

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री टी.आर.मीना, लेखा सदस्य एवं श्री ललित कुमार, न्यायिक सदस्य के समक्ष
BEFORE: SHRI T.R.MEENA, AM & SHRI LALIET KUMAR, JM

आयकर अपील सं./ITA No.296/JP/2014
निर्धारण वर्ष/Assessment Years : 2007-08.

Ajay Traders, Neelam Chowk, SBI Road, Bhiwadi (Alwar).	बनाम Vs.	The DCIT, Central Circle, Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AAFFA 8750 Q		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से/ Revenue by: Shri G.R. Pareek (JCIT)
निर्धारिती की ओर से/ Assessee by by : Shri Rajeev Sogani (C.A.)

सुनवाई की तारीख / Date of Hearing : 05.04.2016.
घोषणा की तारीख / Date of Pronouncement : 06/05/2016.

आदेश / ORDER

PER SHRI T.R. MEENA, A.M.

The appeal filed by assessee is emanating from the order dated 20.02.2014 passed by the learned CIT (A), Alwar for the A.Y. 2007-08. The sole ground of assessee's appeal is against confirming penalty under section 271(1)(c) at Rs. 5,04,900/-.

2. The AO observed that the assessee during the course of search declared an additional income of Rs. 15 lacs for the year under consideration on account of unaccounted/undisclosed sales and included it in the return of income filed for the assessment year under consideration in response to notice under section 153A. Thus the assessee enhanced the income declared in the original return of income

filed under section 139 by Rs. 15 lacs. The AO initiated penalty proceedings u/s 271(1)(c). Before imposing penalty u/s 271(1)(c), the AO gave reasonable opportunity of being heard. In response to the notices, the assessee filed reply on 15.03.2011 in the Office of the AO and requested to allow the time for submission. The AO again gave show cause notice on 17.03.2010 and case was finally fixed for 29.03.2011. The assessee filed the reply on 28.03.2011. The assessee requested before the AO to drop the penalty proceedings by relying on the various decisions as under :-

Dilip N. Shroff vs. JCIT (2007) 291 ITR 519
CIT vs. S.D.V. Chandru, 266 ITR 175 (Mad.)
CIT vs. Suresh Chand Mittal, 241 ITR 124 (MP)
ITO vs. Suraj Bhan, 294 ITR 481 (P&H)
Sir Shadilal Sugar and General Mills Ltd. vs. CIT, 168 ITR 705 (SC)
CIT vs. Bhuramal Manikchand (1981) 130 ITR 129.
CIT vs. Jhagru Ram Kunda Ram (1972) 86 ITR 823.
Indian Cashaw Trading co. vs. CIT (1974) 97 ITR 676.
Gokuldas Harivallabh Das (1958) 34 ITR 98.

After considering the assessee's reply, the AO held that facts of the case laws relied upon are not squarely identical to the case of the appellant. He further considered the Hon'ble Supreme Court decisions in detail on facts and legal aspects in the case of Dilip N. Shroff, Dharmendra Textile Processors (supra), Suresh Chand Mittal and held that Explanation-1 of section 271(1) of the Act to provide relief whereas in the case of the assessee penalty is imposable in view of Explanation 5A of section 271(1). The case law cited by the assessee never considered the Explanation 5A of section 271(1). The assessee further submitted that on the basis of his suo moto

statement and offer made, the income declared and tax due thereon has been paid by him and accepted by the department. However, the department has to accept his condition of not imposing penalty. The AO held that on the basis of statement recorded of Shri Ajay Agarwal by which surrender on behalf of the assessee being partner of firm had been made, no undertaking has been given the department that no penalty would be imposed in case of the assessee in view of surrender of unaccounted/undisclosed by him. Imposition of penalty in cases governed by provisions of section 271(1) and Explanation-5A of it and not by any other consideration. In the present case of the assessee, penalty proceedings u/s 271(1)(c) had been initiated on account of concealment of income to the extent of Rs. 15 lacs as its case was specifically covered by the provisions of Explanation 5A to section 271(1). As per this section, penalty under section 271(1)(c) for deemed concealment of particulars of its income is imposable in the case of assessee. Therefore, he imposed 100% penalty of tax sought to be evaded at Rs. 5,04,900/- under this section.

3. Being aggrieved by the order of the AO, assessee carried the matter before Id. CIT (A) who has confirmed the penalty by observing as under :-

"5.7. I have gone through the copy of the above order passed by the Hon'ble ITAT, Jodhpur Bench and find that after considering the provisions of section 271(1)(c) of the IT Act and the decisions of the Hon'ble Supreme Court rendered in the case of Dilip N. Shroff vs. JCIT & Anr., UOI vs. Dharmendra Textile Processors as well as UOI vs. Rajasthan Spinning & Weaving Mills and also CIT vs. Reliance Petro Products Pvt. Ltd., Hon'ble Tribunal has held that to attract penalty in a case, the details supplied in the return of income must not be accurate, not exact or correct, not according to the truth or erroneous. Where there is no finding that details supplied by the assessee in its return are found to be incorrect or erroneous or false, there is no question of inviting the penalty u/s 271(1)(c) of the IT Act.

5.8. I have also considered the judgment of the Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. vs. CIT as reported in 358 ITR 593. It has been held by the Hon'ble Court that there is no automatic immunity from penalty even if surrender has been made subject to non-initiation of penalty proceedings and prosecution. The initiation of penalty proceedings has been held to be justified under explanation 1 to section 271(1)(c) of the IT Act in that case. However, the facts prevailing in the present case are distinguishable from that case.

5.9. I find that the judgment given by the Hon'ble ITAT Jodhpur Bench is also not applicable to the facts of this case, as the ITAT had not considered in its order the provisions of Explanation-5A to Section 271(1)(c) of the IT Act. The other decisions cited by the appellant are also relating to the period before the insertion of Explanation-5A to section 271(1)(c) of the IT Act. It would be relevant at this stage to consider the provisions of Explanation-5A to Section 271(1)(c) of the IT Act, which were in the statute as on the date of search [as the provisions have been amended by the Finance Act (No.2) of 2009 w.r.e.f. 01-06-2007] i.e. as on 17.09.2008. The relevant provisions are as under :-

"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 (hereinafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (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 the search and the due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such incomes declared by him in any return of income furnished on or after the date of the 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."

5.10. In this case, the appellant has himself made a disclosure of additional income of Rs. 15 lacs on account of unaccounted sales and thus the requirement of clause (ii) of the above Explanation-5A that **"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”, could be said to have been satisfied in real sense. The disclosure in this case has been made by the appellant on account of his inability to explain the entries.

5.11. In view of the above discussion, I find that the provisions of Explanation-5A to Section 271(1)(c) of the IT Act are clearly applicable to the facts and circumstances of this case. Accordingly, I confirm the levy of penalty of Rs. 5,04,900/- imposed by the AO u/s 271(1)(c) of the IT Act, 1961.”

4. Now the assessee is in appeal before us.

4.1. The Id. A/R for the assessee submitted that there was a search under section 132 of the IT Act on the assessee firm along with other group entities, HUFs, Individuals etc. on 17.09.2008. In order to buy peace and to cooperate with the department, total amount of Rs. 3 crores for the entire group was offered as additional income u/s 132(4) of the IT Act. The assessee has disclosed additional income under the head 'Income from other sources'. Return for A.Y. 2007-08 was filed by declaring an income of Rs. 82,88,590/- on 30.04.2010 which was accepted by the AO and no further addition was made by him. It is fact that assessee has enhanced the income by Rs. 15 lacs to the income declared in the original return of income. The AO invoked provisions of Explanation-5A to section 271(1)(c). During the course of search, no incriminating documents were found which is evident from the assessment order that no addition had been made by the AO. He accepted the returned income. The Id. CIT (A) also confirmed the penalty by mis-placing the Hon'ble Supreme Court decision in the case of MAK Data Pvt. Ltd. vs. CIT (2013) 358 ITR 593 (SC). The surrender of income in the revised return was voluntary and suo moto. Additional income disclosed under section 153A in the return does not lead to the conclusion that the assessee firm was having undisclosed income or had

concealed the particulars of income. The surrender was made on the basis of statement recorded u/s 132(4) of the IT Act. He further argued that under similar facts and circumstances which came before the Hon'ble Delhi High Court in the case of Raj Pal Bhatia (2011) 333 ITR 315 (Delhi) wherein the Hon'ble Court held that statement could not be construed as material found during the course of search operations for the purpose of Chapter XIV-B. The case law applied by the Id. CIT (A) has mis-placed the fact that in that case certain documents pertaining to share applications were found during the course of survey, whereas in assessee's case no incriminating documents were found. Therefore, case law relied upon by the Id. CIT (A) is not applicable. He further argued that ITAT Mumbai in the case of financial Technologies (I) Ltd., (2015) 61 Taxmann.com 406 held that Explanation-5A has been used by the legislature where any money, bullion, jewellery or other valuable article or thing found during the course of search which has not been disclosed by the assessee and additions were made on account of unaccounted money, bullion etc. In this case as such revenue has not brought on record any material to prove that unaccounted money, jewellery or incriminating documents were found. He further has drawn our attention to ITAT Jaipur Bench decision in the case of Shri Radhey Shyam Mittal, ITA No. 1013, 1014 & 1015/JP/2013 deleting penalty imposed by the Assessing Officer by invoking Explanation 5A to section 271(1)(c), wherein the Tribunal held that penalty under Explanation 5A to sec. 271(1)(c) has to be made where any incriminating documents are found during the course of search. In the case of assessee, no incriminating documents were found, therefore, the coordinate Bench had deleted the addition. The Id. A/R of the assessee requested to delete the penalty confirmed by Id. CIT (A).

4.2. At the outset, the Id. D/R vehemently supported the order of Id. CIT (A).

4.3. We have heard rival contentions and perused the material on record. It is undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income under section 132(4) at Rs. 15 lacs and requested not to impose penalty u/s 271(1)(c) of the IT Act. The Id. AO imposed the penalty by invoking the Explanation 5A to section 271(1)(c) of the Act, which has been confirmed by Id. CIT (A) by considering the judgment of Hon'ble Supreme Court in the case of MAK Data Pvt. Ltd. (supra). But for imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A of the Act. The issue has been considered by various High Courts as well as by ITAT as relied upon by the assessee, which are squarely applicable to the case of the assessee. As no incriminating documents were found during the course of search, therefore, Explanation 5A to section 271(1)(c) is not applicable. Accordingly, we delete the penalty confirmed by Id. CIT (A).

5. In the result, assessee's appeal is allowed.

Order pronounced in the open court on 6/05/2016.

Sd/-
(ललित कुमार)
(Laliet Kumar)
न्यायिक सदस्य/Judicial Member

Sd/-
(टी.आर.मीना)
(T.R. Meena)
लेखा सदस्य/Accountant Member

जयपुर/Jaipur

दिनांक/Dated:- 6/05/2016

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s. Ajay Traders, Bhiwadi.
2. प्रत्यर्थी / The Respondent-The DCIT, Central Circle, Alwar.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 296/JP/2014)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

Sl. No.		Date	Initial
1	Date of dictation		
2	Date on which the typed draft is placed before the Dictating Member		
	Other Member.....		
3	Date on which the approved draft comes to the Sr.P.S./P.S		
4	Date on which the fair order is placed before the Dictating Member for pronouncement		
5	Date on which the fair order comes back to the Sr.P.S./P.S.		
6	Date on which the file goes to the Bench Clerk		
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 Dispatch of the Order		