

## **No penalty if assessee offers undisclosed income to tax in return filed pursuant to search of another person**

**Summary – The JODHPUR ITAT in a recent case of Devidas Sukhani, (the Assessee) held that where pursuant to search proceedings in case of another person, assessee filed a return declaring certain undisclosed income which was duly accepted while framing assessment under section 143(3), read with section 153A, there being no concealment of particulars of income, impugned penalty order passed under section 271(1)(c) was to be set aside**

### **Facts**

- For relevant assessment year, assessee filed his return declaring certain taxable income.
- Subsequently, a search operation was conducted at the premises of 'D' in course of which incriminating books of accounts/documents relating to the assessee were found and seized.
- In response to notice issued by the Assessing Officer, the assessee filed a return declaring certain undisclosed income.
- The Assessing Officer having completed assessment under section 153A read with section 143(3), passed a penalty order under section 271(1)(c).
- The Commissioner (Appeals) confirmed the penalty order.
- On second appeal:

### **Held**

- It is an admitted fact that assessment was framed by the Assessing Officer on the basis of return of income filed under section 153A and the assessed income was the same as was declared by the assessee. However, penalty under section 271(1)(c) was levied by the Assessing Officer since there was difference in the income declared in the return of income filed under section 139(1) and disclosed under section 153A of the Act. The difference in those two incomes was mainly on account of cash, which was shown by the assessee as an income on account of unexplained cash in circulation out of the books of accounts. In this regard, it is noticed from the assessment order for the assessment year 2007-08 that the Assessing Officer had accepted the cash available with the assessee.
- Therefore, the earlier cash available with the assessee in circulation cannot be treated as undisclosed income for the purposes of levy of penalty under section 271(1)(c) of the Act. The other difference was on account of short term capital gain. The said difference was of Rs. 2,20,1757 which was on account of difference between the sale value and the value as adopted by Sub Registrar considering the provisions of section 50C of the Act.
- The assessee disclosed all the relevant facts in his return of income relating to the short term capital gain, so it was not a concealed income. In the present case, what was offered by the assessee in his

return of income under section 153A had been accepted by the Assessing Officer while framing the assessment under section 153B (sic - 153A) read with section 143(3) of the Act.

- There is no observation of the Assessing Officer that amounts, on which penalty under section 271(1)(c) was levied were not disclosed in return filed by assessee under section 153A of the Act. The Assessing Officer simply stated that the assessee had not disclosed those income in the original return of income. The assessment in this case was framed on 11-7-2008 and before completion of the said assessment, the assessee *vide* letter dated 22-1-2007 *i.e.* just after the search operation on 18-1-2007 stated that he was prepared to pay tax on legitimate and correct amount of income as may be mutually determined on agreed basis. The assessee also stated that the said letter be treated as statement under section 132(4) of the Act, thereby entitling the assessee to the benefits of Explanation 5 to section 271(1)(c) of the Act.
- The Assessing Officer nowhere stated that the contents of the said letter were wrong and not accepted. In other words, he had not stated anything to disprove the contents of the said letter in the assessment order dated 11-11-2008. Moreover, whatever was offered by assessee in his return of income had been accepted by Assessing Officer while framing assessment under section 143(3) read with section 153A.
- In the result, appeal of the assessee is allowed.