIT(A) assessee made the following written statement:

"5. The appellant submits that the Ld. AO was in gross error in imposing the impugned penalty. There is no dispute over the fact that the appellant is following the cash system of accounting' in respect of income earned by way of interest i.e. interest income is recognized as and when the same is received. In the instant case, though the bank might have credited the amount of interest that was accrued to the appellant, the appellant was not aware of such credit to his account at the material point of time while filing the return of income. It is relevant to mention here that the certificate in form No. 16A stated to have been issued by the UCO Bank on 26.04.2006 in respect of payment of interest of Rs.94,403/- was not received by the appellant till date of filing the return of income. Similarly, the certificate of TDS in form 16A stated to have been issued by the ICICI Bank for payment of Rs.91387- on 30.04.2006 was also not received by the assessee till the date of filing the return of income. It was for this reason that the assessee could not include the amount of interest as the certificate for such deduction was not furnished to the assessee till filing the return of income on 27.07.2006. It was for this reason that the assessee did not include these interests in the

return of income and also did not claim any credit for the amount of TDS made by the bank in respect of such interest income. This fact is clearly proved and established by the very fact that the AO himself had passed an order u/s. 154 on 6.2.2009 wherein he has clearly mentioned that the assessee has not claimed credit for the TDS in respect of the aforesaid amount for the obvious reason that the TDS certificates were not received by him at the time of filing the return of income. By the said order u/s. 154 dated 6.2.2009, the AO has given further credit for TDS of Rs.830/- and Rs.9629/- in respect of the tax deducted by ICICI Bank and UCO Bank from the amount of interest credited to the account of the assessee. Having accepted the fact that the assessee was not aware of the fact of interest credited to his account and that he has not received the TDS certificate as mentioned above the Ld AO is not justified in imposing the impugned penalty with respect to the addition made by the AO on account of such interest.

6. It is relevant to mention here that the penalty is not automatic. Just because an addition has been made to the returned income which has been accepted by the appellant does not ipso facto constitute the default of concealment of income or furnishing inaccurate particulars of income. Explanation (1) below section 271(l)(c) is also not applicable to the case of the appellant because it is not a case where the appellant did not furnish any explanation with respect to the issue raised by the AO. The appellant has furnished explanation before the AO regarding the circumstances under which a particular income remains to be shown in the return of income i.e. the appellant has been following cash system of accounting i.e. interest actually received is being recognized and the interest which has accrued and which has been credited by the bank in the records of the bank was not known to the assessee at the time of filing the return of income because he did not get the certificate in Form 16A from the bank. The explanation so furnished by the assessee has not been found to be false by the AO. Moreover the AO himself has rectified the assessment order u/s. 143(3) by passing a rectification order u/s. 154 and credit for tax deducted at source which was not allowed in the original assessment order for want of TDS certificate was allowed.

Under the circumstances, it is submitted that the action of the AO in imposing the penalty is totally unwarranted by facts and unjustified in law. The case laws referred to by the AO in the assessment order are not applicable to the appellant's case because the facts in those cases are quite distinct and different from that of the appellant.
Moreover the ratio of the Supreme Court judgment in the case of Union of India vs. Dharmendra Textile Processors 306 ITR 227 referred to by the AO is also not applicable to the facts o the present case because that decision was in relation to a penalty imposed u/s. 11 AC of the Centra! Excise Act and not u/s. 271(l)(c) of the IT Act. The AO has referred to the following judicial pronouncements which do not apply to the facts of the appellants case.

i) Kantilal Manilal 130 ITR 411 (Guj.)
In this case there was manipulation of accounts. There was a difference between returned income and assessed income. Two explanations were submitted in respect thereof both of which were untrue. The additions were also contested and were sustained by Hon. Tribunal. There was no fresh explanation furnished in penalty proceedings. As a result of this, the conclusion drawn was that there was manipulation of accounts having which also meant that the possibility of intention to defraud the revenue could not be ruled out. In the case of the appellant none of the explanations have been found to be false and neither has the assessment been challenged.

ii) Sultan Abdul 139 ITR 8 (Guj.)
In this case the appellant had shown the prize money received in the competition as casual income and stated that the same was not taxable. It was proved by overwhelming evidences that the story regarding winning all the prize was a hoax and a devise to legitimatize the introduction of unaccounted money under the smoke screen of the story of cross word puzzle competition money.

In the case of the appellant there was only a bonafide omission to include interest income. This omission was on account of non receipt of TDS certificates from the banks. There was no claim

of TDS also made. The source of bank FDR was also explained and has not been treated as unexplained investments etc. Therefore, the reliance placed on the above case is not justifiable.

iii) Manlabhni Bhannabhai 163 ITR 189 (Guj.)
'I'he facts stated in this case are identical to the case of Suleman Abdul which has already been distinguished by the appellant.

iv) Smt. Vilasben Hasmukhlal Shah 192 ITR 214
The facts stated in this case are identical to the case of Suleman Abdul which has already been distinguished by the appellant.

v) Abdulgafur Ahmed Wagmer 199 ITR 827 (Guj.)
The facts stated in this case are identical to the case of Suleman Abdul which has already been distinguished by the appellant.

9. Further the Supreme Court itself has reviewed the judgment subsequently in the case of Rajasthan Cotton & Weaving Mills Ltd wherein the Hon. Supreme Court held that ratio in the case of Dharmendra Textile Processors does not have blanket application, the ratio has to be applied on case to case basis.

10. Without prejudice to the above it is further submitted that even assuming for a moment without admitting that he appellant has committed a default u/s. 271(l)(c) the same is attributable to reasonable cause within the meaning of section 273B. Section 273B of the IT Act provides that where the default is attributable to reasonable cause, no penalty is leviable. In the case of the appellant, omission to return the correct amount of interest income was on account of the fact that appellant has followed cash system of accounting i.e. interest actually received is recognized that the appellant was not aware of the amount of interest accrued to him and credited to his account by the respective banks because he was not communicated by the bank about such credits that even the TDS certificate in form No. 16A in respect of those particular interest was not received by the appellant till the date of furnishing the return of income and for this reason he could not claim credit for such TDS in the return of income. The AO has accepted these facts by passing an order u/s. 154 referred to above. Therefore there was justifiable reason

for the assessee for not considering the interest so credited in the bank account in the return of income filed. In view of section 273B, no penalty is imposable when there is sufficient reason for the default. CIT vs. Milcx Cable Industries (2003) 261ITR 675 (Guj) _
It was held that "Although the assesses conceded the totalling mistakes which had resulted in underassessment only after he had received the notice of the AO pointing out the mistakes. Tribunal having come to a conclusion that the assessee had no intention of concealing particulars of his income or misguiding the AO, it would not be proper it come to a different conclusion and, therefore, penalty under s. 27l(l)(c) was not leviable."

Dahod Sahakari Kharid Vechan Sangh Ltd. v CIT (2006) 282 ITR 321 (Guj)
It was held that "Assessee, a co-operative society, having directly credited the amouni received from the insurance company, to gratuity fund account instead of P&L a/c and not included the same in the total income in the return due to oversight without any mala fide intention or' mens rea, penalty under s. 271(l)(c) was not leviable."

CIT vs. Eli Lilly & Company (India) (P) Ltd. & Ors. (2009) 312 ITR 225 (SC) "Assessees were under genuine and bona fide belief that there was no obligation to deduct tax at source from the home salary paid by the foreign company/head office; consequently, penalty under s. 27Ids not leviable in any case. "

At this stage, kind attention is invited to the decision of the Supreme Court in the case of Hindustan Steel Ltd vs. State of Orissa 83 ITR 26 (SC). It was held thus in the said case; "an order imposing penalty for failure to carry out as statutory obligation is the result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or guilty on conduct, contumacious or dishonest or acted in conscious disregard to his obligation. Penalty will not be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the

authority to be exercised judicial and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the act or where the breach flows from a bona fide belief that the offender Is not liable to act in the manner prescribed by the statute.

The ratio of the judgment of the Supreme Court cited supra has been followed by the High Courts and Tribunals and even the Supreme Court in their recent judgments in the case of Dilip N Shroff reported in 291 ITR 591 and T. Ashok Pai vs. CIT 292 ITR 11. The appellant therefore prays that in view of the ratio laid down by the Supreme Court, the impugned order imposing penalty of Rs.64,619/- u/s. 271(l)(c) of the I.T. Act is unjustified in law and on facts of the case. The penalty order may please be cancelled.

In view of the above facts and circumstances and the various judicial pronouncements referred to above it is requested that the penalty levied by the AO be cancelled."

7. After taking into consideration these submissions of the assessee, ld. CIT(A) confirmed the penalty by observing as under:

"I have considered the facts of the case, penalty order and appellant's submission. It is not in dispute that appellant did not disclose interest income on FDRs, when appellant's income was compared with AIR information received by the Department, the fact of nondisclosure of interest income came to light. The reason given for nondisclosure of interest income by the appellant is that he did not receive TDS certificate and also interest. Interest was credited but he was not aware of the same in the absence of TDS certificate received by it. Since appellant was having FOR, it was obvious that interest income will accrue on the same. By not disclosing interest income accrued on FDRs, appellant has definitely concealed the particulars of income. Such concealment

came to be noticed only after AIR information was compared. If such verification was not done, the interest income would not have been taxed. In view of this there is no doubt that there was concealment of income to the extent of interest income not offered for tax.

The appellant's claim of bona fide mistake is not relevant since there is a concealment of income and furnishing of inaccurate particulars of income in the return filed. Department need not have to prove mens rea in such act of concealment. The decision relied upon by the appellant are not on the fact of the case and therefore do not help the appellant. In this case, concealment is clearly proved and therefore, there is no need to consider explanation 1 wherein bona fide of the explanation furnished has to be considered. As per the decision of apex court in the case of reliance, the concealment is with reference to return of income and in the case of appellant there is concealment as per return of income. In view of these facts, I agree with the A.O. Penalty by the A.O. is therefore, confirmed.

8. Further aggrieved, the assessee is in appeal before me.

9. At the time of hearing, Ld. counsel for the assessee reiterated the same submissions as made before the Ld. CIT(A) which have been reproduced in para 6 above of this order. He also challenged the order of Ld. CIT(A) on the ground that CIT(A) has simply mentioned that case law relied by the assessee are not applicable to the facts of the case and without pointing out as to why these are not applicable. However when these case laws were discussed during the hearing before me, it was found that they are not applicable to the facts of this case as the facts of those cases are quite different from the facts of the instant case.

10. Ld. D.R. on the other hand vehemently supported the order passed by Ld. CIT(A).

11. After hearing both the parties and perusing the records, I find that there is no dispute about the fact that the interest income amounting to Rs.2,11,172/- was not shown by the assessee in his return of income. Had the case was not taken into scrutiny and the A.O. was not having information through AIR, this income would have gone untaxed. Therefore, there is clear concealment of income to the extent of interest income not offered for tax on the part of the assessee and the provisions of Section 271(1)(c) of the Act which read as under, are attracted:

> **"Sec. 271(1)-** If the [Assessing] Officer or the […] [Commissioner (Appeals)] [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person-
>
> (c) has concealed the particulars of his income or […] furnished inaccurate particulars of [such income, or]"

12. The explanation given by the assessee that he did not disclose the interest income as he did not receive TDS certificates has also been found false as is clear form the duplicate TDS certificates received by the assessee that originals were sent well before the date of filing of return. Therefore, Explanation (1) to Section 271 (1)(c) which reads as under, is applicable to the facts of this case:

> *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 nor offers an explanation which is found by the [Assessing] Officer or the […] [Commissioner (Appeals)] [or the Commissioner] to be false, or
>
> (B) such person offers an explanation which he is not able to substantiate [and fails to prove that 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 clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

13. The contention of the assessee that the A.O. by passing the rectification order u/s 154 giving credit to the assessee on the basis of duplicate TDS certificate, has accepted the contention of the assessee that original certificates were not received by him is also not tenable. In my considered opinion, the fact that the assessee got credit of TDS u/s 154 proceedings in fact goes against the assessee. When the assessee received TDS in respect of some FDRs, and not in respect of other FDRs as claimed by him, he should have obtained the duplicate certificates and should have filed them with the return of income showing total interest received by him. Instead, he chose not to show the interest income to the extent of Rs.2,11,172/-. When the A.O. on the basis of AIR information taxed this amount, to take the credit of TDS he obtained the duplicate certificate. As a matter of fact this exercise should have been done by him before filing the return of income. This conduct of the assessee creates doubt about the bona fides of the assessee and, therefore, it cannot be said that default on the part of the assessee in not showing interest income was attributable to reasonable cause. Since the concealment of income is in reference to the return of income, the following observation of the Hon'ble Apex Court in the case of Reliance Petro Products Pvt. Ltd. 322 ITR 158 (S.C.) are relevant to the facts of this case:

> "A glance at the provisions of Section 271(12)(c) of the Income tax Act, 1961, 1961, suggests that in order to be covered by it,

there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless ht case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee an furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous."

14. In view of the above penalty imposed by the A.O. and sustained by the Ld. CIT(A) is hereby confirmed.

15. In the result, appeal of the assessee stands dismissed.

16. Order pronounced in the open court on 17th June, 2011.

Sd./-

(D.K.TYAGI)
JUDICIAL MEMBER

Ahmedabad; Dated :17th June, 2011
Sp

Copy of the Order forwarded to:

1. The applicant
2. The Respondent
3. The CIT Concerned
4. The Ld. CIT (Appeals)
5. The DR, Ahmedabad
6. The Guard File

1. Date of dictation……3/6/11
2. Date on which the typed draft is placed before the Dictating Member……6/6/11..Other Member
3. Date on which the approved draft comes to the Sr. P.S./P.S. 16/6/11
4. Date on which the fair order is placed before the Dictating Member for pronouncement …17/6/11
5. Date on which the fair order comes back to the Sr. P.S./P.S. 17/6/11
6. Date on which the file goes to the Bench Clerk ……17/6/11
7. Date on which the file goes to the Head Clerk ……..
8. The date on which the file goes to the Assistant Registrar for signature on the order …….
9. Date of Despatch of the order. ……..