

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH**

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND MS. ANNAPURNA MEHROTRA, ACCOUNTANT MEMBER

ITA No. 350/Chd/2013
(Assessment Year : 2008-09)

Sh.Parveen Garg,
208, Friends Colony,
Moga.

Vs.

The A.C.I.T.,
Central Circle II,
Chandigarh.

PAN: ACCPK1229P
(Appellant)

(Respondent)

Appellant by : Shri Sudhir Sehgal
Respondent by : Shri Manjit Singh, DR

Date of hearing : 02.09.2015
Date of Pronouncement : 09.09.2015

O R D E R

PER BHAVNESH SAINI, J.M. :

This appeal filed by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)(Central), Chandigarh dated 8.2.2013 for assessment year 2008-09, Challenging levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. The brief facts of the case are that the assessee derives income from House Property and share in the

Partnership Firm. A search under section 132(1) of the Act was conducted on 15.07.2008 at the residences and office of the individual and group concerns of M/s B.R.S Institute of Medical Sciences group of cases. In response to notice under section 153A of the Act, the assessee filed his return of income on 22.02.2010 declaring income of Rs.67,68,610/- and the case of the assessee was assessed at the returned income of Rs. 67,68,610/- vide an order dated 30.12.2010 under section 153A(1)(b) read with section 143(3) of the Act. The notice dated 30.12.2010 for the initiation of penalty proceedings was served on the assessee wherein the assessee was asked to explain why penalty as per explanation 5-A to section 271(1)(c) of the Act should not be levied as the return has not been filed by the assessee within the due date. Consequently, the penalty under section 271(1)(c) of the Act of Rs. 22,42,867/- was imposed by the Assessing Officer vide his impugned order dated 28.06.2011.

3. Before the learned CIT (Appeals), the assessee was aggrieved that the penalty of Rs.22,42,867/- was imposed by not considering the fact that being a partner in an audit firm and also in a non-audit Firm, the assessee can file its return of income only after finalization of the Income Tax Return of the Firms. Moreover, the case of the assessee has been assessed at returned income and under such circumstances, there cannot be any levy of penalty under section 271(1)(c) of the

Act. The relevant portion of the written submission filed during the appellate proceedings, is reproduced below:

5. *The Assessing Officer in his Penalty Order has relied on explanation 5A to the Section 271(l)(c) that in the case of the assessee the due date of filing return was 31.07.2008 and as the warrant of authorization was last executed on 08.08.2008 and the assessee had not filed his return of income so he is covered by the deeming provisions of Explanation 5A to the section 271 (l)(c).*
6. *It is submitted that as stated above the assessee is partner in two Firms namely Shiva Industries and Krishan Lai Parveen Kumar. The books of accounts of the Firm Shiva Industries are audited and thus the due date of return filing of the Assessee cannot be said to be 31st July and it is 30th September. The Explanation 5A to section 271(l)(c) of the Act is only applicable where the due date for filing the return of income has expired and the assessee had not filed its return of income. But in the case of the assessee the due date of return is 30th September as the Assessee is a partner in both an Audit Firm as well as Non Audit Firm. We are enclosing herewith the copies of Income Tax Returns as filed by the Partnership Firm in which the assessee is a partner for the AY 2008-09 and also the copies of Partnership Deed evidencing the share of the assessee in the firm.*
7. *The due dates for the filing of return have been prescribed in section 139 of the Act which is as follows:*

139. [(1) Every persons,—

(a) being a company [or a firm]; or

(b) being a person other than a company [or a firm], if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax,

shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed

Explanation 2.—In this sub-section, "due date" means,—

(a) where the assessee [other than an assessee referred to in clause(aa)] is—

(i) a company [***]; or

(ii) a person (other than a company) whose accounts are required to be audited under this Act or under any other law for the time being in force; or

(iii) a working partner of a firm whose accounts are required to be audited under this Act or under any other law for the time being in force, the [30th day of September] of the assessment year;

Thus, it is very much clear from the explanation 2 to section 139 of the Act that the due date for the partners of a firm whose accounts are required to be audited under this Act is 30th September.

8. The very basis for the levy of penalty u/sec 271(l)(c) is not correct as the only point on the basis of which the Assessing Officer has levied the penalty is that the due date of filing of return of income for the AY 2008-09 had expired at the time of search and the assessee had not filed his return of income. But the fact as stated above is that the due date of filing of return of income had not expired in the case of the assessee and thus provisions of explanation 5A to Section 271(l)(c) are not at all applicable in the case of the assessee.

9. Without prejudice to our above arguments that no penalty is leviable as the provisions of explanation 5A to section 271(l)(c) are not applicable, it is further submitted that even otherwise the income was assessed at the income returned in response to notice u/sec 153A of the Act and as such there cannot be any levy of penalty when the returned income is as such accepted during the course of assessment proceedings. Since there is complete detachment of 153A proceedings from regular assessment proceedings u/s 143 or 147 and hence concealment of income is to be determined with reference to the return of income to Toe filed in response to notice u/s 153A of the Act. Once returned income is accepted by the assessing officer it can neither be a case of concealment of income nor furnishing of inaccurate of particulars of such income. The assessee had disclosed income in the return of income filed determined on the basis of entries recorded in seized material.

10. a) Reliance in this regard is also placed on the Hon'ble Delhi High Court in the case of *M/S S.A.S. Pharmaceuticals as reported in 335 ITR 259* while deciding the issue levy of penalty u/s 271(l)(c) in paragraph 15 & 16 has held as under:

“15. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particulars of income by the assessee has to be in the income tax return filed by it. There is sufficient indication of this Court in the judgment in the case of *Commissioner of Income Tax, Delhi-I Vs Mohan Das Hassa Nand 141 ITR 203* and in *Reliance Petro products Put. Ltd (supra)*, the Supreme court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income tax return filed by the assessee. This view gets supported by Explanation 4 as well as 5 and 5A of section 271 of the Act as contended by the learned counsel for the respondent.

16. No doubt, the discrepancies were found during the survey. This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under provisions of section 271(l)(c) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not disclosed the income but for the said survey. However, there cannot be any penalty on surmises, on conjectures and possibilities. Section 271(l)(c) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the income tax return and offered the surrendered amount for the purpose of tax.”

b) Reliance in this regard is also placed on the latest Judgment of the Hon'ble Tribunal, Delhi Bench in the case of **Prem Arora vs. DCIT in ITA no. 4702 of 2010 vide order dated 09.03.2012** wherein the Judgment of the Hon'ble High Court has been relied upon and relief has been allowed to the assessee.

c) Reliance in this regard is also placed on the latest Judgment of the Hon'ble Tribunal , Delhi Bench in the case of **Suman Raheja vs DCIT in ITA no. 4411 & 4412 of 2011 vide order dated 25.05.2012** wherein the Judgment of the Hon'ble High Court (supra) as well the Judgment in the case of Prem Arora (Del Bench) has been relied upon and relief has been allowed to the assessee.

11. If the facts of the case are examined in the light of decision of Hon'ble Delhi high Court in SAS Pharmaceuticals (supra), penalty u/s 271(l)(c) is not imposable where there is neither concealment of income nor furnishing of inaccurate particulars of income in return filed u/s 153A of the Act. In earlier paragraphs we have held that the concealment of income is to be determined with reference to the return of income to be filed in response to notice u/s 153A of the Act. Once returned income filed u/s 153A is accepted by the assessing officer it can neither be a case of concealment of income nor furnishing of inaccurate of particulars of such income. Hence, the assessee's case is squarely covered by the decision of Hon'ble Delhi high Court in the case SAS Pharmaceuticals (supra). Hence, penalty u/s 271(l)(c) is not exigible.

In view of the above submissions, it is humbly requested that the penalty u/s 271 (l)(c) may please be deleted and oblige.

In continuation of its earlier submission, the assessee furnished the audit report u/s 44AB of M/s Shiva Industries, Moga in which the assessee is a partner of 20 % share. It was reiterated that the last date of filing the return of income in the case of appellant was, accordingly, 30th of September, 2008, since the accounts of the firm are subject to audit u/s 44 AB. Therefore, till the accounts of the firm are finalized, the assessee cannot be expected to file the return of income and i.e. the time of filing the return had to be considered upto 30.09.2008. It was further submitted that the amount of Rs.65,00,000/- could not be disclosed in the original return, though included in the return filed in response to notice u/s 153A as the seized materials were not available. That assessee was also not in the correct frame of mind, and was of the view that the additional income was to be surrendered u/s 153A as per the view of the counsel.”

4. The learned CIT (Appeals), however, did not accept the contention of the assessee and dismissed the

appeal of the assessee. His findings in paras 5 and 6 of the appellate order are reproduced as under :

“5. I have considered the assessee's submissions and the impugned order. The AO has imposed the impugned penalty by not accepting the reply of the assessee and not considering the contention of the assessee that, being a partner in an audit firm and also in a non-audit Firm, the assessee can file its return of income only after finalization of the Income Tax Return of the Firms. In order to adjudicate on the issue, I shall refer to the provisions of Section 271 (1)(c) r/w Explanation 5A, which is reproduced below:

271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the Assessing Officer or the Commissioner of (Appeals) or the Commissioner in the course of any proceedings under this act, is satisfied that any person –

- (a)
- (b)
- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
- (d)

Explanation 5A. - Where, in the course of a search initiated under section 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 this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (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 represents his income (wholly in part) for any previous year, which has ended before the date of search and,-

- (a) *Where the return of 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 purpose 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.*

(emphasis assigned)

In this case, the search was conducted on 15.7.2008. The due dates for filing of the return for AY 2008-09 under consideration as per section 139(1) in respect of an Assessee who is partner in a firm whose accounts are subject to audit is 30th September of the Assessment Year. In other words, assuming the contention of the assessee is correct that the partnership firm is subject to audit for which a copy of Deed dated 1.4.2005 was furnished, the assessee was therefore required to furnish his return by 30.9.2008. Return was stated filed on 2.9.2008 as per ITRV-V copy with due acknowledgement. However this does not help as the surrender of additional income was disclosed in the return filed in response to notice u/s 153A. Though the return u/s 153 (1) (A) has been accepted by the department, importantly the additional income had not been shown in the return filed by the assessee u/s 139(1), even though the due date for filing of the return had not expires. The reasons for not having included the additional income in the return filed u/s 139 have not been elucidated by the assessee, excepting stating that the assessee was not in possession of seized materials, and had relied on his counsel. Hence it is apparent that had it not been for the search operation and questions raised during recording of the statement, there would have been no disclosure of additional income by the assessee. Hence I am of the opinion that the assessee has not sufficiently covered himself with the immunity conferred u/s 271 (1) (c) Explanation 5A. In other words, the appeal of the assessee is dismissed.

6. *In the result the appeal of the assessee is dismissed.”*

7. We have heard the learned representatives of both the parties and perused the findings of the authorities below. The learned counsel for the assessee reiterated the submissions made before the authorities below and submitted that the Explanation 5-A to section 271(1)(c) of the Act is not applicable in the case of the assessee as there was no entry found in the books of account, for which penalty was initiated. Further Explanation 5-A to section 271(1)(c) of the Act is not applicable in the case of the assessee as the due date of return in the case of the assessee was 30.9.2008, which has not expired on the date of search on 15.7.2008. The assessee has filed the return of income on 31.3.2009. The assessee is a partner in two firms and accounts are audited. Therefore, the due date in the case of the assessee for filing of the return was 30.9.2008, which is also admitted by the learned CIT (Appeals). He has, therefore, submitted that the issue is covered in favour of the assessee by the order of the I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar Vs. ACIT in ITA No.1020/Mum/2011 for assessment year 2007-08 dated 28.8.2013. He has further submitted that the penalty was levied on the sole reason that the assessee has not disclosed the surrendered amount in the original return filed on 31.3.2009 but the surrendered amount was shown in the return filed under section 153A of the Act. The assessee is not a technical person and it was advised that the surrendered amount has to be shown in the return filed in response to section 153A of the Act. The error committed

by the assessee was bonafide and inadvertent and, therefore, penalty is not leviable.

8. On the other hand, the learned D.R for the Revenue relied upon the orders of the authorities below.

9. We have considered the rival submissions and perused the material available on record. It is not in dispute that the search was conducted on 15.7.2008 at the premises of the assessee. The Assessing Officer levied penalty as per Explanation 5-A to section 271(1)(c) of the Act because the return has not been filed by the assessee within the due date of filing of the return i.e. 31.7.2008. The assessee, however, explained that the assessee is a partner in two firms and the books of account of one firm are audited. Therefore, in his case the due date of filing of the return cannot be 31.7.2008 and it would be 30.9.2008. This fact is admitted by the learned CIT (Appeals) in his findings. It is, therefore, clear that in the present case, at the time of search on 15.7.2008, the due date of filing of the return for assessment year under appeal i.e. 2008-09 had not expired because the due date of filing of the return was 30.9.2008. The I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra) considered the application of Explanation 5-A to section 271(1)(c) of the Act and held that the deeming provisions of Explanation 5-A cannot be applied because at the time of search, the relevant previous year for the assessment year under appeal, the due date of filing of return of income had not expired. The

findings of the Tribunal in paras 6 and 7 of the order are reproduced as under :

6. We have heard the rival contentions and have perused the findings of the Assessing Officer as well as the Commissioner (Appeals). In the present case, penalty has been levied by invoking the provisions of Explanation 5A to section 271(l)(c) (and not Explanation 5, as mentioned by the Assessing Officer). Explanation 5A, is a deeming provision where in case of search and seizure operation carried out under section 132 after 1st June 2007, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of income, if he is found to be the owner of any money bullion jewellery or other valuable article or thing acquired by him utilizing his income in any previous year or any income based on entry in any books of account or other documents for any previous year. The relevant provisions of Explanation 5A to section 271(l)(c) is reproduced below:-

[Explanation 5A.— Where, in the course of a search initiated under section 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 this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (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 has ended before the date of search and,—

- (a) *where the return of 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."

Thus, in case of search conducted on / or after 1st June 2007, penalty for concealment of income and furnishing of inaccurate particulars of income is deemed under Explanation 5A. However, two exceptions or saving clause has been provided wherein the penalty cannot be levied under this section. Firstly, the assessee has shown the assets as

mentioned in clause (i) or income as mentioned in clause (ii), in the return of income furnished before the date of search or secondly, the due date for filing of return of income for such previous year has not expired. If any case falls under these saving clauses, Explanation 5A cannot be invoked.

7. *In the present case, the search had taken place on 19th June 2007. The due date for filing of return of income for the assessment year 2007-08, had not expired on the date of search as the due date of filing of return of income under section 139(1) was 31st July 2007 and due date under section 139(4) was 31st March 2008. Thus, in the present case, deeming provisions of Explanation 5A cannot be applied here because at the time of search, the relevant previous year for the assessment year 2007-08, the due date of filing of return of income had not expired. Whether the assessee had filed the return of income under section 139(1) or 139(4) after the date of search, will not be of much consequence because the income in question pertains to assessment year 2007-08 for which the due date had not expired at the time of search. The deeming provisions as given any Explanation 5A has to be strictly construed because one has to see what is the status of income on the date of search and not afterwards. The penalty in this case, cannot be levied under the main provision as the assessee has included this income in the return of income in response to notice under section 153A and which has been assessed also. There is no variation between the return of income and the assessed income, qua this addition. For levying the penalty in cases of search after 1st June 2007, the deeming provisions of Explanation 5A can only be invoked, which clearly carves out the exception in the cases where due date of filing of the return of income had not expired at the time of search. Thus, for levy of penalty under Explanation 5A, it has to be seen whether any assets or income found on the date of search has been acquired out of the previous year and not afterwards for which penalty can be levied or initiated under other provisions of section 271(l)(c). Thus, in our opinion, once the due date had not expired for filing the return of income for the assessment year 2007-08, at the time of search, penalty cannot be levied under the deeming provisions of Explanation 5A. Consequently, we set aside the impugned order passed by the learned Commissioner (Appeals) and hold that on this preliminary ground, penalty levied by the Assessing Officer and as confirmed by the Commissioner (Appeals) cannot be sustained and same is deleted.”*

10. Considering the facts of the case in the light of the decision of I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra), it is clear that in the case of the assessee, search had taken place on 15.7.2008. The due date of filing

of the return for assessment year under appeal i.e. 2008-09 had not expired on the date of the search as the due date of filing of the return of income under section 139(1) was 30.9.2008. Thus, in the present case, the deeming provisions of Explanation 5-A cannot be applied because at the time of search, the relevant previous year for the assessment year under appeal, the due date of filing of the return of income had not expired. Thus, the decision of I.T.A.T., Mumbai Bench in the case of Kshiti R. Maniar (supra) is squarely applicable to the facts and circumstances of the case. Further, the assessee explained that there was no variation in the return of income and assessed income as per the assessment order passed under section 153A r.w.s. 143(3) of the Act because the returned income was accepted including the surrendered income. The learned counsel for the assessee also explained that due to the bonafide error, surrendered income was not included in the return filed under section 139(1) or 139(4) of the Act because as per the advice, the surrendered income was to be declared in the return to be filed under section 153A of the Act. The Assessing Officer levied the penalty under deeming provisions of Explanation 5-A to section 271(1)(c) of the Act, which in our view, is not applicable to the facts and circumstances of the case. There is thus, no concealment of income in the case of the assessee for attracting levy of penalty. Therefore, considering the facts and circumstances of the case in the light of the

decision in the case of Kshiti R. Maniar (supra), we set aside the orders of the authorities below and cancel the penalty.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on this 9th day of September, 2015.

Sd/-
(ANNAPURNA MEHROTRA)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Dated : 9th September, 2015

Rati

Copy to: The Appellant/The Respondent/The CIT(A)/The CIT/The DR.

Assistant Registrar,
ITAT, Chandigarh