

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 128 of 2001

With

TAX APPEAL NO. 129 of 2001

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

AMRUT TUBWELL COMPANY.....Appellant(s)

Versus

ASSTT. C.I.T.....Opponent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Appellant(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and

HONOURABLE MR.JUSTICE K.J.THAKER

Date : 11/11/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Since, the issue involved in both the

appeals is similar, they are heard together and disposed of by this common judgment.

2. By way of these appeals, the appellant-assessee seeks to challenge the order of the ITAT, Ahmedabad 'B' Bench, Ahmedabad (for short, 'the Tribunal'), Dated : 22.02.2001, rendered in ITA No.1391/AHD/1995 and ITA No.1392/AHD/1995 for the A.Y.-1986-87, whereby, the Tribunal partly allowed both the appeals filed by the appellant-assessee, though, only for statistical purposes.

3. The brief facts giving rise to the present appeals are that the appellant-assessee is engaged in the business of boring of tube-wells for farmers. The appellant-assessee filed its return of income for the assessment year 1986-87. Pursuant thereto, the case of the appellant-assessee was examined and the AO imposed penalty of Rs.1,51,800/- under Section 271(1)(c) and Rs.12,566/- under Section 273(2)(a) of the Act, on the ground that assessee had failed to disclose its income truly and correctly. Being aggrieved with the same, the appellant-assessee approached the CIT(A), which dismissed both the appeals filed by the appellant-assessee. Hence, the appellant-assessee approached the Tribunal, wherein, the Tribunal passed the impugned common order. Hence, the

present appeals.

4. At the time of admitting Tax Appeal No. 128 of 2001, following question of law was framed;

"Whether on the facts and in the circumstances of the case the Tribunal is right in law in its interpretation of provisions of Section 273(2)(a)?"

5. Whereas, at the time of admitting Tax Appeal No. 129 of 2001, following question of law was framed;

"Whether on the facts and in the circumstances of the case the Tribunal is right in law in upholding levy of penalty under Section 271(1)(c) relatable to addition which is already deleted in quantum proceedings by the same authority?"

6. Mr. Patel, learned Advocate, who appeared for the appellant-assessee in both the appeals, submitted that no penalty could have been imposed on the appellant-assessee under Section 271(1)(c) of the Act, since, there was no willful concealment of income on the part of the appellant-assessee. In support of his submission, Mr. Patel has placed reliance on a decision of this Court in the case of "**NATIONAL TEXTILES VS. COMMISSIONER OF INCOME-TAX**", [2001] 249 ITR 125

(Gujarat), more particularly, the observations made by this Court in Paras-19, 20 and 21 thereof, which read as under;

"19. In the quantum proceedings, the explanation of the assessee in relation to cash credits was not accepted and found to be false. The accountant was not produced and the explanation that relations with him are strained was also found to be an unjustifiable excuse. In the assessment, it was also taken into consideration that the assessee had tried to square up the credit entries to conceal the particulars of income. Only 2 credit entries were explained and regarding the remaining entries, there were no documents or evidence brought on record. The names of parties from whom the temporary loans were obtained were not furnished.

20. The question before us is whether the abovementioned facts which resulted in addition of the cash credits as income of the assessee in themselves, without any further evidence, are sufficient for imposition of penalty by recourse to *Explanation 1* of section 271(1)(c) as it stood in the relevant assessment year or at the time when the penalty proceedings were initiated and concluded. We do not consider it necessary to go into the question as to whether the *Explanation 1* below section 271(1)(c) is a provision of substantive law or procedural law and whether it is prospective or retrospective in operation. The Explanation is to the effect that where in respect of any fact or material for purposes of his assessment, as assessee offers an

explanation which is found by the Assessing Officer or the Deputy Commissioner (Appeals) to be false or where the assessee is unable to substantiate his explanation, then the amount added to his income shall be deemed to represent his concealed income. The newly introduced *Explanation 1* considerably reduces, but does not altogether remove the department's onus to prove concealment in assessment based on unexplained cash credit or unexplained investment and like. (see *Addl. CIT v. Mangalsen Mohanlal* [1982] 136 ITR 905 (All.)) There has not been any significant difference by the introduction of new *Explanation 1* in place of original *Explanation 1* with effect from 1-4-1976. The previous *Explanation* used the expression "deemed to have concealed the particulars of his income or furnish inaccurate particulars of such income for the purpose of clause (c) of this sub-section". While the present *Explanation 1* reads : "Such income shall be deemed to represent the income in respect of which particulars have been concealed." In effect, this makes explicit what was implicit in the previous *Explanation*- *CIT v. Rupbani Theaters (P.) Ltd* [1981] 130 ITR 747 (Cal.).

21. The provisions of section 68 permitting the Assessing Officer to treat unexplained cash credit as income are enabling provisions for making certain additions, where there is failure by the assessee to give an explanation or where the explanation is not to the satisfaction of the Assessing Officer. However, the addition made on this count would not automatically justify imposition of penalty under

section 271 (1)(c) by recourse only to *Explanation 1* below Section 271(1)(c)."

7. Mr. Patel also placed reliance on another decision of this Court in the case of **"COMMISSIONER OF INCOME TAX VS. JALARAM OIL MILLS"**, [2002] 253 ITR 192 (Gujarat). In that case, the revenue imposed penalty under Section 271(1)(c) read with Section 68 of the Act on the assessee on the ground that there was concealment of income on the part of the assessee, therein. In that case, the assessee had merely conceded that certain entries in its books might be treated as its deemed income by virtue of provisions of Section 68 of the Act. In the appeal, however, the Tribunal found that there was no instance to show that the assessee had been earning income from business outside books in past or in the year under consideration. Under the circumstances, this Court, in that case, held that merely because addition was made by invoking provisions of Section 68 of the Act, the penalty under Section 271(1)(c) of the Act would not follow as a consequence, thereof.

8. Mr. Patel also placed reliance on a decision of this Court in **"COMMISSIONER OF INCOME-TAX II VS. DHIRAJ R. RUNGTA"**, [2013] 40 taxmann.com 284. In that case, the revenue rejected the books of accounts of the assessee,

therein, on the ground that the same was defective, however, made certain addition to the income of the assessee relying on the same documents. This Court, therefore, held that once having rejected the books of accounts of the assessee as being defective, it was not open to the revenue to rely upon the same set of documents to make addition to taxable income of the assessee.

9. On the other hand, Mr. Sudhir Mehta, learned Advocate for the respondent-Revenue, strongly supported the orders by the CIT(A) as well as the ITAT and submitted that there being failure on the part of the assessee to disclose all the facts truly and correctly at the time of assessment, the CIT(A) as well as the Tribunal were justified in confirming the orders passed by the competent authority.

10. In support of his submissions, Mr. Mehta placed reliance on a decision of this Court in **"BHARATKUMAR G. RAJANI VS. DY. COMMISSIONER OF INCOME-TAX"**, [2013] 40 taxmann.com 344(Gujarat), wherein, this Court confirmed the order of the revenue imposing penalty on the respondent-assessee, therein, under Section 271(1)(c), having found that there was concealment of income on the part of the assessee, therein.

11. Heard learned Counsels for the parties and perused the material on record, including the orders of the CIT(A) and the Tribunal. In order to appreciate the questions, as to whether the Tribunal was justified in confirming the order of the CIT(A), which had confirmed the order of the AO imposing penalty on the appellant-assessee under Sections 271(1)(c) and 273 (2)(a), here, it would be relevant to refer to the aforesaid sections as enumerated in the Act;

"271(1)...

(c) has concealed the particulars of his income or [***] furnished inaccurate particulars of [such income, or]

XXX

XXX

XXX

273(2)...

(a) has furnished under sub-section (1) or sub-section (2) or sub-section (3) or sub-section(5) of section 209A, or under sub-section(1) or sub-section(2) of section 212, an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue, or]"

12. Thus, both the sections empower the AO to impose penalty on an assessee in a case, where, (1) there is concealment of income or (2) conscious attempt to provide the particulars of income which is untrue. Meaning thereby, the AO

cannot impose penalty in case of an assessee mechanically, merely on the ground of addition of certain amount, over and above the amount already declared by the assessee, and that he has to record reasons specifying that there was either concealment of income or supplying of untrue particulars of taxable income for the relevant year.

13. Here, before adverting to the facts of the present case, it would be relevant to refer to an order of the Tribunal, Dated : 30.01.2001, passed in case of the appellant-assessee being ITA No. 3010/Ahd/93 for the A.Y.-1986-87. In that case, the Tribunal deleted the addition of Rs.92,335/- made by AO in respect of the cash credit, on the ground that the total amount of G.P. Addition sustained by it was more. Further, by the very same order, the Tribunal remanded the matter to the concerned authority, so far as the amount of Rs.21,900/- relating to interest free loan is concerned.

14. Now, coming to the facts of the present case, from the record it appears that the AO imposed penalty of Rs.1,51,800/- on the appellant-assessee under Section 271(1)(c) of the Act and for the said purpose, he took into account three amounts, i.e. (1) Rs.1,35,327/-

towards extra G.P., (2) Rs.92,335/- towards cash credit and squared-up account and (3) Rs.21,900/- interest relating to interest free loans. Here, as stated above, it is clear that in the case of very assessee, in proceedings for the very A.Y. 1986-87, the Tribunal vide its order dated 23.02.2001 had already deleted the entire addition of Rs.92,335/- and remanded the matter to AO for verification, so far as the amount of Rs.21,900/- towards interest relating to interest free loan, is concerned. We are, therefore, of the opinion that once having deleted certain amount and remanded the matter in respect of the other amount for verification, the AO could not have relied on the same to impose penalty under Section 271(1)(c) of the Act or for that matter. The CIT(A) upheld the penalty levied by AO on the ground that the explanation offered by the assessee, herein, in respect of low G.P. And cash credit was either false or the assessee was not able to substantiate the same by producing convincing evidence in support, thereof. Having gone through the record, we find that it is neither the case of the respondent-revenue nor is there any material to show that there was any willful concealment or furnishing of inaccurate or incorrect details of income by the appellant-assessee. In other words, there being no conscious concealment of income, the AO could not

have imposed penalty under Section 271(1)(c) of the Act.

15. So far as the penalty under Section 273(2)(a) is concerned, said section reads as under;

"273(2)[a] has furnished under sub-section(1) or sub-section(2) or sub-section(3) or sub-section (5) of section 209A, or under sub-section (1) or subsection (2) of section 212, an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue, ...]"

The Tribunal has recorded that the CIT(A) confirmed the penalty imposed by the AO under this section on the ground that the difference between the earned income and the assessed income of the assessee was more and that the assessee, himself, had declared income of Rs.75,000/- by filing revised return. The Tribunal, further, observed that the CIT(A) had found that the assessee was not able to prove the source of cash credit, and therefore, CIT(A) upheld the penalty levied by the AO, which is confirmed by the Tribunal. However, while doing so, here again, the Tribunal failed to appreciate the fact that the assessee had not furnished any details pertaining to advance tax which was untrue. On the contrary, the additions were of

such nature that the assessee could not have foreseen. We are, therefore, of the opinion that the order of the Tribunal cannot be sustained and deserves to be quashed and set aside.

16. In view of the above discussion and in view of the decisions relied on by Mr. Patel, these appeals deserve to be allowed. The judgment relied on by Mr. Mehta shall not apply in the facts of the present case.

17. In the result, the impugned common order, Dated : 22.02.2001, passed by the Tribunal is **QUASHED** and set aside and both the appeals are **ALLOWED**. The questions raised in these appeals are answered in favour of the appellant-assessee and against the respondent-revenue, accordingly. No order as to costs.

THE HIGH COURT
OF GUJARAT

(K.S.JHAVERI, J.)

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(K.J.THAKER, J)

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