* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ [ITA No.1579 of 2010]

Judgment Delivered on: 23.5.2011

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COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Jr. Standing Counsel for the Revenue.

VERSUS

HARSH TALWAR …RESPONDENT

Through: Dr. Rakesh Gupta, Advocate with Mr. Ashwani Taneja, Ms. Poonam Ahuja and Mr. Johnson Bara, Advocates

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed
to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. This appeal was admitted on the substantial question of law whether the ITAT was correct in law in deleting the penalty imposed by the Assessing Officer under Section 271 (1) (c) of the

Income Tax Act. The aforesaid issue has arisen for consideration in the following factual backdrop.

For the assessment year 2004-05, the assessee herein who is a partner of M/s Gallaria June 1st. During the assessment proceedings, the assessee was confronted with some stocks comprising of various carpets and durris lying at the premises. It may be noted that a search was carried out at the premises of the assessee on 16th January, 2004 and at the same time, stock registers were verified which showed opening stock of 3290 of various carpets and durris. However, the stock registers for the financial year 2003-04 revealed opening stock of 5417 number of carpets and durris. The assessee surrendered an amount of Rs. 1.25 crores as an unexplained investment. Taking gross profit of 16% thereon which comes to ₹ 28,68,390/-, that amount was added as an additional income for this assessment year. At the same time, while passing the assessment orders, the Assessing Officer chose to initiate the penalty proceedings as well under Section 271 (1) (c) of the Act. Show cause notice was issued and after eliciting reply thereupon and hearing the assessee, penalty of Rs. 41.25 lacs was imposed upon the assessee. The penalty order passed by the AO gives an impression that in the reply submitted by the assessee in the initiation of penalty proceedings, the assessee had merely challenged the said proceedings only on the ground that the mandatory satisfaction which is to be recorded by the AO before proceedings under Section

271 (1)(c) of the Act was not recorded and in the absence of this mandatory requirement, the penalty proceedings were *void ab initio.* The Assessing Officer has dealt with this contention and after repelling the same, he imposed the penalty on the ground that the assessee had himself agreed to surrender the income of Rs. 1.25 crores for tax and this was sufficient justification for imposition of penalty. The assessee challenged this penalty order passed by the AO by preferring appeal before the CIT (A). It was asserted by the assessee that the assessee had given due explanation to the Assessing Officer during the penalty proceedings alongwith plethora of evidence. The surrender was made by the assessee just to buy peace and otherwise the difference in the figures of carpets was due to the fact that these carpets were taken on approval basis. The evidence produced by the assessee was in the form of bills and vouchers, copies of accounts of suppliers/manufacturers duly acknowledging the delivery of carpets to the assessee on approval basis, the details of income tax assessment of the parties alongwith original bills in respect of carpets as and when the same were purchased alongwith the PAN details of the suppliers/manufacturers. The grievance of the assessee before the CIT (A) was that the explanation furnished by the assessee alongwith the aforesaid documentary evidence was not even adverted to and dealt with by the AO while passing the penalty order. It was impressed upon by the assessee before the appellate authority that penalty proceedings

were all together different and independent of the quantum proceedings and it was the right of the assessee to show that there was no concealment or deliberate misstatement of the part of the assessee which warranted any penalty to be imposed by him. The CIT (A) found, and rightly so, that the AO had not dealt with the defence put forth by the assessee as noted above and merely on the basis that the assessee had surrendered the income during the quantum proceedings, the AO jumped to the conclusion that there was concealment on the part of the assessee and rushed to impose the penalty. Thereafter the CIT (A) went into the documents which were submitted by the assessee and on that basis recorded the finding that the assessee had been able to show that there was no deliberate concealment of income on the part of the assessee and therefore the imposition of penalty was not justified. The detailed order passed by the CIT (A) further indicates that the CIT (A) focused his attention to the issue that mere surrender of the assessee would not amount to concealment of the income and this aspect had to be gone into afresh and independently in the penalty proceedings. Various judgments in support of this position are taken note by the CIT (A) in his order. The CIT (A) further specifically dealt with this aspect of the so called concealment and recorded the following findings:-

> "The above submissions of the appellant have been found to be not without merit. It is seen that the appellant had filed copies of accounts confirmed by the suppliers/manufacturers with

regard to transactions on approval basis. In addition the details of income tax assessment of the said suppliers/manufacturers including PAN had also been filed. After going through the penalty order it is seen that the AO has not discussed any of these evidences or proven them to be false. Nor has the AO made out a case that some vital facts were concealed by the appellant and that the AO had detected the same. In any case, the AO apparently made the addition on the ground that the appellant voluntarily came forward and surrendered the said amount. So far as assessment proceedings are concerned, the AO has rightly made the addition when the appellant has voluntarily made a disclosure. However, for the purpose of levy of penalty u/s 271 (c) it was obligatory on the part of the AO to prove that the appellant had in fact concealed the particulars of his income. In the penalty order no cogent reason has apparently been given for holding that the appellant had concealed the particulars of his income or that the explanation of the appellant was false and incorrect. Merely because receipts and deliveries of carpets were made subject to approvals, the reasons of which have been explained in details by the appellant, it cannot be said that the AO was justified in holding that they must necessarily by bogus or in genuine. The second factor which may have influenced the mind of the AO while imposing the penalty can be that the explanation rendered any have been an afterthought. However, it has been stated that there are enough evidences to show that services were in fact provided by each of them. The AO's observation that such instant arrangements represent diversion of income does not appear to be based on any proper reasoning or basis. It appears to be a mere suspicion on the part of the AO. Ultimately the issue boils down to the fact that the AO has not elaborated on any cogent reason for being not satisfied with the explanations furnished by the appellant with regard to the necessity or justification or receiving and making deliveries on approvals. It is seen that the appellant offered this explanation in respect of the state of affairs alongwith all available evidences to substant6iate his

explanation. On the other hand the AO has not discussed any cogent argument for rejecting the appellant's explanation nor has he brought may thing on record to show that the appellant's explanation is false or that the appellant has concealed his income. The AO has not made out a case that the appellant has claimed any fictitious expenses on the basis of any incriminating evidences. The appellant has relied on certain case laws also wherein it is held that penal provisions cannot be attracted where deliberate and conscious concealment or furnishing of inaccurate particulars on the part of the assessee is not established. Certain other case laws have also been cited to content that mere non filing an appeal against additions made by the AO and voluntarily surrendering any amount to buy peace of mind cannot alone constitute sufficient grounds for imposition of concealment penalty.

Considering the facts and circumstances of the case in its entirety, it is held that merely because the appellant agreed to surrender the income does not five the AO the jurisdiction to come to the conclusion that there was deliberate concealment on his part. The surrendered amount may be taken into consideration while computing the income of the person surrendering the income, but it is not sufficient grounds to prove concealment of income on the part of the appellant for the purpose of levy of penalty u/s 271 (1) (c) of the Act. In the light of the evidences and explanation submitted by the appellant, it is held that there is no positive finding of the AO at any stage in the penalty proceedings that the explanation of the appellant was false and incorrect. In the present case there is nothing to show that the explanation given by the appellant was found to be false. This is a case where the explanation of the appellant was rejected without establishing it to be false and penalty was levied."

2. It is clear from the above that the CIT (A) also commented upon the wrong approach adopted by the AO and further that the AO had

not made out a case that the assessee had claimed any fictitious expenses on the basis of any incriminating evidences. It was now the turn of the Revenue to feel aggrieved by the aforesaid order of the CIT (A) in deleting the penalty which prompted the Revenue to challenge the said order by preferring appeal before the ITAT. However, the attempt of the Revenue in seeking to get the order of the CIT (A) has failed, inasmuch as, vide impugned order dated 16th October, 2009 the Tribunal dismissed the appeal of the Revenue and upheld the order of the CIT (A). The position is summarized as under by the ITAT in the impugned order:-

> "We have considered the rival submissions. We have also perused the material on records. A perusal of the assessment order clearly shows that the assessee had made surrender and the surrender has been accepted by the A.O. without doing any further verification. Further in the course of penalty proceedings the assessee has given detailed explanation. The assessee has brought evidences on record to substantiate the case of the assessee that the surrender itself was not called for and that the carpets were taken on approval basis. These evidences as furnished by the assessee, as also the explanation as given by the assessee has nowhere been disputed by the A.O. In fact the AO has levied the penalty without even making any comment o the explanation given by the assessee much less even without whispering about the falsity of the explanation. The AO has gone on the presumption that the assessee himself agreed to the surrender on his own sweet will and consequently, penalty is leviable. This is not reason justifiable enough for the levy of penalty. The assessee might surrender an amount for taxation for various reasons best known to the assessee. The surrender of an amount to taxation in the course of

> assessment proceedings, no doubt is a good finding for initiation of penalty proceeding but is not strong enough for the levy of penalty especially when in the course of penalty proceedings the assessee is able to place evidences and explanation and where he is fully entitled to challenge the surrender and prove the surrender itself was not called for. If such explanation is given by the assessee alongwith the corroborating proof for the same and if such explanation is not dislodged by the AO then penalty cannot be levied on the assessee. It is noticed from the order of Ld. CIT(A) that the CIT(A) has considered the fact that the assessee has produced the bills and vouchers as also the confirmation and copies of accounts of suppliers/manufacturers duly acknowledging the delivery of carpets of the assessee on approval basis as also the details of income tax assessment of the parties alongwith original bills in respect of the carpets as and when the same were purchased alongwith PAN details of the suppliers/manufactures and these evidences have not been rebutted by the A.O. Consequently, the Ld. CIT(A) has rightly deleted the penalty. In these circumstances, we find no error in the order of Ld. CIT(A) in deleting the penalty levied u/s 271(1) (c) of the Act. This view also finds support from the decision of Coordinate Bench of this Tribunal in the case of partnership firm Ms/ Galleria June 1st referred to supra wherein the assessee is a partner. In these circumstances, the appeal of the revenue is dismissed."

3. Apart from what is recorded by the CIT (A), another additional aspect which the Tribunal has pointed out is that even in the case of the partnership firm of M/s Gallaria June 1st, wherein the assessee is a partner, similar penalty under identical circumstances imposed by the Revenue had been deleted by the ITAT. We may further add that

the said order in respect of the partnership firm has been accepted by the Revenue and no appeal preferred thereagainst.

4. For all these reasons, we answer the question of law in favour of the assessee and against the Revenue. As a consequence this appeal is dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MAY 23, 2011
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