

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

Before Shri G S Pannu, Vice President
& Shri Pawan Singh, Judicial Member

ITA No. 4438/Mum/2017 Assessment Year: 2006-07
ITA No. 4439/Mum/2017 Assessment Year: 2007-08
ITA No. 4440/Mum/2017 Assessment Year: 2008-09
ITA No. 4441/Mum/2017 Assessment Year: 2009-10
ITA No. 4442/Mum/2017 Assessment Year: 2010-11
ITA No. 4443/Mum/2017 Assessment Year: 2011-12

Jay Ketan Parikh 94-D, Tahnee Heights, 66, Nepean Sea Road, Mumbai – 400 006 PAN AAIPP6681J (Appellant)	Vs.	Adl. CIT Central Range-2, Mumbai (Respondent)
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ITA No. 4499/Mum/2017 Assessment Year: 2006-07
ITA No. 4500/Mum/2017 Assessment Year: 2007-08
ITA No. 4501/Mum/2017 Assessment Year: 2008-09
ITA No. 4502/Mum/2017 Assessment Year: 2009-10
ITA No. 4503/Mum/2017 Assessment Year: 2010-11
ITA No. 4504/Mum/2017 Assessment Year: 2011-12

Raj Hiten Parikh 41, Laxmi Vilas, 87, Nepean Sea Road, Mumbai – 400 006 PAN AGEPP6664E (Appellant)	Vs.	Adl. CIT Central Range-2, Mumbai (Respondent)
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ITA No. 4505/Mum/2017 Assessment Year: 2006-07
ITA No. 4506/Mum/2017 Assessment Year: 2007-08
ITA No. 4507/Mum/2017 Assessment Year: 2008-09
ITA No. 4508/Mum/2017 Assessment Year: 2009-10

ITA No. 4509/Mum/2017 Assessment Year: 2010-11
ITA No. 4510/Mum/2017 Assessment Year: 2011-12

Saunak Jitendra Parikh 161, Tahnee Heights, 66, Nepean Sea Road, Mumbai – 400 006 PAN AADPP0826C	Vs.	Addl. CIT Central Range-2, Mumbai
(Appellant)		(Respondent)

For the assessees : Shri Vijay Mehta & Shri Anuj Kisnadwala
For the Revenue : Shri Rajeev Gubgotra

Date of Hearing :11.10.2018	Date of Pronouncement : 26.10.2018
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ORDER

Per Shri G.S. Pannu, VP

The captioned are eighteen appeals, six each preferred by three different assessees and involve common issue of levy of penalty u/s. 272A(1)(c) of the Act.

2. It was a common point between parties that the facts and circumstances leading up to levy of penalty u/s. 272A(1)(c) of the Act in the case of captioned three assessees stand on an identical footing. Therefore, ITA No.4438/Mum2017 for A.Y. 2006-07 in the case of Jay Ketan Parikh is taken up as a lead case.

3. **ITA No.4438/Mum/2017 for A.Y. 2006-07 :**

This appeal is directed against the order of the CIT(A)-52, Mumbai, dated 16.03.2017, which in turn has arisen out of the order passed by the Addl. CIT,

Central Range-2, Mumbai u/s. 272A(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") levying penalty of Rs.10,000/-.

4. Briefly, relevant facts are that the appellant is an individual whose assessment proceedings for the captioned assessment years were going on. Summons u/s. 131 of the Act, dated 18.07.2013, was issued by the ACIT Central Circle -9, Mumbai. In response, the assessee appeared and his statements were duly recorded. By the same summons, assessee was also required to submit a duly filled and notarized Consent Waiver Form in connection with the bank - HSBC, Geneva, which the assessee failed to do; and, therefore the levy of penalty u/s 272A(1)(c) of the Act for the aforesaid default. Slight elaboration on this aspect is needed here. The impugned order notes that certain information was received under the Article 28 of the Indo-French Fiscal Convention Treaty of 29.11.1992, regarding some specific foreign bank accounts held by persons belonging to Mahendra Brothers Group, which included the captioned three assessees. It is noted in the penalty order that such accounts were being held with HSBC, Geneva, Switzerland, in the name of four companies, where four individuals, who are resident Indians belonging to M/s. Mahendra Brothers Group were beneficial owners. Three such individuals are the assesseees before us and, in Para no.2, of the penalty order the Addl. CIT, Central Range-2, Mumbai has tabulated the details so obtained. It is further noted in the penalty order that when assessee was put to question, he not only denied the ownership but also any association with the referred bank account in individual or any other capacity. It is further noted by the Addl. CIT Central Range-2, Mumbai in the penalty order

that a large number of assessees had confirmed existence of bank accounts in HSBC, Geneva as found in the information received under the Indo-French Treaty and, therefore, held that the information was credible and that the denial by the assessee was "*prima facie not correct*".

5. It is also noted by the Addl. CIT, Central Range-2, Mumbai that the verification exercise carried out by the Assessing Officer revealed that assessee was the beneficial owner in respect of the account held with HSBC, Geneva, Switzerland. It is in connection with the proceedings carried out by the Assessing Officer to tax the unaccounted income lying in the said bank account that the earlier referred summons u/s 131 of the Act dated 18.07.2013 were issued by ACIT, Central Circle-9, Mumbai.

6. No doubt, in response to the summons, assessee appeared and a statement was duly recorded, but by the same summons assessee was required to submit a duly filled and notarized Consent Waiver Form in connection with the bank account held with HSBC, Geneva. The Addl. CIT, Central Range-2, Mumbai notes that assessee failed to do so. As per the Addl. CIT, Central Range-2, Mumbai the refusal of the assessee was creating a hurdle in further proceeding under the Act to establish the ownership of the money lying in the bank account held with HSBC, Geneva, Switzerland. The assessee was show-caused as to why the penalty for such failure not be levied u/s 272A(1)(c) of the Act. In response, the assessee contended that the Consent Waiver Form in connection with the stated bank account with HSBC, Geneva, Switzerland could not be given by the assessee as he did not have any interest whatsoever in the said account. The

assessee also asserted that he has been attending to all the proceedings carried out under the Act and that there was no failure which would attract levy of penalty u/s 272A(1)(c) of the Act.

7. The Addl. CIT, Central Range-2, Mumbai was not satisfied with the explanation furnished by the assessee. According to him, the reluctance of the assessee in providing Consent Waiver Form highlighted the non-cooperation on the part of the assessee "*to submit the requisite documents*" and, therefore, he found it to be a fit case for levy of penalty u/s 272A(1)(c) of the Act. As a consequence, he levied a penalty of Rs.10,000/- u/s 272A(1)(c) of the Act. This levy has been further upheld by the CIT(A) primarily for the reasons assigned by the Addl. CIT, Central Range-2, Mumbai in the penalty order. Not being satisfied with the order of CIT(A), assessee is in further appeal before us.

8. Before we proceed to dwell with the rival contentions, it was noticed that in the case of Shri Jay Ketan Parikh, a singular penalty of Rs.10,000/- has been levied though the stated assessment years are six, i.e. from Assessment Year 2006-07 to 2011-12. Similarly, the CIT(A) has also passed a singular order against the levy of penalty of Rs.10,000/- though the same relates to six assessment years from 2006-07 to 2011-12. In this background, the filing of six different appeals for each of the six assessment years by the assessee is wrong as it is not a case where penalty of Rs.10,000/- each has been levied for six assessment years. Rather, a singular penalty of Rs.10,000/- has been levied by way of one order for a singular default, though in relation to stated assessment years. Therefore, so far as the assessee, Shri Jay Ketan Parekh is concerned,

Appeal No. 4438/Mum/2017 is taken as the substantive appeal covering the entire levy of Rs.10,000/- pertaining to Assessment Years 2006-07 to 2011-12 and the other five appeals, i.e. ITA Nos. 4440 to 4443/Mum/2017 are treated as infructuous and dismissed.

9. In the above background, the learned representative for the assessee was confronted with the status of quantum assessment proceedings in the context of the monies lying in the stated bank account with HSBC, Geneva, Switzerland. To this, the learned representative submitted that those matters alongwith the impugned appeals were pending before the CIT(A) and the CIT(A) has merely disposed off the penalty appeals whereas the appeals against the quantum proceedings are still pending before him. In this view of the matter, the learned representative made his arguments regarding the technical point, namely, that the failure in question is not covered by the scope and ambit of Sec.131(1) r.w.s. 272A(1) of the Act. In order to appreciate the aforesaid plea, it will be appropriate to refer to the relevant bare provisions of Sections 131(1) and 272A(1)(c), which are reproduced as under :-

"131. Power regarding discovery, production of evidence, etc.

(1) The Assessing] Officer, Deputy commissioner (Appeals)], Deputy Commissioner] Commissioner (appeals)] and Chief Commissioner or Commissioner] shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil the same powers as are vested in a court under the Code of Civil Procedure 1908 (5 of 1908), when trying a suit in respect of the following matters, namely:-

- (a) discovery and inspection;*
- (b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath,*
- (c) compelling the production of books of account and other documents; and*

(d) issuing commissions.”

"272A(1)(c) to whom a summons is issued under sub-section (1) of section 131 either to attend to give evidence or produce books of account or other documents at a certain place and time omits to attend or produce books of account or documents at the [place or time; or]"

10. By referring to the relevant provisions of Sec. 131(1) of the Act, the learned representative pointed out that so far as clauses (a), (b) or (d) are concerned, apparently the same are not relevant in the present context. It has been elaborated by the learned representative that the alleged failure in the present case, namely, non-submission of Consent Waiver Form can at best be attempted to be covered by the Revenue in clause (c) of Sec. 131(1) of the Act. Herein also, the learned representative pointed out that the alleged failure does not constitute non-production of books of account and nor it can be taken to be failure to produce other documents as envisaged in clause (c) of Sec. 131(1) of the Act. The learned representative referred to pages 9 to 11 of the Paper Book, wherein is placed a copy of the Consent Waiver Form. It was pointed out that signing of the Consent Waiver Form by the assessee would, in fact, mean that the assessee was accepting ownership or association with the HSBC bank account in question, whereas the assessee has been all along denying ownership or any association with the said bank account; and, therefore he could not be expected to sign the said Consent Waiver Form. In any case, it is pointed out that the requirement is to produce documents as per clause (c) of Sec. 131(1) of the Act but the signing of the Consent Waiver Form, as devised and produced by the Assessing Officer, would not fall within the scope of clause (c) of Sec. 131(1) of

the Act. Similarly, our attention is invited to Sec. 272A(1)(c) of the Act in terms of which the penalty has been levied. According to him, if a particular non-compliance by the assessee is not of the nature specified in Sec. 131(1)(c) of the Act, the same could not be construed to be a good reason to levy penalty u/s 272A(1)(c) of the Act. Notably, Sec. 272A(1)(c) of the Act permits levy of penalty if a person to whom summons have been issued either to attend or give evidence of books of account or other documents, fails to attend or produce the books of account or other documents at the stated time and place; and, in this case, the case of the Revenue is that the assessee has failed to produce the required document, i.e. signed Consent Waiver Form. In sum and substance, as per the assessee, non-signing of the Consent Waiver Form cannot be equated to 'non-production of books of account or other documents' so as to trigger levy of penalty u/s 272A(1)(c) of the Act.

11. On this limited aspect, we have heard both the parties. The Id. DR appearing for the Revenue has sought to defend the imposition of penalty by reiterating the arguments taken by the lower authorities, which we have already adverted to in the earlier paragraphs and is not being repeated for the sake of brevity.

12. We have carefully considered the rival submissions. Ostensibly, the present proceedings are an offshoot of the assessment proceedings in the case of the captioned assessee for assessment years enumerated earlier. In the course of assessment proceedings, summons u/s 131 of the Act was issued by the Assessing Officer, i.e. ACIT Central Circle -9, Mumbai and in terms of such

summons, assessee was, inter-alia, required to submit a duly filled and notarised Consent Waiver Form in connection with HSBC Bank, Geneva. It is also noteworthy that the assessment proceedings intended to assess the income in the hands of the assessee arising from the said bank account, to which assessee was denying its liability. Be that as it may, in the present proceedings we are not concerned with the merit of such stand of the assessee as the same would be dealt with in the respective quantum proceedings. The limited issue before us is as to whether there was any default on the part of the assessee to comply with the requirements of summons u/s 131 of the Act so as to justify imposition of penalty in terms of Sec. 272A(1)(c) of the Act. The Addl. CIT Central Range-2, Mumbai has levied penalty on the failure of the assessee to submit a duly filled, signed and notarised Consent Waiver Form in connection with HSBC Bank, Geneva. The moot question that is brought up by the assessee is as to whether non-signing of said Consent Waiver Form constitutes a default so as to attract penalty u/s 272A(1)(c) of the Act. A copy of the said Consent Waiver Form is placed in the Paper Book at pages 10 to 13 alongwith a copy of the summons dated 18.07.2013. In the summons, the ACIT Central Circle -9, Mumbai required the assessee to fill-up the Consent Waiver Form, get it notarised and furnish the same.

13. In terms of clause (c) of sub-section (1) of Sec. 131 of the Act, the Assessing Officer or other specified income-tax authorities, can compel production of books of account and other documents. So far the present case is concerned, the aforesaid provision is limited to 'compelling of production of documents', as

obviously the Consent Waiver Form does not constitute books of account. A perusal of clause (c) of Sec. 131(1) of the Act would show that it empowers the income-tax authorities to compel production of documents; and, obviously, it implies that assessee is already in possession of such documents. It is quite well understood that when a law empowers an authority to compel production of a document from a subject, it is implied that the subject concerned is indeed in possession or expected to be in possession of the document. However, in the instant case, it is not the case of the Assessing Officer that the said Consent Waiver Form was in possession of the assessee. A bare reading of the summons show that a proforma of Consent Waiver Form was enclosed requiring the assessee to sign it, notarise it and thereafter submit it back. Therefore, it cannot be said that there was any default on the part of the assessee to submit a document which was already in his possession, as is the wont of the provision contained in clause (c) of Sec. 131(1) of the Act. What the Assessing Officer seeks to do in the present case is to compel the assessee to execute a document, as rightly put by the learned representative for the assessee before us, and not a case where a document already in possession of the assessee is being asked to be produced. Therefore, without going into any other aspect of the controversy, we find that the instant default is not of the type understood by a conjoint reading of clause (c) of Sec. 131(1) of the Act with clause (c) of Sec. 272A(1) of the Act. Therefore, on this count itself, we find no merit in the levy of penalty u/s 272A(1)(c) of the Act, which is hereby ordered to be deleted.

14. Before parting, we may clarify that our decision is only vis-a-vis the tenability of penalty u/s 272A(1)(c) of the Act and does not impinge upon the merit of the controversy regarding the ownership or otherwise of bank account in question, which would be a subject matter of dispute in the relevant proceedings.

15. Therefore, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the penalty of Rs.10,000/- levied.

16. In the result, appeal of the assessee, Jay Ketan Parikh, being ITA No. 4438/Mum/2017 is allowed and the other appeals being ITA Nos. 4439 to 4443/Mum/2017 are dismissed as being infructuous.

17. Insofar as the appeals of other assesseees are concerned, the facts and circumstances therein are on an identical footing with the appeals in the case of Jay Ketan Parikh and therefore our decision therein shall apply mutatis mutandis to the said appeals also.

18. Resultantly, whereas appeals being ITA Nos. 4438/Mum/2017, 4499/Mum/2017 and 4505/Mum/2017 are allowed, the balance of appeals being ITA Nos. 4439 to 4443/Mum/2017, 4500 to 4504/Mum/2017 and 4506 to 4510/Mum/2017 are dismissed as infructuous.

Order pronounced in the open court on 26th October, 2018.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
VICE PRESIDENT

Mumbai, Date : 26th October, 2018

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "F" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai