IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 837 of 2019

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-2

Versus

YAMUNAJI CORPORATION

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Appearance:
MRS MAUNA M BHATT(174) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 10/02/2020

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 This Tax Appeal under Section 260A of the Income Tax Act, 1961 [for short, 'the Act, 1961'] is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B', Ahmedabad dated 24th April 2019 in ITA No.3308/Ahd/2016 for A.Y. 2012-13.

2 The Revenue has proposed the following solitary question of law for the consideration of this Court:

> *"Whether the Appellate Tribunal has erred in law and on facts in upholding the order of the CIT(A) deleting the penalty of Rs.6,93,70,500/- on account of on-money receipts offered for taxation after being detected by the department as a result of survey action u/s.133A?"*

3 It appears from the materials on record that the assessee firm is engaged in the business of construction of shops and residential lats. The assessee filed its return of income declaring total income at Rs.28,27,20,720/-. In consequent of search operation was undertaken of the Ankur Dalal Group, survey action was carried out under Section 133A of the Act in the case of the assessee on 28th March 2012. In the course of survey action, the assessee disclosed income of Rs.22.45 Crore for A.Y. 2012-13. In the return of income, the assessee declared income of Rs.28,27,20,720/- and the assessee included the disclosed income.

4 The assessment was completed under Section 143(3) of the Act, 1961 determining total income at Rs.28,27,20,720/- accepting the returned income. The Assessing Officer levied penalty of Rs.6,93,70,500/- under Section 271(1)(c) on the premise that the assessee had concealed particulars of its income and furnished inaccurate particulars of its income. The Assessing Officer took the view that the assessee had offered the on-money receipts for taxation after being caught by the department on account of survey action.

5 The assessee being dissatisfied preferred appeal before the CIT(A) against the penalty order passed by the AO under Section 271(1)(c) of the Act, 1961. The CIT(A) allowed the appeal of the assessee holding as under:

> *"4 I have carefully perused the material available, and also the relevant statutory provisions and Authorities relied upon by the appellant. Some fundamental and most relevant facts are not in dispute. The appellant was covered u/s 133A, and not u/s 132. The appellant filed its return of income u/s 139(1)at Rs.28,27,20,720/ which remained unenhanced in assessment framed by the AO u/s 143(3). No addition/disallowance has been made by the AO. Whether, and if yes, What admission u/s 132(4) was made by partner or third party in appellant's hands has, in my considered opinion, no direct or indirect relevance in assessment of the appellant or consequent other proceedings*

including the penal proceedings against the appellant. As such, no such relevance statutory or otherwise has been brought out by AO. Moreover, the 'admission made in appellant's hands" u/s 132(4) has been fully honoured by the appellant as is clear from the assessment and penalty orders passed by the AO. In these facts, it completely defies comprehension as to how AO has come to even a prima facie satisfaction during proceedings u/s 143(3) that appellant has "concealed" or "furnished inaccurate" particulars of income. As ruled by the Apex Court in Reliance Petroproducts Pvt. Ltd. 322 ITR 158, "everything starts with the return of income filed by the assessee". Seen in light of Apex Court ruling, obviously, there is no "concealment/inaccuracy" in the return of income filed by the appellant. Thus, the facts of the case clearly and unambiguously go out of the purview of positive "inaccuracy/concealment" as envisaged in the main clause 271(1)(c). Indeed, the only perceivable concealment "found" by the AO therefore painstakingly needs to be attempted to be "discovered" by referring to Explanations 1 to 5A to see whether somehow AO's action fits anywhere therein. Explanation 1 is ruled out as there is no addition / disallowance made by the AO. Explanations 2 to Explanation 5 are also clearly not applicable or relevant. Explanation 5A .is also ruled out on multiple counts. First, there is no warrant u/s 132 executed in case of the appellant, therefore, the words in the Explanation "where in the course of a search, the assessee is found to be th e owner of " would exclude the non-searched entities like appellant. Secondly, even if we presume that non-searched entities are also covered under Explanation 5A, then also the assessment year under appeal is beyond the mischief, as Explanation 5A applies to the Assessment Years for which the return of income has already been filed by the assessee or time-limit for filing the same has expired as on the date of the search. As the search was on 28 / 3 / 20 12, obviously, the assessment year under appeal being A.Y. 2012-13 is beyond the purview of Explanation 5A. Thus, AO himself has consciously excluded the application of Explanation 5A. Relevant to mention is also that the appellant suo motu and un-prompted by any notice from the AO filed the return of income u/s 139 Which came to be accepted without addition/disallowance in assessment u/s 143(3). Possibly section 271AAA would apply? Though, this possibility presently is beyond the purview of my consideration as the AO has not levied this penalty u/s 271AAA, not even recorded his satisfaction during assessment in this behalf, I do believe that the AO rightly realized that in a non-searched entity, there is no question of initiating penalty u /s 271AAA also. In conclusion, thus, there is no way that the penalty levied by the AO is legally even conceivable, leave aside being sustainable. The Ld. AR is absolutely right that AO has unlawfully just surmised that the amount included and returned u/ s 139 is only on account of survey u / s 133A. Even if it were so, the provisions of section 271(1)(c) do not authorise levy of penalty for mere desire to conceal particulars or evade tax When in fact no such concealment or evasion is resorted to by the assessee in the return of income that finally came to be filed. As such, on similar facts, I have already taken a view that

penalty u/s 271(1)(c) is not sustainable when no addition/disallowance is made by the AO in assessment framed u/s 143(3) on the regular return filed u/s 139 by & non-searched entity, despite the fact that the income returned and assessment framed does include "amount disclosed u/s 132."

"15 Thus, and in other words, the Explanation 5A, the only provision enabling the AO to initiate / levy penalty u/s 271(1)(c) notwithstanding the relevant amount having been disclosed in any return filed subsequent to search, applies to the assessment years other than and preceding to the "specified previous years" as defined u/s 271AAA. Obviously, the Assessment Year under reference is an assessment year subsequent to the search-relevant "specified previous years", and therefore, Explanation 5A is clearly not applicable. I also agree with the Ld. AR that when for enabling the AO in levying penalty u/s 271(1)(c) on an amount already forming part of the income returned, enactment of Explanation 5A is considered necessary by the Legislature, by necessary implication, in no other circumstance can the penalty u/s 271(1)(c) be levied by the AO When no addition to income returned has been made by her. Similarly, the Ld. AO has, when confronted with the reality that it is impossible to bring the case Within the four comers of express language of 271(1)(c) [to the effect that she is supposed to be satisfied that "assessee has concealed the particulars of his income or furnished inaccurate particulars of such income", i.e. it is the real and concluded as against likely action of "concealment of" or "furnishing of inaccurate particulars of income which need to be established], has not at all attempted to do so but has rather relied on irrelevant considerations and phrases like "the disclosure cannot be considered to be voluntary" or "but for the search action the assessee would not have disclosed this income" or "assessee never intended to disclose the foreign bank account and income earned thereon. Had the assessee intended to show the foreign bank income in her return of income, interim withdrawals made in her case would have been shown, but the fact that even interim withdrawals were not shown in her return of income emphasize assessee's Willful act of concealment of income". However, even mere plain reading of the provisions would and should have enlightened the AO that even if all these presumptuous allegations were established by her as against having been merely surmised or suspected, then also, unless some addition or disallowance were made to the income returned u/s 139, no penalty u/s 271(1)(c) is leviable except by invoking Explanation 5A. As such, absence of "concealment" or "inaccuracy" is impliedly admitted by the AO herself by way of not making any addition/disallowance in the assessment framed. The computation machinery also has been wrongly applied by AO. In sum total therefore, I agree with the vehement contention of the Ld. AR that no penalty u/s 271(-1)(c) is leviable in view of the fact that no addition/disallowance has been made by the AO and the further fact that computation machinery as provided in Explanation 1 clearly fails. In conclusion, I find favour with each of the contention raised

by the ld. AR as listed above, and and none of the contention of the AO tenable. As such, I also find that the facts of the appellant's case are squarely covered by the SC decision in Reliance Petro-products and Jurisdictional ITAT decision in Dr. Satish Gupta (both supra), and therefore, I have no hesitation in cancelling the penalty. Accordingly, the penalty of Rs. 17,96,638/- levied by the AO u/s 271(1)(c) is hereby cancelled. The appellant gets equivalent relief. The related ground succeeds."

6 The Revenue being dissatisfied with the order passed by the CIT(A) preferred appeal before the Tribunal. The Tribunal while dismissing the appeal preferred by the Revenue and affirming the order passed by the CIT(A) held as under:

"4 We have considered rival submissions and gone through the record carefully. Undisputed facts of the case is that survey under section 133A was carried out at the premises of the assessee on 28.3.2012 I.e. much prior to the closing dates of accounts and date of filing of return under section 139(1) of the Act. The assessees have `admitted an amount of Rs.7O lakhs and Rs.22.45 crores respectively during the survey action Which were subsequently shown in the regular returns of income filed under section 139(1) of the Act. These returns were accepted by the AO without any addition or disallowance nor pointed out any discrepancies during the assessment. However, the impugned penalty was levied on the premise that the assessee would not have disclosed the receipt of on-money, but for the survey action. It is the case of the assessee that income admitted during survey u/s.133A when disclosed in the return of income furnished on or before due date and the same is accepted by the AO, there cannot be & case for levy of penalty. When the due date for filing return of income was not expired, then how the AO could infer that the assessee would not disclose the income in its return. The assessee has disclosed this income in its return and the AO has accepted the same without any addition or disallowance. The Id AO has simply carried away by the surmise that had the survey note taken place, the assessee would not have disclosed this income This assumption and surmises of facts are Without any he Id.AO cannot anticipate that assessee Will not disclose & particular income. There are number of judgments available on this issue where it is held that when an assessee has made a complete disclosure in the return of income and offered the admitted amount for taxation, then there is no question of concealment of income or furnishing inaccurate particulars of income so as to attract provisions of section 271(1)(c) of the Act. Hon'ble Delhi High Court in the case 01 SAS Pharmaceuticals (supra) has held that When the assessee discloses amount during action under section 133A, and the same is honoured by filing return of income subsequent

thereto, no penalty u/s.271(1)(c) of the Act is sustainable. The Id. CIT(A) has made detailed analysis of the issue in the light of the of various judgments and rightly come to the conclusion that levy of impugned penalty is neither sustainable can facts nor in law. We uphold of order of the Id. CIT(A) and reject the ground of appeal of the Revenue."

7 Thus, the Tribunal proceeded on the principle of law that when the assessee disclosed the amount during the survey action under Section 133A and the same is honoured by filing the return of income, there cannot be any order of penalty under Section 271(1)(c) of the Act, 1961. The Tribunal took support of the decision of the Delhi High Court in the case of **CIT vs. SAS Pharmcaceuticals, 11 taxmann.com 207(Del)**.

8 Having heard the learned counsel appearing for the Revenue and having gone through the materials on record, we are of the view that no error, not to speak of any error of law could be said to have been committed by the Tribunal in passing the impugned order. The question proposed by the Revenue, in our opinion, cannot be termed as a substantial question of law involved in this appeal.

9 In the result, this appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

CHANDRESH