

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM

आयकर अपील सं./ITA No.1168, 7151 & 1169/Mum/2013

(निर्धारण वर्ष / Assessment Year :2007-08, 2008-09 & 2009-10)

Mr. Mahendra Motilal Banthia, 169/A, Moti Mahal, M.G.Road, Panvel, Navi Mumbai-410206	Vs.	ACIT/DCIT, CC-39, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AIYB 7531 M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Vijay Kothari
राजस्व की ओर से /Revenue by : Smt. Pooja Swaroop
सुनवाई की तारीख / Date of Hearing : 22/04/2016
घोषणा की तारीख/Date of Pronouncement 08/07/2016

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A), Mumbai, for the assessment years 2007-2008 & 2009-2010, in the matter of imposition of penalty u/s.271(1)(c) of the I.T.Act.

ITA Nos.1168&7151/Mum/2013(AY : 2007-08 & 2008-09)

2. Rival contentions have been heard and record perused. Facts in brief are that a search u/s.132 was carried out at assessee's business and residential premises on 5-3-2009. During the course of search statement u/s.132(4) was recorded wherein assessee has offered Rs.3 crores for the previous year ending on 31-3-2008 relevant to assessment year 2008-09 on estimate basis. The return of income was accepted by

the AO after making small disallowance in respect of some of the expenses incurred. Thereafter the AO also levied penalty under Explanation 5A to Section 271(1)(c) of the I.T.Act.

3. It was contended by Id. AR that pursuant to search action on 5-3-2009 all the proceedings get abated and assessee had no choice but to wait for receipt of notice u/s.153A. The AO issued notice u/s.153A, which was received only after 31-3-2010 giving the time of 20 days. The assessee filed return of income on 23-4-2010 i.e after 31-3-2010 due to the reason that search and seizure action took place on 5-3-2009 before the due date of filing of return of income u/s.139(4) i.e. 31-3-2009. As per Id. AR since notice u/s.153A received only after 31-3-2010 the assessee had no option but to file the return as per the provision of section 153A of the Act. The assessee filed his return declaring taxable income Rs.4,13,78,790/- on 23-4-2010, which also included estimate disclosure of Rs.3 crore made u/s.132(4) of the I.T.Act. As per Id. AR in the above circumstances the assessee has filed return of income within the extended due date r.w.s.153A as provided u/s.139(4) of the Act. As per Id. AR due to search action all proceedings got abated and it was not in the hands of the assessee to file his return without issue of notice u/s.153A. Hence, assessee waited till receipt of notice and when ultimately notice was received u/s.153A in April, 2010, the assessee has duly filed his return of income within the date stipulated u/s.139(4) r.w.s.153A of the I.T.Act.

4. Ld. AR also invited our attention to the TDS deducted on the income earned during the year as well as advance tax paid before the end of the previous year, on the income earned TDS of Rs.29,56,713/- was deducted till 31/03/2008 the corresponding income of which comes to rs.2,95,67,130/-. In addition to that assessee had paid advance tax of Rs.35,00,000/- on 28-2-2008 & the corresponding income of which comes to more than Rs.1 crore. Against these payment of taxes assessee filed return of income declaring Rs.4,13,11,513/- which almost covers the corresponding TDS & Advances Tax. Since both the taxes were paid not only before the search action but before the year ended on 31-3-2008, the Id. AO's contention that assessee has disclosed this income after the search is not correct and hypothetical.

5. The AO did not convince with the assessee's argument and levied penalty under the provisions of Explanation 5A to Section 271(1)(c) of the I.T.Act.

6. By the impugned order, CIT(A) confirmed the action of AO, against which assessee is in further appeal before us and has raised following grounds :-

1. *On the facts and circumstances of the case and in law Ld. Commissioner of Income Tax (Appeals) has erred in confirming penalty imposed u/s.271(1)(c) without appreciating the facts of the case.*
2. *On the facts and circumstances of the case and in law Ld. Commissioner of Income Tax (Appeals) has erred in not excluding the tax already paid by way of Advance Tax & TDS while confirming the penalty. He ought to have reduced the quantum of penalty to that extent.*

7. Similarly for the assessment year 2007-08, the contention of Id. AR was that pursuant to search action on 05.03.2009 all the proceedings get abated and assessee had no choice but to wait for issue and receipt of notice u/s. 153A. The AO issued notice u/s. 153A which was received only after 31.03.2010 giving the time of 20days. The assessee filed his return of income on 23/04/2010 i.e. after 31.03.2010 due to the reason that search and seizure action before the due date of filing of return of income u/s. 139(4) i.e. on 05.03.2009. Since the notice u/s. 153A received only after 31.03.2010 the assessee had no option but to file the return as per the provision of section 153A of the Act. In view of the above, it was contended that the assessee had filed his return of income within the extended due date r.w.s 153A as provided u/s. 139(4) of the Act. It is vehemently submitted that due to search action all proceedings got abated and it was not in the hands of assessee to file his return without receipt of notice 153A, hence the assessee waited till receipt of notice. Ultimately the assessee received notice u/s. 153A dated 30/03/2010 in April 2010. In response to the said notice assessee duly filed his return within the time stipulated. Hence from the series of events it can be said that the assessee filed his return of income within the due date stipulated u/s. 139(4) of the IT Act 1961 r.w.s. 153A of the IT Act 1961. Reliance was placed on latest Chennai Tribunal decision, wherein the Tribunal have held that return filed in response to notice u/s. 153A should be treated as filed u/s. 139(1). It was contended by Id. AR that from the aforesaid facts your honour will appreciate and admit that Explanation 5A

to Section 271 (1)(c) is not applicable to the impugned appellant hence it cannot be said that appellant has concealed either particulars of income or have furnished inaccurate particulars of income. Therefore Id. AR requested to delete unwarranted penalty levied on the returned income accepted as it is. As per Id. AR the aforesaid proposition has been explained by various Hon'ble High Court in various judicial pronouncements sated here under:

CIT v Rajesh Kumar Jalan (2006) 286 ITR 276 (Gauhati)

CITvJagriti Aggarwal (2011) 3391TR 610 (P&H)

CIT v Jagtar Singh Chawla ITA No. 71 of 2012 vide order dated 20103/2013

Fathimabai v ITa ITA No. 435 of 2004 vide order dated 17/10/2008

Lastly reliance was placed on the jurisdictional Hon'ble ITAT decision in the case of ITA Central (Thane) v Gope M Rochlani ITA No. 7737 mum/2011 AY 2008-09 dated 24/05/2013 Mumbai 'G' Bench and also decision in the case of :

Kshiti R. Maniar Mumbai vs ACIT

Asst CIT Central Circle vs Ajit Kumar Surana

Shri Parag M Sanghvi vs DC IT

Shri Parveen Garg vs ACIT.

8. On merit of the penalty, it was submitted that a perusal of additional details in respect of payment of tax and TDS your honour will appreciate that this is not a case of concealment of income because on the income earned TDS of Rs. 21,46,734/- was deducted till 31/03/2008 8: the corresponding income of which comes to Rs. 3,82,66,820/-. In addition to that assessee had paid SA tax of Rs. 28,50,000/- on 29/02/2008 & the corresponding income of which comes to more than 90Lacs. Against these payment of taxes assessee filed return of income declaring

2,00,04,116/- which almost covers the corresponding TDS & S.A. Tax. Since both the taxes were paid not only before the search action but before the due date of filing of ROI, and covers the full income disclosed in ROI filed the Ld AO's contention that assessee has disclosed this income only after the search is not correct and hypothetical. Hence it cannot be said that there is concealment of income.

9. We have considered rival contentions, carefully gone through the orders of authorities below and found from the record that in both the years under consideration the corresponding income with respect to the tax deducted at source and also the amount of advance tax paid by the assessee not only before the last date of financial year but also before search is equal to the amount of income returned by the assessee. It means entire income of the assessee was subject to TDS or the assessee himself has advance tax paid before the end of the financial year. Under these circumstances contention of Id. AR that the AO was not justified in holding that assessee has concealed its income have some merits. We also found that TDS as well as advance tax has been paid by the assessee not only before the due date of filing of return of income but also before search. Under these circumstances, we have to see the intention of assessee as to whether he wants to conceal the income or not. In the interest of justice and keeping in view the proposition of law advanced with respect to extended date of filing of return u/s.153A, which is supported by judicial pronouncements as cited by Id. AR, we restore the

matter back to the file of AO for deciding afresh after giving due opportunity to the assessee.

10. In the result, both appeals of assessee for assessment year 2007-08 & 2008-09 are allowed for statistical purposes.

ITA No.1169/Mum/2013(AY 2009-2010)

11. In this appeal, the assessee is aggrieved by the order of CIT(A) dated 22-11-2012.

12. In this case, the CIT(A) dismissed the assessee's appeal by observing that assessee has not paid admitted tax as required under section 249(4)(a), against which assessee is in further appeal before us.

13. We have considered rival contentions and found that the AO has made protective addition of Rs.56,07,000/- u/s.69C. The CIT(A) has dismissed assessee's appeal as being not admissible on the plea that taxes have not been paid. Ld. AR placed on record details of tax paid by him and contended that as per the provisions of Section 199 of the Act, credit for tax deducted at source has to be given, irrespective of the fact that there was delayed payment of TDS by the deductor. For this purpose, reliance was placed on the decision of Hon'ble Gauhati High Court in the case of Omprakash Gattani, 242 ITR 638. In view of these facts, it was contended that assessee has paid entire tax amount and that the appeal was wrongly not been admitted by the CIT(A) u/s.249A.

14. Considering the fact that there is tax deducted at source out of assessee's income which has to be taken into account while computing the tax paid by the assessee and also considering the challans placed on

record with regard to actual payments of tax, in the interest of justice, we restore this appeal to the file of CIT(A) for deciding afresh on merits as per provisions of Section 250 sub section 6 of the I.T.Act.

15. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 08/07/ 2016.

Sd/-
(AMARJIT SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 08/07/2016

प्र.कु.मि/pkm, नि.स/ PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai