

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'SMC' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD
(Conducted through Virtual Court)
BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT

ITA No.242/Ahd/2018
निर्धारण वर्ष/ Asstt.Year : 2007-08

Jayeshkumar Nadlal Vaidhya 80, Bhagwatinagar Society Bus stand Road Patan 384 4265. PAN : AAQPV 1078 H	Vs.	ITO, Ward-1 Patan.
--------------------------------------------------------------------------------------------------------------------	-----	-----------------------

(Applicant)	(Responent)
Assessee by :	Shri Pritesh Shah, CA
Revenue by :	Shri S.S. Shukla, Sr.DR

सुनवाई की तारीख/Date of Hearing : 27/05/2021
घोषणा की तारीख /Date of Pronouncement: 15/06/2021

आदेश/ORDER

Assessee is in appeal before the Tribunal against order of the Id.CIT(A), Gandhinagar dated 4.12.2017 passed for the Asstt.Year 2007-08.

2. Sole grievance of the assessee is that the Id.CIT(A) has erred in confirming the penalty of Rs.92,746/- which was imposed by the AO under section 271(1)(c) of the Income Tax Act, 1961.

3. Brief facts of the case are that the assessee has filed his return of income on 31.3.2008 declaring total income at Rs.3,57,680/-. An assessment order was passed under section 143(3) on 30.12.2009, whereby the income of the assessee was assessed at Rs.6,40,200/-. The AO has made an addition of Rs.2,82,535/- on account of unaccounted fees receipts. The assessment was set aside by the Id.Commissioner under section 263 of the Act. A fresh assessment

order under section 143(3) r.w.s. 263 of the Act was passed on 11.03.2013 at the total assessed income of Rs.14,32,116/- by making various additions/disallowance. Against these additions, assessee preferred appeal before the Id.CIT(A), who gave partial relief, and confirmed the following additions/disallowances:

i)	<i>Addition income disclosed during survey proceedings to the extent of confirmed by Id.CIT(A)</i>	<i>Rs.15,366/-</i>
ii)	<i>Addition of unexplained investment</i>	<i>Rs.1,25,000/-</i>
iii)	<i>Addition of unexplained investment in house</i>	<i>Rs.2,00,000/-</i>
iv)	<i>Disallowance of interest expenses on housing loan</i>	<i>Rs.29,396/-</i>
	<i>Total addition of which penalty is to be levied</i>	<i>Rs.3,69,762/-</i>

Thereafter, the Ld.AO initiated penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of his income or concealment of income, and issued show cause notice in this behalf. It was explained by the assessee that the assessee has not made any concealment of particulars of income or furnished inaccurate particulars thereof, and all details were furnished in the return of income. However, the Ld.AO did not accept the explanation of the assessee and levied the impugned penalty.

4. Aggrieved by the action of the Ld.AO, the assessee went in appeal before the Id.first appellate authority, but he could not succeed. Hence, the assessee is now before the Tribunal.

5. Before me, the ld.counsel for the assessee assailed both the orders of the Revenue, and reiterated submissions made before them. Further, relying on the judgment of the Hon'ble Gujarat High Court in the case of Snita Transport P.Ltd. vs. ACIT, 42 taxmann.com 54 (Guj), the ld.counsel for the assessee submitted that if the AO failed to record a conclusive finding on the charge for which penalty is being imposed, then such penalty order is not sustainable. In other words, the AO has to record a finding whether the assessee is being visited with penalty for furnishing inaccurate particulars or for concealment of income. In the penalty order, the ld.AO cannot use the expression "or" in between both these charges i.e. penalty is being imposed for inaccurate particulars/concealment of income. He has to record a firm finding as to whether there was concealment of income by the assessee or any inaccurate particulars of income had been furnished by the assessee. No such finding has been made in the instant case. Both these terms cannot be used together in his final conclusion. The ld.counsel for the assessee also made reliance upon a large number of decision, out of them, two are authored by me while sitting in the Division Bench. On the other hand, the ld.DR supported orders of the Revenue authorities.

6. I have considered rival submissions and gone through the impugned orders and the material available on record. The case of the assessee is that while imposing penalty under section 271(1)(c) of the Income Tax Act, 1961, the ld.AO did not arrive at final conclusion as to whether there was a concealment of income or any inaccurate particulars of income by the assessee, and therefore, there is a flip-flop on the part of the AO in deciding the type of default committed by the

assessee, and therefore the impugned order is bad in law. The ld.counsel for the assessee, amongst other, relied on the order of the ITAT in the case of Sharad Bachubhai Vyas Vs. DCIT, in IT(SS)A.No.349/Ahd/2014 vide order dated 16.11.2018. The ld.counsel placed on record a copy of this order. I take note of the finding in the above order of the ITAT. It reads as under:

“5. We have duly considered rival contentions and gone through the record carefully. Hon’ble Gujarat High Court has considered this aspect in the case of Snita Transport (supra). Reference to para 9 of this judgment is worth to note. It reads as under:

“9. Regarding the contention that the Assessing Officer was ambivalent regarding under which head the penalty was being imposed namely for concealing the particulars of income or furnishing inaccurate particulars, we may record that though in the assessment order the Assessing Officer did order initiation of penalty on both counts, in the ultimate order of penalty that he passed, he clearly held that levy of penalty is sustained in view of the fact that the assessee had concealed the particulars of income. Thus insofar as final order of penalty was concerned, the Assessing Officer was clear and penalty was imposed for concealing particulars of income. In light of this, we may peruse the decision of this Court in case of Manu Engineering Works (supra). In the said decision, the Division Bench came to the conclusion that language of "and/or" may be proper in issuing a notice for penalty, but it was incumbent upon the Assessing Authority to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by them. If no such clear cut finding is reached by the authority, penalty cannot be levied. It was a case in which in final conclusion the authority had recorded that "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income." It was in this respect the Bench observed that "Now the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasicriminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."

6. A perusal of the above paragraph would indicate that the Hon'ble High Court found that as user of expression "and/or" in between concealment of income or furnishing of inaccurate particulars while inviting explanation of the assessee, may not be any procedural irregularity or fatal to the proceedings, but if the AO failed to record a finding, while visiting the assessee with penalty, then that would be fatal to the proceedings itself. In other words, while passing final order, the AO has to record a specific finding accepting the fact that penalty is being imposed for furnishing inaccurate particulars or concealment of income. In the light of the above, let us take note of relevant para-8 of the penalty order, which reads as under:

"8. Thus, after careful consideration of the facts and circumstances of the assessee company's case, I am satisfied that the assessee company has committed the default in concealing its income and furnishing inaccurate particulars of its without any reasonable cause and therefore liable for levy of penalty u/s.271(1)(c) of the Income Tax Act, 1961."

7. A perusal of the above finding would indicate that, he wished to impose penalty for furnishing inaccurate particulars of income and furnishing of inaccurate particulars of income. Both these situations contradictory to each other in the above order. Therefore, this order is not sustainable in view of decision of Hon'ble Gujarat High Court cited supra. In view of the above discussion, penalty is not sustainable. We allow ground of appeal, and cancel penalty imposed by the AO."

7. In the above ground, let me peruse the impugned order of the ld.AO which reads as under:

"4. The submission of the assessee is perused carefully and found that the assessee has narrated erroneous facts in his reply. The assessee had disclosed only Rs. 5 lakh during the survey proceedings as against this it is narrated in the reply of penalty show cause dial 81 lakh disclosed during the survey proceedings. Further, penalty proceedings initiated against the addition of the income over and above the disclosure made during the course of survey proceedings and which the Ld. CIT(A) has also confirmed in his order. Therefore, the case of the assessee falls within the ambit of explanation "to section 271 (1) (c) of the I.T. Act which is being invoked in this case, assessee himself not come forward and disclosed the income, if the survey proceedings u/s. 133A had not been carried out on the business premises of the assessed and the assessment u/s. 143(3) had not been completed in the case of the assessee, the said unexplained investment of Rs. 3.25,000/- and

interest expenses of Rs, 29396 and Rs, 15,366/- short disclosed income during the course of survey aggregating to Rs. 3.69J62/- would have escaped assessment resulting into loss of revenue. The assessee has furnished inaccurate particulars of his income for the year under consideration and no bonallde cause for such failure has been established by the assessee. I am, therefore, satisfied that Explanation-1 of section 271(l)(c) is clearly applicable in this ease and therefore, penalty u/s. 271(l)(c) is leviable.

5. *Since the assessee has furnished inaccurate particulars of his income at Rs.3,69,762/- and therefore, the quantum of income for which inaccurate particulars/concealment have been furnished amounts to Rs. Rs.3,69,762/-.*

6. *As such total amount for which the inaccurate particulars have been furnished is at Rs.3,69,762/- on which the penalty leviable at maximum rate @ 300% of the tax sought to be evaded comes to Rs.2,78,238/- and the minimum penalty at the rate of 100% of the tax sought to be evaded by concealed income comes to Rs. 92,746/-."*

8. A perusal of the above order would indicate that the AO has recorded a firm finding that the assessee is being visited with penalty for furnishing inaccurate particulars of income. There is no confusion in the mind of the AO. Therefore, he cannot draw any support from these decisions. Apart from the proposition relied on by the assessee, no other point was argued by the ld.counsel for the assessee for absolving the assessee from levy of penalty. Hence, this appeal is devoid of merit. Accordingly, it stands dismissed.

9. In the result, appeal of the assessee is dismissed.

Order pronounced in the Court on 15th June, 2021 at Ahmedabad.

**Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT**

Ahmedabad; Dated 15/06/2021