IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER

And

SHRI R.C. SHARMA, ACCOUNTANT MEMBER

1. ITA No. 222/ Ind/ 2012
A.Y. 2005-06
2. ITA No. 223/ Ind/ 2012
A.Y. 2005-06

1. Shri Radheshyam Sarda
Indore
PAN – AHCPS – 6464P

2. Smt. Sumanrani Sarda
Indore
PAN – AHCPS – 6465N :: Appellants

Vs

ACIT 1()
Indore :: Respondent

Appellants by	Shri Pankaj Shah and Shri S.N. Goyal
Respondent by	Shri R.A. Verma

Date of hearing	03.07.2012
Date of pronouncement	18.07.2012

O R D E R

PER R.C. SHARMA, ACCOUNTANT MEMBER

These are the appeals filed by different assessees against the order dated 5.3.2012 of the learned CIT(A) for the assessment year 2005-06 in the matter of imposition of penalty u/s 271(1)(c) of the Income Tax Act, 1961.

2. As the facts are common in the cases of both the assessees, both these appeals are heard together and are now being disposed of by this consolidated order.

3. Rival contentions have been heard and record perused. The facts, in brief, are that the assessee had shown income on account of long term capital gain out of sale of shares of M/s Robinson Limited. There was survey u/s 133A in case of DSP Shares & Securities wherein statement of Shri Shigal Shah was recorded. An inquiry was also strated against the assessee in which various details and documents were called for from the assessee. As the broker through whom the shares were purchased did not cooperate, the assessee was unable to furnish the required documents asked by the department. The assessee filed the revised return in which long term capital gain was offered as normal income of the assessee and due taxes and

interest thereon were also paid thereon. The revised return was filed by the assessee duly incorporating the income on 22.5.2008 and the assessment was framed by accepting the revised returned income. However, no addition was made on the income revised by the assessee. On 11.2.2010 the Assessing Officer initiated penalty proceedings u/s 271(1)(c) giving the following reasons :-

> *"However, since the assessee has furnished inaccurate particulars of her income and offered the same for taxation only after issuing notice u/s 148, it is a fit case for imposing penalty u/s 271(1)(c). Accordingly, penalty proceedings being initiated separately."*

Thereafter, the Assessing Officer passed order on 24.1.2011 u/s 271(1)(c) of the Act and levied penalty with respect to the amount of income offered in the revised return. The penalty so levied was partly confirmed by the CIT(A) and the assessee is in further appeal before us.

4. It was argued by the ld. Counsel for the assessee that the reasons itself for which penalty proceedings was initiated are

incorrect, therefore, penalty cannot survive. Our attention was drawn to the reasons recorded for initiation of penalty proceedings which stipulated that since the assessee has furnished inaccurate particulars of income and offered the same for taxation only after issuing notice u/s 148, it is a fit case for imposing the penalty u/s 271(1)(c). As per the ld. Counsel for the assessee, there was wrong mention of facts by the Assessing Officer insofar as the revised return was filed much prior to issue of notice u/s 148 of the Act. He further submitted that the assessment was framed/s 148/143(3) accepting the revised return without making any further addition. The ld. Counsel for the assessee further contended that it is a settled principle that penalty can be levied only for the reason for which it is initiated and when the reasons on which the penalty is initiated are incorrect, levy of penalty cannot stand. He further submitted that the penalty actually levied was for a different reason and not for the reason for which it was initiated. Reliance was placed on the decision of the Gujarat High Court in the case of A.M. Shah & Company; 238 ITR 415 wherein it was held that charge and levy of penalty should be for the same reasons i.e. the basis for issue of notice and for imposition of penalty must be same. In view of

this judgment, the ld. Counsel for the assessee contended that the penalty should be deleted. Reliance was also placed on the decisions of the following High Courts where it is held that penalty initiated on a particular ground cannot be levied or upheld on a different ground :-

i. CIT v. Lakhdir Lal Ji; 85 ITR 77 (Guj)

ii.Sarabhai Chemicals Pvt. Ltd. Vs.CIT; 257 ITR 355 (Guj)

iii.CIT v. Baroda Tin Works; 221 ITR 661 (Guj.)

iv.National Textile v. CIT; 249 ITR 125 (Guj)

v.ACIT v. Nihalchand; 135 ITR 519 (MP) (Guj.)

5. The ld. Counsel for the assessee further contended that the penalty was levied merely on the basis of statement of a third person recorded at the back of the assessee. The ld. Counsel for the assessee also contended that pursuant to the statement recorded u/s 133A of ShriSuraj Shah of DSP Shares, the inquiry was made on the assessee in which various details and documents were called for. As there was non-cooperation of M/s Robinson Limited on whose shares the assessee declared capital gains in the original return, the assessee has declared the

same as normal business income in the revised return to buy peace and avoid litigation. As per the ld. Counsel for the assessee, the statement recorded during survey does not carry any evidentiary value. Reliance was placed on the decision of the Hon'ble Kerala High Court in the case of Paul Mathews & Sons; 263 ITR 101 wherein it was held as under :-

> *"Section 133A enables the income tax authority only to record any statement of any person which may be useful but does not authroise for taking any sworn in statement....*
>
> *.....whatever statement recorded under section 133A is not given any evidentiary value obviously for the reason that the officer is authorised to administer oath and to take any sworn in statement which alone has the evidentiary value as contemplated in the law. (Para 11)"*

Reliance was also placed on the decision of Hon'ble Madras High Court in the case of CIT v. S. Khader Khan Son (300 ITR 157 wherein it was held –

> "Section 133A does not empower any ITO to examine any person on oath; so statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition."

As per the ld. Counsel for the assessee, no penalty can be imposed merely on the change of head of income. In the assessee's case, Rs. 3,70,819/- were originally disclosed as income from long term capital gains. However, to avoid litigation it was later offered to tax under the head income from other sources under which it was assessed in the assessment order. Therefore, there is no concealment but mere change of head of income from capital gains to income from other sources. In this regard, reliance was placed on the following precedents wherein it is held that no penalty can be levied for change of head of income :-

i. CIT v. JMD Advisors P.Ltd.; 124 ITR 223

ii. ITO v. Roborant Investments P. Ltd; 7bSOT 181

iii. Alpha Associates vs. DCIT; 66 TTJ 758

iv. CIT v. Regency Express Builders P.Ltd.166 Taxman 269

The ld. Counsel for the assessee further submitted that when a revised return is filed after investigation started but before issue of notice u/s 148 of the Act, no penalty is leviable and for this purpose, reliance was placed on the decision of the Punjab & Haryana High Court in the case of Guru Ramdas; 254 ITR 361 and ITAT, Jodhpur Bench in the case of Mahavir Tiles; ITA No. 233/JU/10.

6. Reliance was placed on the decision of the Hon'ble Rajasthan High Court in the case of Unique Precured Retraders; 13 DTR 215 wherein it was held that no penalty is leviable in respect of disclosure of additional income after survey. Reliance was also placed on the decision of the Hon'ble Madras High Court in the case of M. Pachamuthu; 295 ITR 502 wherein it was held that mere addition agreed to by the assessee during the course of survey would not empower the Assessing Officer to levy penalty u/s 271(1)(c) of the Act.

7. On the other hand, the learned Senior DR supported the orders of the authorities below for imposing the penalty on the plea that in the original return, the assessee has offered the capital gains as exempt which was found to be taxable after

inquiry. Reliance was placed on the decisions reported as 163 ITR 440 and 335 ITR 23.

8. We have considered the rival submissions, perused the material available on record, carefully gone through the orders of the authorities below and deliberated upon the case laws cited by the ld. Counsel for the assessee and the learned Senior DR during the course of hearing before us in the context of factual matrix of the instant case. From record we find that in the original return of income, details of long term capital gain from sale of shares of M/s Robinson Limited were disclosed by the assessee. Along with the return, state of affairs of the assessee was submitted, share certificates in the name of the assessee were produced along with the invoice of brokers and copy of ledger account of the broker and bank statement of the assessee. However, some additional documents as required by the Assessing Officer could not be produced due to non-cooperation of M/s Robinson Limited, therefore, the assessee filed revised return on 22.5.2008 in which the income declared under the head long term capital gain was offered as normal income. The assessee also paid due taxes and interest thereon. The assessment was framed wherein income offered in the revised

return was accepted by the department without making any further addition. Notice u/s 148 of the Act was issued by the Assessing Officer on 11.2.2010 i.e much after filing of the revised return. After assessing the income as per the revised return, the Assessing Officer also levied penalty u/s 271(1)(c) of the Act. Exactly similar issue has been dealt with by the Punjab & Haryana High Court in the case of Rajiv Garg; 313 ITR 256 wherein the assessee had disclosed long-term capital gains on sale of shares amounting to about Rs. 30 lakhs. Meanwhile, the Investigation Wing of the Department found on enquiry that the broker had accommodated the assessee with bogus entries relating to purchases and sales of shares, so that there could have been no long term capital gains assessable at the lower rate of 20 per cent. Notice under section 148 was issued and the assessee filed a return showing the entire amount of Rs. 30 lakhs amounting to receipts as business income in the revised return. The question arose whether penalty exigible in respect of income offered in the original return as capital gains at the rate of 20 per cent on 30 lakhs as against revised

return at the normal rate on 33%. The Tribunal relying upon the decision of the apex court in CIT v. Suresh Chandra Mittal [200 I] 251 ITR 9 held that it was for the Revenue to discharge its burden, that the assessee had filed inaccurate particulars. Such burden, it was decided, by the Tribunal was not discharged by the Revenue. It was this view, which was endorsed by the High Court in CIT v. Rajiv Garg [2009] 313 ITR 256 (P&H) in a common judgment for members of the Garg family on similar facts.

9. In the instant case, undisputedly the assessee has offered additional income much prior to issue of notice u/s 148. Hon'ble Punjab & Haryana High Court in the case of Guru Ramdas (supra) has held that if the revised return is filed after investigation started but before issue of notice u/s 148 then no penalty is leviable. Hon'ble Supreme Court in the case of Sureshchand Mittal; 251 ITR 9 held that where the assessee has surrendered additional income by way of revised return after persistent queries by the Assessing Officer, once

the revised return has been regularised by the Revenue, the explanation of the assessee that he has declared additional income to buy peace and to come out of the vexed litigation could be treated as bonafide and penalty u/s 271(1)(c) was not leviable.

10. ITAT, Indore Bench in the case of Ashok Kumar Jain HUF in ITA No. 580/Ind/2010 vide order dated 14.9.2011 has held as under :-

> "3. We have considered the rival submissions of ld. representatives of both sides and perused the material available on record. Under the aforementioned facts, the question arises as to whether the penalty u/s 271(1)© could be imposed when the assessee revised its return before finalization of assessment. The obvious reply is 'No' because the revised return was regularized by the revenue and at the same time there is no loss to the revenue. The decision of the Hon'ble Apex Court in

CIT v. Sureshchand Mittal; 251 ITR 9 and the ratio laid down by the Hon'ble MP High Court in CIT v. Shyamlal and Soni (276 ITR 156) support our view. At the same time, initial burden lies on the revenue to establish that the assessee concealed the income or inaccurate particulars of such income were filed by the assessee. The burden shifts to the assessee only if he fails to offer any explanation for the alleged undisclosed income or the explanation so offered is found to be false by the Assessing Officer. The explanation of the assessee that the addl. income was declared to buy peace with the department and to avoid litigation could be treated as bona fide. For imposing penalty u/s 271(1)©, either there should be concealment of income or furnishing of inaccurate particulars of such income. Since these twin conditions are not proved, no penalty is leviable. In the present appeal, the revised return was filed on

> 20.10.2006 before finalizing the assessment on 23.10.2006, therefore, there is no loss to the Revenue, consequently, we delete the penalty, therefore, appeal of the assessee is allowed.

The facts of the case relied on by the learned DR in the case of Prem Pal Gandhi; 335 ITR 23 are distinguishable from the facts of the instant case insofar as the revised return was filed in that case pursuant to the notice u/s 148 of the Act, whereas in the instant case before us, the assessee has filed the revised return much prior to issue of notice u/s 148 of the Act.

11. In view of the above discussion and after appreciation of entire evidence and the peculiar facts and circumstances of the case, we find that this is not a fit case for levying the penalty u/s 271(1)(c) of the Act.

12. In the result, both the appeals of the assessee are allowed.

This order was pronounced in the open Court in the presence of ld. Representatives from both sides at the conclusion of the hearing on 18th July, 2012.

Sd sd

(JOGINDER SINGH) (R.C.SHARMA)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Dated: 18th July, 2012

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