IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H" MUMBAI

BEFORE SHRI B.R. MITTAL, JUDICIAL MEMBER

AND

SHRI RAJENDRA, ACCOUNTANT MEMBER

ITA No. 3549/Mum/2011
Assessment Year 2001-02

Haren P Choksey, Krishna Villa, Linking Road, Santacruz (W), Mumbai – 400 054.	Vs.	DCIT Central Circle-45, 569, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020. PAN: ACYPC 0753 G
(Appellant)		**(Respondent)**

Assessee by	:	Shri Ajay R. Singh
Revenue by	:	Shri N.K. Mehta (Sr.AR)
Date of hearing	:	23-07-2012
Date of pronouncement	:	01-08-2012

ORDER

PER RAJENDRA, A.M.

Appellant has filed an appeal against the order dated 18-01-2011 of the CIT (A)-38, Mumbai raising following Grounds of Appeal:

> *"On the facts and in the circumstances of the case, the ld. Assessing Officer erred in levying a penalty of Rs. 4,16,570/- u/s. 271 (1) (C) of the Income Tax Act, 1961 without appreciation of correct facts and circumstance of the case and learned CIT(A) erred in upholding addition. On facts and circumstances of the case & law on subject the same be deleted.*
>
> *The appellant craves leave to add/delete/amend the above grounds or ground of appeal".*

Facts of the case:

2. A search and seizure operation was carried out on 5.10.2007 in the business and residential premises of Choksey group of businesses. Since the assessee had

business connections with the group, his business and residential premises were also searched by the investigation wing of the Department. During the search and seizure proceedings an undisclosed bank account belonging to the assessee was detected. Besides in another bank account of the assessee, there was a cash deposit of Rs.4,21,000/- and credit entries of Rs. 7 lakhs. The assessee vide letter 30.11.2007 disclosed income of Rs. 12.73 lakhs for the year under consideration. In this case, assessment u/s. 147 r.w.s. 143 (3) of the Income-tax Act,1961 (Act)was completed on 12.12. 2008and penalty proceedings u/s.271(1)(c) were initiated for furnishing inaccurate particulars of income.

3. After considering the submissions of the assessee, assessing officer held that assessee had no intention to offer a sum of Rs. 12.73 lakhs for taxation had search action not been carried out by the Department, that the unaccounted transactions were not part of the original return of income filed u/s.139(1) of the Act, that the assessee had offered the said sum after he thought that there was no possibility of escape without offering the same for taxation, that if the search action was not conducted the assessee would not have made any declaration about the same in return of income which showed that there was no intention on part of the assessee to disclose these transactions. He levied penalty amount to Rs. 4.16 lakhs u/s. 271 (1) (c) of the Act.

4. Assessee preferred an appeal before the First Appellate Authority (FAA). After considering the submissions of the assessee and the assessment order FAA held that the appellant had introduced certain bank accounts, that he had failed to produce the persons in whose names the bank accounts were operated, that the appellant had also owned up the transaction in the said bank accounts, that the appellant was operating the said accounts and the remittances into the bank accounts was not taken into account while furnishing the return of income for the AY.2001-02, that it was clearly a case of concealment of income, that the admission and contact on part of the assessee demonstrated that he had not voluntarily disclosed the income reflected in the said bank accounts and the return of income filed under section 139 (1) of the Act, that only consequent to the search and seizure proceedings and on detection and further investigation into the said bank account is he had admitted the income/money remitted into the bank account is, and filed return of income in response to a notice u/s.148 of the Act, that the basic ingredients of concealment within the meaning of section 271(1)(c) of the Act were satisfied in this case.

5. Authorised Representative (AR) of the assessee submitted that declaration about the said sum was made when statements u/s.132 (4) of the Act were recorded, that penalty levied by the AO was not justified, that on the similar facts and circumstances penalty was not levied by the AO in other years. He relied upon the decision delivered by the F bench of the ITAT, Mumbai in the case of Viren P Choksey (ITA No. 5744/Mum/2009 AY. 2001-02 dated 19th August.2011). Departmental Representative (DR) submitted that assessee had not come forward voluntarily, that return was filed by the assessee after detection of the bank accounts by the Department.

We have heard the rival submissions and perused the material before us. We find that in the case of Viren P Choksey, brother of the assessee, issue has been

decided against the revenue. In the case of Viren P Choksey (supra) the tribunal has held as under:

> *"We have considered the issue. There is no dispute with reference to the fact that assessee is in the business of purchase and sale of cars on commission basis, It is also not disputed that assessee has offered commission income from the business originally which had not been varied even in the reassessment proceedings. The only issue is bringing to tax in the reassessment proceedings the peak amount offered out of the credit entries in the bank account Nos. 1922 and 296 of two banks. It was the submission of the assessee that assessee is a dealer and in the process the buyers issue cheques to the agent, as they do not know the seller, who after getting the amount, pass on the price of the car to the seller. In this process there are credits and debits in the bank accounts. Assessee was offering the commission earned in the transactions. As seen from the order of the A.O., the A.O. simply accepted the revised return wherein peak amount of Rs.4,l4,878/- was offered by the assessee. It is also true that assessee offered similar amounts in A.Y. 2003-04 and A.Y. 2004-05 and all the amounts offered were accepted without any dispute. It is not the case of the A.O. that the commission income earned on these transactions was not disclosed by the assesseé. What the assessee originally disclosed was the commission amount and in the revised proceedings also the same commission amount originally offered was accepted. The A.O. also not made out any case that the transactions in the bank account pertains to assessee's unaccounted transactions. It is the submission that most of the transactions are by way of cheques, the contention of which was not disputed in any of the proceedings. What the assessee was asked to explain or prove is that the transactions are from the buyers' and sellers of the cars. There is no incriminating material found during the search proceedings that assessee was introducing his own moneys in the form of cash credits in the bank account. Since assessee was unable to justify the credits and debits vis-à-vis the clients, in order to settle the matter he has offered peak credits as o~ income, which was accepted in the respective three assessment years as such.*
>
> *We also noticed that the A.O. dropped penalty proceedings in A.Y.2003-04and A.Y. 2004-05. In fact in these years also, assessee had filed original returns admitting only commission income as an agent in purchase and sale of cars. In these years also consequent to search, peak credits were offered as income in the proceedings under section 153A. The penalty proceedings were initiated but they were dropped by the A.O. after accepting assessee's explanation. The same explanation was offered in A.Y. 2001-02 also that assessee is an agent, that the transactions pertain to different clients, that assessee was unable to furnish any evidence due to lapse of time and offering the peak amount as income in all the three years on voluntary basis.*
>
> *Since the A.O. himself has dropped the penalties in two assessment years, we are of the opinion that the explanation given for all the three years should have been accepted by the A.O. There cannot be a bonafide explanation for two assessment years and malafide explanation for one assessment year when, consequent to the search, assessee offered peak credits in the bank accounts as income. Since on similar facts A.O. accepted the explanation as bonafide, we are of the opinion that the explanation given by assessee for this assessment year, offering income and admitting peak credit should be accepted as bonafide explanation.*
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> *The learned D.R. relied on the principles established by the Hon'ble Supreme Court in the case of G.C. Agarwal vs. CIT 186 ITR 571 justifying levy of penalty. On the set of facts particularly with reference to the explanation then available for A.Y. 1964-65 and 1965-66 where total income returned by assessee was found to be less than 80%*

of the total income assessed, invoking the explanation then existing penalty was upheld. However, the observations of the Hon'ble Guwahati High Court in the case of CC. Agarwal vs. CIT 102 ITR 408 while confirming the penalty is worth extracting here:

> *"It is now settled law that in order to sustain a penalty under section 271(1)(c) the department must establish that the receipt of the amount in dispute constitutes income of the assessee and part from the falsity of the explanation given by the assessee, the department must have before it cogent material or evidence from which it can be inferred that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars in respect of such income. It is also settled law that the fining given in the assessment proceedings for determining or computing the tax cannot by itself be said to be conclusive in penalty proceedings though it may be good evidence which may be considered along with the other evidence in the penalty proceedings."*

These principles stood the test of time in examining scope of penalty u/s 271(1)(c). What we noticed in this case is that the A.O. was satisfied about the explanation given by the assessee as bonafide in respect of two assessment years but levied the penalty with reference to this assessment year. Since the explanation is common and the fact that bank account was came to the knowledge after the search, there cannot be different treatment given to the same assessee in different assessment years on the same set of facts. Therefore, we are of the opinion that the A.O. should have dropped the penalty proceedings in this assessment year as well. Consequently, we are of the opinion that the explanation offered by the assessee is to be considered as bonafide explanation and accordingly in view of Explanation 1 to sec 271(1)(c), penalty proceedings are not attracted. The penalty is therefore, cancelled.

In the result, appeal of the assessee is allowed."

As the facts and circumstances of the case under consideration are similar to the matter of Viren P Choksey. So, respectfully following the same, we decide Ground No.1 in favour of the assessee.

Appeal filed by the assessee stands allowed.

Order pronounced in the open court on 1st August, 2012

Sd/-	Sd/-
(B.R. MITTAL)	**(RAJENDRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai,
Date 1st August, 2012

TNMM

Copy to:

1. Appellant
2. Respondent
3. The concerned CIT (A)
4. The concerned CIT
5. DR "H" Bench, ITAT, Mumbai
6. Guard File

(True copy)

By Order

Asst. Registrar,
Income Tax Appellate Tribunal,
Mumbai Benches, Mumbai