IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT
[CONDUCTED THROUGH VIRTUAL AT AHMEDABAD]

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 3431/Ahd/2015
(Assessment Year: 2010-11)

ITO Ward-4(2)(1), Ahmedabad	Vs.	M/s. Rushabh Vatika C-903, Imperial Heights, 150 ft. Ring Road, Opp. Big Bazar, Rajkot
[PAN No. AALFR0187L]		
(**Appellant**)	..	(**Respondent**)

Revenue by :	Shri Om Prakash Singh, CIT DR
Assessee by :	Shri Deepak Rindani, AR

Date of Hearing	03.08.2021
Date of Pronouncement	09.09.2021

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the Revenue is directed against the order dated 07.09.2015 passed by the Commissioner of Income Tax (Appeals)-1, Rajkot arising out of the order dated 31.12.2013 passed by the ITO, Ward – 9(1), Ahmedabad under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred as to "the Act") for the Assessment Year (A.Y.) 2010-11.

2. The facts culled out from the records is this that the assessment under Section 143(3) of the Act was completed on 21.02.2012 determining total income at Rs. 5,83,25,466/- upon making addition of Rs. 4,15,88,930/- on account of suppressed profit on sale of plots in

respect of a project namely Rushabh Vatika. The said addition was made by taking the entire gross amount of unaccounted sale consideration found and admitted by the appellant during the course of action under Section 132 of the Act. In appeal the Ld. CIT(A) applied profit ratio of 30% to gross unaccounted sales which was, in turn, confirmed by ex-parte order dated 30.05.2013 passed by the Ld. Tribunal. The impugned penalty order has been passed consequent upon the said order of the Hon'ble Tribunal.

3. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee submitted before us that though the penalty proceeding was initiated on the count of furnishing of inaccurate particulars of income by the assessee while levying penalty no such allegation has been levied against the assessee by the ITO. Before the First Appellate Authority the appellant raised its preliminary objection as the levy itself is invalid and bad in law inasmuch as no order under Section 271(1)(c) could have been passed in the facts of the case. Rather the appellant relied upon the provision of sub-Section (3) of Section 271AAA of the Act where it says that no penalty under the provision of Clause (c) of sub-Section (1) of Section 271 shall be imposed upon the assessee in respect of undisclosed income refer to in sub-Section (1).

4. We have heard the rival submissions made by the respective parties and we have also perused the relevant materials available on record.

5. In fact, a search was initiated on 15.09.2009 in the case of partner of the assessee and the group cases and during which statement under Section 132(4) was recorded from several persons of the group admitting unaccounted sale account pertaining to project of the appellant firm; it was accepted to declare profits attributable thereto and pay tax thereon. Subsequent thereto the appellant declared unaccounted profit @ 20% of the undisclosed sales so admitted and paid tax thereon.

6. It is relevant to mention that in the quantum appeal the Ld. CIT(A) determined the ultimate net profit @ 30% as offered in the return of income taking into consideration the estimated profit in respect of the project of Kothariya 172, Silver Stone and Silver Springs, being the nearly projects of Rushabh Vatika situated in Chekla Village having identical business of land as determined by the Hon'ble Settlement Commission. The relevant observation made by the Ld. CIT(A) in the quantum appeal is as follows:-

> *"6.6 So far as the estimation of profit which should be taxed in the hands of the appellant is concerned, it is pointed out by the appellant that the Hon'ble Commission has determined the net profit which should be charged in respect of the projects Kothariya 172, Silver Stone and Silver Springs @30% in place of 20% disclosed in the returns of income as well as in the application submitted before the Settlement Commission. This is also a fact that both Silver Springs and Rushabh Vatika are nearby projects situated in Chekhla Village having identical business of selling of plots of land. The Hon'ble Commission while estimating the profits of Silver Springs @ 30% has duly considered the business activities of nearby Rushabh Vatika Project for the purpose. Therefore, it cannot be disputed that the estimation of profits of the appellant in respect of Rushabh Vatika Project has to be in tune with the estimation of profits in the cases of Silver Springs as settled by the Commission unless any differentiating evidence in respect of Rushabh Vatika Project is brought on record. It is further noted that Shri Mukesh M. Sheth, a key person of the group in the statement recorded u/s 132(4) of the Act has clearly admitted the fact of unaccounted sales and offered to tax the income or profit arising out of the said unaccounted sales. The entire unaccounted sales has not been offered / disclosed as income as is evident from the perusal of the statement recorded.*

6.7 It is further noted that the appellant has shown the gross profit of Rs.67,34,398/- on its accounted sales of Rs.3,69,66,577/- in respect of Rushabh Vatika Project. Thus, the gross profit shown on the accounted sales is 18.22%. Therefore, the contention of the appellant, that for the same scheme of land plots, the Department has taxed the income @ 12% for block period ending on 12-09-2002 which has become final, is not justified so far as the present year is concerned wherein disclosed gross profit on accounted sales is 18.22%. It is also an admitted fact that in respect of unaccounted sales, the margin of profit is always higher.

6.8 In view of the above and considering the order of the Settlement Commission in respect of Silver Springs wherein profit has been estimated @ 30% instead of 20% offered in the return of income, it would be fair and reasonable to adopt the same rate of estimated profit even in the case of Rushabh Vatika Project of the appellant. The total unaccounted sales in the present case is Rs. 5,19,86,163/-. The estimated profits on such unaccounted sales @ 30% amounting to Rs. 1,55,95,849/- is accordingly taxed in the case of the appellant. Since the appellant has already disclosed profit of Rs.1,03,97,2337- @ 20% on the quantum of unaccounted sales, the balance amount of Rs.51,98,616/- is, therefore, sustained out of total addition made by the AO at Rs.4,15,88,930/-"

7. While imposing penalty the Ld. AO's observed is as follows:-

"5. In compliance to the show cause notice dated 19.08.2013 the assessee had submitted letter dated 06.09.2013, received in this office on 10.09.2013, whereby the assessee had sought more time to file a detailed reply. Further, it was mentioned by the assessee that it had applied to the competent authority for shifting the jurisdiction of its case from Ahmedabad to Rajkot and requested to keep the penalty proceedings pending.

Section 271(1)(c) of the I.T Act provides that where the assessing officer, in the course of any proceedings under the IT Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Penalty is leviable in view of Explanation 1 to Section 271(1)(c) of the Act also. The Explanation 1 to section 271(1)(c) is reproduced as under :-

"Explanation 1 - Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,"

Reliance in this respect is placed on the following decisions:

(i) A.M. Shah & Co. v. CIT 238 ITR 415 (Guj) - whereby the Hon'ble High Court held that "the word 'inaccurate particulars' would cover both falsity in final figure as also constituent elements, which are inaccurate in some specific or definite respect, whether in constituent or subordinate items of income or end result. Therefore, any concealment or inaccuracy in particulars of income in return occurring at any stage up to and inclusive of ultimate stage or working out of total income would attract penalty provisions of section 271(1)(c)."

(ii) In a judgment in the case of Union of India Vs. Dharmendra Textiles Processor &. Others 306 ITR 277 the Honorable Supreme Court observed that the object of enactment of section 271(1)(c) read with explanation indicated that the section had been enacted to provide for a remedy for the loss of revenue. The penalty under this section is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is in the matter of prosecution u/s. 276C. What is required is that there is concealment/or furnishing inaccurate particulars of income that would be sufficient to levy penalty.

6. Except the above mentioned letter dated 06.09.2013, in compliance to the show cause notice dated 19.08.2013, neither anybody attended nor any submission in this regard was received in this office till date. It is therefore, presumed that the assessee has nothing to say in the matter and has no objection to the proposed penalty. During the course of assessment proceedings the assessee has failed to explain as to why it has offered only ad-hoc at 20% of cash sales. The only argument put forward during the course of assessment proceedings was that "undisclosed sales should not be treated as income." However, since the assessee has booked all the expenses and the cash sale was representing profit only the above argument was not accepted and was rejected. The argument put forward wit out any documentary evidence cannot be accepted. On careful consideration on these facts I have reason to believe that the assessee has furnished inaccurate particulars of income.

7. In view of the discussions made in the preceding paragraphs, it is clear that the assessee had consciously and deliberately concealed income by way of furnishing inaccurate particulars of income to the tune of Rs.4,15,88,930/-

and hence it is liable for penalty u/s. 271(1)(c) of the Act. Further, though delivered on different set of facts, it is pertinent to refer to the decision of Hon'ble Karnataka High Court in the case of CIT V/ s. Sree Valliappa Textiles (2007) 294 ITR 322 wherein it has been held that Section 271(1)(c) has to be strictly applied in the larger interest of discipline in filling correct returns by the assessees.

8. Therefore, I am satisfied that this is a fit case for levy of penalty u/s 271(1)(c) of the Act. The maximum penalty leviable @300% of the tax sought to evaded works out to Rs. 3,85,52,980/- and minimum penalty @100% comes to Rs. 1,28,50,980/-. Looking to the facts of the case, I levy minimum penalty of Rs. 1,28,50,980/- u/s. 271(1)(c) of the I.T. Act."

8. The Ld. CIT(A) while dealing this particular aspect of the matter observed as follows:-

"I find that the search was conducted on 15-9-2009 and therefore the said date clearly falls within the period of 1st June, 2007 to 1st July, 2012 mentioned in sub-section (1) of Sec. 271AAA. I further find force in contentions of the A.R. that "the income admitted by the appellant and found during search is also duly covered by the definition of "undisclosed income" given in the Explanation below Sec. 271AAA(4) and therefore it becomes consequently apparent that in respect of such undisclosed income the jurisdiction itself for levy of penalty u/s 271(1)(c) would cease to apply in view of the explicit provisions of Sec. 271AAA(3) of the Act. In other words and having due regard to the purpose behind introduction of Sec. 271AAA by the Finance Act, 2007 w.e.f. 1-4-2007, the case of the appellant for levy of penalty would obviously arise u/s 271AAA only and not under any other section of the Act in respect of the income so assessed for the year under appeal. It is also pertinent to note that Sec. 271AAA appears to be a specific provision for levy of penalty in search cases only, more so because it says "notwithstanding anything contained in any other provisions of this Act ....." and also it is titled as "Penalty where search has been initiated." It is also a recognized principle in the income-tax Act that specific provision prevails over a general provision. In view of above, it becomes clear that once a search has been initiated within the period specified in section 271AAA, penalty in such cases could be considered only by passing an appropriate order under the said section and not under any other section or in particular not under Sec. 271(1)(c). The aforesaid proposition has also been laid down and has come to be elaborately dealt with by various Courts and Tribunals in the precedents cited before me and relied upon by the appellant (supra). I also find further force in the contention of the A.R. that a jurisdictional error by invoking an inapplicable provisions of law is fatal and it cannot be cured, particularly when read in the context of the statement given u/s 132(4) of the Act wherein the deponents had clearly referred to the benefit of penalty u/s 271AAA of the Act in respect of the undisclosed income admitted by them. Therefore, I further find that based on the assessment material on record, the I.T.O. levying penalty could not have been unaware of the correct penalty provisions applicable in the case. In view of above, I

hold that the order of levying penalty u/s 271(1)(c) of the Act cannot be sustained on this ground itself and hence the levy of penalty is directed to be deleted.

It would also be necessary to deal with the second aspect of the contentions advanced on behalf of the appellant which are with regard to the provisions of Sec. 271AAA itself. In this regard/ the A.R. submitted before me that while Sec. 271AAA provides for penalty to be computed @ 10% of the undisclosed income of the specified previous year, sub-section (2) thereof provides that nothing contained in sub-section (1) shall apply if the assessee in a statement u/s 132(4) admits the undisclosed income, specifies the manner in which it has been derived, substantiates the manner and pays tax with interest thereon. On this aspect, the A.R. argued that in the case of the appellant all the said three conditions of sub-section (2) were duly fulfilled because the undisclosed income was admitted u/s 132(4), it was specified that the same was derived upon sale of plots in a specific real estate scheme named Rushabh Vatika of Chekhla, the manner of deriving the same was in cash which was also substantiated alongwith land plot nos. of the said scheme, as stated in the statement u/s 132(4) itself, profit thereon was declared in the return of income by computing the same @ 20%. It was further argued that adoption of profit rate of 30% by the C.I.T. (Appeals) was finally upheld by the tribunal and that the said rate itself was by way of an estimate by an appellate authority and it cannot be said that the higher rate of 30% than the rate of 20% declared by the appellant was based upon any incriminating material showing such 30% rate. Based on the same, it was argued that even a higher estimation of only a profit rate was an application of a theory accepted by the Hon'ble Gujarat High Court in several cases in search/ survey matters as cited and accepted by the tribunal in the case of the appellant itself and thus the same can be duly said to be covered by the provisions of sub-section (2) of Sec. 271AAA.

The submissions on this aspect of the argument are duly considered. It is seen from record and in particular from the statement u/s 132(4) dated 23-10-2009 cop of which is in paper book that the undisclosed income was admitted u/s 132(4), that it was specified by the deponents that the same was derived from sale of plots in a specific real estate scheme named Rushabh Vatika of Chekhla, that the manner of deriving the same was in cash which was also substantiated alongwith land plot nos. of the said scheme as stated in the assessment order itself, as stated in the statement u/s 132(4) itself, profit thereon was declared in the return of income by computing the same @ 20%. Thus, I find that even if the entire undisclosed sales are considered as profits (although the same are finally estimated at 30% rate of sales and not at 100%), the entire such sales/income, for reasons stated above, gets covered under sub-section (2) of Sec. 271AAA. Therefore, in my considered view, the substantive provisions of Sec. 271AAA(1) cannot apply when sub-section (2) itself states that "Nothing contained in sub-section (1) shall apply if .....". I also find from the statement u/s 132(4) that the investigating officer did not put any question with regard to the rate of profit or the extent of income arising from undisclosed sales whereas the deponents had very clearly stated that they will disclose the taxable income or the amount of profit from the sales in the returns of relevant years of relevant concerns and had also clearly declared the same with an understanding that if on the said income they will be entitled to get the benefit of penalty u/s 271AAA,

than they will get the said benefit. Thus, it can be seen on an overall perusal of the entire statement read with seized material and the assessment order in the light of subsequent appellate orders, that the appellant was forthright in making disclosure in the light of specific provisions of the Act and" thus even the investigating officer cannot be said to be unaware of the same. In view of above, in addition to my findings earlier above with regard to validity of order u/s 271(1)(c), the levy of penalty is deleted even if the same can be said to have been levied u/s 271AAA of the Act. In the result, ground no. 1 is allowed."

9. The argument advanced by the Ld. Counsel appearing for the assessee by way of a written submission is reproduced hereinbelow:-

"(i) No penalty is levied by the A.O, on the amount of income on admitted sales offered by the firm in ROI i.e. Rs. 1,03,97,233/- being 20% profit of total disclosure of Rs. 5,19,86,163/-; hence no penalty can be levied on remaining 80% on the ground of furnishing of inaccurate particulars of income when no inaccurate particulars are shown to have been furnished in the return of income filed for the year; only estimation of income from same particulars was changed by the A.O. and then by CIT(A) and confirmed by Tribunal.

(ii) Further, Expl. 5A to Sec. 27l(l)(c) does not get attracted because due date for filing ROI (30-09-2009) had not expired (dt. Of search 15-09-2009); income found was thus declared in regular return, hence no question of penalty; moreover the F.Y. had not even ended on the date of search.

(iii) When the income declared in the ROI by estimating the profit rate @ 20% is not visited with penalty, any subsequent change in income is as a result of change in estimate only by assessing and appellate authorities (20% to 100% to 30%); estimated addition does not lead to penalty u/s 271(l)(c) even in search cases. ***[Bombaywala Readymade Stores 230 Taxman 0313 (Guj), Lallubhai Joglbhai Patel 261 ITR 216 (Guj)]***

(iv) There is no case by AO as to which and how "inaccurate particulars of income" were furnished, when all facts and figures were disclosed and reasons for adopting 20% profit rate were elaborately explained, none of which are negatived by the AO [Dilip Shroff 291 ITR 519 SC]

(v) Further, Expl. 5A to Sec. 271(l)(c) does not get attracted since there was no search proceedings u/s 132 of the Act in case of respondent. [Decision of Bombay HC in case of Rajkumar Gulab Badgujar in Tax appeal no. 897-898-901-907-914/2016 dated 08-01-2019]"

10. It appears from the entire set of facts that the quantum was finalized by the Ld. CIT(A) on estimated basis fully relying upon the order passed by the Hon'ble Settlement Commission. It was argued by the

Ld. AR that principally penalty cannot be levied on addition made on estimated basis and hence the penalty does not lie. However, the main argument advanced by the assessee is this that the Assessment Year in appeal pertains to "specified previous year" as defined under Explanation (b)(ii) to Section 271AAA as it is the previous year 2009-10 where the action under Section 132 of the Act was carried out on 15.09.2009. The income assessed is the "undisclosed income" as defined under the Explanation (a)(i) to Section 271AAA which is represented by documents and transactions found in course of search proceeding in relation to undisclosed sales amounts of real estate plots. Such "undisclosed income" of the specified previous year is found, in the instant case, during search proceedings initiated under Section 132 of the Act on 15.09.2009 i.e. on or after 01.06.2007 but before 01.07.2012. Therefore, admittedly the appellant's case coming under the purview of the statutory provision of Section 271AAA of the Act. However, Section 271AAA (3) specifically prohibits initiation of penalty proceeding under Section 271(1)(c) in respect of an undisclosed income as referred under sub-Section 1 of Section 271AAA. However, we find that the impugned penalty proceeding has been initiated and culminated into imposition of penalty under Section 271(1)(c) but the same has been explicitly prohibited by the provision of sub-Section 3 of Section 271AAA particularly where undisclosed income has been found during the search proceeding. This provision left no space for confusion or doubt in barring the Ld. AO to assume jurisdiction to levy penalty under Section 271(1)(c) of the Act. Thus, in the present facts and circumstances of the case the very initiation of penalty proceeding under Section 271(1)(c) is contrary to the statutory provision, palpably bad and

not maintainable in the eye of law. However, taking into consideration the entire aspect of the matter we find that initiation of the penalty proceeding is erroneous and is not sustainable. Thus, the same is hereby quashed.

11. In the result, the appeal preferred by the Revenue is dismissed.

This Order pronounced in Open Court on 09/09/2021

Sd/-	Sd/-
(WASEEM AHMED)	(Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 09/09/2021
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad