

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: “ H ” NEW DELHI**

**BEFORE SHRI C.L.SETHI, JUDICIAL MEMBER
AND
SHRI R.C.SHARMA, ACCOUNTANT MEMBER**

**ITA No: 586/Del/2010
Assessment Year : 2006-07**

M/s Trivium Power Engineers P.Ltd. vs. The ITO, Ward 16(4)
A-1/610, Ekta Garden Room no. 143, C.R.bldg.
I.P.Extension, Patparganj I.P. Estate, New Delhi 2
Delhi 110 092

(Appellant)

(Respondent)

**Appellant by : Sh. R.K.Mehra, C.A.
Respondent by : Sri NK Chand, Sr.D.R.**

ORDER

PER C.L.SETHI, JUDICIAL MEMBER

The assessee is in appeal against the order dated 11.12.2009 passed by the Id. CIT(A) confirming the penalty amounting to Rs. 2,01,628/- levied by the A.O. u/s 271(1)(c) of the Income Tax Act, 1961 for the A.Y. 2006-07.

2. The assessee company filed its return of income on 1.12.2006 declaring total income at Rs. 5,61,362/-. A regular assessment came to be made u/s 143(3) of the Act wherein the total income of the assessee was determined at Rs. 11,67,360/-. In the assessment, the addition of Rs. 6 lakhs on account of unexplained cash credit u/s 68 was made by the A.O. During the assessment proceedings, it was noticed by the A.O. that the assessee had received unsecured loan amounting to Rs.6 lakhs in cash from various persons during the year under consideration. The names of the persons and the amounts taken from them as loan are as under.

<u>Sl.No.</u>	<u>Name</u>	<u>Amount – Rs.</u>
1.	<i>Pawan Kumar Mishra</i>	<i>18,500</i>
2.	<i>Satya Prakash</i>	<i>17500</i>
3.	<i>Surender Kumar</i>	<i>18800</i>
4.	<i>Ram Babu</i>	<i>19800</i>
5.	<i>Ravir Singh</i>	<i>16700</i>
6.	<i>Subhash Kumar</i>	<i>18500</i>
7.	<i>Manoj Kumar</i>	<i>17800</i>
8.	<i>Sameer Kumar</i>	<i>19200</i>
9.	<i>Bhola Prasad</i>	<i>18500</i>
10.	<i>R K Chaudhary</i>	<i>16800</i>
11.	<i>Sushil Nagar</i>	<i>17600</i>
12.	<i>Jitender Singh</i>	<i>15800</i>
13.	<i>Ram Vir</i>	<i>18900</i>

14.	<i>Nadim</i>	19500
15.	<i>Jamaluddin</i>	18500
16.	<i>Ashok Kumar</i>	19700
17.	<i>B N Jha</i>	15900
18.	<i>Jibacha Jha</i>	15900
19.	<i>S K Jha</i>	18500
20.	<i>Hari Narain</i>	15600
21.	<i>Mukesh Goyal</i>	17000
22.	<i>Vinita Dhawan</i>	17800
23.	<i>Naveen Kumar Jha</i>	16800
24.	<i>Satish Kumar</i>	16800
25.	<i>Nazimuddin</i>	18900
26.	<i>Heera Kant</i>	18900
27.	<i>Ajit Kumar</i>	18900
28.	<i>Suresh Kumar Shukla</i>	18900
29.	<i>Gopal Bahadur KC</i>	17800
30.	<i>Ajay Sheker Chaudhary</i>	15800
31.	<i>Antriksha Gupta</i>	12500
32.	<i>Avinash Kumar /Amar Kumar</i>	18500
33.	<i>Amar Kumar Chaudhary</i>	18500
34.	<i>Sanjeet Mandal</i>	14900

Total: *Rs. 6,00,000/=*

In order to verify the genuineness of the above loan, the A.O. issued notice u/s 133(6) to the aforesaid persons seeking relevant information from them.

Out of the total letters sent to 34 persons, 15 letters were received back unserved with the remarks “no such address” and 9 persons did not give any reply. It was also noticed by the A.O. that the assessee company failed to furnish even the addresses of following 9 persons.

1. <i>Ram Vir</i>	18,900
2. <i>Nadim</i>	19,500
3. <i>Jamaluddin</i>	18,500
4. <i>Mukesh Goyal</i>	17,000
5. <i>Nazimuddin</i>	18,900
6. <i>Heera Kant</i>	18,900
7. <i>Ajit Kumar</i>	18,900
8. <i>Suresh Kumar Shukla</i>	18,900
9. <i>Sanjeet Mandal</i>	14,900

3. The assessee company was then asked by the A.O. vide letter dt. 04.9.2008 as to why Rs.6 lakhs claimed to be received in cash as unsecured loan should not be treated as unexplained cash credit within the meaning of S.68 of the Act. The assessee company vide letter dt. 26.9.08 surrendered the amount of unsecured loans amounting to Rs.6 lakhs received during the year for taxation with a condition that no penal action shall be initiated against the assessee. The assessee's plea that no penal action shall be initiated against it was not accepted by the A.O. as the A.O. was of the view

that this plea cannot be accepted for the reason that that the income surrendered by the assessee company was not voluntary but the said amount was surrendered because of the detection made by the department by making necessary enquiries. The A.O. was, therefore, satisfied that the assessee company has not disclosed the true particulars of its income and initiated penalty proceedings u/s 271(1)(c) of the Act in the course of assessment made by the A.O. wherein the aforesaid income of Rs.6 lakhs was added to the assessee's total income. In the course of penalty proceedings before the A.O. the assessee submitted vide letter dt. 22.3.2009 that the amount was surrendered just to buy peace of mind and on the condition that no penal action shall be initiated against the assessee. But this explanation of the assessee was not accepted by the A.O. by giving the reason that income surrendered by the assessee was not voluntary but the assessee surrendered the income because of the detection made by the department through enquiries conducted by it. The AO, therefore, had taken a view that the assessee had concealed particulars of its income making it liable for penalty u/s 271(1)(c) of the Act. The AO, therefore, levied the penalty equal to the amount of 100% of the tax sought to be evaded on the concealed income assessed to tax in the assessment.

4. On an appeal, the CIT(A) confirmed the AO's order by observing that the assessee surrendered the amount after pointing out the same by the AO and the assessee has brought into its books unaccounted income in the shape of cash credits.

5. Still aggrieved, the assessee is in appeal before us.

6. The ld. counsel for the assessee has submitted that during the course of assessment proceedings, the AO was provided with the entire information available with the assessee with regard to the names and addresses of those parties to the extent available with the assessee. He further stated that the ld.A.O. has issued notices u/s 133(6) seeking certain information from those parties but the assessee was not confronted with any reply furnished by those parties. He further submitted that the A.O. has made the addition of Rs.6 lakhs on the same being surrendered by the assessee with the condition that no penalty proceedings shall be initiated by the A.O. u/s 271(1)(c) of the Act. He, therefore, submitted that when the amount was surrendered voluntarily by the assessee with the condition that no penalty proceedings shall be initiated u/s 271(1)(c) of the Act, the A.O. was unjustified in levying the penalty upon the assessee. In support of the assessee's case, the ld.counsel for the assessee has relied upon the following decisions.

1. *CIT vs. Suresh Chandra Mittal(2001) 251 ITR 9 (SC)*

2. *Smt. Raj Rani Mittal vs ITO-Rudrapur (2010)*
36 SOT 4 (Del) (URO) – copy of head notes enclosed.
3. *ITO vs. Dr.Sameer Kant Aggarwal (2009)*
34 SOT 12 (Luck) (URO)
4. *ACIT vs. Smita Commercial & Investment P.Ltd. (1997)*
90 Taxmann 275 (Del) (Trib)
5. *CIT vs. Saran Khandsari Sugar Works (2000)*
246 ITR 216 (All.)
6. *Addl.CIT vs. Prem Chand Garg (2009) 24 DTR(Del)*
(TM) (Trib.) 513
7. *Kumar Agencies (India) vs ACIT, (2003) 87 ITD 69(Mum) (TM)*

7. The ld.D.R., on the other hand, has submitted that in none of the cases, the amount was received either by cheques or through banking channel. In all the 34 cases, the amount below Rs.20,000/- has been shown to be received in cash. He further submitted that no credible evidence was filed either in assessment proceedings or penalty proceedings to establish identity and credit worthiness of the payer and the genuineness of the transaction. Whatever few evidences that has been furnished by the assessee, which are placed at page nos. 11, 12 and 13 of the paper book filed by the assessee before the Tribunal, do not inspire any confidence. He further submitted that the assessee has not given the details about the creditors so as to give the names of the organization whether the creditors were working or their PAN no. or other evidences to establish their identity and existence.

He further submitted that the argument of the ld.counsel for the assessee that the sum was surrendered voluntarily does not hold any water as the surrender was made subsequent to the detection made by the A.O. and after a show cause notice issued by the A.O to the assessee. He, therefore, submitted that since the surrender was not voluntary and the addition has been made by the A.O. as a result of enquiry conducted by him, the various decisions relied upon by the assessee would be of no assistance to the assessee's case rather they support the revenue's case. In support of the revenue's case, the ld. D.R. has relied upon the certain decisions.

8. We have considered the rival contentions of both the parties and have carefully perused the orders of the authorities below. We have deliberated upon the various decisions cited at the Bar in the light of the factual matrix of the present case.

9. From the perusal of the provisions of section 271(1)(c) of the Act, it is clear that penalty in this section is leviable if the Assessing Officer is satisfied in the course of any proceedings under the Act that any person has concealed the particulars of his income or furnished inaccurate particulars of the income. It is well settled that the penalty proceedings and the assessment proceedings both are different. The Explanation-1 to section 271(1)(c) of the Act provides that the amount added or disallowed in computing the total income of the assessee shall be deemed to be the income

in respect of which particulars have been concealed. This deeming provision is not absolute but is rebuttable one. It only shifts burden on the assessee. The Explanation 1 to section 271(1)(c) refers to the two situations in which presumption of the concealment of income or particulars of income can be drawn. The first situation is where the assessee in respect of any facts material to the computation of his total income fails to offer an explanation or offers an explanation, which is found by the Assessing Officer or the Commissioner to be false. The second situation is where the assessee in respect of any facts material to the computation of his total income offers an explanation, which the assessee is not able to substantiate and also fails to prove that such explanation was bona fide one and that all the facts relating to the computation of his total income have been disclosed by him.

10. In the light of the decision of Hon'ble Supreme Court in the case of Union of India vs. Dharmendra Textile Processors (2008) 306 ITR 277, a willful concealment is not essential for attracting civil liability of penalty leviable under sec. 271(1)(c) of the Act, but, at the same time, apart from examining the case from the point of view of mens rea, it is also essential to appreciate as to whether the assessee has offered any explanation and in case any explanation is offered, whether the same is found to be false or is bona

vide one and whether all the facts relating to the computation of assessee's total income has been disclosed.

11. In the light of the position of law discussed above, we now proceed to examine and appreciate the facts and circumstances of the present case. It is not in dispute that in the course of assessment proceedings an addition of Rs.6 lacs on account of unexplained cash credit has been made by the AO and that stands final. Now, therefore, question arises as to whether the assessee has offered any explanation with regard to the aforesaid addition of Rs.6 lacs on account of unexplained credit introduced by the assessee in its books of accounts. The assessee has given an explanation that the aforesaid amount of Rs.6 lacs has been surrendered voluntarily as assessee found it difficult to substantiate the cash credit inasmuch as number of creditors were involved and there whereabouts could not be ascertained at the time when the assessment proceedings had taken up. The assessee has also given an explanation that the assessee has surrendered this income with the condition that no penalty under sec.271(1)(c) shall be initiated by the AO. In other words, it is the case of the assessee that the assessee has surrendered amount voluntarily with the condition that no penalty shall be levied under sec. 271(1)(c) of the Act by the AO.

12. Now, let us examine as to whether the income surrendered by the assessee is voluntary or bona fide one. In this case, the Assessing officer had taken up the case for scrutiny and issued notice under sec. 143(2) that was served upon the assessee. The AO also raised certain questionnaire and in response thereto certain details were filed by the assessee. During the course of assessment proceedings, it was noticed by the AO that the assessee had shown unsecured loans amounting to Rs.6 lacs received in cash from 34 persons. In order to verify the genuineness of the aforesaid transactions, the AO sought information under section 133(6) of the Act from the aforesaid 34 persons by issuing notices to them. Out of 34 persons, 15 letters were received back unserved with the remarks “No such person” or “Incomplete address” or “No such address”. 9 persons did not file any reply and in respect of others, addresses furnished by the assessee were not complete. This outcome of the enquiry conducted by the AO was confronted to the assessee, who was asked to show cause vide letter dated 4.9.2008 of the AO as to why the amount of Rs.6 lacs received in cash should not be treated as unexplained cash credit under sec.68 of the Act. Having received the show cause notice from the AO, the assessee vide letter dated 26.9.2008 surrendered the amount for tax, and in the letter the assessee stated that the amount is being surrendered on the condition that no penal action shall be

initiated against the assessee. However, this stand of the assessee that no penal action should be initiated against it was not accepted by the AO for the reason that the income surrendered by the assessee company was not voluntary but the said amount was surrendered because of the detection made by the department through enquiries conducted by it. The AO, therefore, mentioned in the assessment order that he was convinced that the assessee company had not disclosed the true particulars of his income and hence he initiated penalty proceedings under section 271(1)(c) of the Act. From these facts narrated above, it is clear that the assessee company had surrendered the amount vide its letter dated 26.9.008 only after a show cause notice dated 4.9.2008 was issued by the AO intimating the assessee about the outcome of his enquiry and then to show cause as to why the amount of Rs.6 lacs should not be added as unexplained cash credit under sec.68 of the Act. In the present case it is not in dispute that the assessee has received various amounts below Rs.20,000/- in each case in cash from 34 persons. The assessee has given just the names and incomplete addresses of the persons without furnishing any details or particulars or evidences as to their identity, nature of their business or profession or employment and the source of their income from which the amount was claimed to have been advanced to the assessee. The assessee is a private limited company, and it is beyond

imagination that the 34 persons without having any close relation or connection to the business of the assessee company would advance amount in cash to the assessee. The assessee has not been able to explain as to under what circumstances the amount was received in cash from 34 persons in the denomination of below Rs.20,000/- in each case. The very transaction of receiving money from respective persons has not been established. The assessee has also not given any details as to when and by what mode this amount has been repaid by the assessee to the creditors. Even in the course of penalty proceedings, no prima-facie evidence or details as to the identity and/or the creditworthiness of the creditors, and genuineness of transaction were furnished by the assessee. Mere several cash loan entries in the name of different persons made in the books is not sufficient to show even prima-facie that the amount was actually received by the assessee as loan from these persons. The assessee should have furnished at least some piece of evidence to show prima-facie that the assessee had accepted the amount as loan. But that much has not been done by the assessee except furnishing certain names even without establishing their identity and existence. The assessee has also not filed any sort of confirmations from the respective persons to establish that the assessee had actually taken the loan in cash from 34 persons. It is, thus, a case where the assessee has not furnished full

particulars as to the nature and character of the loan as well as to the identity, nature of business or profession or employment and source of income of the creditors. The assessee has therefore, not acted bonafidely and has not furnished correct information as to the details of the loan introduced by the assessee in its books of account. The fact that the AO conducted an enquiry by issuing notice under sec. 133(6) of the Act to the creditors before the income was surrendered by the assessee, is not in dispute. It is also seen that the persons to whom notices under sec. 133(6) of the Act were issued, were not found available at the given address as a result thereof, the notices issued to them were returned back unserved. Even in the cases where the letters were not returned back unserved, no reply has been furnished by any of them. This outcome of the enquiry conducted by the AO was confronted to the assessee vide AO's letter dated 4.9.2008 and only thereafter the assessee vide letter dated 26.09.2008 had surrendered the amount to tax. It is, therefore, clear that the surrender made by the assessee does not seem to be voluntary and bona fide but under the compulsion. It is only after the assessee was cornered, the assessee came forward to disclose the amount for taxation and therefore, in this case, it is very difficult to hold that the assessee has filed the surrender letter dated 26.09.008 voluntarily and bonafide. In these circumstances, it is very difficult to believe that the

amount was surrendered by the assessee just to buy peace. It is the case where the assessee had no other option than to agree to the additions under compulsion, being cornered by revenue. Of course, things would have been different in case before the enquiry conducted by the AO by issuing notices to the creditors u/s 133(6) of the Act, the assessee would have disclose the income in the nature of unexplained credit.

13. The meaning of word “Voluntarily” has recently been deliberated upon by the Hon’ble Allahabad High Court in the case of CIT vs. Shri Rakesh Suri reported in 2010-TIOL-357-HC-ALL-IT as under:-

“41. A Full Bench of the Allahabad High Court in the case reported in (1998) 230 ITR 855: Bhairav Lal Verma Versus Union of India, while interpreting the word `vonutarily’ given in Section 273(A) of the Act held that voluntarily means out of free will without any compulsion. When the assessee concealed the incriminating material with regard to income so disclosed cannot be held to be voluntarily. It shall be appropriate to reproduce the relevant portion from the judgment of Bhairav Lal Verma (supra) as under:

“The position thus settled is that the word “voluntarily” in section 273A of the Act means out of free will without any compulsion. Disclosure of concealed

income after the Department has seized the incriminating material with regard to the income so disclosed, cannot be voluntary disclosure, because it was made under the constraint of exposure to adverse action by the Department. But it cannot be held as a principle of law that the disclosure of income made after the search/raid cannot be voluntary. It is a question which has to be decided by the Department in each case on the basis of the material on the record. If on record there is incriminating material with regard to the disclosed income, the disclosure cannot be voluntary. But if the Department has no incriminating material with regard to the income disclosed, the disclosure is liable to be treated as voluntary having been made without any compulsion or constraint of exposure to adverse action by the Department. In a case where the assessee has disclosed not only the income regarding which the Department has incriminating material, but has also disclosed the income with regard to which no incriminating material was seized by the Department, the disclosure of the income with regard to which the Department has no incriminating material, is liable to be treated as voluntary. For example, if an assessee is having five accounts and the Department has incriminating material with regard to one of those accounts only, the disclosure of income relating to four accounts with regard to which the Department has no incriminating material, is voluntary, because it was made without any constraint or compulsion, even though the disclosure of the income relating to the account regarding which the Department has incriminating

material, is liable to be treated as non-voluntary.”

: - Dictionary:-

42. Black’s Law Dictionary (Seventh Edition) defines “voluntarily” as intentionally or without coercion. It shall be appropriate to reproduce meaning of “voluntarily” and “voluntary” as given in Black’s Law Dictionary, which is as under:-

“Voluntarily, adv. Intentionally; without coercion. Voluntary, Adj. 1. Done by design or intention <voluntary act>. 2. Unconstrained by interference; not impelled by outside influence <voluntary statement>. 3. without valuable consideration; gratuitous <voluntary gift>. 4. Having merely nominal consideration <voluntary deed>-voluntariness, n.

43. In the Law Lexicon by P. Ramanatha Aiyar, meaning of Voluntary has been given as, to quote:-

“Voluntary – Of one’s free will, impulse of choice; not constringed by another; acting voluntarily or willingly [S. 2(2), Sale of Goods Act]; [Art. 101(3), prov., Const.]

Voluntary – The expression ‘voluntary’ is used in this section to mean ‘naturalisation’ in the narrow sense of that term and excluding compulsory, involuntary or collective naturalization which some states have adopted at different times. T.E. Mohamed Usman vs. State of Madras, AIR

1961 Mad 129, 138. [Citizenship Act, 1955, S. 9(1)]

“Means doing of something as the result of the free exercise of the will but not something done under a legal duty.”
“Where a person obtained a passport acted on his own volition and knew the nature of his act and did not act in performance of a legal duty, nor due to coercion or fraud or misrepresentation or mistake he has acted voluntarily.” Abdul Salam V. Union of India, AIR 1969 All. 223 at 228. [Citizenship Rules (1956) R. 30]”

From the said decision it is thus clear that voluntarily means out of free will without any compulsion. It is also observed therein that when the assessee concealed incriminating material with regard to the income disclosed by the assessee, disclosure cannot held to be voluntarily. Disclosure of income after the department has collected incriminating material with regard to the income so disclosed, cannot be voluntary disclosure, because it was made under the constraint of exposure to adverse action by the Department. In the present case, the department has collected sufficient material against the assessee with regard to the identity and existence of the creditor and genuineness of the transaction, and only after incriminating material collected by the department was brought to the knowledge of the assessee, the disclosure was made by the assessee under the constraint of exposure to adverse action by the AO. It is, thus, the case where disclosure has not been

made voluntary and out of free will, but disclosure has been made under compulsion.

14. Having regard to the totality of the above facts and circumstances of the case, we are not in agreement with the contention of the learned counsel for the assessee that the AO has made the addition merely on surrender or disclosure by the assessee. In the present case, the AO has made the addition not on the basis of surrender made by the assessee but it has been made in the light of the outcome of the enquiry conducted by the AO during the course of which it was found by the Assessing Officer that the creditors were not even in existence inasmuch as they were non-responsive to the notices to them and even in most of the cases, the notices could not be served and had returned back unserved. Therefore, the assessee's contention that no penalty under sec.271(1)(c) is to be levied inasmuch as the assessee has surrendered the amount voluntarily is without any force.

15. The next contention of the assessee that the assessee has surrendered the amount only with a condition that no penalty under section 271(1)(c) shall be levied, has also no merit. It is not in dispute that in the assessee's letter dated 26.9.2008 the assessee has submitted that the assessee has surrendered the amount with the condition that no penalty proceedings should be initiated against it. However, this condition was not accepted by

the AO while making the assessment where the AO has categorically observed that this plea of the assessee company cannot be accepted on the ground that the income surrendered by the assessee company was not voluntarily but the said amount was surrendered because of detection made by the Department through enquiries conducted by it. Thus, on facts, this contention of the assessee also fails. Moreover, mere because the assessee had agreed to the addition subject to the condition that penalty under sec. 271(1)(c) would not be levied shall not preclude the department from proceeding to levy the penalty in view of the settled position of law that there cannot be estoppel against the Statute and the assessee's explanation regarding the addition had to be considered by the AO independently as so observed by the Hon'ble Kerala High Court in the case of CIT Vs. D.K.B. & Co. (2000) 243 ITR 618 (Ker.). Since, in the present case, the addition has been made on the basis of the enquiry conducted by the AO and not merely on the basis of disclosure made by the assessee agreeing to the addition, the condition imposed by the assessee that no penalty under sec. 271(1)(c) should be levied, has no force in the eyes of law. Hence, this contention of the assessee is also rejected. The various decisions cited by the learned counsel for the assessee in support of the contention that no penalty under sec. 271(1)(c) should be imposed in the case of conditional surrender would

not advance any further the assessee's case inasmuch as all those cases relied upon by the learned counsel for the assessee were rendered in the different context as discussed hereunder.

16. In the case of CIT vs. Suresh Chandra Mittal (supra), the income was offered to tax in the return filed in response to the notice issued by the AO. However, in the present case, in the return of income the assessee has not offered the aforesaid amount of Rs.6 lacs as income liable to tax but the said concealed income has been detected by the AO after making necessary enquiries as a result of which the assessee had no other alternative but to surrender the same to the department. Therefore, this case is of no help to the assessee.

17. The assessee has mainly relied upon the decision of ITAT, Delhi Bench, Delhi in the case of Smt. Raj Rani Mittal vs. ITO reported in (2010) 36 SOT 4 (Del) (URO). However, this case gives no assistance to the assessee's case. In that case, the AO just made the addition on the basis of surrender made by the assessee and the AO did not bother to issue summons to the parties so that they could be brought on record as witnesses of the revenue to prove that the assessee had concealed the income. In that case, the assessee had taken unsecured loans from 2 persons. The addition was made by the AO on the basis of surrender made by the assessee. In other

words, the addition was made on agreed basis and the AO had failed to bring any material on record to support the addition. In that case, the assessee submitted affidavits of the loan creditors. However, the assessee surrendered the income as she could not produce the parties living at Delhi at far away place of Rudrapur, and, therefore, on the basis of surrender the AO made the addition. However, the facts of the present case are quite distinct to the aforesaid case cited by the learned counsel for the assessee inasmuch as, in the present case, the assessee has not furnished any iota of evidence as to identity and existence of the alleged creditors nor furnished any confirmation from the respective parties. The assessee has not furnished particulars of their identity, creditworthiness and genuineness of the transaction. The payments were also received in cash though, in the case relied upon by the learned counsel for the assessee, the payments were received by account payee cheque and deposited in the assessee's bank account. In the present case, the addition has been made on the basis of incriminating material collected by the Assessing Officer and not merely on the basis of the surrender made by the assessee. Therefore, this case is also of no help to the assessee rather it supports revenue's case.

18. Similar is the position with regard to some other decisions cited by the learned counsel for the assessee inasmuch as in those cases the additions

were made purely on the basis of surrender made by the assessee and not on the basis of any sort of incriminating material brought on record by the AO. In the case of *Kumar Agencies (India) vs ACIT (2003) 87 ITD 69 (Mum) (TM)*, transactions were made through banks and parties were assessed to tax, and the assessee surrendered the amount to buy peace and avoid litigation as the assessee expressed its inability to produce creditors, who were not directly known persons but the transactions were made through brokers. The loan was received and repaid by account payee cheques, confirmations from creditors were filed which bore P.A. No. of the depositors. However, in the present case, no such facts are available where transactions were made in cash, and no evidence as to the identity, and existence of the depositors was filed. Thus, this case does not support at all the assessee's case.

19. In *ITO vs Dr. Sameer Kant Aggarwal (supra)*, the penalty levied by the department was deleted as the AO had failed to prove by independent material that assessee had concealed his income or had furnished inaccurate particulars of income. But, in the instant case before us, the AO has been able to bring on record the incriminating material even as to very existence or identity of the depositors, and the genuineness of the transaction.

20. The case of CIT vs Saran Khandsari Sugar Works (supra) is a case where income was estimated without any basis. Hence, this case is on different facts and of no help to the assessee.

21. To the present case, the decision of Hon'ble Allahabad High Court, Lucknow bench in the case of Shri Rakesh Suri (supra), which has been strongly relied upon by the learned DR, is fully applicable where the penalty levied under section 271(1)(c) was held to be justified even on conditional/agreed surrender of income if it was established that the surrender was not voluntarily but an afterthought, which is the situation in the present case before us. Since the surrender of income by the assessee is not found to be voluntarily but has been made under compulsion, the penalty levied by the AO under sec. 271(1)(c) with regard to the addition of unexplained credit of Rs.6 lacs cannot be said to be invalid or unjustified more particularly in view of the fact that the assessee's explanation is not found to be bona fide and further the assessee has failed to furnish all relevant material particulars relating to the concealed income of Rs.6 lacs added by the AO. In other words, we are of the considered view that the assessee has not been able to discharge its burden that lay upon it vide Explanation 1 to section 271(1)(c) of the Act.

22. For the reasons and discussions made above, we are, therefore, of the considered view that the learned CIT(A) has rightly confirmed the AO's order in levying penalty u/s 271(1)(c) of the Act. We, therefore, affirm the CIT(A)'s order, and dismiss this appeal filed by the assessee.

23. In the result, the appeal filed by the assessee stands dismissed.

24. This decision was pronounced in the open court on 25th June, 2010.

(R.C. SHARMA)
ACCOUNTANT MEMBER

(C.L. SETHI)
JUDICIAL MEMBER

Dated... 25th June, 2010
Vijay

Copy to :

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

Assistant Registrar