

Board of Industrial and Financial Reconstruction (BIFR) ordered for winding up. Just before passing the order of winding up the AO passed order u/s 143(3) on 10th Feb.2000 determining the assessed income at 'nil'. Thereafter penalty was levied u/s 271(1)© on deemed income of Rs. 3,90,43,136/- being loss claimed and disallowed.

2.2. On 14th Feb.,2001 the Hon'ble Delhi High Court appointed an official liquidator. On 31.10.2002, the Ld.CIT(A) dismissed the appeal of the assessee filed against the order of the AO passed u/s 143(3), ex parte. On 25.3.2003 the official liquidator vide letter dt. 25.3.2003 informed the AO that the Hon'ble Delhi High Court vide order dt. 16.4.2001, directed the official liquidator not to take any further steps, pursuant to the Court Order dt. 14.2.2001 and hence no reply is filed by the official liquidator before the AO. The Advocate of the assessee company had also informed the AO that the company is in liquidation.

2.3. The AO passed an ex parte penalty order on 27.5.2003 u/s 271(1)© and instead of serving the same on official liquidator, the AO served the same on the assessee. The assessee on 5.6.2003 passed on the penalty order to the official liquidator with the request to take necessary action, as he was the competent authority. The official liquidator did not take any action.

2.4. On 15.12.2004, the final winding up order was passed and regular official liquidator appointed. On 1.1.2005 the main director of the assessee company who looked after all the affairs, Shri RK Srivastav, passed away, after prolonged illness from 1999 to 2004 due to transplantation of kidney.

2.5. On 18.11.2009 the assessee received a demand notice from the department dt. 4.5.2006 through the official liquidator, vide letter dt. 18.9.2009. Thereafter the assessee filed an appeal before the First Appellate Authority against the order of penalty passed by the AO u/s 271(1)© of the Act with a delay of 2565 days.

3. The Ld.CIT(A) dismissed the appeal of the assessee both on the ground that the delay and on merits. He held that the assessee has not shown any reasonable cause and hence he refused to condone the delay. The Ld.CIT(A) also considered the arguments of the assessee on merits and came to a conclusion that the loss claimed by the assessee was not genuine and was claimed to defraud the interest of the Revenue.

3.1. Aggrieved the assessee is before us.

4. The Ld.Counsel for the assessee Mr.Raj Kumar Gupta submitted that the Ld.CIT(A) was wrong in not condoning the delay in filing of the appeal. He submitted that the delay in this case can be broken up into two parts – the first part is the delay of 2367 days which is attributable to the action of the official liquidator. He pleaded that the assessee was under a bonafide impression that the appeal must have been filed by the official liquidator. He vehemently contended that the official liquidator is the competent authority and the latches on his part cannot be fastened on the assessee. On the second part he submitted that the assessee got the information that the penalty has been demanded, when the official liquidator forwarded a demand notice, to the assessee on 18.11.2009 and after 198 days the assessee filed the appeal. He submits that after excluding 30 days allowed for filing the appeal, the balance period of delay would be 180 days which has to be explained.

4.1. He further submitted that, the only working and active Director of the company was Shri RK Srivastav who died on 1.1.2005 after prolonged illness from 1999 to 2004, and has left behind, his wife Smt.Rekha Srivastava, who was a house wife and who is a stranger to income tax. He submitted that Smt.Rekha Srivastav took time to understand the issue that led to demand notice and thereafter she had to collect all the relevant papers, as the books of accounts etc. were impounded by the AO during the assessment proceedings on 27.1.2000 and as the balance of records/books were taken by the official liquidator of the High Court vide order dt. 14.1.2001. He submitted that the assessee company closed its operations

in 1997-98 and it had no staff, no office or activity or liquidity, which state of affairs continues till date. He pleaded that the widow of the Director, after taking huge efforts, could file this appeal before the First Appellate Authority and under those circumstances there was a reasonable cause for delay and the first appellate authority should have condoned the delay. He relied on a number of case laws in support of his proposition. We would be dealing with them during the course of our finding.

4.2. On merits Mr.Rajkumar Gupta submitted that the assessee's turnover/total revenue receipts, during the year was only Rs.4,79,391/- and against this a huge penalty of Rs.1.66 crores has been levied. He submitted that a perusal of the assessment order demonstrates that the AO has not dealt with the objections of the assessee, nor did he give any reasons for determining the income at 'nil'. He submitted that the assessment order was passed in a summary manner, on the ground that there are certain mismatch in figures, as per balance sheet, profit and loss a/c vis-à-vis books of accounts and made a deemed addition of Rs.3,90,43,136/-. He submitted that as the assessee company was in liquidation, the return of income was filed based on a provisional balance sheet and there after the auditors of the assessee company opined that certain expenditure is not allowable and under those circumstances variation in claim had occurred. He submitted that the assessee had given detailed explanation before the AO on these variations and the AO has not looked into the item wise explanations provided. He submitted that the assessment order was made on pure guess work, not specifying any undisclosed income or concealed income.

4.3. His submissions are mainly three fold (i) penalty cannot be levied on additions made on estimate basis; (ii) no penalty can be levied if the AO has not considered the explanation offered at the stage of assessment proceedings, inspite of the fact that it was available with him before the imposition of penalty; (iii) penalty cannot be levied on deemed income; (iv) the AO should be clear as to whether the penalty in question is levied for concealment of income or on the charge that the assessee has furnished

inaccurate particulars of income; (v) without prejudice, if it is to be considered, that the penalty is to be levied on the charge of concealing of particulars of income, based on the notings in the assessment order. Then, there is no undisclosed income that has been a subject matter of addition. It was submitted that the difference between the returned income and the assessed income is not on account of finding of assessee having any concealed income. Reliance was placed on a number of case laws which are as under :-

- i) Sangrur Vansspati Mills Ltd. 171 Taxmann 320 (P & H)
- ii) CIT vs. Krishi Tyre Retreading & Rubber Industries 263 CTR (Raj.) 484
- iii) Ajaib Singh & Co. 253 ITR 630 (P&H)
- iv) CIT vs. P. Govindasmay 263 ITR 509 (Mad.)
- v) CIT vs. G.R. Rajendran 259 ITR 109 (Mad.)
- vi) CIT vs. Pushpendra Suran 264 CTR (Raj) 204
- vii) CIT vs. Baroda Tin Works 221 ITR 661 (Guj.)
- viii) New Sorathia Engg. Co. vs. CIT 282 ITR 642 (Guj.)

5. Ld. D.R. Smt.Parminder Kaur, on the other hand opposed the contentions of the assessee. She submitted that perusal of the assessment order demonstrates that, the assessee admitted and filed a revised return of income, recomputing the loss at Rs.34,72,540/-. She argued that the variation between the loss declared in the original return of income at Rs.3,90,43,136/- and the revised return of income is huge and points out to the fact that the assessee had concealed its income. She submitted that the assessee had not heeded to the advice of its auditors and has claimed certain expenses which were rightly disallowed by the AO though the assessee had filed the revised return of income. She specifically took this Bench through para 6 of the Ld.CIT(A)'s order at page 11.

5.1. On the issue of condonation of delay she relied on the order of the First Appellate Authority and submitted that the second limb of the delay of 198 days was beyond reasonable cause. She argued that Courts have laid down that every day delay has to be explained. She argued that the Director of the appellant company was alive during passing of the penalty order and even after his death the appeal has been filed after a long gap.

6. In reply the Ld.Counsel for the assessee submitted that the suggestion of an auditor is only an opinion and the assessee is not bound by the same. He further submitted that the AO rejected the revised return on the ground that it is non-est in law. He reiterated that the company was sick and the return of income was filed based on provisional balance sheet and accounts and thereafter, when the auditors said that certain expenses claimed cannot be allowed on technical grounds, due cognizance was taken of these observations and a revised return of income was filed in a fair manner.

7. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, on perusal of orders of authorities below, material placed on record and case laws cited, we hold as follows.

8. The Ld.CIT(A) at para 2 page 3 has rejected the plea of the assessee for condonation of delay in filing of the appeal before him on the following grounds.

- a. The assessee was aware of the penalty proceedings as the order was served on him;
- b. The main Director of the assessee company Shri RK Srivastav was alive during the passing of penalty order. He died on 1.1.2005.
- c. Even after the death of the main Director the appeal has been filed after a gap of 5 yrs-6 months, for which no explanation is given by the assessee;
- d. The assessee has not shown any cogent reason for filing the appeal with delay, except the sickness of Shri RK Srivastav.

8.1. In our view these findings of the First Appellate Authority are not factually correct for the following reasons.

8.2. The assessee company was declared a sick company on 23.2.2000, where the BIFR ordered its winding up. On 14th Feb.2001 the Hon'ble Delhi High Court appointed an official liquidator. This fact was informed to the AO. The AO passed an ex parte penalty order on 27.5.2003. He has not served this penalty order on the official liquidator, who is the competent authority. Instead he served the penalty order on the assessee company, which in turn informed the official liquidator and requested the official liquidator to take necessary action. This act of the company shows its bonafide. Under the circumstances, the fact that Shri RK Srivastav was alive during the passing of the penalty order, is not a relevant circumstance as he could not have filed an appeal against the penalty order. The company had in our view acted in a diligent and bonafide manner and communicated the fact of passing of a penalty order to the official liquidator with the request for further action. When the official liquidator, who is the competent authority in this case, does not take any action the assessee cannot be blamed.

The undisputed fact is that the main Director of the company Shri RK Srivastav fell sick in 1998 and developed severe diabetes and heart problems and ultimately passed away on 1.1.2005. He was survived by his wife, who is a housewife and who was not knowing the affairs of the company.

8.3. The Ld.CIT(A) further observes that after the death of Mr. Srivastava 5y-6m has elapsed, before filing of the appeal and the assessee has not given any cogent reasons to explain the delay. This conclusion of the Ld.CIT(A) is also wrong for the reason that a regular official liquidator was appointed by the Hon'ble Delhi High Court on 15.12.2004 and it was the official liquidator who was competent to file an appeal. Thus, this ground taken by the First Appellate Authority to refuse the condonation of delay is untenable.

8.4. In our view, when the company is under liquidation, and when any official liquidator was appointed and was in charge of the affairs of the company, he should have filed the appeal and perused the matter. We are of the view that the contention of the assessee that it was under a bonafide belief, that the appeal would have been filed by the official liquidator, is correct.

8.5. The official liquidator passed on the letter of demand sent by the AO to the assessee vide letter dt. 18.11.2009. At that point of time the Company's affairs were being taken care of by Smt.Rekha Srivastav, the wife of Late Shri RK Srivastav. Admittedly she is a house wife and unaware of the complexities of the Income Tax law. She had to collect information and papers. The books of accounts of the assessee were impounded by the AO and were still lying with him. The balance records/books were with the official liquidator. There is no active Directors in the company. The company was sick and has no business from the AY 1997-98. Under these circumstances we are of the considered opinion that the assessee was prevented from sufficient cause in filing the appeal in time before the First Appellate Authority and under those circumstances, the delay in question is to be condoned.

8.6. The ITAT "C" Bench of Ahmedabad in ITA no.954/Ahmd./2009 for the AY 2003-04 vide order dt. 14.10.2011 had considered in a similar case, at para 6 page 8 held as follows.:

"6. We have considered the rival submissions and material on record. It is not a disputed fact that the assessee went in liquidation at the initial stage because of the order passed by the Hon'ble Gujarat High Court and the Official Liquidator was appointed in the matter. The AO framed the assessment in the name of the Official Liquidator attached to the assessee company and ultimately after various rounds of litigations and taking steps in the matter winding up was set aside by the Hon'ble Gujarat High Court in January, 2008. These facts were sufficient to hold that the assessee was prevented from sufficient cause from preferring the appeal in time before the Tribunal. Since the existence of the assessee was in liquidation before the Hon'ble Gujarat High Court, therefore, the assessee could not have moved the appeal for the purpose of filing appeal before the Tribunal. Considering the facts and circumstances and the documents placed on record, we have to

take pragmatic and liberal approach while condoning the delay in the matter.”

8.7. In view of the above discussion, we are of the view that the Ld.CIT(A) should have condoned the delay in filing of the appeal before him. In the result we allow ground nos. 2 and 3 of the assessee and condone the said delay in filing of the appeal before the Ld. CIT(A).

8.8. Ground nos.4 and 5 are on merits.

8.9. A perusal of the assessment order demonstrates that it has been passed in a cursory and summary manner, de hors of any detail, except for mentioning that certain figures had not tallied, no analysis whatsoever or reasons leading to the disallowance, are given by the AO. AO simply says that the assessee has filed reply explaining the discrepancies but does not give any reason as to why the explanation cannot be accepted. Nowhere in the penalty order the charge on which penalty is being levied has been specified. Such an assessment, in our view cannot be a basis for levy of penalty u/s 271(1)(C).

8.10. The Hon'ble Jurisdictional High Court in New Holland Tractors India (P) Ltd. Vs. CIT in ITA 182/2002 judgement dt. 25th September,2014 at para 26 observed as follows.

“26. The word ‘conceal’ inherently and per se refers to an element of mens rea, albeit the expression furnishing of inaccurate particulars is much wider in scope. The word ‘conceal’ implies intention to hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other. (See CIT vs. A.Subramania Pillai (1997) 226 ITR 403 (Mad). The word ‘conceal’ means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word ‘concelare’ which implies ‘con’ and ‘celare’ to hide. It means to hide or withdraw from observation, to cover or keep from sight, to prevent discovery of, to withhold knowledge of. The word ‘inaccurate’ in Webster’s Dictionary has been defined as ‘not accurate, not exact or correct, not according to truth, erroneous, as inaccurate statement, copy or transcript.’ The word ‘particular’ means detail or details of a claim or separate items of an account (See CIT vs. Reliance Petroproducts Pvt.Ltd. (2010) 322 ITR 158 (SC). Thus the words – furnished inaccurate particulars is broader and would refer to

inaccuracy which would cause under declaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of accounts etc. (see CIT vs. Raj Trading Co. (1996) 217 ITR 208 (Raj.) Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that adhoc addition per se without other or corroborating circumstances may not reflect – furnished inaccurate particulars. Lastly, at times and it is fairly common, the charge of concealment and – furnishing of inaccurate particulars may overlap.”

8.11 *The Hon’ble Karnatak High Court in the case of CIT vs. Manjunatha Cotton and Gining Factory , Manjunatha Ginning and Pressing, Veerabhadrappa Sangappa and Co., V.S. Lad and Sons, G.M. Exports (2013) 359 ITR 565 (Karn) in ITA Nos. 2564 of 2005, 2565 of 2005, 5020 of 2009, 5022 and 5023 of 2009, 5025 and 5026 of 2010 judgment dated 13th December, 2012 concluded as under :-*

- (a) Penalty under Section 271(1)(c) is a civil liability.*
- (b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.*
- (c) Wilful concealment is not an essential ingredient for attracting civil liability.*
- (d) Existence of conditions stipulated in Section 271(1)(c) is a sine qua non for initiation of penalty proceedings under Section 271.*
- (e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.*
- (f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(1)(c), at least the facts set out in Explanation 11(A) and (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.*
- (g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(1)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1 (B).*
- (h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*
- (i) The imposition of penalty is not automatic.*
- (j) Imposition of penalty even if the tax liability is admitted is not automatic.*

(k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.

(l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not 'bonafide, an order imposing penalty could be passed.

(m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

(n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

(o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

(p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

(q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

(r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

(s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

(t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

(u) The findings recorded in the assessment proceedings insofar as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee

to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessmen or reassessment cannot be declared as invalid in the penalty proceedings.”

8.12. As stated the AO has passed the order in a summary manner, without specifying the grounds of disallowance, item wise. The AO has also not specified the charge on which penalty is being levied. The explanation given by the assessee, during the course of assessment proceedings, explaining the variation between the provisional books and the audited records, were not considered by the AO. Under these facts and circumstances, applying the proposition laid down in the case law referred above, we hold that the penalty levied cannot be sustained. Hence we quash the order levying penalty u/s 271(1)(c) and allow the appeal of the assess.

9. In the result the appeal by the assessee is allowed.

Order pronounced in the Open Court on 16th January, 2015.

Sd/-

(GEORGE GEORGE K)
JUDICIAL MEMBER

Sd/-

(J.SUDHAKAR REDDY)
ACCOUNTANT MEMBER

Dated: the 16th January, 2015

*manga

Copy of the Order forwarded to:

- 1.Appellant;
- 2.Respondent;
- 3.CIT;
- 4.CIT(A);
- 5.DR;
- 6.Guard File

By Order
Asst. Registrar