

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH

**Before: Shri Mahavir Prasad, Judicial Member
And Shri Amarjit Singh, Accountant Member**

**ITA No. 2029/Ahd/2014
Assessment Year 2003-04**

Shri Rasikbhai C. Patel, Mota Wanda, Chikhodra, Anand-388001 PAN: AEDPP4171J (Appellant)	Vs	The ITO, Ward-1, Anand (Respondent)
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**Revenue by: Shri Mudit Nagpal, Sr. D.R.
Assessee by: Shri Vijay Ranjan
with Ira Kapoor, A.R.**

Date of hearing : 04-10-2017
Date of pronouncement : 31-10-2017

आदेश/ORDER

PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-

This assessee's appeal for A.Y. 2003-04, arises from order of the CIT(A)-IV, Baroda dated 21-03-2014, in confirming penalty of Rs. 3,35,126/-, in proceedings under section 271(1)(c) of the Income Tax Act, 1961; in short the Act.

2. In this case, return of income declaring income of Rs. 78,712/- was filed on 4th August, 2003. Thereafter, assessment u/s. 143(3) r.w.s. 147 of the act was passed on 23rd December, 2008 determining total income at Rs. 11,66,368/- as against the income of Rs. 78,712/- disclosed in the return of income. The brief fact of the case are that incriminating document were found during a survey action u/s. 133A carried out in the case of M/s. Vastu Construction on 23rd Sep, 2003. The assessee has admitted on the basis of impounded document that the land document was made at Rs. 1,32,500/- and construction agreement was made at Rs. 7,75,000/- which was actual price charged by the builder, i.e. Shri Bankim D Patel from whose custody incriminating documents were found. However, the total consideration paid by the assessee was more than 22 lacs by cash and cheques. Subsequently, during the course of assessment proceedings, the assessee has retracted the statement recorded on 26th December, 2006 stating that he was not in a normal state of mind when the statement was given. The assessing officer observed that in the statement dated 28th Jan, 2006, the assessee had given specific and clear answer to each question and at no point of time he indicted about any ill health. Therefore, the assessing officer has concluded that the assessee has made unaccounted investment amounting to Rs.10,88,196/- in the land and building. Consequently, the assessing officer has levied minimum penalty of Rs. 3,35,126/- u/s. 271(1)(c) of the act for concealing the particulars of income.

3. Aggrieved assessee preferred appeal before the Id. CIT(A). The Id. CIT(A) has sustained the penalty levied by the assessing officer by observing as under:-

“4.3 I have considered the facts of the case, A.O.’s observations and the appellant’s submission. The Hon’ble ITAT, Ahmedabad, in its decision in ITA No. 832/Ahd/2010, relating to appellate proceedings, in regard to assessment order in this case has discussed the facts of the case in detail. The ITAT has held in this order that the case had been reopened u/s. 147 because of the incriminating materials and the statement of the appellant. They have also held that retraction which was made by the appellant was without any basis. They have further held that in this present case, the existence of page no. 45 as incriminating materials was not denied by the appellant. The retraction having no supporting evidences has no value in the eyes of law. Subsequently, they have discussed the case of M/s. Vastu Construction, the concern who has developed the project and from whom the appellant has purchased the property in question. They have discussed the content of page no. 45 which was recovered at the time of survey and which has also been reproduced in the order of the ITAT. The observations of the A.O. of M/s. Vastu construction regarding to this page no. 45 has been reproduced in para 7.1 of the order of the ITAT. The conclusion drawn by the A.O. on the basis of the statement recorded by the appellant has been reproduced in para 7.2 of the order of the ITAT. On the basis of such document and statements, the ITAT has held that it is not a case were merely on the basis of the statement, the impugned addition was made. It has held that this is a case where the statement was recorded on the basis of an incriminating material recovered during the course of survey action and then the additions were made.

4.3.1 Thus all the appellant’s contentions that the addition has been made only on the basis of his statement, that his statement was recorded under coercion and duress have been found to be incorrect by the appellate authorities. A fresh submission made by the appellant that since his wife was the co-owner of the property, hence entire addition should not have been made in his hand is also not relevant at his stage as no such contention has been raised by the appellant either during the course of assessment proceedings or during the course of appellate proceedings in relation to the assessment proceedings.

4.3.2 In the statement recorded u/s. 131, the appellant had admitted that page no. 35 to 45 to annexure A-1 collected from the possession of Shri Bankimbhai D Patel were relating to the construction of his house. He had also admitted that the total cost was Rs. 24,16,196/- which had been remitted to the builder out of his personal savings, agricultural income, money received from his two daughters which are residing at Narobi and Lusaka who had given the money at the time of their visit to him and relatives of his father in law who were also residing abroad. The A.O. examined the investment of this total cost of the construction and finally held that the appellant failed to explain the source of investment of Rs. 10,88,196/-. Hence, the decisions relied upon by the appellant in the case of SAS Pharmaceuticals (Supra) and National Textiles (Supra) are not relevant. This is not a case of cash credit where the appellant’s contentions have been negated. This is a case where he appellant had admitted of having made certain investment in the construction of his house and subsequently failed to explain the source of part of the investment made in such construction. Such unexplained investment has been added to the total income of the appellant. During the course of current appellant proceedings also, the appellant has not been able to file any explanation regarding source of this addition for Rs. 10,88,196/-. From the discussions made above and on the basis of the assessment order and appellate orders, it has been proved beyond doubt

that the appellant had made unexplained investment in the construction of the house property and hence it is held that the AO has rightly levied penalty u/s. 271(1)(c) in this case.”

4. During the course of appellate proceedings before us, on the basis of additional ground of appeal filed the Id. Counsel contended that the Id. CIT(A) erred in confirming the penalty on the reasoning that the assessing officer had practically issued the notice in this case u/s. 274 r.w.s. 271(1)(c) of the act without application of mind because he failed to specify under which limb of section 271(1)(c) of the act penalty proceedings were initiated. The Ld. Counsel Sh. Vijay Ranjan has placed reliance on the judicial pronouncements in the cases of Pooja Proteins Pvt. Ltd. vs. ACIT ITA No. 1160/Ahd/2014 dated 09-06-2017, in the case of Shri Badarmal Modiram Jain vs. ACIT dated 20-03-2017 and in the case of CIT vs. SSA¶ Emerald Meadows [2016] 73 taxmann.com 248 (SC).

5. On the other hand, Id. departmental representative supported the order of the Id. CIT(A) and he has also placed reliance on the judicial pronouncement of Honble High courts¶ decision in the case of Snita Transport (P) Ltd. Vs. ACIT dated 11th December, 2012 (Gujarat).

6. We have heard both the sides and perused the material on record and judicial pronouncements cited by both the sides carefully. We observed that Co-ordinate Bench of the ITAT on the identical issue in the case of Pooja Proteins Pvt. Ltd. vs. CIT vide ITA 1160/Ahd/2014 order dated 9th June, 2017 has decided the identical

issue in favour of the assessee by following the order of Hon'ble Supreme Court in the case of CIT vs. SSA's Emerald Meadows 73 taxman 248(SC). The relevant part of the decision of the Co-ordinate Bench is reproduced as under:-

"5. A perusal of the notice issued under section 274 read with section 271 of the Act exhibited at page 8 of the paper book shows that the same is a proforma notice without specifying under which limb the Assessing Officer is proposing to levy the penalty. This issue is no more res integra as the same has been decided in favour of the assessee and against the Revenue by the Hon'ble Supreme Court in the case of CIT vs. SSA's Emerald Meadows, 73 taxmann. com 248. The Hon'ble Supreme Court was seized with a special leave petition filed by the Revenue against the order of Hon'ble Karnataka High Court rendered in the case of CIT vs. Manjunatha Cotton & Ginning Factory, 359 ITR 565 which decision was relied upon by the Tribunal in allowing the appeal of the assessee holding that notice issued by the Assessing Officer under section 274 read with section 271(1)(c) of the Act was bad in law as it did not specify under which limb of section 271(1)(c) penalty proceedings have been initiated i.e. whether for concealment of particulars of income or furnishing of inaccurate particulars of income. A similar view was taken by the co-ordinate bench in ITA No.2848/Ahd/2013 and in ITA No.542/RJT/2012.

6. Respectfully following the ratio laid down by the Hon'ble Supreme Court and the decisions of the co-ordinate bench, we set aside the order of the CIT(A) and quash the penalty order framed by the Assessing Officer under section 271(1)(c) of the Act dated 23.03.2012."

Respectfully following the ratio laid down by the Hon'ble Supreme Court and decision of the Co-ordinate Bench, we set aside the order of the Id. CIT(A) and quash penalty order framed by the assessing officer u/s. 271(1)(c).

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31-10-2017

Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER
Ahmedabad : Dated 31/10/2017

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

आदेश क०० तालम अ०मत / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलअध आधकरण,
अहमदाबाद