

**RUSTOM SORAB MEDORA vs. INCOME TAX OFFICER (INTERNATIONAL TAXATION)**

AHMEDABAD TRIBUNAL

ANIL CHATURVEDI, AM & KUL BHARAT, JM.

ITA No. 2283/Ahd/2012

Jul 11, 2014

(2014) 40 CCH 0484 AhdTrib

Legislation Referred to

Section 274, 271(1)(c), 143(3)

Case pertains to

Asst. Year 2008-09

Decision in favour of:

Assessee

**Penalty u/s 271(1)(c)—Concealment of income—Assessee's assessment was completed u/s 143(3)—AO during course of assessment noticed that assessee had claimed Long Term Capital Gain as exempt u/s 10(38)—On further verification of details of LTCG, AO found increase in shares of L on account of bonus shares received which were sold by assessee within one year of their allotment—AO held that bonus shares of L sold by assessee within one year was short term capital gain and made addition to income declared by assessee—No appeal was filed by assessee against assessment order—AO initiated penalty proceedings u/s 271(1)(c) and after considering detailed submissions made by assessee imposed penalty—CIT(A) affirmed penalty imposed by AO—Held, it was incumbent upon AO to come to a positive finding as to whether there was concealment of income by assessee or whether any inaccurate particulars of such income had been furnished by assessee—No such clear-cut finding was reached by AO neither in show cause notice nor in penalty order, order of penalty was liable to be struck down—Further assessee has offered gain arising out of bonus shares as capital gain and paid tax on same—Had assessee waited for more time to transfer bonus shares there would have been a long term capital gain which was exempt at that point of time—No reason for assessee to evade tax—Penalty imposed u/s 271(1)(c) set aside—Assessee's appeal allowed**

Held

*It was held by Gujarat High Court in CIT vs. Whiteford India Ltd., that it was incumbent upon the AO to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. If no such clear-cut finding was reached by the AO, the order of penalty passed by the AO was liable to be struck down. Further the assessee has offered gain arising out of bonus shares as capital gain and paid tax on the same, had the assessee waited for more time to transfer the bonus shares there would have been a long term capital gain which was exempt at that point of time. Therefore, there was no reason for the assessee to evade tax. Authorities below were not justified in imposing the penalty and confirming the same. Moreover, the penalty notice was issued by the AO is also defective. CIT vs. Whiteford India Ltd., **relied on***

(Para 4.1 & 4.2)

## Conclusion

*Where there was no clear finding by the AO as to whether the assessee was guilty of concealing the income and/or furnishing inaccurate particulars of the income, penalty imposed by AO u/s 271(1)(c) was liable to be set aside, more so when assessee has offered gain arising out of bonus shares as capital gain and paid tax on the same on account of which penalty was levied by AO.*

## In favour of

Assessee

## Cases Referred to

*New Sarathia Eng.Co. vs. CIT, 282 ITR page 642*

*CIT vs. Whiteford India Ltd. reported at (2013) 38 taxmann.com 15 (Guj.)*

## Counsel appeared:

*S.N. Soparkar with Urvashi Shodhan, AR for the Appellant.: A. Tirkey, Sr.DR for the Respondent*

## **KUL BHARAT, JM.**

1. This appeal by the Assessee is directed against the order of the Ld.Commissioner of Income Tax(Appeals)-Gandhinagar ('CIT(A)' in short) dated 27/08/2012 pertaining to Assessment Year (AY) 2008-09. The Assessee has raised the following grounds of appeal:-

### *I. On Legality:*

1. The Ld.CIT(A) has erred both in Law and in fact in confirming the applicability of Sec.271(1)(c) of the Act on the facts of the case and thereby confirming order of ITO levying penalty of Rs.12,32,407/-.

2. Your Appellant submits that the ITO has not satisfied himself and has not recorded any Satisfaction of concealment prior to initiation of Penalty proceedings and thereby he has violated the very principle of applicability of Sec.271(1)(c) and therefore the levy of Penalty be cancelled.

3. Your Appellant further submits that neither the order of ITO levying Penalty u/s.271(1)(c) nor the Show Cause Notice are clear as to whether your Appellant has committed offence of concealing income or "furnishing inaccurate particulars of such income".

It is further submitted that the very Show Cause Notice and Penalty Order is vague uncertain and capable of two views and therefore in view of binding judgement of Hon.Gujarat High Court in the case of New Sarathia Eng.Co. vs. CIT, 282 ITR page 642 your Appellant submits that the levy of Penalty is bad in Law and void and therefore requires to be deleted.

## II. On Merits:

1. It is submitted by your Appellant that even on merits penalty u/s.271(1)(c) is not leviable since all necessary details and information to work out the total income and computing Capital gains/Short term and or Long Term was voluntarily submitted by the Appellant in Return of Income and therefore Sec.271(1)(c) does not apply.

2. Your Appellant further submits that in response to the Show Cause Notice of Penalty your appellant had submitted Explanation based on facts of the case record and is not ITO not accepting the Explanation does not entitled him to levying penalty as held by various authorities and therefore also kindly levied u/s.271(1)(c) be cancelled.

It is therefore submitted that reliefs claimed above be allowed and the order of the Assessing Officer be modified accordingly.

Your Appellant reserves right to add, alter or amend any or all Grounds of Appeal.

2. The facts as narrated in the order of the Id.CIT(A) are as under:-

*"3. In this case the assessment was finalized u/s.143(3) on 23/11/2010 on a total income of ` 1,13,58,240/-. During the course of assessment proceedings, the AO noticed that the assessee claimed Long Term Capital Gain of Rs.28487270/- as exempt u/s.10(38) of the IT Act. On further verification of details of LTCG, the AO found increase in shares of M/s.L&T. The increase in shares of M/s.L&T was bonus shares allotted by M/s.L&T which was sold by the assessee within one year of their allotment. On verification of all the document filed during the course of assessment proceedings, the AO concluded that the bonus shares of M/s.L&T sold by the assessee within one year was short tem capital gain and made addition of Rs.1,08,77,381/- to the total income declared by the assessee. The assessee had not filed appeal against the assessment order. Simultaneously, penalty proceedings u/s.271(1)(c) of the Act were also initiated for concealment of income and the show cause notice under section 274 rws 271(1)(c) of the Act dated 23/11/2010 was issued and served upon the assessee. Thereafter, during the penalty proceedings, detailed submissions were made by the appellant, which were considered and rejected by the AO. Penalty @ 100% of the amount of tax sought to be evaded has thereafter been imposed by the AO."*

2.1. The assessee filed an appeal against the order of the Assessing Officer (AO in short) against the imposition of penalty u/s.271(1)(c) of the Income Tax Act,1961 (hereinafter referred to as "the Act"). The Id.CIT(A) rejected the submission of the assessee and disallowed the appeal. Against the order of the Id.CIT(A), the assessee is in appeal before us.

3. The Id.Sr.counsel for the assessee Shri S.N.Soparkar submitted that the imposition of penalty is not justified as the assessee has disclosed the material information by filing the revised computation of capital gain. The assessee paid all taxes. He submitted that this is not the case where the assessee has suppressed and concealed any information. In fact, all material were available with the AO. He has submitted that the assessee has also taken an objection with regard to the initiation of penalty proceedings. In support of this contention, he drew our attention towards para-6 of the assessment order. He placed reliance on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT vs. Whiteford India Ltd. reported at (2013) 38 taxmann.com 15 (Guj.).

4. We have heard the rival submissions, perused the material available on record and gone through the orders of the authorities below as well as the judgement relied upon by the Id.Sr.counsel for the assessee. We find that during the course of penalty proceedings u/s.271(1)(c) of the Act, the AO vide para-6 of his order has directed as under:-

*"6. Assessed under section 143(3) of the I.T. Act. Issue Demand Notice and challan accordingly. Charge interest u/s.234A, 234B & 234C of the Act as applicable, as per law. Issue penalty notice u/s.274 r.w.s.271(1)(c) of the Act for furnishing of inaccurate particulars of income/concealment of income as discussed above. Issue Demand Notice and challan accordingly."*

4.1. The Hon'ble Jurisdictional High Court in the case of CIT vs. Whiteford India Ltd.(supra) has observed as under:-

*"4. Having heard Shri Varun Patel, learned advocate appearing on behalf of the appellant and considering the observations made by the Assessing Officer, while passing the order of penalty, it is not in dispute and/or cannot be disputed that there was no clear finding by the Assessing Officer whether the assessee was guilty of concealing the income or furnishing inaccurate particulars of the income. While considering the similar situation, the Division Bench in the case of Manu Engg. Works (Supra) has observed and held as under;*

*"We find from the order of the Inspecting Assistant Commissioner, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order; 'I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Now, the language of 'and/or' may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the Inspecting Assistant Commissioner to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the Inspecting Assistant Commissioner and, on that ground alone, the order of penalty passed by the Inspecting Assistant Commissioner was liable to be struck down."*

*4.1 Similar view has been subsequently expressed by another Division Bench in the case of New Sorathia Engineering Co. (Supra). Considering the ratio laid down by this Court in the aforesaid two decisions and the facts of the case on hand, more particularly, when it is observed that there was no clear finding by the Assessing Officer whether the assessee is guilty of concealing the income and/or furnishing inaccurate particulars of the income and the learned Income Tax Appellate Tribunal has set aside the order passed by the CIT(A) confirming the order passed by the Assessing Officer imposing penalty*

*under Section 271(1)(c) of the Act, it cannot be said that the Income Tax Appellate Tribunal has committed any error.*

*4.2 Reliance placed upon Section 271 (1)(b), which has been inserted by the Finance Act, 2005 with effect from 01/04/2006 is neither here nor there. Still the requirement while imposing the penalty under Section 271(1)(c) are required to be complied with. It cannot be disputed that while imposing the penalty under Section 271(1)(c) of the Act, two conditions are required to be satisfied i.e. (i) the assessee has concealed the particulars of his income (ii) the assessee has furnished incorrect particulars of such income. As held by the Division Bench in the case of Manu Engineering Works (Supra) the Assessing Officer is required to give clear finding whether the assessee is guilty of concealing the income and/or furnishing incorrect particulars of income."*

4.2. In view of the ratio laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Whiteford India Ltd.(supra) and the coupled with fact that the assessee has offered gain arising out of bonus shares as capital gain and paid tax on the same, we find force in the contention of the Id.Sr.counsel for the assessee that had the assessee waited for more time to transfer the bonus shares there would have been a long term capital gain which was exempt at that point of time. Therefore, there was no reason for the assessee to evade tax. Under these facts, we are of the opinion that the authorities below were not justified in imposing the penalty and confirming the same. Moreover, the penalty notice was issued by the AO is also defective in view of the ratio laid down by the Hon'ble Jurisdictional High Court in the case of CIT vs. Whiteford India Ltd.(supra). Therefore, grounds raised by the assessee are allowed.

**5. In the result, the appeal of the assessee is allowed.**

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