

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “D” KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.599-600/Kol/2016**  
Assessment Years:2008-09 & 2009-10

Sri Joy Barman 52B,Sashi Bhusan Neogi Garden Lane, Kolkata-36 <b>[PAN No.AEVPB 3030 L]</b>	<b>V/s.</b>	Income Tax Officer, Ward-42(3), Kolkata
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri T.P. Kar, A.R
राजस्व की ओर से/By Revenue	Shri Arindam Bhattacharjee, Addl. CIT-DR
सुनवाई की तारीख/Date of Hearing	03-01-2018
घोषणा की तारीख/Date of Pronouncement	07-02-2018

**आदेश /ORDER**

**PER Waseem Ahmed, Accountant Member:-**

The above two captioned appeals are pertaining to the same assessee for assessment years 2008-09 & 2009-10. Since these appeals belong to the same assessee, therefore these have been clubbed together. Accordingly these were heard together and consolidated order is being passed for the sake of convenience and brevity against the different orders of Commissioner of Income Tax (Appeals)-13, Kolkata vide dated 31.12.2015 & 30.12.2015 for the AY 2008-09 & 2009-10 respectively. Assessment was framed for the AY 2009-10 by the ITO Ward-42(3), Kolkata u/s 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 21.12.2010.

Penalty was levied for the AY 2008-09 by Assessing Officer vide his order dated 27.06.2011 u/s 271(1)(c) of the Act.

Shri T.P. Kar, Ld. Authorized Representative appeared on behalf of assessee and Shri Arindam Bhattacharjee, Ld. Departmental Representative appeared on behalf of Revenue.

First we decide to proceed to adjudicate assessee's appeal in ITA No.600/Kol/2016 for A.Y. 2009-10.

2. The solitary issue raised by assessee in this appeal is that Ld. CIT(A) erred in confirming the order of Assessing Officer by treating the cash deposit in the bank as undisclosed income of assessee.

3. Briefly, stated facts are that assessee in the present case is an individual and engaged in distributorship business of herbal cosmetic items of different companies under the name as M/s New Enterprise. During the course of assessment proceedings, AO observed that the assessee failed to disclose certain bank accounts in his income tax return where there were certain cash deposits in those bank accounts. The necessary details of the bank accounts as well as details of cash deposits stand as under:-

i) Axis Bank Dunlop Br. SB A/c No.236010100136723	Rs.3,29,000/-
ii) Unite Bank of India, Baranagar SB a/c No.0078010318043	Rs.2,71,600/-
iii) ABN AMRO Bank, Kolkata SB a/c No.1222732	Rs.9,18,500/-
iv) Bank of Baroda, Baranagr, Kolkata SB a/c 00370100015959	Rs.1,82,000/-
Total undisclosed cash deposits	Rs.17,01,100

On being confronted about the source of cash deposits in the aforesaid bank accounts, the assessee submitted that the cash was withdrawn from the credit cards which were deposited in the saving bank accounts for the purpose of payment. The assessee also filed the details of outstanding balance of the credit card stood as on 31.03.2009 as detailed under:-

	Outstanding loan
i) ABN Amro Bank (RBS), credit card No.5425051700985681	Rs.1,87,160
ii) ABN Amro Bank (RS), Credit card	Rs. 99,869

No.5425051702802041	
iii) Standard Charter Bank, Credit card No.4129057681733687 [opening bal- closing Bal = Rs.53,235 – Rs.300]	Rs. 52,935
iii) ICICI Bank, Credit card No.4132890000 [opening Bal – Closing Bal = Rs.79,962 – Rs.77,476]	Rs. 2,486
iii) CITI Bank, credit card No.5546379574793004 [opening Bal – Closing Bal = Rs.1,79,352 – Rs.4,019]	Rs.1,75,333
	Rs.5,17,783
The assessee also paid the interest on loan as per loan a/c No.9427464, ABN Amro Bank (RBS)	Rs. 81,768
	Rs.5,99,551

In view of the above, the AO treated that the cash deposited of ₹11,01,549/- (1701100 – 599551) as unexplained cash credit and added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that he (assessee) used to arrange cash through channel of the agents of the bank against the use credit card. Subsequently, the cash amount used to be deposited in the SB account. Thus, there is circulation of same money. All the credit card statements were available before the AO at the time of assessment proceedings but no reference has been made to the credit card statement by the AO in his assessment order and he erroneously considered the outstanding amount appearing on 31.03.2009 for ₹5,99,551/- as source of cash deposit in the SB bank account. Accordingly, AO has not treated the amount of ₹5,99,551/- as unexplained cash credit however. But the AO failed to consider the amount of money withdrawn through the credit cards during the year which has been duly repaid through SB account.

The assessee also submitted that the AO has made the addition of all the money deposited with the bank without giving effect to the withdrawals made by the assessee from the bank. In such a situation, the AO should have applied the peak credit theory.

There were other bank accounts of the assessee which were not disclosed in the income tax returns. But the AO has treated the cash deposit in other undisclosed bank account as undisclosed sale of assessee and accordingly he worked out the undisclosed income after applying the gross profit ratio declared by assessee. Thus the AO in these undisclosed bank accounts should have applied the GP ratio. However, Ld. CIT(A) disregarded the contention of assessee and confirmed the order of AO by observing as under:-

*“Ground number 1,2,3,4 & 5 relates to the addition of Rs.1101549/- on account of cash deposit made in various bank accounts as narrated by the AO in his assessment order. The AO found that on various date cash in financial year 2008-09 has been deposited to the tune of Rs.170110/- in different Bank. The assessee during the course of assessment proceeding submitted that the cash deposit was made from his credit card withdrawal and he further stated that he made personal expenditure through credit card the appellant that cash deposits were made out of ATM card withdrawals. It gives an understanding that in the appellant made personal expenses by withdrawing from ATM cards and then spend on other many ATM cards and after withdrawals deposits were made in those account, which TDM has been use by the ape. The AO worked out total Rs.599551/- being withdrawal from his undisclosed cash deposit and reduced it from the total cash deposit of Rs.1701100/-. The above reduction from total cash deposit was allowed to the assessee on his demand accepting his contention that he had outstanding credit card loan by which he deposited cash by sweeping the credit card. The same has been mentioned in the assessment order credit card wise total loan which has been withdrawn and deposited in another credit card account. The appellant made contention before the under signed that the deposit was made form credit card withdrawal in order to make repayment to the other banks from where he had withdrawal cash. The appellant has submitted the credit card details. It is pertinent to mention that there evidences were submitted before the AO which has been duly considered while framing the assessment order. The AO has worked out the withdrawal from one bank credit card to deposit in another bank, to the tune of Rs.517783/- and allowed from the total deposit. The appellant was shown the order of the AO and confronted with the fact that the issue raised in ground 1 to 5 has already been considered by the AO while arriving at addition of Rs.1101549/-. The appellant did not substantiate his claim further and after confrontation no argument was enhanced neither any working of such claim was furnished. All the details which were furnished before the AO were resubmitted again before the under signed. The assessee further claimed that GP rate of 7.43% should be applied over entire cash deposit rather than adding entire deposits. This contention of the assessee is not acceptable. As he could not sustained or proved that the above receipts are sale proceed from the business. During the assessment proceeding he also accepted that he has withdrawal the cash from his personal expenses from credit card and deposited later on in cash in order to meet out the overdue from the bank. The GP ratio is applicable only when it is proved by the assessee that these are sale proceed deposited in*

*bank account. It is not controverted that all the banks accounts which are part of addition has not been disclosed to the department. The withdrawals were also made for personal expenditure. Hence contention of applying GP is not **acceptable**. I agree with the order of the AO and I appreciate his rationality over allowing the corresponding withdrawals as claimed by the appellant. Nothing has been left out further to grant any relief for the appellant. Hence Is upheld and the ground of the appeal is **dismissed**."*

Aggrieved by this, the assessee has come up in appeal before us.

5. Before us Ld. AR for the assessee filed written submission which is reproduced hereunder:-

(a) The appellant is carrying on a proprietary business of wholesale trading of herbal and cosmetic products under the name and style of "New Enterprise". During the year under assessment it is found that he has done his business mainly through credit card system on taking credit facilities in his personal name against those cards. The appellant took credit facility against one card but he repaid to that loan on taking loan from another card and so on. The Assessing Officer contended those loans as his undisclosed cash deposit on resumption and added to income as undisclosed without considering the source of cash deposits as credit taken from different credit cards facilities. As such the Assessing Officer is erred in not realizing / considering the fact of circulation of money from ne credit card to another credit card account and added to income on revenue mind in spite of having all the statements of those credit cards were available with the Assessing Officer he has not discussed in the assessment order without putting his opinion on the system such.

(b) Since the addition of Rs.11,01,549/- was made as undisclosed on presumption basis without applying the presumption rate u/s 44AD even. Kindly refer the age 6 and page 7 of the CIT(A)'s order since the money was circulated from one credit card through another credit card account and also routed through is personal savings account.

(c) The CIT(A) even he has mentioned the above facts in his order but being revenue mind he has not considered those too.

Accordingly, the addition as made and confirmed by the CIT(A) be deleted specially the sum of Rs.11,01,549/- as wrongly added to income with applying the presumptive profit on total additional sales u/s. 44AD or at the rate as presumptive calculation by the Assessing Officer himself mentioned in his order.

He requested the Bench to decide the issue on merits.

On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

6. We have heard the rival contentions and perused the material available on record. In the instant case, assessee has deposited the cash in his saving bank accounts for ₹17,01,100/- only. These bank accounts were not disclosed by the assessee in the income tax returns. It was explained by the assessee to the AO that the amount of cash deposit was made out of money withdrawal through the credit card. Thus, AO reduced the amount of outstanding balance on credit card at the end of financial year for ₹5,99,551/- from the above stated cash deposits and added the balance amount of ₹11,01,549/- as unexplained cash credit to the total income of assessee. The view taken by the AO was subsequently confirmed by the Ld. CIT(A).

Indeed, cash was deposited in SB accounts of assessee which were not disclosed in his income tax return. However the AO was pleased to reduce the amount of credit card balance outstanding at the year end from the amount of total cash deposits made in the undisclosed bank account. From the action of the AO it is transpired that there is link between the amount withdrawn from the credit card and the money deposited in the undisclosed saving accounts of the assessee. Accordingly the AO held that the money withdrawn through the credit card was used in the bank accounts of the assessee. Thus the amount of unexplained cash credit was reduced by the AO. Now the same analogy can be applied for amount withdrawn by the assessee during the year from the credit card and deposited in the saving bank account of the assessee for the repayment of the credit card dues. But we observe that the AO has not applied the same analogy for the amount deposited in the impugned saving

bank accounts to clear the dues of the credit card during the year. Thus in our considered view the AO has applied contradictory approach in determining and treating the amount of cash deposit in the bank as unexplained cash credit.

6.1 As per assessee the amount withdrawn from one credit card account was deposited in other credit card liability. Thus, the same amount of money was in circulation. In such a situation, Ld. AR also argued that the peak credit theory should be applied. Similarly the addition should have been made after adjusting the withdrawal made from the bank account. In view of above we are of the opinion that the AO has not applied his mind judiciously and as per the accounting principles. Accordingly the order of the AO suffers from the infirmities as discussed above.

6.2 It was also observed that the AO also detected the cheque deposits in the undisclosed bank accounts which were treated as business receipt of assessee. Accordingly, gross profit rate was applied to determine the undisclosed income of the assessee. As per the assessee the impugned cash deposits should also be treated as business receipts and accordingly the GP rate should be applied. But the AO has wrongly treated the cash deposit as unexplained cash credit.

We find force in the arguments advanced by Ld. AR for the assessee that entire cash deposit cannot be treated as undisclosed income of the assessee without giving the benefit to the drawing of cash made by the assessee during the year. Moreover the AO should have also verified the amount withdrawn through credit card and its repayment during the year. In case the assessee is able to establish the nexus between the cash deposited and the amount withdrawn during the year then the benefit for the same should be extended to the assessee. Thus, we are of the considered view the entire amount of cash deposit cannot be treated the income of assessee without adjusting the amount of withdrawals from the said bank accounts. Similarly the benefit of the money withdrawn through the credit card should also be given to the assessee if he is able to establish the nexus between them.

It was also observed that Ld. CIT(A) has given the finding that personal expense were also incurred by assessee through credit card but no details of such expense was brought on record. But this aspect also needs to be considered. Therefore, we are inclined remit the matter back to the file of AO for fresh adjudication as per law and in the light of above stated discussion. We also direct the AO to provide the reasonable opportunity of being heard to assessee. Hence the ground of appeal of the assessee is allowed for statistical purposes.

7. In the result, assessee's appeal is allowed for statistical purpose.

**Coming to ITA No. 599/Kol/2016 for A.Y. 08-09.**

8. In this appeal the assessee has challenged the order of CIT(A) whereby the CIT(A) deleted the penalty imposed by the AO on the assessee u/s 271(1)(c) of the Income Tax Act, 1961 (Act).

9. The facts and circumstances under which penalty u/s 271(1)(c) of the Act was imposed on the assessee by the AO are as follows :-

The Assessee is an individual and carries on the business of herbal cosmetics under the name & style of New Enterprises. The assessment was framed after making the addition of the following income :

1. Interest on undisclosed bank account	Rs.	9,123.00
2. Unexplained Money	Rs.	8,03,002.00
3. Cessation of liability	Rs.	31,041.00

In respect of the aforesaid addition made in the course of assessment proceedings, the AO initiated penalty proceedings u/s 271(1)(c) of the Act.

4. In the penalty proceedings the assessee agreed for the penalty on interest income as it was not disclosed.

Regarding unexplained money addition of Rs.8,03,002 it was submitted that the amount was in-fact representing the loan on credit cards but the addition of the same was not challenged to buy the peace of mind. Moreover, the

addition was made on estimated basis. Thus, no penalty on this count can be initiated u/s 271(1)(c) of the Act.

9.1 However the assessee failed to provide any explanation with regard to the addition made on account of cessation of liability during the assessment proceedings.

Accordingly penalty u/s 271(1)(c) of the Act was imposed on the assessee by the AO for Rs.2,81,550.00 being @ 100% of tax sought to be evaded by the assessee. The order of AO was confirmed by CIT(A).

10. Aggrieved by the order of CIT(A) the assessee has filed the present appeal before the Tribunal.

11. The Id. Counsel for the assessee before us filed written submission which is reproduced below:-

Your appellant submits before your Honour to consider the aforesaid case in respect of chargeability of the penalty proceedings under section 271 (1 )(c) of the Income Tax Act, 1961.

(I) For the first and second grounds of Appeal- Applicability of Penal Provision Us 271(1)(c) when the income determined by Assessing Officer on estimated basis.

Kindly refer the findings of the Penalty order of the Assessing Officer Para 3 of Page 2 where the Assessing Officer has mentioned as -

Quote - That prior to detection by the Assessing Officer, I voluntarily made disclosure or not. In this respect you may see I use several credit cards to get credit money. Then I repaid such credit liability by taking credit from other banks: It is money taken on credit which is otherwise loan only. It is only because that I could not clarify entire deposits and withdrawn, which has added the difference as my unexplained money. It is never considered as my sales suppression, undisclosed interest, capital gains etc. Therefore I did not have any specific system of accounting this concealed income to disclose. I always felt that money on credit that is a loan only can be treated as my income" ..... Unquote

That means the Appellant has made the transactions through credit cards of bank but repaid though another card of other bank.

Also your appellant submits the observation of the assessing officer in Page 3 Para one (third line) where stated that - Quote "However as stated that a few cheques transactions have been made from shown Bank A/cs but which are seen to be treated "drawings" of the assessee" - Unquote

In this case the Assessing Officer has considered the sum of Rs.8,03,022/- as income on presumption even the details of cash were furnished and has mentioned in the table in his order.

Further in his quantum assessment order the Assessing Officer has mentioned in Para-16 of Page -5 that

Quote - "During the hearing made on 14-12-2010, the AR on behalf of the assessee in good Spirit continued to admit regarding the unexplained amount of money that are found from the transactions made from and to of the undisclosed bank A/c and payment to credit card bankers. Discussed further, and an amount of Rs.8,03,022/- is therefore treated as assessee's unexplained money and added to the total income as per the provisions of Section 69 A of the Act. .... Unquote

Now your appellant submits the following decisions for your consideration in respect of applicability of the penalty proceedings when the appellant agreed to make additions to income -

(a) CIT -vs- Sankaran(S) - 241 ITR 825(Mad)

The Madras High COU11 in the above Case held that-

Mere addition to income of the instance of the assessee can not lead to the conclusion of concealment of income and penalty U/s 271 (1)( c) can not be levied.

a-l) In CIT -vs- Gururam Dass Fruit and Vegetable Agency- reported in 244 ITR(AT) 146(Chan) held that surrender of amount would not prove Concealment and Penalty U/s 271(1)(c) can not be levied on that basis.

(b) Your appellant submits that very often a discrepancy is noticed between certain entries in one set of books of the assessee and the position emerging from another set of documents. For instance, a discrepancy may be clearly noticed between the assessee's balance sheet and the information supplied by the Bank. This does not necessarily attract a Penalty, particularly where there is a plausible explanation which excludes an intention to conceal, as happened in CIT vs. Mohamed Haneef (N A) reported in 83 ITR 2015(SC).

(c) Your appellant further submits the decision of Allahabad High Court in CIT vs. Saran Khandsari Sugar Works - reported in 246 ITR 216 where held that mere admission does not justify Penalty even in the light of the Explanation to section 271 (l)( c) where the High Court endorsed the decision of the Tribunal, which had followed the decision in the case of similar surrender of cash credits on the condition that no penalty will be levied. Mere agreement for addition does not mean that there has been either fraud or willful neglect so as to justify levy of Penalty. - Reference - CIT vs. Paripusham - 249 ITR 550(Mad) following Sir Shadilal Sugar & General Mills Ltd. vs. CIT -168 ITR 705(SC) and CIT vs. Inden Bislars - 240 ITR 943(Mad) followed.

(d) Sir Shadilal Sugar & General Mills Ltd. vs. CIT -168 ITR 705(SC)  
Assessee agreeing to additions - does not necessarily mean concealment.

(e) CIT vs. G. Topi Saheb, SLP (civil no.4167 of 1985) reported in 193 ITR(St.) 28, 29(SC) Cash credit treated as income from undisclosed source - Penalty not justified.

(f) ITO vs. Rakesh Kumar Gupta - 52 SOT 11(URO)-16-ITR(Trib) 303 (Delhi) - when assessee surrenders an amount with a condition that no Penal action shall be taken, to avoid further litigation and to buy peace, no Penalty U/s 271 (1)(c) can be imposed.

(g) Asst. CIT vs. RMP Infotech (P) Ltd. -12 ITR(Trib) 581(Chennai)

(h) White Line Chemicals vs. ITO-48 taxman.com - 28 ITR(Trib) 523(Ahd.)  
Penalty U/s 271(l)(c) cannot be imposed merely on ground that there were defects in accounts books of assessee and flat rate of Profit is applied to arrive gross Profit.

(i) CIT vs. Calcutta Credit Corporation - 166 ITR 29 (Cal)

The Calcutta High Court held that mere addition does not automatically lead to Penalty, more particulars where two opinions on the same facts possible.

(j) CIT vs. PMP Soundara Pandian & Bros. - 140 ITR 385(Mad)

The Madras High Court held that - addition towards unexplained cash credit on agreed basis - in favour of assessee.

(k) Roshan Lal Madan vs. ACIT - reported in 245 ITR(AT)36 (Chand)

Where held that an addition made on the basis of presumption under deeming provisions u/s 69, 69(A), 69(8), 69(C) need not necessarily lead to a conclusion that income had been concealed. Levy of penalty u/s 271 (c) is not justified in every such case.

(l) Your appellant further submits that the Assessing Officer has added the sum of Rs.31,0411/- on his own presumption on account of cessation of liability u/s 41(1).

In this respect your appellant submits that the Assessing Officer has himself considered that liability to creditors are extinguished because of its period of limitation. The appellant has not considered the sum of Rs.31,0411- as remission or cessation of liability and no entry passed in its accounts. There is no transfer entry in the accounts passed by the appellant but only difference in their respective general ledger balances between the creditor and the appellants which can be reconciled. Even the entry is passed but the liability is not extinguished since the appellants shall pay in future.

Therefore it cannot be treated as income and consequently the provisions of section 41 (1) cannot be applied. Therefore the penalty cannot be imposed on

such amount of tax as determined. Please consider that liability subsisting but not legally enforceable cannot amount to cessation of liability.

Kindly consider the decision of the Supreme Court in CIT vs. Sugauli Sugar Works (P) Ltd. - reported in 236 ITR 518.

Accordingly the unilateral presumption of the Assessing Officer has no evidentiary value. Hence the Penalty as determined by the Assessing Officer be deleted in full.

Ld. AR further prayed before the Bench to delete the penalty levied Authorities Below.

On the other hand, Ld DR before us vehemently relied on the order of authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case have already been elaborated in the preceding paragraphs therefore we are not repeating the same for the sake of brevity. From the foregoing discussion we note that the addition has been made by the AO on account of unexplained money and cessation of liability on basis of lack of evidence. Though the assessee's explanation in respect of the credit card transactions and cessation of liability in the absence of sufficient proof was not accepted, that would not mean that the assessee made any deliberate attempt towards concealment of particulars of income. Mere sustaining of addition on the basis of entries in the credit card account would not warrant a conclusion that the assessee had concealed certain particulars of income. It was lack of sufficient evidence for which the addition was sustained in part. We are of the considered opinion that this is not a fit case for levy of penalty u/s 271(1)(c) of the Act, we therefore, set aside the order of Ld. CIT(A) and direct the Assessing Officer to delete the penalty.

12.1 The legal position in this regard has been explained in the decision in the case of Dr. Hakeem S.A. Sajed Sattar v. Asstt. CIT [\[2009\] 120 ITD 1 \(Chennai\)](#). It has been held that on estimated addition, penalty under s. 271(1)(c) of the Act cannot be imposed because there can be no concealment in these cases, nor that the assessee has furnished inaccurate particulars of

income. Any estimate is an opinion which is taken subjectively, when this difference of opinions leads to any addition, it cannot terminate into a penalty under s. 271(1)(c) of the Act. The decision of Shiv Lal Tak v. CIT [\[2001\] 251 ITR 373/\[2002\] 121 Taxman 99 \(Raj.\)](#) of Hon'ble Rajasthan High Court is also relevant.

12.2 Thus, it is manifestly clear that the sustained additions are a result of estimated disallowances of credit card transactions and cessation of liability. Accordingly, by respectfully following the above judgments/orders and by applying their *ratio decidendi* to the facts of this case, we are left with no option but to delete the impugned penalty.

**13. In combine result, assessee's appeal in ITA No.600/Kol/2016, for statistical purpose, the appeal of assessee is allowed and that of ITA No.599/Kol/2016 is also allowed.**

Order pronounced in the open court 07/02/2018

Sd/-  
(न्यायिक सदस्य)  
(N.V.Vasudevan)  
(Judicial Member)  
Kolkata,

Sd/-  
(लेखा सदस्य)  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp, Sr.P.S

दिनांक:- 07/02/2018 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक/Assessee-Sri Joy Barman, 52B Sashi Bhusan Neogi Garden Lane, Kolkata-36
2. राजस्व/Revenue-ITO Ward-42(3), Kolkata
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of  
Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।