

Income Tax Appellate Tribunal - Delhi

Mahendra Dass , New Delhi vs Assessee on 29 July, 2015

IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'E' : NEW DELHI)

BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER  
and

SHRI A.T. VARKEY, JUDICIAL MEMBER

ITA No.2913/Del./2013  
(ASSESSMENT YEAR : 2006-07)

Shri Mahendra Dass,  
Golok Dham, HAF (B), Part - 1,  
Sector - 10, Dwarka,  
New Delhi - 110 075.  
(PAN : ADZPD5989K)

vs. IT0, Ward 26 (3),  
New Delhi.

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : S/Shri Sanjay Kumar, CA &  
Akash Garg, Advocate  
REVENUE BY : Shri P. Dam Kanunjna, Senior DR

Date of Hearing : 07.07.2015

Date of Pronouncement : 29.07.2015

ORDER

PER A.T. VARKEY, JUDICIAL MEMBER :

This appeal, at the instance of the assessee, is directed against the order of the Commissioner of Income-tax (Appeals)-XVII, New Delhi dated 28.02.2013. The relevant assessment year is 2006-07.

2. The only ground raised by the assessee is against the confirmation of the imposition of penalty of Rs.1,94,972/- (being 100% of tax due on short-term capital gain of Rs.6,89,392/-) under section 271(1)(c) of the Income-tax Act, 1961 (hereinafter 'the Act').

3. Briefly stated, the facts of the case are that the assessee is an individual and filed the return of income for the assessment year under consideration on 12.01.2007 declaring total income at Rs.1,21,662/- which was processed u/s 143(1) of the Act at the same income. The AO received an AIR information that assessee had made investment of Rs.5 lakhs in HSBC mutual fund on 23.02.2006. Thereafter, the case was selected for scrutiny assessment and a notice u/s 143(2) dated 18.10.2007 was issued to the assessee. The AO observed that during the year, assessee derived income from salary of Rs.23,000/- and income from other sources of Rs.98,262/-. The AO asked the assessee to submit the source of investment for investing Rs.5 lakhs in HSBC mutual fund and asked the assessee to produce documentary evidence to support his claim, if any. In response to that, assessee submitted copy of statement of his account in Axis Bank Limited. The AO raised queries on certain credit entries appearing in the bank statement of the assessee. The assessee subsequently

filed a revised computation of income along with revised balance sheet for the year under consideration and declared income from salary at Rs.23,400, income from other sources at Rs.98,262/- and also short term capital gain of Rs.6,89,392/- on sale of property. The assessee submitted before the AO that he had purchased a plot of land in Kaithal for Rs.98 lakhs on 29.09.2004 and was having 1/4th share in this land and further submitted that some of the portion of this land was sold during the year. The assessee submitted that in the said process of sale of land, he made short term capital gain of Rs.6,89,392/- and the tax on the same was worked out to be Rs.3,12,413/- which was deposited by the assessee on 14.11.2008. The assessee submitted the documents in support of purchase and sale of land before the AO. The AO observed that assessee made short term capital gain on sale of property but the same was not declared while filing the original return of income on 12.01.2007. The AO further observed that when the case was selected for scrutiny and queries were raised on certain entries in assessee's bank statement, then only the assessee come forward to declare the short term capital gain of Rs.6,89,392/-. The scrutiny assessment was accordingly completed at total income of Rs.8,11,054/-. The AO recorded in the assessment order that penalty provisions under section 271(1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income were squarely attracted in this case.

3.1 Thereafter, during the penalty proceedings, the AO issued a notice u/s 274 read with section 271(1)(c) of the Act on 10.12.2008 fixing the case for 24.12.2008. In response to the said notice, the assessee requested for an adjournment to 09.01.2009 vide reply dated 24.12.2008, but, on 09.01.2009, the assessee did not file his submission. Further, a show cause notice u/s 271(1)(c) was issued to the assessee and thereafter, another opportunity was offered to the assessee vide letter dated 16.06.2009 fixing the hearing for 19.06.2009. In response to this notice, the assessee filed his reply on 22.06.2009 and submitted as under :-

"The assessee had entered into all the sale through duly registered Power of Attorney in favour of Shri Muruari Lal Gera. All documents have been given during assessment. Since sale was executed through POA, it is within human probabilities that the assessee did not know there was a registered sale. Secondly, all the sales were settled by way of cash. DD and cheques were not issued by the buyers...."

The assessee further submitted before the AO that while he was arranging papers for answering the queries posed during assessment proceedings, it came to the notice of the assessee that the cash received by him was not on account of advance as he thought but it was sale consideration of some portion of the land which was sold during the relevant assessment year. The AO considered the submissions of the assessee and observed that the same was not tenable and held that it is a fit case for imposition of penalty u/s 271(1)(c) because, according to the AO, if the case had not been selected for scrutiny assessment and queries would not have been raised on the credit entries in the bank statement of the assessee, the said short-term capital gain would never have been declared by the assessee and offered for tax. Therefore, he observed that this act/ omission of the assessee itself showed that the assessee had concealed the income. Accordingly, the AO imposed minimum penalty of Rs.1,94,972/- at the rate of 100% tax sought to be evaded.

3.2 Against the order of penalty imposed u/s 271(1)(c) of the Act, the assessee preferred an appeal to the first appellate authority. The CIT (A) dismissed the appeal filed by the assessee. The relevant finding of the CIT (A) reads as follows :-

"4.3 The above explanation of the appellant was not accepted by the AO and the AO in the penalty order had clearly stated that it was only when queries were raised about the bank statement of the appellant that the appellant came forward with revised computation of short term capital gains of Rs.6,89,392/-. The events mentioned above in this appellate order, clearly indicates that the appellant had no option but to file a revised return when the AO asked him about the source of credits in his bank account in the revised computation filed on 07.11.2008, the appellant had not made any explanation regarding this omission of short term capital gain while filing the original return of income. The explanation that the appellant was misled by the power of attorney holder that the amount received were advances and not sale was furnished only during the penalty proceedings. This can be only an afterthought, as if the same was a genuine error it should have been mentioned clearly in the letter filed while submitted the revised computation. As per the records, the appellant had purchased substantial property at Kaithal for Rs.98,00,000/- and sold 28 plots of land during the year under consideration. Therefore, the appellant's explanation that he was misled by the power of attorney holder cannot be accepted as bonafide. Moreover, the appellant is responsible for the actions of power of attorney holder and he had received substantial amount of money during the year from the power of attorney holder. Nothing prevented the appellant from mentioning the omission or error while submitted the revised computation of income during the assessment proceedings. If the error or omission was genuine, the appellant should have mentioned the same while filing the revised computation of income instead of waiting till the penalty proceedings are initiated. It appears that the appellant was aware that only few cases are selected for scrutiny and probably assumed that penalty proceedings will not be pursued by the department after the assessment is completed. In this connection, it is pertinent to note the observations of the Hon'ble Delhi High Court in the case of Zoom Communication (P) Ltd. Reported in 327 ITR 510. The relevant portion is as follows :-

"The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under Section 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a licence to unscrupulous assesseees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the

basis of self Assessment under Section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a malafide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have."

Therefore, I am of the view that the appellant should not be allowed to escape with the payment of tax alone and penalty is required to be levied as a deterrent.

4.4 The appellant has raised the issue of mens rea in ground no.3 & 4. However, in view of the Hon'ble Supreme Court decision in the case of M/s. Dharmendra Textiles reported in 306 ITR 277 (SC), mens rea is not required to be proved any more in penalty proceedings.

4.5 Further, the appellant's AR was asked specifically to substantiate the explanation offered by the appellant during the penalty proceedings. As per explanation 1 to 271(1)(c), if the appellant fails to offer an explanation or offers an explanation which he is not able to substantiate then the amount added to disallowed is deemed as concealment of income. In this case, the appellant had not offered any explanation during the assessment proceedings and the explanation offered during the penalty proceedings was not substantiated. In spite of specific directions, the appellant's AR did not substantiate the explanation offered by the appellant during the penalty proceedings. Therefore, this is a case where clause (B) of Explanation (1) to section 271(1)(c) is clearly attracted. As per Explanation (1) of 271(1)(c), any amount added or disallowed in the assessment proceedings is deemed to represent the income in respect of which particulars have been concealed. Clause (B) is attracted in this case as the appellant is not able to substantiate the explanation offered by him during the penalty proceedings. Since the deeming provisions of Explanation (1) to section 271(1)(c) is attracted in this case the appellant is deemed to have concealed particulars of income. Hence, penalty of Rs.1,94,972/- levied by the AO is hereby upheld and the grounds of appeal No.1 to 12 raised by the appellant are rejected."

4. Against the confirmation of penalty imposed u/s 271(1)(c) of the Act, assessee is in appeal before us.

5. On merits, the Id. Counsel for the assessee reiterated the submissions made before the Income-tax authorities. He submitted that the short term capital gains were accidentally left out and the disclosure was made before the detection of the concealment. Id. Counsel for the assessee further submitted that the assessee was misled by Mr. Murari Lal Gera (GPA holder) who told him that the funds that was passed on to him (assessee) was only the advance for the land; and it was due to this lack of knowledge that the assessee did not include the consideration of sale of land in his original return of income. He submitted that only when the assessee was arranging the papers for answering the queries raised by the AO, during the scrutiny proceedings, he stumbled across papers, which showed that the funds transferred to him was not advances collected but infact it was sale consideration. Upon knowing this fact, immediately the assessee prepared the revised computation

and accordingly, tax was deposited. The Id. Counsel submitted that there was a reasonable cause due to which the assessee did not include short-term capital gains in his original return of income. He further submitted that there was no specific or precise detection of concealed income by the AO and according to him, it is a well settled law that if disclosure is made before detection of concealment, it may not attract penalty u/s 271(1)(c) of the Act. In the said facts and circumstances, the Id. Counsel pleaded that the orders of the lower authorities be set aside and penalty be deleted.

6. On the other hand, Ld. DR relied on the orders of the income-tax authorities below and does not want us to interfere in the order of the Id. CIT (A).

7. We have heard the rival submissions and perused the record. We find that the original return for the relevant assessment year was filed on 12.01.2007 declaring Rs.1,21,662/-. Based on AIR information, the assessee's case was taken for scrutiny. The AO asked the assessee to produce his passbook and when the AO asked the assessee to explain certain credit entries in his financial statement, that the assessee filed the revised computation of short term capital gain of Rs.6,89,392/- and deposited tax of Rs.3,12,413/- on 14.11.2008. We find that the assessee was left with no option but to file the revised return when the AO asked him about the source of credits in his bank account. We also find that the assessee had not made any explanation regarding the omission of short term capital gain while filing the revised return of income. We further find that the explanation of the assessee that he was misled by the power of attorney holder of the property that the amount received was only an advance for sale of property and not on account of sale consideration of property, was for the first time taken as defence that too during the penalty proceedings, which the CIT (A) had rightly held to be an afterthought. In case, this advance story was genuine and mistake happened because of that, then assessee should have mentioned this fact clearly in the letter which he filed while submitting the revised computation. The CIT (A) relied on the judgment of Hon'ble jurisdictional High Court in the case of Zoom Communication (P) Ltd. reported in 327 ITR 510 to hold that the assessee should not be allowed to escape with the payment of tax alone and penalty is required to be levied as a deterrent. Further, we find that the Id. CIT (A) has taken note of the fact that assessee has not substantiated by adducing evidences to prove the explanation given during the penalty proceedings. Simply by making an assertion, without corroborating the same by evidences, cannot help the assessee. We find on a perusal of Page 4 of paper book that during the relevant assessment year, date of sale of properties commenced from 27.07.2005 to 24.03.2006 and there was altogether 28 sale transactions, which cannot per-se support or justify the explanation of the assessee, that the GPA holder had misled him by stating that the funds given to the assessee was only an advance of the said 28 transactions and that is how he was misled and did not reflect in the original return of income is farfetched and cannot be believed unless he corroborates the same by adducing some evidences. We find that the assessee failed to corroborate his explanation which he gave during penalty proceedings before the AO and CIT (A) and so we further find that the CIT (A) has rightly held that Clause (B) of Explanation (1) to section 271(1)(c) is clearly attracted as the assessee is not able to substantiate the explanation offered by him during the penalty proceedings. In view of the above, we do not find any infirmity in the order of the CIT (A) and the same is accordingly confirmed. Accordingly, the ground is rejected.

8. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in open court on this 29th day of July, 2015.

Sd/-  
(R.S. SYAL)  
ACCOUNTANT MEMBER

sd/-  
(A.T. VARKEY)  
JUDICIAL MEMBER

Dated the 29th day of July, 2015  
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Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XVII, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
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