

C.E. Bailey Vs. Deputy Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Sep-29-1997

Appellant : C.E. Bailey

Respondent : Deputy Commissioner of

Judgement :

1. All these appeals involve consideration of common points. Hence, we find it convenient to dispose of all these appeals by this consolidated order.
2. All these assesseees are foreign technicians and are employed by a non-resident company called M/s. GEC Turbine Generator India Ltd., a non-resident company registered in U.K. (hereinafter referred to as 'GEC'). M/s. GEC was engaged in the business of erecting, setting up, etc., of Power Stations. It had undertaken the contract of setting up of a Power Plant at Balco, Korba, in Madhya Pradesh for M/s. Bharat Aluminium Corporation. It had also undertaken a sub-contract in the matter of erection of power plant at Rihand, UP to be set up by NTPC. This sub-contract was taken from the principal contractor known as Northern Engineering Industries. The object of sub-contract was only to provide technicians for supervision and erection. These employees were all working in India at different places or work sites.
3. The survey operation under section 133A was conducted on the employer-company on 8-7-1988. Thereafter, search operations under section 132 of the Income-tax Act were conducted on 19-7-1988. The proceeding of search was once again carried out on 2nd March, 1990.

During the course of search proceedings, various incriminating records, books of account and other documents were found and seized. These documents revealed that the salary, value of perquisites and other benefits disclosed by the employees of the said employer-company in their original return of income did not reflect the actual payments made to them. The completed assessments for various years in the cases of these employees were re-opened either under section 143(2)(b) or under section 148 of Income-tax Act, 1961.

3.1 After the search, the employer company GEC filed a settlement application before the Deputy Director of Investigation, Unit-IV, as well as to the Director of Investigation, New Delhi vide application dated 23rd July, 1990 and paid taxes on the basis of settlement application with regard to the employees whose salary, perquisites, etc., had been originally shown less than the actual payments made to them. Since, the employer-company had offered higher figures of salary and perquisites allowed to various employees, some of the employees furnished revised returns declaring such higher amount of salary and perquisites as were agreed by the employer-company in the aforesaid settlement application. A list of 21 employees who furnished such revised returns along with letter dated 21-3-1991 was submitted by the Ld. Counsel of the assessee at the time of hearing. The various other employees in pursuance of the notices issued under section 148, after the search, submitted letters before the Assessing Officer stating that the original returns already filed by them may be treated as a return pursuant to notice under section 148.

4. The Assessing Officer completed the fresh assessments/reassessments in the cases of all these employees in which the Assessing Officer not only adopted the figures of higher salary and perquisites shown in the settlement application submitted by the employer-company or the figures shown by some of these employees in the revised returns filed after the search, but also made further additions on the basis of seized records.

The quantum appeals in the cases of various employees of this company was decided by the Tribunal by a consolidated order in the case of E.Sproule [IT Appeal No. 8428 (Delhi) of 1992, dated 6-1-1994]. This consolidated order was

passed in the cases of 23 employees. Another order was passed by the Tribunal in the case of John Scott [IT Appeal No. 8432 (Delhi) of 1992, dated 21-1-1994]. This order was passed in the cases of 13 employees. This subsequent order was passed on similar lines by following the aforesaid earlier order dated 6th January, 1994 in the cases of 23 employees. Copies of the above two referred orders passed by the Tribunal in the quantum appeals had been furnished by the Ld. counsel from pages 35 to 90 of the Paper Book. The details about the decisions of the Tribunal in the quantum appeal in the cases of remaining employees if any were not furnished.

4.1 The Assessing Officer levied penalty under section 271 (1)(c) by holding that these assesseees concealed the particulars of their income while filing the original returns. In some of the penalty orders, the Assessing Officer has observed that the ITAT vide their order dated 6th January, 1994 has allowed certain reliefs. However, the Department has filed applications for reference to the Tribunal under section 256(1) which were pending at that time before the Tribunal. The Assessing Officer, therefore, observed that the order of the Tribunal has not become final. He accordingly levied penalty under section 271 (1)(c) on the entire amount of addition including those additions which were made by the Assessing Officer in the fresh assessment orders/reassessment orders made after the search but were deleted by the Tribunal in the quantum appeal.

4.2 These assesseees preferred appeal before the CIT(A) against levy of such penalty under section 271(1)(c) of Income-tax Act, 1961 (for short referred to as 'Act').

5. The CIT(A) in the appellate order passed in various cases mentioned at Sl. Nos. 1 to 28 held that the orders passed by the ITAT in the quantum appeal were binding on the Assessing Officer as long as the same were not set aside or reversed by a higher judicial authority.

Therefore, he held that the levy of penalty under section 271 (1)(c) in respect of additions reduced or deleted by the ITAT in the quantum appeal is not justified. He directed the Assessing Officer to delete the penalty levied in respect of additions reduced or deleted by the Tribunal in the quantum appeal. The CIT(A) further

observed that the difference between income, i.e., salary and value of perquisites stated in the original returns filed by these assesseees and the income determined under the same heads after the giving effect to the orders of ITAT would be the concealed income of the appellants and no benefit can be given to the appellants on account of revised returns filed by them after the concealment as such was detected during the course of search and seizure proceedings carried out under section 132 of the Act. In cases, where the Assessing Officer had given the effect on orders passed by the ITAT in the quantum appeal, the CIT(A) in these penalty appeals had given the exact figure of income finally determined as a result of the order passed by the Tribunal and has also worked out the amount of concealed income by determining the difference between the income shown in the original return and the income as has been finally determined after giving effect of the order passed by the Tribunal.

5.1 In cases where the appeal effect order has not been passed by the Assessing Officer to give effect to the order of the Tribunal, the CIT(A) directed the Assessing Officer to restrict the penalty only in relation to tax on difference between the income declared in the original return and the income to be determined as per the order of the Tribunal in the quantum appeal. In cases where no revised returns were filed by the assessee, the CIT(A) has given similar finding directing to Assessing Officer to restrict the penalty imposable under section 271(1)(c) only with reference to difference between the income by way of salary and perquisites shown in the original return of income and the income as may be finally determined after giving effect of the order passed by the Tribunal in quantum appeals.

5.2 Such findings have been given by the CIT(A) in the various cases mentioned at Sl. Nos. 1 to 28.

5.3 All the assesseees mentioned at Sr. Nos. 1 to 28 have raised the following identical grounds in their respective appeals :- "1. The levy of penalty under section 271 (1)(c) of I.T. Act is wrong. It is contended that the provisions of the above section is not attracted at all.

2. The learned CIT(A) has grossly erred on facts and in law in confirming the imposition of penalty. It is contended that the appellant neither concealed nor furnished inaccurate particulars nor made an unsubstantiated claim. The appellant had only acted on the representation by the employer thus no penalty is leviable.

3. The appellant craves leave to add, amend, alter or vary the above grounds of Appeal." 5.4 In the appeals of various assessees mentioned at Sl. Nos. 29 to 76, the Assessing Officer had issued notices under section 148 after the search operations were conducted at the premises of the employer-company. The assessees in these cases informed the Assessing Officer that the returns filed earlier by them may be treated as return filed in pursuance of the notice under section 148. The Assessing Officer completed the fresh assessment orders on the basis of facts and information obtained as a result of search and subsequent investigation made thereafter. The Assessing Officer also levied penalty under section 271(1)(c) in all these cases in respect of income, of which particulars were concealed by these assessees. The CIT(A) in these cases confirmed the penalty levied under section 271 (1)(c). While confirming the said penalty, the CIT(A) observed that these assessees could not be said to be unaware of the fact of having received allowances like overtime allowance or rupee allowance/daily allowance for posting in certain places. These persons were residents in India during the relevant year and, therefore, all allowances received and all perquisites availed by these employees should have been disclosed in the return of income. The CIT(A), therefore, rejected the explanations submitted on behalf of these assessees that employer had not shown the items of allowances and perquisites in the salary certificate, which according to these assessees, constitute a reasonable cause for not disclosing the same in the returns filed by them. The CIT(A) further observed that the claim made by these assessees that the Assessing Officer did not have the original return, will make no difference as at no stage these employees have denied that the income in the original returns filed by them was as per details given in Form No. 24 filed by the employer. The CIT(A) has also further observed that quantum appeal in all these cases had also been dismissed by him. While confirming the said penalty, the CIT(A) had also followed the reasoning given in the penalty appeals decided by the CIT(A) in the case of F.A. Watkins [Appeal Nos. 360 and 362 of 1994-95] and in the case of Neil

Graham [Appeal No. 361 of 1994-95](2 employees of the same employer-company). These orders passed by the CIT(A) are subject matter of consideration in ITA Nos. 1691-1692 and 1693/Delhi/95 mentioned at Sl. Nos. 5 to 7.

6. The Ld. Counsel for the assessee did not specifically point out as to whether the Tribunal has passed any order in the quantum appeal relating to the cases mentioned at Sl. Nos. 29 to 76. The CIT(A) in the impugned orders has also not referred to any order passed in the quantum appeal by the Tribunal in relation to these matters. The CIT(A) following the above referred orders in the cases of F. A. Watkins (supra) and Neil Graham (supra), confirmed the penalty levied under section 271 (1)(c) in the cases mentioned at Sl. Nos. 29 to 76. These assessees have raised the following identical grounds in their respective appeals :- "1. The levy of penalty under section 271(1)(c) of I.T. Act is wrong. It is contended that the provisions of the above section is not attracted at all.

2. The learned CIT(A) has grossly erred on facts and in law in confirming the imposition of penalty. It is contended that the appellant neither concealed nor furnished inaccurate particulars nor made an unsubstantiated claim. The appellant had only acted on the representation by the employer thus no penalty is leviable.

3. The learned CIT(A) has grossly erred in rejecting the appellants contention that the Assessing Officer in the absence of the original return has no material to reassess or impose penalty under section 271(1)(c).

4. The appellant craves leave to add, amend, alter or vary the above grounds of appeal." A perusal of the aforesaid grounds reveal that only ground No. 3 raised in these appeals is an additional one raised in these appeals mentioned at Sl. Nos. 29 to 76 as compared to the grounds raised in the appeals mentioned at Sl. Nos. 1 to 28.

6.1 Shri R. Ganeshan, the Ld. C.A. appearing on behalf of these assessees vehemently contended that the CIT(A) has erred in sustaining the penalty levied in all these cases. He argued that penalty orders passed by the Assessing Officer along with Annexure A annexed with the said penalty orders clearly indicate that the entire discussion relate to levy of penalty on those items of additions which

have been deleted by the Tribunal in the quantum appeals. The satisfaction recorded by the Assessing Officer at the time of initiation of the penalty proceedings under section 271(1)(c) relate to those disputed items of addition which no longer survive, as all those additions discussed in the penalty order have been deleted by the Tribunal in the quantum appeals. The CIT(A) cannot sustain the penalty on an entirely new basis. He can confirm the penalty only on the basis of initial satisfaction recorded by the Assessing Officer. He drew our attention towards judgment of the Hon'ble Supreme Court in the case of D. M. Manasvi v. CIT [1972] 86 ITR 557 to support this contention.

6.2 The Ld. Counsel further submitted that no penalty could be sustained on the difference between income shown in the original return and the income shown in the revised return or in the settlement application or the income finally determined as a result of the order passed by the Tribunal, because the Assessing Officer had not initiated the penalty proceedings with reference to such difference. The sustaining of the penalty on a charge different than the charge for which the penalty was initiated and levied by the Assessing Officer is not valid. He invited our attention towards the following judgments to support this contention :- (a) CIT v. Lakhdhir Lalji [1972] 85 ITR 77 (Guj.). (b) CIT v. Ananda Bazar Patrika (P.) Ltd. [1979] 116 ITR 416/1 Taxman 445 (Cal.).

6.3 The Ld. Counsel further submitted that the employer-company had agreed to certain higher figures of salary and perquisites allowed to their employees only with a view to extend cooperation to the income-tax authorities, obviate wasteful litigation and to acquire peace. In order to corroborate this contention, the Ld. Counsel invited our attention to the various paras of the application for settlement of liabilities submitted by the employer-company vide letter dated 23rd July, 1990. He also invited our attention towards para 12 of the orders passed by the Tribunal dated 6-1-1994 in the cases of 23 employees of GEC. It has been observed by the Tribunal in the said para that the said petition does not indicate that the employer-company has admitted suppression of either salary or perquisites paid to its employees.

Since, the employer-company had agreed to higher figures of salary and perquisites for the purposes of discharging their liability to deduct tax at source and paid to the Government, the employees also agreed to make payment of such higher tax. This cannot amount to any admission as to existence of any concealed income in the hands of these employees.

The Ld. Counsel also placed reliance on decision of the Tribunal reported in *Parasmal Parekh v. Asstt. CIT* [1996] 58 ITD 34 (Jp.).

6.4 The Ld. Counsel further contended that even if it is assumed that the employer-company had agreed to certain higher figures of salary and perquisites allowed to its employees, no penalty can be levied in respect of such agreed amounts in view of the judgment of the Hon'ble Supreme Court in the case of *Sir Shadilal Sugar & General Mills Ltd. v. CIT* [1987] 168 ITR 705/33 Taxman 460A.

6.5 The Ld. Counsel also invited our attention towards reply submitted to the Assessing Officer in the course of penalty proceedings under section 271 (1)(c). He also drew our attention towards various paras of the orders passed by the Tribunal on 6-1-1994 in the quantum appeals with a view to show that the various disputed items of additions in respect of which the Assessing Officer has levied the penalty, were deleted by the Tribunal. These submissions were made with a view to support his contention that the very foundation of initiating and levy of penalty by the Assessing Officer, no longer survived after the order of the Tribunal in the quantum appeals. He, thus, strongly urged that penalty levied on these assessees should be cancelled.

6.6 The Ld. D.R. strongly supported the orders of the CIT(A). He submitted that the revised returns were filed by some of the employees after detection of the concealed income by the department as a result of survey and search operations. These assessees had clearly concealed the particulars of their income in the original returns submitted for all the years and in all the cases presently under consideration. The Ld. D.R. further submitted that the Assessing Officer had determined the income of these assessees in the fresh assessment/reassessment completed after the search at figures of income shown in the settlement petition submitted on behalf of the employer-company and had also included some more

allowances and perquisites as a result of examination of the seized documents. The Tribunal has deleted only those additions which were made by the Assessing Officer in excess of the figures shown by the employer-company in the settlement petition.

The figures of income shown in the revised returns submitted by some of the employees are almost similar as that shown in the settlement application submitted by the employer-company. The difference between the income shown in the original return and the income shown in the settlement petition cannot be regarded as any hypothetical or notional income surrendered with a view to acquire peace and obviate litigation.

The higher figures of salary and perquisites shown in the settlement application submitted by the employer-company represent the actual and real payments made by the employer-company to these employees, which would be evident from the fact that the figures shown in settlement petition tallies with the statements filed before the Revenue Authorities in UK. Such extra income was declared by the employees in the revised return and by the employer-company in the settlement petition on the basis of concrete and definite material found during the course of search. He invited our attention towards findings given by Tribunal in order dated 6-1-1994 in para 12. It has been specifically mentioned in the said para that statement filed before the Inland Revenues, U.K. was furnished which shows monthly payment of salary paid to the employees, which tallies with the statements enclosed with the settlement petition.

7. The Ld. D.R. submitted that the assessee has not furnished any explanation to justify the difference between the figures shown in the original return and the figures disclosed by the employer-company in the settlement application. The Ld. D.R. submitted that the filing of the inaccurate particulars of income in the original returns was deliberate and it was wilfully done. The moment search operations were carried out, the employer-company made disclosure of higher payments of salary and perquisites which they had already disclosed earlier to the Inland Revenue Authorities in U.K. 7.1 The Ld. D.R. relied upon the following judgments to support his contention that penalty confirmed by the CIT(A) is justified :- (a)

Tube Fabrico (I.) Ltd. v. CIT [1994] 210 ITR 1035/73 Taxman 198 (Delhi) In this case, it was held by the Hon'ble Delhi High Court that the assessee could not plead an agreement because there could be no agreement or estoppel against a statute. When the statute itself cast a liability on the assessee, no agreement with the department could entitle it to avoid that liability. This judgment was relied upon by the Ld. D.R. to meet the arguments advanced by the Ld.

Counsel for the assessee that settlement petition was submitted with a view to acquire peace with the hope that it would put to end all litigations and no penalty would levied.

In this case, the Hon'ble Supreme Court confirmed the decision of Gauhati High Court reported in F. C. Agarwal v. CIT [1976] 102 ITR 408. It was held by the Hon'ble High Court that the assessee had filed revised return disclosing much larger income than those in the original return but was unable to discharge the burden of proof under the Explanation to section 271(1)(c).

(c) Addl. CIT v. Jeevan Lal Sah [1994] 205 ITR 244/73 Taxman 182 (SC) The Hon'ble Supreme Court in the aforesaid case held that Explanation to section 271(1)(c) added by the Finance Act, 1964 creates a presumption of law, which is, no doubt, rebuttable, to the fact that where total income returned by the assessee is less than 80% of his total assessed income, he shall be deemed to have concealed the particulars of his income for the purposes of section 271(1)(c) unless he proves that the failure to return the correct income did not arise from any fraud or any gross or any wilful neglect on his part. The explanation, thus, shifts the burden to the assessee in the situation covered by it. It was further held that the rule regarding burden of proof enunciated in CIT v. Anwar Ali [1970] 76 ITR 696 (SC) is no longer valid. The Ld. D.R. submitted that the burden under the new explanation inserted in section 271(1)(c) will also have the same effect. The burden lies on the assessee to prove that the difference between the income shown in the original return and the income finally determined after appeal is of such a nature which cannot be regarded as concealed income.

The assessee has not furnished any explanation with regard to the aforesaid difference before the Departmental Authorities nor before the Tribunal.

(d) Calicut Trading Co. v. CIT [1989] 178 ITR 430/47 Taxman 27 (Ker.) In this case, the Hon'ble Kerala High Court has held that the revised return including the concealed income which has been detected by the department cannot lead to cancellation of the penalty levied under Explanation to section 271(1)(c) of the Act.

7.2 The Ld. D.R. further submitted that the Assessing Officer has validly initiated penalty proceedings under section 271 (1)(c). He has not initiated such penalty proceedings with reference to specific items of additions made by the Assessing Officer. The Assessing Officer has specifically mentioned in the penalty order passed under section 271 (1)(c) in all these cases that the assessee has concealed the particulars of his income while filing the original return. It cannot, therefore, be validly contended that the CIT(A) has confirmed the penalty on a charge different than the charge on which the Assessing Officer had levied the penalty.

7.3 The Ld. D.R. also pointed out that the CIT(A) has not varied the charge on which penalty has been sustained. The CIT(A) has merely reduced the amount of penalty to the advantage of the assessee in respect of those items of additions, which have been deleted in the quantum appeal by the Tribunal. The judgment of Hon'ble Gujarat High Court and Calcutta High Court relied upon by the Ld. Counsel for the assessee are not at all applicable on the facts of the present case.

7.4 During the course of hearing of the aforesaid appeal, the Ld.

Counsel for the assessee was specifically required by the Bench to submit specific and precise details of items of difference between the income shown in the original return and the income finally determined after giving effect of the order passed by the Tribunal in all the cases with his explanations with regard to each such item of addition finally sustained. The Ld. Counsel was granted adequate time for furnishing such details and explanations. In spite of such a specific opportunity granted by the Bench to the assessee, the required details and explanations were not ultimately furnished.

7.5 The Ld. Counsel for the assessee in the rejoinder submitted that the facts of the various judgments relied upon by the Ld. D.R. are clearly distinguishable and

they do not apply to the facts of the present case. He strongly urged that the penalties sustained by the CIT(A) in all these cases should be cancelled.

8. We have carefully considered the rival submissions made by the Id.representatives of the parties and have perused the orders of the Id.departmental authorities. We have also gone through all the documents to which our attention was drawn during the course of hearing. We have also carefully gone through all the decisions cited by the Id.representatives of the parties.

8.1 The Assessing Officer recorded his satisfaction for initiating penalty proceedings in accordance with section 271 (1)(c) of the Act.

While recording such satisfaction as contemplated under section 271 (1)(c), he has not directed issuance of notice under section 271(1)(c) in relation to any particular item of income or additions but has initiated such action with reference to entire difference between the income shown in the original return and the amount of income finally assessed. While directing the issuance of notice under section 271(1)(c), the Assessing Officer has observed as under :- "Issue notice under section 271 (1)(c) for concealment of salary income and filing inaccurate particulars of income." 8.2 The Hon'ble Supreme Court in the case of Anwar Ali (supra) laid down that before a person could be visited with a penalty for concealment, etc., the revenue must prove that the amount in question was the income of the assessee and that he had concealed the same with a motive. It further held that the penalty could not be imposed merely because any explanation given by the assessee in regard to the items in question was not believed to be true. The Finance Act, 1964 introduced an explanation at the end of sub-section (1) of section 271 which provides that where the total income returned by any person was less than 80% of the total income assessed, the onus was on such person to prove that the failure to file the correct income did not arise from any fraud or any gross or wilful neglect on his part and unless he did so, he should be deemed to have concealed the particulars of his income or furnished inaccurate particulars for the purposes of section 271 (1)(c). Another change was brought into being which is effective from April 1, 1976. The then existing explanation was

taken away from the statute and instead as many as four explanations have been enacted to section 271 (1) prescribing different deeming provisions. Explanation 5 was added in 1984, Explanation 6 had been added in 1989 with which we are not presently concerned.

8.3 It is patent that the new Explanation I inserted with effect from April 1, 1976, has been designed to get over, by legislation, what the Hon'ble Supreme Court in its wisdom laid down to be the law in the case of Anwar Ali (supra). The new Explanation I provides, in substance, that where in respect of any facts, material to the computation of the total income of any person under this Act - (ii) The assessee offers an explanation which the Assessing Officer or DC(A) or CIT(A) considers to be false; or B. The assessee offers an explanation which he is not able to substantiate. With effect from 10-9-1986, it has been further provided that where an assessee fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall be deemed to represent the income in respect of which particulars have been concealed for the purposes of section 271(1)(c)." 8.4 The aforesaid explanation only embodies a rule of evidence and places the onus of proving that the statement of income in the return does not represent any concealment of income or furnishing of inaccurate particulars of income. It only contains a rebuttable presumption. Such a presumption can be rebutted only if the assessee proves affirmately that failure to return the correct income was not due to any fault or blameworthy action on the part of the assessee and he substantiates his explanation by bringing on record relevant material to prove his innocence. The initiation of penalty by the Assessing Officer in terms of section 271(1)(c) necessarily implies that the question relating to levy of penalty will have to be determined on the basis of section 271 (1)(c) read with Explanation thereto. The Explanation automatically applies to cases where the returned income is less than the income finally assessed. The consequences follow as a matter of law. The burden lies on the assessee to offer an explanation and substantiate the same and he has to further prove that such explanation is bona fide as contemplated in Explanation I to section 271 (1)(c). If the assessee fails to offer an explanation or he is not able to substantiate any explanation offered by

him or he fails to prove that such explanation is bona fide one, the assessee shall be deemed to have concealed the income within the meaning to section 271 (1)(c).

9. We have to examine the facts of the present case in the light of the aforesaid provisions of the Act as well as the principles of law enunciated in the various judgments relied upon by the Ld.

representatives of the parties.

9.1 The contention of the Ld. counsel for the assessee that the penalty has been sustained by the CIT(A) on an entirely different charge is not at all valid on the facts and circumstances of the present case. The Assessing Officer had initiated the penalty proceedings under section 271 (1)(c) for concealment of income and for furnishing of inaccurate particulars in terms of section 271 (1)(c) and not with reference to any particular item of concealment of income. The satisfaction recorded by the Assessing Officer while initiating the said penalty, therefore, clearly covers within its ambit, the entire amount of difference between the income shown in the original return and the income finally assessed. Explanation I to section 271 (1)(c) is clearly applicable on the facts of the present case. The CIT(A) did not sustain the penalty on a new or a different item of addition. He merely reduced the amount of penalty by directing the Assessing Officer to delete the penalty in respect of those items of additions, which have been deleted in the quantum appeals by the Tribunal. The ratio of judgments reported in Lakhdhir Lalji's case (supra), Ananda Bazar Patrika (P.) Ltd.'s case (supra) and D. M. Manasvi's case (supra) relied upon by the Ld. Counsel for the assessee do not in any manner support his contention. All those judgments relate to the period prior to introduction of Explanation to section 271(1)(c). The facts of those cases are also clearly distinguishable with the facts of the assessee's case. The judgment of Hon'ble Supreme Court reported in Sir Shadilal Sugar & General Mills Ltd.'s case (supra) also does not in any manner help the assessee, as the Hon'ble Supreme Court in the said judgment has held that mere agreeing to certain additions will not automatically lead to the conclusion that the amount agreed to be added was concealed income. In that case the Tribunal gave a definite finding of fact that

necessary evidence existed on records which supported the Tribunal's conclusion that there was no concealment. It was a case relating to assessing year 1958-59 when the Explanations to section 271 (1)(c) were not existing on the statute. In the present case, the burden clearly lies on the assessee to explain the difference between the income shown in the original return and the income finally determined after giving effect of the order passed by the Tribunal. But the assessee in spite of granting specific opportunity for furnishing the details of such difference and explanation in relation thereto, had chosen not to furnish any details or explanations. The failure on the part of the assessee to furnish any explanation to justify and explain the aforesaid difference an adverse inference will have to be drawn and consequently the original returns of income furnished by these assesseees will be liable to be branded as incorrect returns. The extra income shown in the revised returns filed by some of these assesseees or the extra income finally sustained as a result of higher figures of salary and perquisites shown in the settlement petition submitted by the employer-company were detected by the department by conducting the survey and search operations. These assesseees were, therefore, clearly guilty of concealment of income and furnishing the inaccurate particulars of income in the original returns of income filed by them.

The assessee has failed to discharge the burden which lies upon them under Explanation I to section 271(1)(c).

9.2 The CIT(A) in the appeals mentioned at Sl. No. 1 to Sl. No. 28 has held that difference between the income, i.e., salary and value of perquisites, stated in the original returns filed and the income determined under the same heads after giving effect to the orders of ITAT would be the concealed income of the appellants. The penalty levied by the Assessing Officer was restricted to the quantum of penalty imposable under section 271(1)(c) in relation to such difference in the figures of income. The CIT(A), however, deleted the penalty imposable on the amounts added to the income of the assessee while completing the assessment under section 143(3), but subsequently deleted by the ITAT.9.3 It will, therefore, be imperative to go through the orders of the Tribunal in the quantum appeals rendered in the cases of 23 employees of the employer-company vide above referred order dated 6-1-1994. The Tribunal, inter alia, gave the following findings

in the aforesaid order :- "At page 172 of the paper book, a statement filed before the Inland Revenue, U.K. was furnished which shows monthly payment of salaries paid to the employees which tallies with the statements enclosed with the settlement petition. This is, therefore, further proved that no payments in excess of what was disclosed by them in their tax returns in U.K. was paid to them by way of salaries. The department is, therefore, not at all right in estimating and adding further, either the overtime or the overheads on the basis of the Budget papers, which are purely papers for overcasting and do not represent the actual payments. Further for the purposes of taxation of salaries under the Indian Income-tax Act, the actual payment of salary must be taken and that figure is available in the settlement petition and that figure alone should be taken as representing the salary, overtime payment, perquisite paid in India and perquisite paid in U.K. and out of the aggregate of those sums, only such sums as are taxable under the Indian Income-tax Act should alone be brought to tax. This should be the proper way of assessing the income from salary. Since, the department is unable to prove that the overtime and overheads were paid to these employees and the documents on record show that no payments of such nature was made to them, the inclusion of those sums as salary does not appear to be proper and correct."

"None of the papers found in search goes to suggest that any amount other than the salaries paid in U.K. and other expenses paid for in India, as disclosed in the statements filed before the Dy. Director (Investigation) was paid to the employees." "In any case there is justification enough to adopt the salary figures disclosed in the settlement petition filed before the Investigation Wing, for the purpose of assessment. It is to be noted that the salary figures disclosed originally were the amounts mentioned in the contract, without taking into account the increments and actual overtime payments, but the figures disclosed in the revised return and in the settlement petition were not only the contractual amounts but also the increments and the actual overtime payments, in other words, the actual amounts paid under all heads including perquisites. There is, therefore, no need to add any further amount to the salary figures disclosed in the settlement petition. More particularly on imaginary grounds and on estimate basis like 15% for overtime and 45% for over heads. Nor it does seem correct that the amounts disclosed in the settlement petition, were grossed up figures. We confirm the

action of the Department insofar as adoption of those figures are concerned as salary paid to the assessee herein. But we find no justification for the addition of any further sum to those figures as there is no proof of payment of those sums to them either in U.K. or in India and further more what were paid actually were already included." "In any case we have elsewhere in this order held, that the various additions proposed by the Assessing Officer and confirmed by the Commissioner (A) were not in order and directed their deletion, which included the overtime, the overheads, living allowance, perquisites and tax perquisites and also directed the grant of standard deduction at Rs. 10,000 but confirmed the adoption of salary figures as disclosed in the settlement petition. It is now ascertained that the salary figures disclosed in the settlement petition included the salary mentioned in the contracts plus the increments and the overtimes actually paid. Therefore, for the purpose of granting exemption under section 10(6)(viiia), the salary figure as ultimately held by us to be assessable must be taken and the exemption worked out." 9.4 It is clear from the aforesaid findings given by the Hon'ble Tribunal that difference between the income shown in the original return and the income finally determined after giving effect of the order passed by the Tribunal represents real and actual income of these assessee, which was not shown by them in the original returns of income. The Tribunal after considering entire relevant material has given a definite finding in para 15 of the order that salary figures disclosed originally were the amounts mentioned in the contract, without taking into account the increments and actual overtime payments. However, the figures disclosed in the revised returns and in the settlement petition were not only the contractual amounts but also the increments and the actual overtime payments, in other words, the actual payment paid under all heads including perquisites. The correctness and reality of this fact that the amount of income finally assessed represents the actual and real amounts paid to all these employees is further proved by the fact that the amount of salary and perquisites mentioned in the settlement petition were the same amounts which were submitted before the Inland Revenue Authorities in U.K. It is, therefore, clear that the difference between the income shown in the original returns and the income finally determined after giving effect of the order of the Tribunal represents real income, which was not disclosed by these assessee in their respective original

returns of income. The burden clearly lies on the assessee under Explanation I to section 271 (1)(c) to prove their innocence and submit their explanation for such difference. The burden further lies on the assessee to substantiate such explanation by bringing necessary material on records and have to further prove that the explanations submitted by them are bona fide. The assessee has not discharged such burden which clearly lies on them under Explanation-I to section 271(1)(c).

9.5 It may be worthwhile to refer to the judgment of Hon'ble Supreme Court in the case of Jeeven Lal Sah (supra) in which it was clearly held that the rule regarding the burden of proof enunciated in Anwar Ali's case (supra) is no longer valid. The explanation shifts the burden to the assessee in the situation covered by it. If he fails to establish the same, the presumption contained in these explanations will become a finding and levy of penalty would be justified. It is true that the said judgment relates to old explanation inserted by the Finance Act, 1964 but the ratio of the judgment will equally apply in relation to interpretation of the new Explanation-I added in section 271(1)(c).

10. In view of the aforesaid facts and discussions, we are of the view that the CIT(A) has rightly confirmed the penalty in respect of the difference between the income shown in the original returns and the income determined after giving affect of the order of the ITAT. Such findings cover the appeals mentioned at Sl. Nos. 1 to 28.

11. The facts relating to the appeals mentioned at Sl. Nos. 29 to 76 are almost similar. The only new ground which has been raised in these appeals is ground No. 3. No arguments were made by the Ld. Counsel for the assessee in respect of such a ground raised in these appeals. Such a ground raised in these appeals will not in any way effect the ultimate decision in these appeals also. It is an admitted fact that notices under section 148 were issued in all these cases. The assessee informed the Assessing Officer that the returns filed earlier may be treated as filed in pursuance of notice under section 148 of the Act.

It is not the case of these assesseees that they had declared higher income of salary and perquisites matching with the figures shown by the employer-company

in the settlement petition submitted after the search.

The CIT(A) has confirmed the penalties in all these cases enumerated at Sl. Nos. 29 to 76. It was not brought to our notice by the Ld.

representatives of the parties as to whether any order has been passed by the Tribunal in the quantum appeals in these cases. We, however, direct the Assessing Officer to restrict the penalty under section 271 (1)(c) in relation to the amount of difference between the income shown by these assesseees in their respective original returns and the income as may be finally determined as per the order of the Tribunal in the quantum appeals. In case, these assesseees have not preferred any appeal before the Tribunal in the quantum proceedings, the penalty should be restricted to the amount of difference in income as shown in the original returns and the income determined after giving effect to the order of the CIT(A). The findings given by the CIT(A) while confirming the penalty in all these cases mentioned at Sl. Nos. 29 to 76 is modified to the aforesaid extent.

12. In the result, the appeals mentioned at Sl. Nos. 1 to 28 are dismissed and the appeals mentioned at Sl. Nos. 29 to 76 are disposed of as indicated hereinbefore.

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