

## **No concealment penalty could be imposed just because an expenditure was disallowed due to TDS default**

**Summary – The High Court of Gujarat in a recent case of Nayan C. Shah, (the Assessee) held that Words 'inaccurate particulars' in section 271(1)(c) must mean details supplied in return, which are not accurate, not exact or correct or not according to truth or erroneous; merely submitting an incorrect claim in law for expenditure would not amount to furnishing inaccurate particulars of income so as to attract penalty under section 271(1)(c)**

### **Facts**

- The assessee-firm was engaged in the business of construction.
- During assessment proceedings, the Assessing Officer noticed that in some cases, the tax deducted at source from certain parties to whom labour payments were made, were not deposited into Government account as per the provisions of section 200(1). The Assessing Officer disallowed such payments under section 40(a)(ia) and also levied penalty under section 271(1)(c) for furnishing inaccurate particulars of income.
- On appeal, the Commissioner (Appeals) found that out of total amount, tax was deducted at source in respect of certain amount and deposited in Government account before due date of filing the return of income and balance amount of TDS was deposited in Government account later and was allowable in next assessment year. The Commissioner (Appeals), therefore, held that it was a technical breach of law and, therefore, no penalty was warranted.
- On revenue's appeal, the Tribunal held that the assessee had suppressed the actual particulars of income by not making disallowance under section 40(a)(ia) and restored the penalty order passed by the Assessing Officer.
- On appeal to the High Court:

### **Held**

- In the case of *CIT v. Reliance Petroproducts (P.) Ltd.* [\[2010\] 322 ITR 158/189 Taxman 322 \(SC\)](#), the Supreme Court observed that reading the words 'inaccurate' and 'particulars' used in section 271(1)(c) in conjunction, they must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. The Supreme Court held that by any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed. The Court further observed that there can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income.
- Reverting to the facts of the instant case, the Assessing Officer, in the penalty order, has observed that the addition/disallowance made on account of non-deduction of tax at source and non-

payment of the tax deducted at source into the Government account within the stipulated time as per the provisions of section 40(a)(ia), are totally found out by the Assessing Officer only during the course of assessment proceedings and had not been disclosed by the assessee. He, accordingly, has formed the opinion that the assessee has furnished inaccurate particulars of income. However, he has not stated as to what are the inaccurate particulars of income in the return filed by the appellant.

- From the facts as emerging from the record, it appears that the assessee has made a claim of expenditure in relation to the payments made, which he may not have been entitled to claim in view of the provisions of section 40(a)(ia), as tax on part of such amount had not been deducted at source and deposited in the Government account before the due date for filing return income. However, as held by the Supreme Court in the above decision, merely submitting an incorrect claim in law for the expenditure would not amount to furnishing inaccurate particulars of income. The impugned order passed by the Tribunal, therefore, cannot be sustained.
- Another notable aspect of the matter is that while the Assessing Officer has imposed penalty on the ground that the assessee has furnished inaccurate particulars of income, the Tribunal has set aside the order of the Commissioner (Appeals) by holding that the assessee has suppressed the actual particulars of income by not making disallowance under section 40(a)(ia). Thus, the Assessing Officer has imposed penalty on the ground of furnishing inaccurate particulars, whereas the Tribunal has upheld the order of the Assessing Officer on the ground of concealment of particulars. It is by now well-settled that while issuing a notice under section 271(1)(c), the Assessing Officer is required to specify as to what is the default on the part of the assessee, as to whether the case is one of furnishing inaccurate particulars, or whether it is a case of concealment of income, or both. In the facts of the present case, the Assessing Officer has proceeded on the footing that inaccurate particulars were filed by the assessee, whereas the Tribunal has held that the assessee had suppressed particulars for the year under consideration. Under the circumstances, the Tribunal, having confirmed the penalty imposed by the Assessing Officer on the ground of suppression of actual particulars in respect of which the assessee was not put to notice, the order of the Tribunal is rendered unsustainable on this ground also.
- In the light of the aforesaid discussion, the view expressed by the Commissioner (Appeals) to the effect that the breach in question was technical and venial in nature, requires to be upheld and the impugned order passed by the Tribunal upholding the levy of penalty on the ground of suppression of particulars, deserves to be set aside.