IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'C' BENCH, NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 6422/DEL/2018
[A.Y 2007-08]

Shri Krishan Lal Madhok 672, Tulsi Farms, Opp. Nanda Hospital Chattarpur, New Delhi	Vs.	The A.C.I.T. Central Circle – 15 New Delhi
PAN: AAKPM 8593 J		
[Appellant]		[Respondent]

Date of Hearing : 06.09.2021
Date of Pronouncement : 06.09.2021

Assessee by : Shri Priyanshu Goel, CA

Revenue by : Shri Rocktim Saikia, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the Commissioner of Income Tax [Appeals] - XXVI, New Delhi dated 24.08.2018 pertaining to Assessment Year 2007-08.

2. The solitary grievance of the assessee is that the ld. CIT(A) erred in confirming the penalty of Rs. 75,53,556/- u/s 271(1)(c) of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short].

3. The roots for levy of penalty lie in the assessment order framed u/s 153A of the Act. Facts on record show that the assessee filed original return of income declaring total income of Rs. 2,31,20,540/- and after search and seizure action u/s 132 of the Act and after receiving notice u/s 153A of the Act, the assessee filed return of income u/s 153A of the Act declaring income at Rs. 4,54,88,542/-.

4. Returned income was assessed at Rs. 4,74,19,927/- after making addition on account of peak credit balance in HSBC Bank of Rs. 18,58,311/- and Rs. 73,074/- on account of accrued interest. Penalty proceedings u/s 271(1)(c) of the Act were separately initiated.

5. The Assessing Officer imposed penalty holding that income of Rs. 2,23,68,002/- was not declared in the original return of income filed u/s 139 of the Act. Further, addition made on account of HSBC deposit and interest thereon were also subjected to levy of penalty u/s 271(1)(c) of the Act.

6. After giving thoughtful consideration to the aforestated facts, at the very outset, we are of the opinion that once income is returned in the return filed u/s 153A of the Act, then the return filed u/s 139 of the Act gets superseded by the return filed u/s 153A of the Act, which means that any initiation of penalty u/s 271(1)(c) of the Act should be based on the assessed income u/s 153A of the Act qua the return filed. In our considered opinion, the returned income u/s 139 of the Act should not be considered in initiating penalty proceedings u/s 271(1)(c) of the Act qua the assessment made u/s 153A of the Act.

7. The Hon'ble High Court of Delhi in the case of Neeraj Jindal 79 TAxmann.com 96 had the occasion to address an identical issue. The relevant findings of the Hon'ble Jurisdictional High Court read as under:

> "17. In this case, the A.O. in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be "voluntary". Hence, in the A.O.'s opinion, the assessee had "concealed" his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating evidence, does not show that the assessee has "concealed" his income for the relevant assessment years. On this

point, several High Courts have also opined that the mere increase in the amount of income shown in the revised return is not sufficient to justify a levy of penalty.

18. The Punjab & Haryana High Court in Commissioner of Income Tax v. Suraj Bhan, (2007) 294 ITR 481 (P & H), held that when an assessee files a revised return showing higher income, penalty cannot be imposed merely on account of such higher income filed in the revised return. Similarly, the Karnataka High Court in the case of Bhadra Advancing Pvt Limited v. Assistant Commissioner of Income Tax, (2008) 219 CTR 447, held that merely because the assessee has filed a revised return and withdrawn some claim of depreciation penalty is not leviable. The additions in assessment proceedings will not automatically lead to inference of levying penalty. The Calcutta High Court in the case of Commissioner of Income Tax v. Suresh Chand Bansal, (2010) 329 ITR 330 (Cal) held that where there was an offer of additional income in the revised return filed by the assessee and such offer is in consequence of a search action, then if the assessment order accepts the offer of the assessee, levy of penalty on such offer is not justified without detailed discussion of the documents and their explanation which compelled the offer of additional income. The Madras High Court in the case of S.M.J. Housing v. Commissioner of Income Tax, (2013) 357 ITR 698 held that where after a search was conducted, the assessee filed the return of his income and the Department had accepted such return, then levy of penalty under Section 271(1)(c) was not justified. From the above cases it would be clear that when an assessee has filed revised returns after search has

been conducted, and such revised return has been accepted by the A.O., then merely by virtue of the fact that such return showed a higher income, penalty under Section 271(1)(c) cannot be automatically imposed.

19. The whole matter can be examined from a different perspective as well. Section 153A provides the procedure for completion of assessment where a search is initiated under Section 132 or books of account, or other documents or any assets are requisitioned under Section 132A after 31.05.2003. In such cases, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted under Section 132 or requisition was made under Section 132A. The Assessing Officer shall assess or reassess the total income of each of these six assessment years. Assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or requisition under Section 132A, as the case may be, shall abate. [Ref to Memorandum accompanying the Finance Bill, 2003] Section 153A opens with a non-obstante clause relating to normal assessment procedure covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after May 31, 2003. The sections, so excluded, relate to returns, assessment and reassessment provisions. However, the provisions that are saved are those under Section 153B and 153C, so that

these three Sections 153A, 153B and 153C are intended to be a complete code for post- search assessments. Considering that the non-obstante clause under Section 153A excludes the application of, inter alia, Section 139, it is clear that the ITA 463/2016 & CONNECTED CASES Page 13 revised return filed under Section 153A takes the place of the original return under Section 139, for the purposes of all other provisions of the Act. This is further buttressed by Section 153A (1)(a) which reads:

"Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall-

a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139.

20. Therefore, the position that emerges from the above-mentioned provision is that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. On similar lines, the Gujarat High Court in the case of Kirit Dahyabhai Patel v. Assistant Commissioner of Income Tax, (2015) 280 CTR (Guj) 216, held that: "In view of specific provision of s. 153A of the I.T. Act. the return of income filed in response to notice under s. 153A of the I.T. Act is to be considered as return filed under s. 139 of the Act, as the AO has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under s. 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under s. 153A, if any."

21. Thus, it is clear that when the A.O. has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act. For all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to Section 153A(1) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate." What is clear from this is that Section 153A is in the nature of a second chance given to the assessee, which

> incidentally gives him an opportunity to make good omission, if any, in the original return. Once the A.O. accepts the revised return filed under Section 153A, the original return under Section 139 abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under Section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under Section 153A, and not vis-a vis the original return under Section 139."

8. Since the impugned issue has now been settled in favour of the assessee and against the revenue by the Hon'ble High Court of Delhi [supra], we do not find any merit in the levy of penalty on the amount of Rs. 2,23,68,002/-.

9. In so far as the levy of penalty on deposits made in HSBC account and interest earned thereon is concerned, this Tribunal in ITA No. 3917 to 3921/DEL/2017 and others in assessee's own case has made the following observations while deleting the addition.

> "24. Be that as it may, the question which needs to be highlighted is that even assuming that the statement of the assessee is paramount and sacrosanct, then there is no denial by the revenue authorities that the assessee has honoured his statement and

offered Rs.2,23,68,000/– in his return of income for A.Y 2007–08 and has paid taxes thereon. In all his submissions made during the course of assessment proceedings and highlighted by us elsewhere, the assessee was constantly stating that this peak credit was calculated by the tax authorities and at the behest of the tax authorities the assessee offered the same in his income for A.Y 2007–08 and paid taxes thereon.

25. Nowhere the Assessing Officer has demolished this claim of the assessee which means that the Assessing Officer has inherently accepted the contention of the assessee that the disclosure was at the behest of the tax authorities and calculation of peak credit was also at the behest of the tax authorities.

26. We have carefully examined the computation of income for A.Y 2007–08 and under the head 'income from other sources' at item L – "Other Income", the assessee has shown income of Rs. 2,23,68,007/–. Once the assessee has returned the undisclosed income and paid taxes thereon, in our considered opinion, there should not be any quarrel to bifurcate the disclosed amount in two A.Ys when tax rate in both the A.Ys is the same and there is no loss to the revenue. We are of the considered view that the revenue authorities should desist from such litigation.

27. Considering the facts of the case in totality, as discussed hereinabove, as culled out from the records, and the relevant documentary evidences, we do not find any merit in bifurcating the income in two A.Ys when the assessee has paid taxes in A.Y 2007–

08. Making the addition of same income in two A.Ys definitely amounts to double taxation. We, accordingly direct the Assessing Officer to delete the addition in A.Y. 2006.07 amounting to Rs. 2,05,50, 550/- and Rs. 18,58,311.00 in F.Y 2007-08 also. Accordingly, the appeals of the assessee in ITA Nos. 6269 and 6268/DEL/2017 are allowed.

28. Now we will address to the appeals of the revenue.

29. In ITA No 6648/Dell/2017, the revenue has raised two issues. One is relating to deletion of addition of Rs.18,58,311/- made by the Assessing Officer under section 69 of the Act on account of difference appeared in peak balances in bank account maintained with HSBC, Geneva and second ground relating to deletion of addition of Rs. 73,074/- made by the Assessing Officer on account of interest accrued to the assessee on bank balance in his foreign bank account maintained with HSBC, Geneva.

30. The grievance raised vide ground No. 1 becomes otiose qua our decision in ITA No 6268 and 6269/DEL/2017.

31. Addition on account of interest accrued on HSBC account, Geneva is common in all the appeals of the revenue bearing ITA Nos. 3917 to 3921/DEL/2017, though the quantum of amount may differ.

32. The short issue is that in all these appeals for the revenue relating to different A.Ys, the Assessing Officer was of the firm belief that the assessee must have earned some interest on the

balances in his bank account with HSBC, Geneva. The Assessing Officer assumed that in India a Savings Bank account holder earns interest at the rate of 4%, therefore, applying the same rate, the Assessing Officer made the impugned addition.

33. The first appellate authority in all the A.Ys in which the revenue is in appeal found that the assumption made by the Assessing Officer is baseless and deleted the addition.

34. Before us, the learned DR strongly supported the findings of the Assessing Officer.

35. Per contra, the learned counsel for the assessee relied upon the decision of the ld. CIT(A).

36. On the facts mentioned hereinabove, we are of the considered opinion that the action of the Assessing Officer defies the taxability of concept of real income. The undisputed fact is that in the alleged sheets of bank deposits received from the French government under DTAC, there is no mention of any interest paid by the bank to the assessee. Therefore, it is illogical to compute interest and that too at the rate prevailing in India. Since there is no documentary evidence to support the presumption of the Assessing Officer, we do not find any reason to interfere with the findings of the ld. CIT(A)."

10. Sublato Fundamento Cadit Opus, meaning thereby, that in case the foundation is removed, the super structure falls. Since the foundation [assessment] has been removed, the super structure i.e. penalty must fall. Accordingly, the penalty is directed to be deleted.

11. In the result, the appeal filed by the assessee in ITA No. 6422/DEL/2018 is allowed.

The order is pronounced in the open court on 06.09.2021 in the presence of both the rival representatives.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 06th September, 2021

VL/

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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