qqIN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'B', HYDERABAD

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No. 535/H/2019 Assessment Year: 2009-10		
Kamala Shiva Kumar, Secunderabad. PAN – APKPK 1463 N	Vs.	Income-tax Officer, Ward – 10(3), Hyderabad.
(Appellants)		(Respondent)

Assessee by:	None
Revenue by:	Shri Rohit Mujumdar
Date of hearing:	16/03/2021
Date of pronouncement:	03/05/2021

O R D E R

PER L.P. Sahu, AM:

This appeal filed by the assessee for AY 2009-10 is directed against the CIT(A) - 6, Hyderabad's order, dated 12/01/2018 involving proceedings u/s 271(1)(c) of the Income Tax Act, 1961 ; in short "the Act".

2. We notice at the outset that assessee's instant appeal suffers from 353 days delay in filing. To this effect, the assessee filed petition for condonation of the said delay therein, inter-alia that due to the ill health during the relevant period, caused the impugned delay in filing of the instant appeal. Case law Collector Land Acquisition vs Mst. Katiji & Ors, 1987 AIR 1353 (SC)

and University of Delhi Vs. Union of India, Civil Appeal No. 9488 & 9489/2019 dated 17 December, 2019, hold that such a delay; supported by cogent reasons, deserves to be condoned so as to make way for the cause of substantial justice. We accordingly hold that assessee's impugned delay of 353 days is neither intentional nor deliberate but due to the circumstances beyond its control. The same stands condoned. Case is now taken up for adjudication on merits.

3. Briefly the facts of the case are that assessee, in the business of wholesale trade in electrical goods in the name of M/s Sri Trinetra Electricals, filed his return of income for the AY 2009-10 on 30/09/2009 declaring a total income of Rs. 3,35,670/-. Subsequently, the case was selected for scrutiny, under CASS. During the course of scrutiny proceedings, the AO notice from the 26AS statement that the assessee had received contract receipts amounting to Rs. 1,88,78,974/-, which was not admitted by him in the P&L Account enclosed to the return of income filed. He, therefore, asked the assessee to furnish the reasons for not reflecting the said receipts as income, against which, the assessee vide letter dated 23/12/2011 submitted its reply, which was extracted by the AO in his order at pages 1 & 2.

3.1 The AO rejected the submissions of the assessee on the ground that the assessee has not substantiated any

of his contentions stated in his letter with supporting evidence and did not furnish the details like names and addresses of the persons alleged to have carried on the contract works in the name of the assessee. Rejecting the request of the assessee to estimate profit at 5% of the contract receipts, the AO estimated the assessee's income at 12.5% of the total contract receipts of Rs. 1,88,78,974/- which worked out to Rs. 23,59,872/-.

3.2 When the assessee preferred an appeal before the CIT(A), the CIT(A) directed the AO to compute the net profit at 8% of the contractual receipts.

4. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) vide letter dated 08/03/2016 on the ground that the assessee has furnished inaccurate particulars by not accounting the income earned from the execution of contract works and earned undisclosed income which is not disclosed to the department. In the penalty proceedings, the assessee stated that the contract receipts pertain to the business done along with associates and all transactions were carried out by his associated and also stated that he did not admit income from the contact receipts in the return of income nor claimed credit for TDS. He, therefore, requested to drop the penalty proceedings initiated u/s 271(1)(c) on the ground that the income had been assessed on estimate basis and that the tax liability is covered by

TDS and also the fact that the business was done by his associates.

4.1 Rejecting the submissions of the assessee, the AO levied minimum penalty of Rs. 4,96,945/- u/s 271(1)(c) of the Act.

5. On appeal before the CIT(A), the CIT(A) confirmed the penalty.

5. Aggrieved by the order of the CIT(A), the assessee is in appeal before the ITAT raising a ground that the levy of penalty is not maintainable since the notice issued u/s 274 rws 271(1)(c) dated 28/12/2011 does not contain if the proceedings are initiated for concealment of particulars of income or furnishing of inaccurate particulars of such income. Also raised a ground on merit that the levy of penalty u/s 271(1)(c) of the Act is not justified since the substantial part of the additional tax liability of Rs. 4,96,945/- is covered by corresponding TDS of Rs. 4,21,811/- for which credit was not claimed in the return of income.

6. None appeared on behalf of the assessee at the time of hearing. However, we proceed to decide the appeal after hearing the ld. DR and the facts available on record.

7. After hearing the ld. DR and perusing the material on record as well as the orders of revenue authorities, we do not want to adjudicate the legal ground raised by the assessee as notice issued by the AO u/s 274 rws 271(1)(c) is not filed on record.

7.1 As regards the ground raised on merits, on going through the orders of authorities below, we observe that penalty has been imposed by the AO on the ground of non-disclosure of the contract works and addition made on estimated basis, on which penalty has been imposed by the AO for furnishing of inaccurate particulars of income during the year. Penalty cannot be levied on the estimate addition.

> ***"4.1** With regard to the levy of penalty on addition of Rs. 1,38,750, it was submitted that penalty was imposed merely on estimate of income. The AO rejected the assessee's contention on the reason that the plot though had not been sold at the price lower than the price fixed by the revenue authorities, the same was not applicable to the assessee as income from the sale of plot was shown under the head 'business income'. Further, for some of the plots the rates are very lower and the contention of the assessee has already been rejected by the CIT(A) under s. 264 of the IT Act. The assessee challenged the penalty order before CIT(A) and it was submitted that penalty is imposed without arising any reason. The assessee has, purchased land at Rahon Road, Ludhiana from 9th Feb.. 2004 onwards upto financial year 2006-07 and development of the above land had been carried out during the above period. The total cost of land available for sale measuring 13100 square yards after leaving space for roads and parking etc. including estimated development charges works out at Rs. 721 per square yard. During the year under consideration, the assessee had sold four plots measuring 982.5 square yards for Rs. 7,86,000 on rates varying from Rs. 456 per square yard to Rs. 1,056 per square yard and earned net profit of Rs. 77,600. The above profit has been disclosed in the return under the head 'business income'. The sale rates are supported by sale deeds. The irregularities in the shape of the land had been attended to and due to various reasons there was difference in the rates. The Judgment of the Hon'ble Supreme Court in the*

case of K.P. Varghese v ITO [1981] 131 ITR 597/7 Taxman 13 was relied on in which it was held that it is only the registered value of any property which has to be considered and the onus of establishing that any amount was received over and above the amount declared is always on the Revenue. It was further submitted that addition is merely on the estimate basis so it is not a conclusive evidence to prove that assessee has concealed the particulars of income or filed inaccurate particulars of income. No evidence was found during the course of search for levy of the penalty. It was, therefore, submitted that levy of penalty may also be cancelled. The learned CIT(A) on consideration of the submissions of the assessee, cancelled the penalty under this head also. The findings of the learned CIT(A) in para 8 of the appellate order arc reproduced below :

"8. I have considered the facts of the case and the basis of penalty imposed by the AO on the issue. It is a matter of fact that the addition made is purely on estimate basis and nothing had been brought on record by the AO which could be termed as evidence to reject the sale price as recorded in the registered document. The AO rejected the various contentions of the appellant for having sold the plot at price lower than the normally expected price by recording his own conclusions and finally proceeding to make the addition by substituting an estimated sale price as against the price recorded in the registered document which was not below the price fixed by the Revenue authorities. The addition so made got confirmed before the CIT(A) in proceedings under s. 264, but the fact remains that the AO even during the penalty proceedings has merely relied upon the addition made and sustained and not brought any evidence to hold that the plot in question had actually been sold at price other than the registered price. The penalty under s. 271(1)(c) would not be leviable as the assessee had given detailed explanation for charging lower rates and the same have not been controverted by the AO by bringing on record any evidence to show that the reasons/explanation given by the assessee was false or unsubstantiated. The relianced place by the Authorised Representative on the Hon'ble Punjab & Haryana High Court judgment in the case of CIT v. Sangrur Vanaspati Mills Ltd. is perfectly in order. As such the penalty imposed by the AO deserves to be deleted."

***5.** The learned Departmental Representative relied upon the order of the AO and submitted that assessee has not disclosed suo motu the surrendered amount of Rs. 45 lakhs in his return of income, therefore, it is a case of concealment of income and the revised return was filed after the AO detected the concealed income upon which show cause notice was issued on 24th Dec, 2008. Therefore, it is a fit case of concealment of income and penalty should have been levied. The learned Departmental Representative submitted that since revised return was filed after detection made by the AO, therefore, the disclosure of Rs. 45 lakhs is not voluntary and bona fide and in support of his contention, he has relied upon the following decisions :*

(i) *Decision of Hon'ble Punjab & Haryana High Court in the case of Prempal Gandhi v. CIT [2011] 335 ITR 23/[2009] 185 Taxman 64.*

(ii) *Decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. Bansal Abhushan Bhandar [IT Reference Nos. 272 to 276 of 1995, dated 6-11-2006].*

(iii) *Decision of Hon'ble Punjab & Haryana High Court in the case of Rajesh Chawla v. CIT [2006] 154 Taxman 364.*

(iv) *Unreported decision of Hon'ble Punjab & Haryana High Court in the case of Shveta Nanda v. CIT [2011] 336 ITR 298/[2012] 211 Taxman 129 (Mag.)/[2011] 13 taxmann.com 133.*

As regards the penalty imposed on difference in the valuation of sale of property, the learned Departmental Representative merely relied upon the order of AO.

6. *On the other hand, the learned counsel for the assessee reiterated the submissions made before the learned CIT(A) and submitted that surrender letter was filed during the search itself on 10th Aug., 2006 which is already part of the record. The assessee has paid advance tax of Rs. 5 lakhs each on due dates and the same has also been the part of the record and thus assessee paid Rs. 15 lakhs as advance tax on the surrendered income which is also shown in the original return of income filed on 3rd September 2007 under s. 139(1) of the IT Act (paper book-2). Paper book-04 is revised return in which assessee has specifically mentioned the surrender of Rs. 45 lakhs upon which advance tax has also been paid. The cash flow chart and balance sheets were filed before the AO and at the assessment stage on 16th Dec, 2008 i.e. before the order sheet dt. 24th Dec, 2008 pointed out by the learned Departmental Representative in which also the assessee has specifically declared the surrendered income of Rs. 45 lakhs. The copy of the same is filed at pp. 6 and 7 of the paper book reflecting surrendered amount of Rs. 45 lakhs. The assessee never retracted from the surrender of Rs. 45 lakhs at any stage. There was no query raised by AO regarding non-inclusion of Rs. 45 lakhs till 16th Dec, 2008 though the proceedings started earlier. From the details filed in balance sheet and cash flow statement on 16th Dec, 2008 (paper books 6 and 7), the AO became aware of the non-inclusion of the amount of Rs. 45 lakhs in computation of income and on that basis only he raised the query on 24th Dec, 2008 as to how this amount has been accounted for in the return. Thus, AO was aware of the surrender of the amount and from the advance tax already paid by the assessee were neither the assessee nor the AO could notice the inadvertent error, therefore, everything was part of the record, therefore, there was no concealment on the part of the assessee at any point of time. It was an inadvertent error that while preparing computation of income, income of Rs. 45 lakhs was omitted to be disclosed in the*

original return but there was no intention to conceal anything because every fact was disclosed and was part of the record to show the assessee voluntarily surrendered Rs. 45 lakhs. He has relied upon the decision of the Hon'ble Supreme Court in the case of Price Waterhouse Coopers (P.) Ltd. v. CIT [2012] 348 ITR 306/211 Taxman 40/25 taxmann.com 400 in which though everything had been mentioned in the tax audit report but was not disallowed while preparing the computation of income, it was held that it was a case of inadvertent mistake and no penalty was leviable for concealment. He has also relied upon the decision of the Hon'ble Punjab & Haryana High Court in the case of CIT v. Ravail Singh & Co. [2002] 254 ITR 191/122 Taxman 831 held 'that Penalty- Concealment of income-Additions made on basis of estimate and not on concrete evidence of concealment of income-Penalty not leviable under ' s. 271(1)(c) IT Act, 1961, s. 271(1)(c), Explanation'.

***7.** He has also relied upon the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts (P) Ltd. [2010] 322 ITR 158/189 Taxman 322 held that 'No information given in return found to be incorrect-Making incorrect claim-Does not amount to concealment of "particulars" IT Act, 1961, s. 271(1)(c)*

***8.** The learned counsel for the assessee, therefore, submitted that all facts and surrender of the amount were already within the knowledge of the Revenue Department and part of the record and it was also specifically disclosed in the cash flow and balance sheet filed at assessment stage on 16th Dec, 2008, therefore, it is a case of bona fide error and not a case of concealment of income. He has submitted that assessee has surrendered amount during the course of search under s. 132(4) r/w cl. (2) of Expln. 5 to s. 271(1)(c) of the Act which has been accepted, therefore, penalty is not leviable. Learned counsel for the assessee also submitted that none of the judgments cited by the learned Departmental Representative are applicable because in all these cases there was a enquiry by the Department and all the facts were confronted to the assessee and thereafter the assessee made the surrender. Thus, the facts are entirely different. As regards the penalty on sale of property, he has submitted that merely because the sale rate was enhanced by the AO as against the sale deed is no ground to prove that assessee has concealed the particulars of income or filed inaccurate particulars of income.*

***9.**We have heard the rival submissions and considered the material available on records It is not disputed that assessee has made surrender of Rs. 45 lakhs during the course of search on 10th Aug., 2006 itself and surrender was within the knowledge of the Revenue Department. The assessee never retracted from the surrender so made during the course of search. The assessee also made such surrender while his statement was recorded during search under s. 132(4) of the*

IT Act. The assessee in pursuance of his surrender also deposited the advance tax of Rs. 15 lakhs in three instalments of Rs. 5 lakhs each on 14th Sept., 2006, 12th. Dec. 2006 and 15th March, 2007. Thus, all facts were disclosed to the Revenue Department in pursuance to the surrender of Rs. 45 lakhs that assessee made during the course of search. The assessment year under appeal is 2007-08 and the due date of filing of return under s. 139(1) did not expire on the date of the surrender made by the assessee. The learned Departmental Representative filed the copy of the order sheet to show that AO asked for explanation of the assessee on 24th Dec, 2008 as to how the amount of Rs. 45 lakhs have been accounted for in the return of income. The learned Counsel for the assessee, however, submitted that in the original return of income filed on 3rd Sept., 2007, the assessee individual could not-show the surrender of Rs. 45 lakhs but advance tax of Rs. 15 lakhs paid on surrendered amount of Rs. 45 lakhs has been disclosed in the computation of income filed with the original return of income. The learned counsel for the assessee also pointed out as per the order sheet dt. 24th Dec, 2008, pointed out by learned Departmental Representative the assessee has filed cash flow chart and balance sheet on 16th Dec, 2008 before AO wherein the surrendered income had been reflected and the copy of the same is filed at pp. 6 and 7 , of the paper book. It would, therefore, show that prior to the order sheet dt. 24th Dec, 2008, the AO did not raise any query on this issue and prior to that the assessee had already declared and disclosed that Rs. 45 lakhs had already been disclosed to the Revenue Department is also accounted for in the cash flow statement (capital account) and the balance sheet. The assessee, therefore, disclosed all the particulars of the surrender of amount as well at the stage of the assessment. The assessee on realizing the mistake has immediately filed the revised return on 26th Dec, 2008 including the surrender amount of Rs. 45 lakhs in the return of income. Such was an inadvertent mistake on the part of the assessee because the fact of the surrender of Rs. 45 lakhs was already disclosed before the AO prior to the assessment as well as the assessment stage before the AO detected any mistake. Revised return filed by the assessee under s. 139(5) was also valid return of income filed in accordance with law. Thus, it is not a case of detection of anything by the AO prior to filing of the revised return by the assessee. The AO was having all facts and information on record of surrender of Rs. 45 lakhs and payment of tax on the same before filing the original return of income.

***9.1** The Hon'ble Madras High Court in the case of CIT v S.I. Paripushpam [2001] 249 ITR 550/118 Taxman 844 held that 'there was no evidence on the basis of which the Department could contend that the assessee had fraudulently or wilfully or negligently concealed the income. The assessee's agreeing to the addition of the amount by itself did not establish fraud or wilful neglect without something more.*

Hence the Tribunal was justified in cancelling the penalty levied under s. 271(1)(c) of the IT Act, 1961.'

9.2 *The Hon'ble Gujarat High Court in the case of CIT v. Union Electric Corpn. [2006] 281 ITR 266 held that 'penalty was imposed on the assessee in the asst. yr. 1981-82. The Tribunal after hearing the parties came to the conclusion that the debt entry was a solitary instance in which the cost of wires was shown as "consumable stores" and the assessee failed to recover the same from the sister concern. The assessee had come forward with a request to disallow the same on account of apparent mistake and the request was made by the assessee during the course of assessment proceedings before the AO had detected this fact. The Tribunal, therefore, held that the bona fides of the assessee were evident and in such case imposition of penalty was not warranted. On a reference :*

Held, that the Tribunal had recorded findings of fact as to the admission made by the assessee and the bona fides of the assessee. The facts as such were not disputed. Hence penalty could not be levied.'

9.3 *The Hon'ble Punjab & Haryana High Court in the case of CIT v. Budhewal Co-operative Sugar Mills Ltd. [2009] 312 ITR 92/[2008] 171 Taxman 173 held 'dismissing the appeal, that the society had paid advance tax as well as self-assessment tax not taking into account the deduction claimed under s. 80P(2)(a)(iii) of the Act. It was evident from the facts that the assessee's claim was bona fide and that all the particulars relating, to the computation of income had been disclosed. Thus, the Tribunal rightly cancelled the penalty levied.*

9.4 *The Hon'ble Punjab & Haryana High Court in the case of CIT v. Bhandari Silk Store. [2011] 337 ITR 153/[2012] 20 taxmann.com 439 held that 'the Tribunal while upholding the deletion of penalty on surrender of Rs. 2 lakhs had categorically recorded that the surrender related to the stocks included under the definition of other valuable articles of things and that the condition enumerated under Expln. 5 to s. 271(1)(c) were fulfilled. It was also not disputed that the statement of the assessee was recorded under s. 132(4) of the Act on the date of search. Therefore, the Tribunal was right in upholding the order of the CIT(A) cancelling the penalty on Rs. 2 lakhs. It had been noticed by the Tribunal that the assessee had disclosed the amount of Rs. 1,25,000 at the time the search party was learning the premises of the assessee. It was further recorded that the time for filing the return of income for the asst. yr. 1989-90 under s. 139(1) had not expired on the date of search and the assessee having disclosed the amount of Rs. 1,25,000 in the return filed for the asst. yr. 1989-90 and paid all taxes could not be held to have concealed the particulars of income which were liable to penalty under s. 271(1)(c). The Tribunal was, thus, right in upholding the cancellation of penalty on this amount as well'.*

10. *Considering the above discussion and the case laws, it is clear that all the facts of surrendered income and actual surrender of Rs. 45 lakhs and payment of tax thereon were within the knowledge of the Revenue Department and were in fact disclosed by the assessee to the Revenue Department prior to the order sheet dt. 24th Dec, 2008. It appears to be inadvertent mistake on the part of the assessee in not mentioning Rs. 45 lakhs in the original return of income, therefore, the decision in the case of Price Waterhouse Coopers (P) Ltd. (supra) delivered by Hon'ble Supreme Court squarely applied in favour of the assessee. The assessee thus would be entitled for benefit of Expln. 5(2) to s. 271(1)(c) of the IT Act. The decisions cited by learned Departmental Representative are, therefore, clearly distinguishable on facts because the AO did not detect anything on or before 24th Dec, 2008 because every fact was disclosed to the Revenue Department and within the knowledge of AO. In view of the above discussion, we do not find any infirmity in the order of learned CIT(A) and delete the penalty with regard to the surrender of Rs. 45 lakhs.*

10.1 *As regards the levy of penalty on account of sale of property at Rahon Road, Ludhiana, the main reason for levy of penalty was that assessee disclosed lower rates of plots but the same was not supported by any reasons by the AO for taking higher valuation. The learned Departmental Representative admitted that no material or evidence was found during the course of search to support findings of the AO that assessee has concealed any higher sale consideration. The assessee in support of the sale consideration filed sale deeds which have not been rebutted through any evidence. The assessee did not maintain regular books of account, therefore, provisions of s. 145(3) were applied and rates were enhanced by the AO for making estimated addition of Rs. 1,38.750. It is well-settled law that for estimated addition, no penalty is leviable. The particulars of sale of plots were also disclosed in the return of income filed by the assessee. The Hon'ble Madras High Court in the case of CIT v. K.R. Chinni Krishna Chetty [2000] 246 ITR 121/[2002] 120 Taxman 871 held that 'Mere revision of income to a higher figure by assessing authority does not automatically warrant inference of concealment of income'.*

11. *Considering the above discussion,. we are of. the view that learned CIT(A) had properly appreciated the facts and material on record and correctly cancelled the penalty on this issue also. :*

12. *In view of the above discussion, we do not find any infirmity in the order of learned CIT(A) in cancelling the penalty."*

7.2 Respectfully following the above decision, we set aside the order of the CIT(A) and direct the AO to cancel the penalty levied u/s 271(1)(c) of the Act. Accordingly,

the ground raised by the assessee on this issue is allowed.

8. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 3rd May, 2021.

Sd/-	Sd/-
(S.S. GODARA)	(L.P. SAHU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Hyderabad, dated 3rd May, 2021
kv

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