IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A-SMC", HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT

ITA No. 1519/Hyd/2016
Assessment Year: 1999-2000

Jyothirmoy Yamsani, Hyderabad.	vs.	DCIT, Circle-1, Warangal.
PAN – AAOPY7315A (Appellant)		(Respondent)

Assessee by : Shri S. Rama Rao
Revenue by : Shri V. Sreekar

Date of hearing : 14-09-2017
Date of pronouncement : 28-11-2017

ORDER

PER D. MANMOHAN, VICE PRESIDENT:

This is an appeal filed by the assessee against order passed by CIT(A)-3, Hyderabad and it pertains to A.Y 1999-2000. Levy of penalty of Rs. 1,40,000/- u/s 271(1)(c) of the Act is challenged before the Tribunal on the ground that the action of A.O in treating the peak cash credit of Rs. 5,50,000/- as concealed income is not in accordance with law.

2. The assessee, during the year under consideration, was engaged in the business of running a Xerox machine. He admitted total income of Rs. 7,57,350/- on 30-06-1999 which was accepted by A.O. Subsequently it came to the

notice of the department that the assessee made a number of transactions by cash deposits and withdrawals in the financial year. It was found that there were total deposits of Rs. 10,49,150/- in Canara Bank at Kundhanbagh, Hyderabad, which were not reflected in the balance sheet of the assessee. Under these circumstances the A.O re-opened the assessment by issuing a notice u/s 148 of the IT Act. In response to the notice assessee filed revised return on 25-02-2005 declaring total income of Rs. 12,07,352/-. In other words, the assessee admitted additional income of Rs. 5,50,000/- only as against Rs. 10,49,150/- which was not reflected in the balance sheet. The A.O therefore, added total cash deposits of Rs. 10,49,150/- and completed the assessment. The ITAT, however set aside the case to work out the peak credit. As per the direction of the Tribunal A.O completed the assessment as per the revised return filed by the assessee. In other words, additional income of Rs. 5,50,000/- offered by assessee, in response to a notice issued u/s 148 of the IT Act, was accepted.

3. According to A.O the amount deposited in the bank account was not even reflected in the balance sheet and

additional income was offered to tax only in the revised return, after the A.O noticed the deposits in the bank account. Thus, the AO had arrived at a *prima facie* view that it was a case of concealment of income and furnishing of inaccurate particulars of income. Accordingly a notice was issued u/s 148 of the Act, in response to which assessee submitted that the peak credit working was based on the bank accounts in the name of assessee and his wife i.e., Canara Bank and ING Vysya Bank. Since major transactions were reflected in Canara Bank, much stress was not made on the other two accounts. Assessee having offered to tax 'peak credit' in the revised return, it was submitted that it is not a fit case for levy of penalty.

4. A.O observed that assessee's contention is not acceptable because a verification of bank statements and peak credit workings indicate that equal number of transactions - volume wise and quantum wise - in the other two bank accounts were never mentioned by assessee earlier at any stage of scrutiny proceedings as well as appellate proceedings. He also observed that penalty proceedings were initiated in view of concealment of two bank accounts in ING Vysya bank and also for furnishing inaccurate particulars (para 6 of the penalty order). Vide para 7

A.O reiterated that the notice was issued not only for concealment of income but also for furnishing inaccurate particulars and finally concluded that there was concealment of income and furnishing of inaccurate particulars of income; The relevant portion of the penalty order reads as under:

> *"8. The above explanation of the assessee is not acceptable in view of the fact that the working of peak credit is only to ascertain the amount of unaccounted money invested and its circulation but the fact remains that the assessee concealed his income to the extent of peak credit amounting to Rs. 5,50,000/-. Therefore, the concealed income of Rs. 5,50,000/- is liable for levy of penalty u/s 271(1)((c) of the Act. Moreover, the revised return was filed by the assessee only after issue of notice u/s 147 and not voluntarily. Even after filling revised return, the assessee did not reveal the other two accounts at any stage of assessment as well as appellate proceedings earlier. Reliance is placed in this regard in the case of CIT Vs Usha International Ltd. In ITA No. 1696/2006.*
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> *9. As the assessee has concealed and furnished inaccurate particulars of income and thereby concealed income to the extent of Rs. 5,50,000/- and evaded tax of Rs. 1,40,000/-. The minimum and maximum penalty to be levied is Rs. 1,40,000/- and Rs. 4,20,000/- respectively. However, considering the facts and circumstances of the case, I levy a penalty of Rs. 2,00,000/- u/s 271(1)(c) of the IT Act, 1961.*

5. Before the Ld CIT (A) it was contended that there is no basis for the Assessing Officer to arrive at the concealed income as the Hon'ble ITAT directed AO to verify the peak credit. It was also contended that levy of penalty of Rs. 2 lakhs is excessive.

6. Ld CIT (A) observed that in the light of the following decisions the revised return filed by the assessee, after issuance of notice u/s 148, cannot be said to be voluntary.

(1) CIT vs. Usha International Ltd., (2012) 254 CTR (Delhi) 509;

(2) CIT vs. Rakesh Suri (2010) 230 CTR (All) 184 and

(3) P. RajaSwamy Raja Jewellry vs. CIT (2010) 323 ITR 527 (Ker.).

7. Ld CIT (A) further observed that the revised return was filed only after cash deposits were detected by the Department and thus it is a clear-cut case of concealment of income. However, keeping in view the nature of business of the assessee the penalty leviable was restricted to Rs. 1,40,000/-.

8. Further aggrieved, assessee is in appeal before the Tribunal.

9. Though the assessee challenged the levy of penalty on merits, at the time of filing the appeal, in the light of the later judgment of the Hon'ble jurisdictional High Court in the case of The Principal CIT, Visakhapatnam vs. Baisetty Revathi (ITTA No.684 of 2016, dated 13.07.2017), the following additional grounds were filed along with a petition seeking admission of additional grounds by stating that the above mentioned additional grounds were inadvertently omitted to be raised before the tax authorities.

"(a) The learned Commissioner of Income Tax (Appeals) ought to have held that the notice u/s 274 rws 271(1)(c) is not valid and consequently the order passed u/s 271(1)(c) of the I.T. Act is also not valid.

(b) The learned Commissioner of Income Tax (Appeals) ought to have considered the fact that the Assessing Officer did not

strike off the inappropriate portion in the notice issued u/s 274 and held that the notice is not valid."

10. Ld Counsel briefly narrated the facts of the case to submit that no addition was made to the income admitted in the revised return and hence penalty is not leviable. It is not in dispute that consequent to the original assessment proceedings the Assessing Officer initiated penalty proceedings but the penalty was ultimately levied after giving effect to the direction of the ITAT. He adverted my attention to pages 10 and 11 of the paper book (written submissions filed before CIT (A)) to contend that in the light of the decision of the Supreme Court in the case of Suresh Chandra Mittal (251 ITR 9) any amount admitted in response to a notice issued u/s 148 should not be considered as 'income concealed' and the burden is upon the Revenue to prove the same (also see 241 ITR 124 (MP)).

11. It was also contended that additional income was offered to tax on 25.02.2005 and the assessment was completed on 29.03.2006 by merely adding further amount of Rs. 4,99,150/- and thus the admitted income achieved finality; if at all the Assessing Officer is of the view that Rs. 5,50,000/- represents concealed income, penalty should have been levied with reference to the assessment order and not with reference to the order passed on 19.03.2014. By referring to the additional ground the Ld Counsel submitted that the Assessing Officer did not strike off the inappropriate portion in the notice issued u/s 274 and thus the notice is invalid and consequent proceedings deserve to be quashed. Reliance was placed upon the decision of the jurisdictional High Court (supra) to submit that it is the duty of the Assessing Officer to specify as to whether the penalty

proceedings are initiated on account of "concealment" or "furnishing of inaccurate particulars of income" as otherwise the proceedings arising therefrom deserve to be quashed. The judgment also states that the person who is "accused" of the conditions mentioned in section 271 should be made aware of the grounds on which imposition of penalty is proposed as he has a right to contest such proceedings. The Hon'ble Court also recognised the fact that some cases may attract both the offences and in some there may be overlapping of both, but in such cases initiation must be specifically for both the offences. It was further observed that concealment of income is an act of omission while furnishing of inaccurate particulars of income is an act of commission. The consequences of such acts, being penal in nature, an assessee has to be informed as to what exactly is the charge i.e., the precise allegation against the assessee should be informed. Ld Counsel referred to the notice issued by the Assessing Officer to submit that the Assessing Officer has not specified as to whether the notice was for concealment of income or for furnishing of such inaccurate particulars of income.

12. Ld Counsel submitted that the issue raised in the form of additional grounds goes to the root of the matter and therefore deserve to be admitted since no additional facts are required to be gone into.

13. Ld Departmental Representative, on the other hand, submitted that the assessee declared total income of Rs. 7,57,352/- only, vide return of income dated 30.06.1999, and an assessment was made accordingly. Only upon detection by the Department about concealment of income and furnishing of

inaccurate particulars of income, referable to cash deposits in Canara Bank and other two bank accounts maintained by him and his wife, the assessee came forward with a revised return, in response to a notice u/s 148, declaring additional income of Rs. 5,50,000/-. He also referred to provisions of section 139(5) of the Act to submit that the income declared in response to notice u/s 148 cannot be treated as "revised return" since there was long gap between the date of filing of original return and the date of admitting the additional income. But for the probe made by the Revenue the additional income would not have been offered and the bank deposits were not even reflected in the balance sheet. Thus it was a clear case of not only concealment of income but also furnishing of inaccurate particulars of income. Under these peculiar circumstances the Assessing Officer initiated penalty proceedings without striking off either 'concealment' or 'furnishing inaccurate particulars' since both are relevant in this case. The assessee also having responded appropriately it cannot be said that the assessee was not put to notice about the reasons for issuance of notice. In fact the order levying penalty clearly specifies that it was for non-furnishing of bank accounts, in ING Vysya Bank, resulting in furnishing inaccurate particulars and thereby concealment of income.

13.1. Ld Departmental Representative thus sought to distinguish the judgment of the jurisdictional High Court by contending that in the aforecited judgment the Hon'ble Court had taken note of the fact that there was ambiguity in the show cause notice which was further compounded by the confused finding of the Assessing Officer whereas, in the instant case, the finding was categorical that there was concealment of income on account of the fact that

the assessee furnished inaccurate particulars of income which resulted in concealment of income. He relied upon the following judgments wherein the Courts have held that even if an additional income is offered in response to a notice u/s 148, it cannot be said to be voluntary if it is noticed that the additional income was offered consequent to the detection of income by the Assessing Authority.

(1) 323 ITR 527 (Kerala) in the case of P. Rajaswamy, Raja Jewellery vs. CIT;
(2) 243 ITR 818 (Kerala) in the case of P.C. Joseph & Bros. vs. CIT and
(3) 331 ITR 458 (Allahabad) in the case of CIT vs. Rakesh Suri.

14. I have carefully considered the rival submissions and perused record. With regard to the first contention of the assessee, that the additional income having been offered in the revised return, penalty provisions are not attracted, the fact remains that the Income Tax Act provides for filing of revised return within the time provided u/s 139(5) of the Act. Even if it is not filed within the specified time, there may be some exceptional cases where the assessee declares additional income voluntarily before it is brought to his notice by the Assessing Officer.

14.1. In the instant case, the assessee declared income on 30.06.1999 and the assessment was completed. But for unearthing the fact by the Assessing Officer that the total deposits of Rs. 10,49,150/- were not reflected in the balance sheet it would not have come to light and when the assessee was cornered, by issuing a notice u/s 148, the assessee declared additional income referable to peak credit.

15. No doubt the Assessing Officer was initially of the opinion that the entire credit should be taken into consideration instead of peak credit. But the fact remains that the amount offered to tax by the assessee was treated as 'concealed income' on account of the fact that the assessee has furnished inaccurate particulars of income and this was specified even in the assessment order dated 19.03.2014 by observing as under:-

> "*Penalty proceedings u/s 271(1)(c) are initiated separately in view of the concealment of two bank accounts in ING Vysya Bank and furnishing of inaccurate particulars.*"

Therefore, it cannot be said that assessee was not put to notice as to the reasons for issuance of notice. It was clearly stated in the assessment order itself and penalty notice was also issued. In fact the penalty was also levied not only for 'concealment of income' but also for 'furnishing of inaccurate particulars of income'. Assessing Officer was of the view that there was concealment of facts and figures, on account of furnishing of inaccurate particulars of income, which resulted in concealment of income.

16. The decision of the Hon'ble jurisdictional High Court is applicable where clarity is lacking either in the assessment order or in the penalty notice, which may impair the chances of the assessee to respond to the notice issued by the Assessing Officer appropriately. In the instant case, the assessment order itself makes it clear since the AO specified that the assessee concealed particulars of income and furnished inaccurate particulars of income; therefore the A.O did not find it necessary to strike off one of the reasons in the printed format. The only mistake, if any, is retaining the word "or". However, such trivial omission should not

be considered in isolation, so long as the reasons for issuance of notice are made known to the assessee.

17. In the instant case, the assessment order categorically indicates that penalty is leviable on both counts and even penalty order details the nature of default on the part of the assessee, followed by a specific conclusion that the assessee has concealed income and furnished inaccurate particulars of income. Under these circumstances, it cannot be assumed that the assessee was not given a proper opportunity of responding to the notice by virtue of not striking off the word "or" in the penalty notice.

18. Assessee, in his reply, responded to both the accusations which also proves that there was no confusion in the mind of the assessee as to the reasons for initiating penalty proceedings, either before the first appellate authority or before the second appellate authority; In the original grounds of appeal the assessee has not raised this objection which also proves that the objection was not on the ground of violation of principles of natural justice on the part of the Assessing Officer.

19. It is well settled that the observations of the Courts are neither to be read as Euclid's theorems nor as provisions of the statute, and that too taken out of their context. In the case of Collector of Central Excise, Calcutta vs. M/s. Alnoori Tobacco Products and Anr. (2004) [6 SCC 186] the Court observed that circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and cases should not be disposed of blindly placing reliance on an earlier decision. The Court further observed that precedent should be followed only so far as it marks the path of justice and a close

similarity between one case and another is not enough to match the colour of one case against the colour of another.

20. The decisions cited by the Ld Counsel for the assessee are mainly focused on the point that even if there is a remotest possibility of assessee not getting opportunity to put forth it's case fully, on account of lack of clarity in issuance of notice, it would be in violation of principles of natural justice, more particularly in penal proceedings. However, in the instant case, the AO has all through made it transparent that the initiation of proceedings were not only for 'concealment of penalty' but also for 'furnishing of inaccurate particulars of income'. In the assessment order as well as in the penalty order, it was specified. In the notice one of the portions was not struck of, to achieve the purpose for which notice was issued, and the assessee has understood it in the same perspective. Therefore, assessee never raised any objection with regard to issuance of notice, either before the AO or before the Ld CIT (A).

21. Having noticed a decision of jurisdictional High Court, on a different set of facts, the assessee raised additional ground before this Bench, overlooking the fact that there is no ambiguity in the notice issued by the Assessing Officer. Such being the case, I am of the firm view that the reliance placed by the assessee on the decision of the jurisdictional High Court is misplaced. In the instant case, the assessee having declared the additional income only after discovery of the Assessing Officer with regard to total deposits not reflected in the balance sheet, it was a clear case of 'concealment of income' and non-recording of the deposits in the balance sheet would amount to furnishing of inaccurate

particulars of income. Under these circumstances, the order passed by the Ld CIT (A), in levying penalty, does not call for any interference. Accordingly, appeal of the assessee is dismissed.

22. Order pronounced in the open court on 28th November, 2017

Sd/-
(D. MANMOHAN)
VICE PRESIDENT

Hyderabad, Dated: 28th November,2017.

OKK

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