

**आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'एस.एम.सी' अहमदाबाद ।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“SMC” BENCH, AHMEDABAD**

सर्वश्री राजपाल यादव न्यायिक सदस्य एवं वसीम अहमद, लेखा सदस्य, के समक्ष।  
**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND**  
**SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**आयकर अपील सं./ ITA Nos. 3527 & 3528/Ahd/2015**

**निर्धारण वर्ष/Assessment Years: 2004-05 & 2007-08**

Sujag Fine Chemicals Pvt. Ltd., 42/6 & 7, GIDC Estate, At & Post, Nandesari, Dist. Baroda - 391 340	Vs	The Asst. Commissioner of Income Tax, Circle - 4, Baroda.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCS 2989 J		
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>
Revenue by :		Shri Sunil Talati, C.A.
Assessee by :		Shri Saurabh Singh, Sr. D.R.

सुनवाई की तारीख/Date of Hearing : 31/05/2018

घोषणा की तारीख /Date of Pronouncement : 06/06/2018

**PER RAJPAL YADAV, JUDICIAL MEMBER:**

The present two appeals are directed at the instance of the assessee against separate orders of the learned Commissioner of Income-tax (Appeals)-2, Vadodara dated 27.10.2015 passed for Assessment Years 2004-05 & 2007-08 respectively.

2. The solitary grievance of the assessee is that the learned CIT(A) has erred in partly confirming the penalty imposed by the Assessing Officer u/s. 271(1)(c) of the Income Tax Act.

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3. The brief facts of the case are that assessee company has filed its return of income on 29/10/2004 and 29/10/2007 declaring Nil income and income of Rs.79,59,110/- in A.Y. 2004-05 and 2007-08 respectively. Assessment orders u/s 144 r.w.s. 147 of the Income Tax Act were passed in both the years on 06/12/2010 determining the total income of the assessee at Rs.45,81,659/- and 1,69,13,581/- in A.Y. 2004-05 and 2007-08 respectively. The learned AO has initiated penalty proceedings u/s.271(1)(c) in both the years. A notice u/s. 274 r.w.s. 271(1)(c) of the Act was issued on 06/12/2010 in both the years, which were duly served upon the assessee. The Assessing Officer kept the penalty proceedings in abeyance because assessee has preferred appeals against the assessment orders before the learned CIT(A). The learned First appellate authority has decided quantum appeal in both the years on 21/08/2012 and after the decision of the learned CIT(A), learned AO took up the penalty proceedings and he passed impugned penalty orders on 31/03/2014.

Dissatisfied with the penalty orders, assessee went in appeal before the learned CIT(A). Learned first appellate Authority has partly deleted the penalty and partly confirmed. We have been informed that revenue has not challenged the orders of the learned CIT(A) in both years.

4. With the assistance of Learned Representatives, we have gone through the record carefully. Before we embark upon an enquiry upon

the facts of the present case, we deem it appropriate to take note of section 271 (1)(c) of the Income Tax Act which read as under:

*“9. Section 271(1)(c) of the Act has a direct bearing on the controversy and, therefore, it is salutary upon us to take note of the relevant provisions of section 271(1)(C) along with Explanation 1 which read as under:*

*“271. Failure to furnish returns, comply with notices, concealment of income, etc.*

*(1) If the Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person*

*(a) and (6)\*\**

*(c) 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.*

*(i) and (Income-tax Officer,)\*\* \*\* \*\**

*(ii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, 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 fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:*

*Explanation 1- Wherein 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) or the CIT 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, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the*

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*income in respect of which particulars have been concealed”.*

5. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeals); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the

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assessee fails to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation\appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee, for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished."

6. In the light of above, let us examine the facts of present appeals. A perusal of penalty order would indicate that first item of addition considered by the Assessing Officer for visiting the assessee with

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penalty is addition on account of disallowance of depreciation on goodwill. This addition was deleted by the ITAT in the quantum appeal in ITA No.2508/Ahd/2012, 2533/Ahd/2012 (for the Asst. Year 2004-05) and ITA No.2603/Ahd/2012 (for Asst. Year 2007-08) copy of this order has been placed on record by learned Counsel of the assessee.

7. The next item in A.Y. 2004-05 relates to disallowance of interest expenditure amounting to Rs.2,09,268/-. The learned CIT(A) has deleted the penalty on this item and order of the CIT(A) has not been challenged.

8. The next item is interest income amounting to Rs.39,936/-. Originally an addition of Rs.1,39,063/- was made out of which addition of Rs.39,936/- was not pressed in the quantum proceedings before the learned CIT(A). It was not challenged before the ITAT. The case of the assessee is that, a perusal of TDS certificate would indicate that the assessee has alleged interest income, which remain to be included by the assessee. According to the assessee, it was a *bonafide* mistake committed by the clerk and since it has admitted the income during the course of assessment proceedings, no penalty imposed. In support of its contention the learned counsel for the assessee relied upon the judgment of Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. vs. CIT- reported in 348 ITR 306. Similar addition has been made in A.Y. 2007-08. The addition was of Rs.8,601/-.

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As far as addition of Rs.39,936/- is concerned, the discussion made by the AO, is on Page 9 of the assessment order. A TDS certificate issued by Zandu Chemicals Ltd. was noticed by the AO. It contemplates the payment of interest amounting to Rs.39,936/- but assessee failed to recognize this interest income. There is no explanation at the hand of the assessee either in the assessment proceedings or in the penalty proceedings. Therefore, to our mind learned CIT(A) has rightly confirmed the penalty on this issue. We do not find any error in the order of learned CIT(A), penalty on an addition of Rs.39,936/- stand confirmed. The judgment of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. is not applicable. There, a provision for gratuity was made in respect of regular as well as adhoc employees. As far as adhoc employees was concerned, no provision was required to be made and it was required to be added back while filing the return. The assessee failed to add back, but gave an explanation that considering the large number of employees, the person who has prepared the statement of income fail to take note of these aspects. No explanation is available here. The assessee has not given any reply, therefore, penalty on addition of Rs.39,936/- in A.Y.2004-05 and 8,601/- in A.Y.2007-08 is confirmed.

9. Next item of addition in A.Y. 2004-05 is, addition on account of unsecured loan. A perusal of penalty order would indicate that an addition of Rs.32,30,348/- was made u/s. 68. However, in the present penalty proceedings, we are required to look into the addition of

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Rs.8,63,598/-. This amount contains two component, one taken from Shri Suresh B. Sheth amounting to Rs.6,98,598/- and 1,65,000/- from Khokhani Investment. As far as, unsecured loans taken from Shri Suresh B. Sheth are concerned. He was one of the promoters of the company and managing director. Addition u/s.68 on account of loans taken from him was made in A.Y.2004-05 as well as 2007-08. The ITAT has deleted the addition in ITA No.2087 & 2296/Ahd/2012 in A.Y. 2004-05, whereas in ITA No.2510/Ahd/2012. Thus, the assessee has given an explanation about this addition and on the basis of explanation in other years additions were deleted. In this year, it failed to substantiate the explanation but on the other hand Assessing Officer has also failed to prove that explanation given by the assessee was false. In other word the revenue failed to demonstrate that explanation of the assessee accepting the receipt of the loans from Shri Suresh B. Sheth was false. Shri Suresh B. Sheth is identifiable person and a man of means but necessary evidence could not be produced in this year and therefore, addition was confirmed. To our mind the assessee does not deserve to be visited with penalty on addition of Rs.6,95,598/- it is deleted.

10. As far as addition of Rs.1,65,000/-, in the case of Khokhani Investment is concerned. Assessee failed to give any explanation either in the assessment proceedings as well as in the penalty proceedings therefore, penalty on this addition is confirmed.

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11. The next item considered by the Assessing Officer is addition on account of Job work. Penalty on this item is deleted by the learned CIT(A) and revenue did not challenge this order of the learned CIT(A) hence, we are not required to look into whether the assessee deserves to be visited with penalty on an addition of Rs.1,81,359/-. In view of the above discussion, appeal of the assessee for A.Y. 2004-05 is partly allowed.

12. In Asst. Year 2007-08 first item of addition relates to the disallowance of depreciation on goodwill. This addition was deleted by the ITAT hence no penalty can be imposed.

13. The next items are addition of Rs.22,10,044/- u/s. 68 of the Income Tax Act and addition of Rs.9,85,074/- u/s 40A(2)(b) of the Income Tax Act. Learned counsel for the assessee submitted that both these additions have been deleted by the ITAT. In the original order, Tribunal has remitted one of the issue back to the file of the AO representing addition of Rs.1,00,000/- made u/s. 68. However, the assessee filed a miscellaneous application bearing no.148/Ahd/2017 and this addition also stands deleted. He placed on record copies of the Tribunal's orders. Learned DR did not controvert to this contention of the learned Counsel for the assessee.

14. We have duly considered rival contentions and gone through the record carefully. We are of the view that sub-clause (iii) of section

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271(1)(c) provides mechanism for quantification of penalty. It contemplates that the assessee would be directed to pay a sum in addition to taxes, if any, payable by him, which shall not be less than, but which shall not exceed three times the amount of tax sought to be evaded by reason of concealment of income and furnishing of inaccurate particulars of income. In other words, the quantification of the penalty is depended upon the addition made to the income of the assessee. In the present case, the additions have already been deleted therefore, the very basis to visit the assessee with the penalty has been extinguished, and no penalty can be imposed upon these two amounts. Hence, penalty on an addition of Rs.22,10,044/- is deleted. As far as an addition of Rs.9,85,074/- is concerned. Learned CIT(A) has already deleted the penalty and no appeal is there before the ITAT.

15. As far as interest income of Rs. 8,601/- is concerned. We have already discussed it while considering identical amount in A.Y. 2004-05. Penalty of this addition stands confirmed.

16. In the result, both the appeals of the assessee are partly allowed.

**Order pronounced in the Court on 6<sup>th</sup> June 2018 at Ahmedabad.**

**Sd/-**  
**(WASEEM AHMED)**  
**ACCOUNTANT MEMBER**

Ahmedabad; Dated, 06/06/2018  
*Priti Yadav, Sr.PS*

**Sd/-**  
**(RAJPAL YADAV)**  
**JUDICIAL MEMBER**

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**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)-2, Vadodara
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

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

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