

आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1327/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Manoj S. Gugale
652, Shantisadan,
Topkhana,
Ahmednagar

.... अपीलार्थी/Appellant

PAN: ADZPG9595N

Vs.

The Income Tax Officer,
Ward 3, Ahmednagar

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Suhas P. Bora
प्रत्यर्थी की ओर से / Respondent by : Shri Sanjeev Ghei

सुनवाई की तारीख / Date of Hearing : 27.09.2018	घोषणा की तारीख / Date of Pronouncement: 26.11.2018
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आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of CIT(A)-2, Pune, dated 22.02.2016 relating to assessment year 2011-12 against levy of penalty under section 271(1)(c) of the Income-tax Act, 1961 (in short 'the Act').

2. The assessee has raised the following grounds of appeal:-

On facts and in law

1. *The Id CIT(A) has erred in confirming penalty of Rs.4,39,162/- levied u/s 271(1)(c) by the AO without appreciating the facts of the case and submissions of the appellant.*
2. *The learned CIT(A) while confirming the penalty levied by the Assessing Officer u/s 271(1)(c) had erred in not appreciating the following important facts:*
 - a) *The appellant had offered additional income, which constitutes a voluntary and bonafide act.*
 - b) *In compliance of the disclosure, the appellant had filed the revised statement incorporating the additional income during the course of assessment proceedings also claimed the TDS voluntarily, which was remained to be claimed.*
 - c) *Offering of the additional income and claim of TDS which was remained to be disclosed in the return of income is a voluntary and bonafide offer and it is full and true disclosure of all the facts.*
 - d) *The learned A.O has not pointed out any mistake either on legal front as well as on merits in this revised statement.*
3. The issue raised in the present appeal is against levy of penalty under section 271(1)(c) of the Act at ₹ 4,39,162/-.
4. Briefly, in the facts of the case, the assessee for the year under consideration had furnished return of income declaring total income of ₹ 4,52,640/-. The case of assessee was picked up for scrutiny. The Assessing Officer noted that there was difference of TDS as per 26AS statement and the TDS declared in the return of income. In order to verify the same, the Assessing Officer called for the details. On perusal of 26AS statement, the total TDS was ₹ 6,43,191/- and as per return of income filed by assessee, the TDS was shown at ₹ 35,020/-. The assessee was asked to explain the same. Further, on perusal of return of income, the Assessing Officer also noted that the assessee had only declared salary income, whereas as per 26AS statement, there were total receipts of ₹ 4,40,25,087/-. The assessee thus, was asked to explain as to why the said receipts should not be treated as concealed income and even penalty proceedings under section 271B of the Act

should not be initiated, since the gross receipts exceeded ₹ 1 crore. The assessee pointed out that total receipts of ₹ 4.40 crores should not be considered as its concealed income because the nature of business of assessee was advertising agency and the profit (net income) was only commission and not the entire receipts. On these receipts, TDS was already made and the receipts were reflected in the bank account statement. The learned Authorized Representative for the assessee further stated that the books of account have been maintained and the assessee has prepared Profit and Loss Account and offered ₹ 14,55,987/- as profit from business & profession. The assessee had not shown the business income in the return of income and hence, the same was added to total income of assessee as concealed income from business & profession, to which the learned Authorized Representative for the assessee agreed. Penalty proceedings under section 271(1)(c) of the Act were initiated for concealing the particulars of income. Further, the Assessing Officer also noted that the assessee had failed to declare income from interest and dividend of ₹ 57,673/- in his return of income. Hence, the same was also added and penalty proceedings were initiated for concealing the particulars of income. The assessee had further sold plot at Savedi during the year under consideration and worked out the short term capital gains at ₹ 10,800/-. However, the working submitted by assessee was not correct and the short term capital gain was worked out at ₹ 39,150/-. The assessee had also not shown the short term capital gains in his return of income and the assessee was show caused in this regard and was asked to explain as to why the same should not be treated as his concealed income. The learned Authorized Representative for the assessee had no explanation to offer and agreed for the addition of ₹ 39,150/- and penalty proceedings under section 271(1)(c) of the Act were initiated for concealing the particulars of income. The Assessing Officer in penalty order passed under section 271(1)(c)

of the Act noted that three additions were made in the hands of assessee totaling ₹ 15,52,810/-. In response to notice issued under section 271(1)(c) of the Act, the assessee did not file any explanation. Another notice was given to the assessee and the assessee furnished written explanation, which is reproduced under para 5 of penalty order. In the said reply, the assessee pointed out that he had filed income tax return declaring total income of ₹ 4,52,637/-. Subsequently, the assessment was made and addition of ₹ 15,52,810/- was made in the hands of assessee, on which total tax worked out to ₹ 4,39,162/-, whereas TDS deducted was ₹ 6,43,191/- and hence the assessee had claimed refund of ₹ 1,73,890/-. He admitted that there was concealment of income during the said assessment year, however, there was no default in paying tax on the said concealed income and hence, there was no evasion of tax. He pointed out that there was no tax liability, penalty proceedings initiated may be dropped. The Assessing Officer noted that the assessee had only come forward and accepted his mistake in not offering the income when the Assessing Officer had detected concealment, therefore, it was clear case of assessee's intention to conceal income. In view thereof, the Assessing Officer held the assessee to have concealed the particulars of income to the extent of ₹ 15,52,810/- and penalty of ₹ 4,39,162/- was levied.

5. Before the CIT(A), the assessee furnished written submissions which are reproduced in the order of CIT(A). However, penalty levied by Assessing Officer was upheld by CIT(A) since the additional income was offered only during the assessment proceedings, when the same were confronted by the Assessing Officer and the learned Authorized Representative for the assessee admitted to the same. Reliance was placed on the ratio laid down by the Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. Vs. CIT reported in

358 ITR 593 (SC) in this regard and penalty levied was upheld in the hands of assessee.

6. The assessee is in appeal against the order of CIT(A) and pointed out that income from business, short term capital gain and interest on dividend as well as TDS on the same was remained to be disclosed in the return of income. He further stated that as against total income declared in the return of income at ₹ 4,52,637/-, the Assessing Officer had assessed the income at ₹ 20,05,450/- and once the credit for TDS was allowed, then no further tax had to be paid by assessee. The learned Authorized Representative for the assessee pleaded that the income from business which was earned in earlier year also was not shown in the return of income but was shown in the revised computation filed during the course of assessment, in which the assessee makes claim of TDS at ₹ 6,43,191/-, which was not claimed in the original return of income. After the adjustment of TDS, refund was due to the assessee, hence it was not case where the assessee had defaulted in payment of tax. The next plea of assessee before us was that where the receipts from business of advertising agency were deposits in the bank, from which tax was deducted, then it cannot be said that the assessee was having malafide intention of not disclosing the said receipts in the return of income. The said error was through oversight and the mistake of assessee in not declaring the additional income was not the intention to evade tax liability and hence, there was no question of any concealment of particulars of income by the assessee. The learned Authorized Representative for the assessee has filed written note and has reiterated his stand that omission or non-disclosure of income from different heads was only due to the mistake or inadvertency and was not with a view to evade tax and has given various explanations. In this regard, he pleaded that penalty proceedings were distinct from assessment proceedings

and finding recorded in assessment proceedings would not operate as *res judicata* in penalty proceedings. He further placed reliance on the following decisions:-

- i) *DCIT Vs. Smt. Prabhavathi Dharam Singh (2009) 34 SOT 125 (Bangalore)*
- ii) *Anandamoy Bhattacharjee Vs. ITO (2009) 105 ITD 365 (Calcutta)*
- iii) *ITO Vs. Smt. Madhuri Satish Misal in ITA No.2375/PN/2012 along with CO No.103/PN/2013, relating to assessment year 2008-09, order dated 25.08.2014*
- iv) *CIT Vs. Smt. Madhuri Satish Misal in Income Tax Appeal No.492 of 2015, judgment dated 19.09.2017*

7. The learned Authorized Representative for the assessee has also distinguished the reliance placed upon by the CIT(A) on different decisions.

8. The learned Departmental Representative for the Revenue placing reliance on the order of CIT(A), placed heavy reliance on the decision of the Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. Vs. CIT (supra).

9. We have heard the rival contentions and perused the record. The assessee is an individual and as admitted and pointed out by the learned Authorized Representative for the assessee, was filing the returns of income for earlier years also. The assessee was asked to file copies of return of income and financial statements for assessment years 2010-11 and 2011-12. The year under appeal before us is assessment year 2010-11. First, we shall look at the financials and return of income filed for assessment year 2010-11, copy of which is placed at pages 22 to 26 of Paper Book. In the return of income, the assessee had declared gross income of ₹ 16,02,200/-. The assessee has also attached Profit and Loss Account of M/s. Classic Advertising i.e. the concern in which the assessee was earning commission and incentive to the tune of ₹ 25,26,716/- and advertising receipts of ₹ 14,22,530/-. The assessee has

worked out the net profit after expenditure at ₹ 11,69,941/-. The assessee was also preparing Balance Sheet and has filed copy of the same along with Annexures. The declaration of gross total income of ₹ 16 lakhs is apparently on account of business income of about ₹ 11.70 lakhs and salary of about ₹ 5 lakhs. The assessee has not filed any computation of income and hence, we are not clear about exact income declared under each head.

10. Now, let us look at the return of income filed for assessment year 2011-12, which is placed at pages 15 and 16 of Paper Book. The assessee has filed computation of income and only has declared salary income from Classic Publicity Pvt. Ltd. at ₹ 5,60,000/-. The assessee has not declared any income from business of proprietary concern, which admittedly, he was carrying on during the year under consideration also. The assessee has enclosed the copy of Balance Sheet and Profit and Loss Account for the year ending 31.03.2011, in which commission was to the tune of ₹ 29.71 lakhs and advertising receipts to the tune of ₹ 16.19 lakhs. The assessee has declared net profit of ₹ 15,13,660/- in Profit and Loss Account. In other words, the assessee was carrying on the business of same scale as in earlier year. The assessee had declared business income in the return of income filed for earlier year but during the year under consideration, he failed to declare business income.

11. Now, let us look at Form No.26AS for assessment year 2011-12. In Form No.26AS, there are details of tax deducted at source under section 192 of the Act i.e. salary receipts from Classic Publicity Pvt. Ltd. to the tune of ₹ 5 lakhs and then there is tax deducted at source of Axis Bank on account of interest on several deposits under section 194A of the Act and then there are various deductions under section 194(3) of the Act and Form No.26AS is placed at pages 27 to 44 of Paper Book, wherein various parties have deducted

tax at source under section 194C of the Act. If we look at the entries it is clear that he is not carrying on the business for one or two persons, the receipts are from several persons and he is receiving commission on different dates from different parties. While filing the return of income for assessment year 2011-12, in verification, he solemnly declared that the income is declared by him to his best of knowledge and belief and he also says that information given in the return is correct and complete income in the return of income filed by him. However, a person who is carrying on the business on day-to-day basis in his sole proprietary concern fails to declare the business income at all in the return filed for the year under appeal; he has received salary income from M/s. Classic Publicity Pvt. Ltd. in the preceding year and in the present year and he only declares that salary income in the return of income filed for the captioned assessment year. Another aspect to be kept in mind is the short term capital gain which has not been declared by assessee in the return of income. Further, the assessee has also not declared interest from fixed deposits and dividend in the return of income. The Assessing Officer has taken up assessment proceedings and when confronted with the details of Form No.26AS by Assessing Officer, the assessee claims that he has declared income; it cannot be said to be declaration of income by the assessee voluntarily. The onus was on the assessee to declare the said income in the return of income or may be in the revised return of income within stipulated time. The declaration, if any, made during the course of assessment proceedings, once the proceedings have been commenced and the assessee is confronted with the details in Form No.26AS statement, then such a declaration cannot be said to be voluntary and cannot discharge the assessee from his onus. We find no merit in the plea of assessee in this regard. He has time and again pointed out that it was by an inadvertent mistake the said income was not declared but keeping in mind the declaration of assessee in

assessment year 2010-11 and when compared to the declaration of income in assessment year 2011-12, it is not case wherein the business income has arisen for the first time. Similar income was being carried on in earlier years, even receipts were similarly earned and the assessee had declared the business income in earlier years, then non-declaration of said business income in the year under consideration makes the assessee liable to charge of concealment i.e. non furnishing of correct particulars of income.

12. Let us now come to the next stand of assessee that in any case, TDS has been deducted and no demand is due from the assessee. Once we consider the figures of receipts in Form No.26AS, which totaled ₹ 4,40,25,087/-, the assessee has explained and the Assessing Officer has noted the same in para 4 and total receipts of ₹ 4.40 crores should not be considered as his concealed income. He has prepared Balance Sheet and Profit and Loss Account and offered income of ₹ 14,55,987/-. This exercise has been carried out only once the assessment proceedings have been initiated. Further, on the income from short term capital gain, there is no question of any TDS being deducted, may be on interest income, some TDS has been deducted but that does not absolve the assessee from the levy of penalty for concealment under section 271(1)(c) of the Act. The plea of no tax due after including the concealed income cannot absolve the assessee from its obligation to declare total income earned in the year and such non-declaration makes the assessee liable to levy of penalty for concealment.

13. The Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. Vs. CIT (supra) has held that even voluntary disclosure does not release the assessee from mis-chief of penal proceedings under section 271(1)(c) of the Act. It has further been held that the Assessing Officer shall not be carried away by the

plea of assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', 'amicable settlement', etc. to explain away its conduct.

14. Applying the said ratio to the facts of present case, we hold that there is no merit in the plea of assessee of having no liability to pay tax and hence, no liability to any penalty for concealment. The learned Authorized Representative for the assessee has relied on various case laws. The first is the Bangalore Bench of Tribunal in DCIT Vs. Smt. Prabhavathi Dharam Singh (supra), wherein the ratio laid down is in respect of tax deducted at source out of salary income and it was held that omission to declare salary income was due to inadvertency or mistake. The Tribunal held that where no deliberate or conscious intention on the part of assessee was proved, so the plea of inadvertency could not be rejected. This is the case where the employer had deducted tax from salary and the said deduction is on the prevalent market rates. However, in the case of assessee, it is not salary which was not declared but it was business receipts of assessee on which TDS was deducted and total receipts were not taxable in the hands of assessee. The claim of assessee was as per Income & Expenditure Account which needs to be verified and then net income was to be added in the hands of assessee. In such circumstances, it cannot be said to be a case of inadvertency.

15. Similar is the ratio laid down in other decisions of Calcutta Bench of Tribunal in Anandmoy Bhattacharjee Vs. ITO (supra), which is also case of salary income being covered by TDS deduction and the Pune Bench of Tribunal in ITO Vs. Smt. Madhuri Satish Misal (supra), wherein also it was case of TDS out of interest earned on fixed deposits. Another point to be noted in the decision of Pune Bench of Tribunal is that addition was made in the hands of assessee on account of transaction of assessee's husband and she agreed

to the addition, hence it was held that it is not case of concealment. However, the facts of present case are totally at variance and the said reliance is misplaced.

16. Now, coming to the last reliance on the decision of the Hon'ble Bombay High Court in CIT Vs. Smt. Madhuri Satish Misal (supra), which upheld the decision of Pune Bench of Tribunal and as pointed out the factual aspects are different and hence the reliance is misplaced. Upholding the order of CIT(A), we dismiss the grounds of appeal raised by assessee.

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

Order pronounced on this 26th day of November, 2018.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक Dated : 26th November, 2018.
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-2, Pune;
4. The Pr.CIT-1, Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "ए" / DR 'A', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune