

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'बी' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, AHMEDABAD
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 2742/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2012-13

Shri Hashmukhbhai Bachubhai Radadia, 492, Avadh, Opp. Amul Ice- cream Parlour, Lad Society Road, Vastrapur, Ahmedabad. (PAN No. AAQPR 7176 N)	Vs.	DCIT, Circle - 3(3), Ahmedabad.
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri U. S. Bhati & Abhimanyu Bhati, A.R.
Revenue by :		Shri Mudit Nagpal, Sr. D.R.

सुनवाई की तारीख/Date of Hearing : 02.08.2018

घोषणा की तारीख /Date of Pronouncement : 23.10.2018

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the appellate order of the learned Commissioner of Income-Tax (Appeals)-3, Ahmedabad ["CIT(A)" in short] Dated 22.09.2016 relevant to Assessment Year 2012-13.

2. Assessee has raised the following grounds of appeal:-

- “1.0 The learned Commissioner of Income-tax (Appeals) erred in law and on facts in confirming the Penalty Order.
- 2.0 The learned Commissioner of Income-tax (Appeals) erred in law and on facts in concluding that mistake committed by the appellant was intentional. He has further erred in not considering the explanation of the appellant duly supported by the affidavits to the effect that the Advocate

of the appellant had committed a mistake due to identical sale deeds of same date.

- 3.0 *The learned Commissioner of Income-tax (Appeals) erred in law and on facts in confirming the penalty amounting to Rs.3,61,330/- u/s 271(1)(c) of the Income Tax Act, 1961.*
- 4.0 *The appellant may be allowed to add, amend, alter or raise additional grounds of appeal."*

3. The solitary issue raised by the assessee in this appeal is that Id CIT(A) erred in confirming the penalty u/s 271(1)(c) of the Act for Rs. 3,61,330/-.

4. Briefly stated facts are that the assessee is an individual and deriving his income from letting out property, share in profit of partnership firm, Long Term Capital Gain (LTCG) on sale of lands and interest income.

4.1 The assessee during the year has sold three properties but offered the capital gain income to tax in respect of two properties only. The necessary detail of the properties sold by the assessee in the year under consideration stands as under:

Sr. No.	Particulars	Total amount of Transaction	A's Share	Indexed Cost	Capital Gain
1.	F. Plot No.61/2, Sola Gam Daskori	Rs.8,50,00,000/-	Rs.85,00,000/-	Rs.6,16,331/-	Rs.78,83,669/-
2.	Survey No. 750/2, Sola Village Daskori	Rs.1,75,40,000/-	Rs.17,54,000/-	Rs.38,160/-	Rs.17,15,840/-
3.	750/2 dated 20/06/2011	Rs.1,75,40,000/-	Rs.17,54,000/-		Rs.17,34,920/-

However, the AO during the assessment proceedings observed that the capital gain income in respect of the property mentioned at Serial No.3 above was not offered to tax. The AO also found that the assessee has claimed index cost of acquisition against the sale of property mentioned at serial no. 2 & 3 against the sale of property mentioned at S. No. 2 above. Thus, the assessee has claimed more deduction on account of index cost of acquisition.

4.2 On question by the AO the assessee agreed that he has not shown capital gain income respect of property mentioned at Serial No.3 vis-à-vis has claimed excess index cost of acquisition. Accordingly, the AO made the addition to the total income of the assessee for Rs. 17,34,920/- and Rs. 19,080/-. The AO in the assessment order framed u/s 143(3) of the Act dated 13.03.2015 initiated the penalty proceedings u/s 271(1)(c) of the Act.

4.3 Subsequently, the AO issued a notice u/s 274 r.w.s. 271(1)(c) of the Act dated 07.09.2015 for initiating the penalties on account of furnishing inaccurate particulars of income.

4.4 The assessee in compliance to the notice submitted that he has sold one piece of plot to different parties and accordingly, two sales Deed were registered. However, the accountant of the assessee inadvertently has shown the income from the sale of land in respect of one sale registry document due to oversight as the address of the property was same. However, the Id AO disagreed with the submission of the assessee and levied the penalty u/s 271(1)(c) of the Act for Rs. 3,61,324/- being 100% of the amount of tax sought to be evaded.

5. Aggrieved, assessee preferred an appeal to Id CIT(A). The assessee before the Id CIT(A) submitted that the AO has specified both the charges in the notice issued u/s 274 of the Act i.e. concealment of income as well as furnishing inaccurate particulars of income. Thus, the Assessee claimed that the penalty u/s 271(1)(c) of the Act is not to be levied.

5.1 The assessee also submitted that he was not aware of any provision for the income tax therefore he was depending upon the accountant who has made the mistake by not offering the capital gain income. The assessee in respect of his claim also filed the copy of the affidavit of the accountant. However, the Id. CIT(A) disregarded the contention of the assessee and confirmed the order of AO by observing as under:

"4. Decision: I have gone through the penalty order of the AO and submission filed by the appellant carefully. The first ground of appeal reads as under:

- (1) The penalty order passed u/s.271(1)(c) of the Income-tax Act, 1961 by the learned Assessing Officer is bad-in-law. More particularly, in absence of clear cut finding on the part of the Id A. O. whether there is concealment of income or inaccurate particulars of income*

The appellant has seriously contended the issue and filed specific submission on this issue, basically saying that in the notice either of the two should have been struck out i.e. furnishing inaccurate particulars or concealment of income. The appellant relied on the Hon'ble Gujarat High Court judgment in the case of CIT vs. .Manu Engineering Works 122 ITR 306 (Guj.) with the further comments that the same has been applied in some other cases including the case of Vikramkumar Sardarmal Shah Vs. ITO by the ITAT, Ahmedabad on 17.02.2016. I have gone through the judgment of Hon'ble Gujarat High Court in the case of CIT vs. Manu Engineering Works 122 ITR 306 (Guj) and find that the judgment is relating to A.Y.1970-71 With due respect to the judgment wherein the old designations of the officers have been mentioned, it is mentioned that the Income Tax Act, 1961 has been amended a number of time in the last 45 years, more particularly in the year 1988. This is the year wherefrom the "recording of reasons" were made mandatory. Subsequently, even the disclosure

of reasons to the appellant has become mandatory as per accepted judgements of the Courts. In the good old time, the departmental officers were following a different set of procedures than those being followed in the current decade. The law is non-static and is ever evolving. Therefore, it is my humble understanding that the ratio laid down for A.Y. 1970-71 cannot be applied in each and every case without marshaling the factual matrix and the change of law over a period of time. It is also my humble understanding that once there is a concealment of income it becomes automatically submission of inaccurate particulars of income to the department. For instance in instant case, one of the three real estate transactions was not shown in the return of income, therefore, the income pertaining to one of the transaction was not shown to the department on the day of filing of return of income. It is my understanding that the appellant concealed the income from the department to the extent relating to undisclosed real estate transaction. The substance of the matter is important and the same would determine the taxability or otherwise in any particular case. The nature of the fault is of utmost importance in decision of imposing the penalty u/s.271(1)(c) of IT Act, 1961. The AO has initiated penalty proceedings as per law. The notice has been issued in prescribed format within prescribed time limit and the order has finally been issued after giving proper opportunity to the appellant. All the facts are in the knowledge of appellant who has cooperated with the AO to get the proceedings finalized. Whatever is not directly allowable ought not to have been indirectly allowed, is the spirit of the law and is widely accepted by the Courts. In the circumstances, I am constrained to go with the interpretation and the stand taken by AO. Consequently the ground No.1 is hereby dismissed.

The ground No.2 reads as under:

"The ld AO has erred in law and on facts in imposing a penalty u/s 271(1)(c) of Rs 3,61,330/- "

The facts have been very clearly brought out by the AO in the penalty order wherein it is mentioned that the appellant disclosed sale of only two properties out of the total three at Rs.95,99,509/- against Rs.1,13,53,509. The return was filed on 31.12 2012 and the appellant remained silent for almost two years until AO inquired during assessment proceedings based on AIR information and cross-verified documentary evidences. It may be mentioned that more than 90% of the returns are not scrutinized and enclosures which are voluntary to be filed, are not necessarily checked.

The appellant has relied on a few cases but ratio in those cases is not applicable. This is not inadvertent mistake or a silly mistake. The appellant in this case has not come out clearly with important facts till the filing return of income so as to

show the lack of mens rea. I feel the mistake claimed by appellant is intentional and undertaken with purpose by not filing return of income. It may be mentioned that more than 90% of the returns are not scrutinized and enclosures which are voluntary to be filed, are not necessarily checked. As per various pronouncements by the different courts, penalty of concealment cannot be imposed because the assessee has taken a particular stand or had preferred an interpretation which was plausible and reasonable, but has not been accepted, unless the assessee had not disclosed facts before the authorities. Such cases have to be distinguished from cases where the claim of the assessee is farcical or farfetched. Dubious and fanciful claims under the garb of interpretation, are a mere pretence and not bonafide. Similarly, the appellant can't get benefit of landmark Supreme Court judgment in the case of Reliance Petro Products Ltd., 322 ITR 158 (SC) wherein in the last para of judgment it has been stated, wherein there is no findings by the assessing officer for the inaccurate particulars or concealment of income- Infact, same ratio is reiterated by Hon'ble Gujarat High Court in the case of CIT Ahd-IV Vs. Whiteford India Ltd.- 38 Taxmann.com 15 (Guj.) wherein the relief to the assessee was granted with following comments, "..... where no clear finding was recorded by Assessing Officer whether assessee was guilty of concealing income and/or furnishing inaccurate particulars of income,". Therefore, courts have consistently held that there need to be findings of A.O. if the penalty order is to be confirmed. In instant case, there is specific finding by the A.O. In a recent judgment dated 31.10.2013 in the case of Mak Data Pvt. Ltd. Vs. CIT, 38 Taxmann Com 448 (SC), the Hon'ble Supreme Court has ruled, "voluntary disclosure does not absolve assessee, bonafide explanation of income required". The facts of the case also make it amenable to the judgment against it in the case of K.P. Madhusudhanan Vs. CIT 251 ITR 99 (SC). Further, as per judgments, additional income in response to notice u/s. 148, penalty on additional income confirmed in the case laws

*PC Joseph & Bros. Vs. CIT 243 ITR 818 (Ker.)
Naram Das Suraj Bhan Vs CST 21 STC 104 (SC)*

The dictionary meaning of the word concealment is to hide, to keep secret. The Explanation to section 271(1)(c) does not alter or extend this meaning. It only assumes the concealment to exist if the assessee fails to prove that the non disclosure was not due to fraud or willful conduct, held by Allahabad High Court in the case of Mohammad Ibrahim Azimulla 131 ITR 680 (AIL). Concealment means an attempt to hide an item of income or a portion thereof from the knowledge of the income /ax authorities, held in case of CIT Vs. Mahabit Prasad Bajaj 298 ITR 109 (Jhar)

The A.O. has initiated penalty perfectly as per provisions of the I.T. Act, 1961 and has only imposed penalty of 100% of amount payable on concealed income for which inaccurate particulars have been furnished. It is not the case where appellant made certain claims in the return of income which were found to be not allowable subsequently during assessment proceedings, rather it is a case where additions have been made on certain facts which came to surface only during the examination of record by the assessing officer. In view of facts of this case and the case laws quoted above, I conclude that penalty order u/s.271(1)(c) of IT Act, 1961 is very fair and need not to be interfered."

Being aggrieved by the order of Id CIT(A) assessee is in appeal before us.

6. The Id AR before us filed a paper book running from pages 1-48 and reiterated the submission as made before the Id CIT(A).

7. On the other hand, Id DR vehemently supported the order of authorities below.

8. We have heard the rival contentions and perused the materials available on record. In the instant case the dispute relates to the penalty imposed by the AO on account of furnishing inaccurate particulars of income. It is fact on record that the accountant has furnished an affidavit before the lower authorities admitting the mistake committed by him inadvertently in filing the income tax return of the assessee. Copy of the affidavit is placed on pages 46 to 48 of the Paper Book. None of the authority below has challenged the affidavit furnished by the accountant of the assessee. Therefore we presume that the contents furnished in the affidavit of the accountant are true and correct. Accordingly we draw the inference that there was no *mala-fide* act on the part of the assessee to furnish/ conceal the income on account of sale of the property. In this regard, we find support and guidance from the judgment of Hon'ble

Punjab and Haryana High Court in the case of CIT vs. Dipak Kumar reported in 232 CTR 78 wherein it was held as under:

"5. Having heard learned counsel, we are of the view that the question concerning bona fide mistake or belief is more or less a question of fact, which has been decided by the CIT(A) on the basis of the affidavit filed by the counsel. There is no finding of intentional and motivated mistake which might have been resorted to by the assessee-respondent.

6. We are not impressed with the argument of Mr. Sukant Gupta, learned counsel for the appellant-Revenue, that the issue of bona fide belief based on the advise of the counsel should have been raised before the AO and there was no scope for raising such an issue before the CIT(A) because it is an afterthought. However, we do not find any merit in the aforesaid submission. It is not unknown that IT returns are filed through the experts in the IT laws and, therefore, the advise given by the learned counsel can be acted upon with bona fide belief to be correct. There is no rule of law that the aforesaid issue should have been pressed only before the AO or there was any bar on the assessee-respondent not to raise this issue before the appellate authority. The affidavit filed by the counsel of the assessee, has been readily accepted by the CIT(A) as well as by the Tribunal. It is well settled that if on the evidence adduced before the AO or the appellate forum, a possible view has been taken then under s. 260A of the Act, no substantive question of law could be framed merely because another view is possible. The appeal is, thus, without merit and accordingly the same is dismissed."

8.1 Similarly, we also extend our reliance on the judgment of Hon'ble Madras High Court in the case of CIT vs. Raj Textile in 166 ITR 632 wherein it was held as under:

"While framing the assessment for the assessment year in question the ITO added certain amount, which according to the ITO had not been disclosed by the assessee. The ITO also initiated penalty proceedings under section 271(1)(c) of the Income-tax Act, 1961. In those proceedings, the assessee contended that a mistake had crept in the return filed by the assessee due to inadvertence. The ITO was not satisfied with the explanation and found that the assessee had deliberately concealed the particulars of income. The ITO accordingly levied penalty under section 271(1)(c) of the Act. The appeal preferred by the assessee before the Commissioner (Appeals) was allowed. The revenue thereupon preferred further appeal before the Tribunal. The Tribunal upheld the order of the

Commissioner (Appeals) and found that the mistake had been made by the assessee inadvertently and that there was no conscious concealment of income. The Tribunal, therefore, upheld the decision of the Commissioner (Appeals). Aggrieved by that order, the department sought a reference but that application was rejected. Hence, the department has filed this application."

4. Having heard the learned counsel Shri Mukati for the applicant, we have come to the conclusion that this application deserves to be dismissed. The question as to whether there was a bona fide mistake made by the assessee in disclosing his income and whether there was or was not conscious concealment of income, are questions of fact. The learned counsel for the department was unable to point out any question of law arising out of the order passed by the Tribunal. In our opinion, therefore, the application deserves to be rejected."

8.2 After considering the facts in totality we are of the view that there was no deliberate Act on part of the assessee to conceal/ furnish inaccurate particulars of income therefore, we are of the view that the penalty levied by the AO and sustained by the Id CIT(A) is not maintainable. As we have decided the issue in favour of the assessee on merit therefore we are reluctant to adjudicate the issue raised by the assessee on technical ground. Hence we direct the AO to delete the penalty imposed u/s 271(1)(c) of the Act. Hence, the ground of appeal of the assessee is allowed.

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

Order pronounced in the Court on 23rd October, 2018 at Ahmedabad.

Sd/-

**(RAJPAL YADAV)
JUDICIAL MEMBER**

Ahmedabad; Dated 23/10/2018
Prati' Vidya, Sr. PS

Sd/-

**(WASEEM AHMED)
ACCOUNTANT MEMBER**

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) - 3, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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

1. Date of dictation ...08/10/2018 (PAGE-5)
 2. Date on which the typed draft is placed before the Dictating Member : .. 16/10/2018
 3. Other Member.....
 4. Date on which the approved draft comes to the Sr.P.S./P.S...25/10/2018.
 5. Date on which the fair order is placed before the Dictating Member for pronouncement.....
 6. Date on which the fair order comes back to the Sr.P.S./P.S.....
 7. Date on which the file goes to the Bench Clerk.....
 8. Date on which the file goes to the Head Clerk...
 9. The date on which the file goes to the Assistant Registrar for signature on the order.....
- Date of Despatch of the Order.....