

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 29.01.2018
Pronounced on: 20.02.2018

+ **ITA 219/2017**

PR. COMMISSIONER OF INCOME TAX-21

..... Appellant

Through: Mr. Zoheb Hossain, Sr.
Standing Counsel for Revenue.

versus

DR. VANDANA GUPTA

..... Respondent

Through: Mr. Abhinav Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The question of law framed for this appeal is as follows:

“Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the penalty of ₹67,98,000/- imposed under Section 271(1)(c) of the Income Tax Act was not leviable in the facts and circumstances of the case?”

2. The brief facts are that the assessee – an individual, filed her return of income on 25.09.2009 in which she declared a total income of ₹9,18,060/-. During the pendency of proceedings for that assessment year, survey was conducted under Section 133A by the Revenue at her business premises (B-1, Rohit Kunj, Pitampura, New

Delhi) on 22.02.2010. In these search proceedings, the assessee who is a Medical Practitioner, surrendered ₹2,00,00,000/- and filed a revised return declaring that amount as additional income. The AO completed scrutiny assessment, by assessing total of the two figures i.e. ₹2,09,18,060/-. He initiated penalty proceedings, on the footing that the assessee had concealed the income and filed inaccurate particulars when she, in fact, filed the return on 25.09.2009. The penalty order was subsequently made on 29.06.2012. The assessee appealed to the CIT (A) against imposition of penalty contending that she neither concealed particulars of income nor furnished inaccurate particulars and that all material disclosures were made during the assessment proceedings. The revised return merely reflected the voluntary disclosures made by her.

3. In the appellate proceedings, the assessee also urged that during survey, no documents or evidence was gathered by the Revenue Department, establishing that she did not, in fact, conceal any particulars of income. The disclosures were not related to any incriminating document or material recovered or gathered during the survey action. The assessee stated that she disclosed the amount to buy peace of mind and avoid further proceedings. The assessee relied upon the statement made by her in the course of the survey in this regard.

4. The CIT (A) considered the contentions of the assessee as well as the decisions cited before him (including the judgments of the Supreme Court in *Dilip & Shroff v. Joint Commissioner of Income Tax*

291 ITR 519 (SC); *MAK Data Pvt. Ltd. v. Commissioner of Income Tax* (2014) 1 SCC 674 and observed as follows:

“..... I find that the appellant has disclosed the income only after a survey was conducted by the Department. Moreover, the disclosure was made as the appellant was unable to produce the books of account for F.Y. 2008-09. She admitted that part of the receipts had not been declared for taxation while filing the Income Tax Return for A Y. 2009-10. This shows that the claim of the Appellant was not bona fide. Therefore, the information furnished by the appellant in the return of income was factually incorrect and the appellant cannot escape the rigors of section 271(l)(c) of the LT. Act, 1961. The Hon'ble Delhi High Court in the case of CIT vs. Escort Finance Ltd., 328 I.T.R. 44 has held that even if there is no concealment of income or furnishing of inaccurate particulars, but if a claim which is ex-facie bogus is made, the same will still attract penalty provisions. Similar views have been expressed by the Hon'ble Court in the case of CIT vs. Zoom Communications (P) Ltd. holding that very few returns are selected for scrutiny and therefore, non- sustainable claims cannot be said to be bonafide.”

5. The CIT (A) was of the opinion that the assessee could be said to have concealed material particulars and filed inaccurate returns. The ITAT- whom the revenue appealed to, held that since the assessee disclosed the income in the revised return which was in consonance with the voluntary statement made by her, the exercise of discretion in assuming jurisdiction and imposing penalty was unwarranted. In so concluding, the ITAT went by the decision of this Court in *Commissioner of Income Tax v. SAS Pharmaceuticals* (2011) 335 ITR. The ITAT was also of the opinion that the AO was wrong in invoking jurisdiction without first premising the notice upon one or the other

condition i.e. with respect to concealing of income or filing inaccurate particulars. For these two reasons, the ITAT allowed the assessee's appeal and granted the relief.

6. Counsel for the Revenue urges that the ITAT fell into error in holding that Section 271(1)(c) was not attracted to the circumstances of this case. It was pointed out that prior to the survey (on 22.02.2010), the assessee had filed a return, which failed to disclose the true particulars. It was only during survey proceedings that she surrendered income to the extent of ₹2,00,00,000/- and revised the returns subsequently. The fact that she voluntarily revised the return, would not absolve the assessee from liability to penalty. Learned counsel submitted that the onus of proving that the returns were filed accurately, in the circumstances shifted to the assessee. Once it was shown that additional income was surrendered and a revised return was filed, it was up to the assessee to establish that, in fact, the omission was bona fide or that there was a cogent and reasonable explanation. In this respect, learned counsel relied upon the explanation inserted by the Finance Act, 1964 to Section 271(1)(c) and also cited the judgment reported as *Additional Commissioner of Income Tax v. Jeevan Lal Shah* 205 ITR 244. It was highlighted that the object of omitting the expression “deliberately” from the provision i.e. Section 271(1)(c) was to remove the requirement of a mental state and shifting the burden of proof to the assessee. In support, the Revenue relied upon *Commissioner of Income Tax v. Musaddilal Ram Bharose* 165 ITR 14 (SC).

7. Lastly, counsel relied upon the judgment of a Division Bench of this Court in *Commissioner of Income Tax v. Zoom Communications Pvt. Ltd.* (2010) 327 ITR 510. Counsel for the assessee argued that Section 271(1)(c) plainly states that an act of concealment or furnishing inaccurate particulars can relate only to a return. It is submitted that in the present case, returns were filed and the mere circumstance that the survey was conducted leading to further disclosures that led to additions could not have legitimately led to the Revenue authorities concluding that there was concealment of material particulars. The assessee did all that she was expected to do when the survey was conducted. Concededly, no material was seized; the record bears testimony to the fact that she voluntarily offered ₹2,00,00,000/-. Learned counsel placed heavy reliance upon the judgment of this Court in *SAS Pharmaceuticals (supra)* and stated that in that decision the Court in similar circumstances where additions were made based upon disclosures during the survey, nevertheless held that the initiation and imposition of penalty, would be based on surmises unless there is some intentional omission. Learned counsel also points out the decision of the Court in *Commissioner of Income Tax v. Mohandas Hassanand* 141 ITR 203 in support of his submission.

8. Learned counsel submitted that like in the facts of the present case, penalty imposed in the cases of additional income surrendered after survey were held to be unwarranted by different High Courts. Reliance was placed upon the judgment of the Punjab & Haryana

High Court in *Commissioner of Income Tax v. Bharat Rice Mills* 201 Taxation 633; *Additional Commissioner of Income Tax v. Bharatiya Bhandar* (1979) 13 CTR 159 (MP) and *Commissioner of Income Tax v. SI Paripushpam* 249 ITR 550 (Mad.).

9. Learned counsel contended that in the case of search assessments, if the conditions spelt out in Explanation 5 to Section 271(1)(c) are satisfied, penalty cannot be levied. In the present case, however, no search took place and; a mere survey was conducted. Admittedly, no incriminating or damaging material or documents were seized. The assessee of her own record and in order to buy peace, surrendered ₹2,00,00,000/-. Without a finding that the returns (subsequently revised in consonance with law) did not furnish material particulars or were inaccurate in material facts, penalty could not have been imposed. It was stated that for these reasons, the impugned order is reasonable and does not call for interference.

10. The above factual background shows that when originally filed, the assessee had not disclosed the income that she ultimately declared. On 22.02.2010, during the course of survey, she voluntarily surrendered ₹2,00,00,000/- and filed a revised return declaring that amount as additional income. She later filed a revised return. Based on it, the assessment was completed and accepted. The AO imposed and the CIT (A) affirmed penalty under Section 271 (1) (c) of the Act. The ITAT, professing to follow certain decisions of this court, held that there was no concealment of income or filing of inaccurate particulars.

11. In *SAS Pharmaceuticals* (supra) relied upon by the assessee and ITAT, in this case, it was observed as follows:

“15. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income tax return filed by it. There is sufficient indication of this in the judgment of this Court in the case of Commissioner of Income Tax, Delhi-I Vs. Mohan Das Hassa Nand 141 ITR 203 and in Reliance Petroproducts Pvt. 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.

17. 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 the provisions of Section 271 (1) (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 only on surmises, conjectures and possibilities. Section 271 (1) (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 purposes of tax.”

12. It is instructive at this stage to notice that after *SAS Pharmaceuticals (supra)* was decided, the Supreme Court rendered its ruling in *MAK Data Private Ltd v Commissioner of Income Tax (supra)*. The facts there are interesting; they bear a close comparison with the circumstances of this case. During scrutiny assessment of the assessee, survey of its sister concerns was done; the assessee at that stage volunteered and surrendered some amounts, based on the following statement:

“The offer of surrender is by way of voluntary disclosure of without admitting any concealment whatsoever or with any intention to conceal and subject to non-initiation of penalty proceedings and prosecution.” All the appellate authorities and the High Court upheld throughout the ensuing penalty. Rejecting the assessee’s appeal, the Supreme Court observed as follows:

“The AO, in our view, shall not be carried away by the plea of the assessee like “voluntary disclosure”, “buy peace”, “avoid litigation”, “amicable settlement”, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271 (1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271 (1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of

income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

10. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of Section 271 (1) (c) has also been elaborately discussed by this Court in Union of India v Dharmendra Textile Processors (2008) 13 SCC 369 and CIT v Atul Mohan Bindal (2009) 9 SCC 589.

11. The principle laid down by this Court, in our view, has been correctly followed by the Revenue and we find no illegality in the department initiating penalty proceedings in the instant case. We, therefore, fully agree with the view of the High Court.”

13. In the present case too, the assessee merely made a voluntary surrender; she did not offer any explanation as to the nature of income or its source. The observations in *MAK Data (supra)* are that the authorities are not really concerned with the statement- whether voluntarily or otherwise and have to see whether there was any non disclosure of material facts, or income. The complete failure to furnish any details with respect to the income, which if given could have been the only reasonable basis for deletion of penalty, in the opinion of the court, reinforced the views of the AO and CIT (A) that the revised return was an afterthought, based on the subsequent event of disclosure of ₹2,00,00,000/-. The court further notices that by reason of Explanation 1 to Section 271(1)(c), an assessee is not absolved of penalty, if she or he “*offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and*

that all the facts relating to the same and material to the computation of his total income have been disclosed by him". The mere offer therefore, of the amount during the search in the absence of any explanation for the source of income, renders the assessee's argument insubstantial in the totality of circumstances.

14. For the foregoing reasons, the question framed is answered against the assessee and in favour of the revenue; the appeal is therefore allowed but without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

FEBRUARY 20, 2018

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