

आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA Nos. 2880 & 2881/PUN/2016

निर्धारण वर्ष / Assessment Year : 2010-11

Shri Vivek Vasant Gandhi,
Prop. of M/s. Siddeshwar Traders,
At Post Sawarde, Tal. Chiplun,
Ratnagiri-415 612.
PAN : ABNPG3981G

.....अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax,
Ratnagiri Circle, Ratnagiri

.....प्रत्यर्थी / Respondent

Assessee by : Shri M.K. Kulkarni &
Shri Sanjay M. Vhanbatte

Revenue by : Shri Sudhendu Das

सुनवाई की तारीख / Date of Hearing : 06.03.2019

घोषणा की तारीख / Date of Pronouncement : 07.03.2019

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM :

These two appeals on quantum and penalty preferred by the assessee emanates from the order of Ld.CIT(Appeals)-2, Kolhapur dated 25.10.2016 for the assessment year 2010-11 as per grounds of appeal on record.

These cases were heard together. Since issues common and facts are similar, these appeals are being disposed of vide this consolidated order. First, we would take quantum appeal in ITA No.2880/PUN/2016.

ITA No.2880/PUN/2016 (Quantum Appeal)
Assessment Year 2010-11

2. The brief facts in this case are that the assessee is a Kirana Trader and filed return of income on 30.09.2010 declaring total income at Rs.12,78,330/-. There was survey action u/s.133A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') in the case of the assessee on 03.02.2010. During the course of survey certain incriminating documents in the form of a diary was impounded. These documents indicates that the assessee has made investments in house renovation and godown shed repairs which were not recorded in the books of accounts. When confronted with the same during the course of his sworn statement, the assessee offered the same to tax. However the Assessing Officer noted that the godown repair expenses of Rs.11,80,000/- and house renovation expenses of Rs.19,91,750/- even though recorded in the diary and admittedly made outside the books, were not disclosed by the assessee in his return of income. Similarly during the course of the survey excess quantitative stock was found with the assessee which he agreed to surrender. Once again the same was not included in his return of income. The Assessing Officer therefore asked the assessee to explain the circumstances in which he has not offered these amounts as income. In response, the assessee stated before the Assessing Officer that the house renovation expenses noted in the diary are merely estimates and that the house has been shown in the balance sheet at a value of Rs 1,92,470 and therefore the alleged expenses towards repair of the house of Rs 19,91,750 is an impossibility. He further stated that no purchase bills for cement or other

raw materials were found at the time of the survey. Similarly in the case of godown repair expenses, the assessee stated the same i.e no bills towards the same were found and that the entries made in the diary were mere estimates. The Assessing Officer however did not agree with the assessee and held that the entries in the diary have been made in the own handwriting of the assessee as admitted by him and were exact figures and therefore cannot be estimates. The Assessing Officer, therefore, added the amounts of Rs.11,80,000/- and Rs.19,91,750/- to the total income of the assessee.

3. The Assessing Officer also noted that physical excess stock was found with the assessee during the survey and the inventory for the same was prepared by the survey team. On valuation of the same, the stock was found in excess of the book stock by Rs.38,30,310/-. The assessee stated before the Assessing Officer that the inventory of the stock was wrongly made and without understanding the implication of the same and under pressure, the declaration was extracted from the assessee. The assessee stated that the stock declaration part was obtained without proper inventory and also without considering the availability of any space in the godown. He therefore stated that nothing can be added on this count. The Assessing Officer then rebutted the claim of the assessee by examining the stock inventory wherein the assessee has signed on each and every page. The Assessing Officer held that if the stock was wrongly taken, then it is not known as to how the assessee signed on the same. He accordingly added Rs.38,30,310/-.

4. Aggrieved by these additions, the assessee carried the matter to the CIT(A) Kolhapur. As there was no compliance before the CIT(A), the appeal of the assessee was dismissed.

5. Being further aggrieved, the assessee carried the matter to the Pune Bench of the Tribunal in ITA No.1910/PN/2013 and the Tribunal vide order dated 25.11.2014, set aside the matter back to the file of the Ld. CIT(A) directing him to decide the appeal afresh after granting reasonable opportunity to the assessee.

6. That in the second round of appeal, the Ld. CIT(A) with regard to the additions towards repair of house and godown has held as under:

*“5.1 **Ground No.1** : This is against the additions towards repairs of the house and godown. From the submissions of the appellant before me as reproduced above, it is seen that in respect of the godown expenses, the appellant states that the total area of the godown itself is 280 sft. carpet area and that expense of Rs.11,80,000/- for repairing the same works out to Rs.4000/- per sft. This according to the appellant is more than the construction rate. The appellant also stated that the entries in this regard in the diary are mere estimates and therefore have no evidentiary value. I have also perused the retraction letter of the appellant dated 18.03.2013 which also mentions the same things as submitted before the AO. In respect of the renovation of house also, the appellant stated before me that the house area is 2000 sft. Of builp up area consisting of 6 rooms of about 10ft x 30 ft. The cost of renovation works out to Rs 1000 per sft which according to the appellant is the cost of new construction. He therefore stated that by no stretch of imagination can the cost of renovation be Rs 1000 per sft. The same submissions are mentioned in the retraction letter of the appellant. The appellant then went on to rely upon a number of case laws including a CBDT circular regarding the evidentiary value of confessions in sworn statements. I have carefully considered the matter. I specifically requested the appellant to furnish copies of the diary impounded which is the basis of these additions. This diary consists totally of 9 written pages all written in Marathi. The relevant pages of the diary for the house renovation and godown renovation are pages 2 & 3 respectively. The same are reproduced hereunder:*

From the above it could be seen that there are exact figures mentioned regarding; each item of expenditure. On page 2 of the diary there are 4 items of expenditure for house renovation: Fabrication Rs 1,00,990; Furniture Rs 11,99,870; Woodwork Rs 1,56,533 and Tiles Rs 1,90,987. Similarly on page 3 is the detail of godown renovation. There are 8 items of expenditure:- Cement Rs 3,49,320; Sand Rs 87,890; Dabar Rs 34,000; Steel Rs 3,99,877; Bricks Rs 45,667; Koba Rs 25,653; Light Rs 38,686 and Fabrication Rs 1,98,907. It is admitted that these diary notings are in the handwriting of the appellant and these are also signed on each page by the appellant. There are other entries in the diary too from pages 4 to 9 which mention sundry household expenditure. In spite of this clear evidence, the appellant would have me believe that the addition is based merely on his sworn statement. The facts actually indicate the opposite. The AO has made the addition based on these noting in the diary and not on the sworn statement of the appellant. His statement is merely corroborative and also confirms the existence of the diary and the fact that the same is in his handwriting. The appellant instead of explaining the notings in the diary or explaining the source of funds in his hands is trying to side step the issue by raising theoretical issues about the cost of renovation. He has made bland statements before me that the cost of renovation per square foot is exorbitant. It would not be out of place to mention that the diary is the primary evidence and the opinion of the appellant that the cost of renovation is exorbitant remains a mere opinion without the weight of evidence. The claim of the appellant that the notings in the diary are mere estimates I again a bland statement without the backing of any evidence. In fact it is to be noted that the figures of expenses as noted in the diary and reproduced above are exact figures. I fail to understand how such exact and odd figures could ever be estimates. To my mind the notings in the diary are crystal clear and the appellant has not been able to explain the source of funds in his hands for incurring this expenditure. I am therefore of the opinion that the AO has correctly assessed the sums of Rs.11,80,000 and Rs 19,91,750 as unexplained investment of the appellant. The various case laws including the CBDT Circular are of no help to the appellant on facts. These refer to cases where the addition has been made merely on the statement recorded from the assessee and do not apply to cases where the addition is based on incriminating material found during survey. I am therefore, of the view that the diary impounded is the primary evidence in this case and has to be believed or disbelieved in toto. One cannot believe the entries therein based on one's convenience. I therefore, uphold the additions of Rs.11,80,000/- and Rs.19,91,750/- made by the AO. Ground No. 1 is dismissed.”

7. We have perused the case records and have given considerable thought to the findings of the Ld. CIT(Appeals). The facts emerged in this case show that it is admitted the notings in the diary are hand writing of the assessee and they are also signed on each of the page by assessee. There are other entries in the diary too from pages 4 to 9 which mention sundry household expenditure. In spite of this clear evidence, the assessee has strongly argued that the addition has been made merely on the basis of his sworn statement.

However, the facts indicate otherwise. The Assessing Officer has made the additions based on these notings in the diary and not on the sworn statement of the assessee. His statement is merely corroborative and also confirms the existence of the diary and the fact that the same is in his hand writing.

We further observe that the assessee has himself agreed with the notings in the diary are in his own hand writing and that it pertains to repair and maintenance of the house. We also observe that these pages are duly signed by the assessee himself. Therefore, we do not find any infirmity with the findings of the Ld. CIT(Appeals) and additions made of Rs.11,80,000/- and Rs.19,91,750/- are sustained. Thus, **this ground of appeal raised by the assessee is dismissed.**

8. The other ground of appeal is with regard to the upholding of addition of Rs.38,30,301/- towards undisclosed stock made by the Assessing Officer. The Ld. CIT(Appeals) on this issue has held as under:

*“5.2 **Ground 2:** This is against the addition of excess stock. Once again I find that there is excess stock quantity wise found during the course of the survey. The physical stock inventory runs into 55 pages and the physical stock inventory is very meticulously taken. The inventory mentions the quantity, description of stock, sale rate and the valuation at sale price. Once again I find that the appellant has signed on each page and certified the physical stock as being found in his business premises. The only defence of the appellant both before the AO, in appeal as well as in the so called retraction letter is that it is not physically possible to store the stock found in his business premises. This begs the question as why wasn't this issue raised at the time of survey itself. On one hand, the appellant has certified the physical quantity of stock found, while on the other he later offers an opinion and a roundabout theory about how the stock cannot be stored in the quantities found. The defence of the appellant remains a mere opinion without any basis or evidence. In spite of the categorical concurrence of the appellant regarding the physical stock found during survey, the appellant would have me believe his defence now. I am afraid I cannot agree with the appellant. The basis of addition is the physical stock inventory and not the sworn statement. In fact on this issue, there is no requirement of referring to the sworn statement. Therefore the various case laws quoted by the appellant are of no use to him. I therefore have no hesitation in upholding the addition of Rs.38,30,301/-towards undisclosed stock made by the AO. Ground 2 is dismissed.”*

9. We have perused the case records and analyzed the facts and circumstances in this case. We find that there is excess stock quantity wise found during the course of the survey. The physical stock inventory runs into 55 pages and the physical stock inventory is very meticulously taken. The inventory mentions the quantity, description of stock, sale rate and the valuation at sale price and the assessee has signed on each page and certified the physical stock as being found in his business premises. When this has been done, there does not remain any other grievance for the assessee with respect to this addition.

At the time of hearing, the Ld. AR of the assessee stated that hand writings in the diary and signature in each of the pages in stock inventory were not genuine. We find that this plea taken by the assessee at this particular stage is of no help to the assessee since the entire facts on records proves conclusively that whatever action the Revenue Authorities have taken it has been agreed upon by the assessee himself. In view of the matter, this addition of Rs.38,30,301/- towards undisclosed stock made by the Assessing Officer and confirmed by the Ld. CIT(Appeals) is hereby sustained. **This ground of appeal raised by the assessee is dismissed.**

10. In the result, quantum appeal of the assessee in ITA No.2880/PUN/2016 is dismissed.

ITA No. 2881/PUN/2016 (Penalty Appeal)
Assessment year 2010-11

11. Now, we would take up the penalty appeal in ITA No.2881/PUN/2016. Penalty u/s.271(1)(c) of the Act has been imposed on the assessee with regard

to the quantum addition made in respect of repair of house and godown and excess stock found during survey.

12. That at the outset in our humble understanding, the quantum proceedings and the penalty proceedings are altogether different in character and they cannot be clubbed into one single transaction. It is true in the case of the assessee the quantum additions have been sustained in respect of renovation of house and godown and also in respect of excess stock found at the time of survey and these additions have been confirmed based on the facts on records. However, penalty u/s.271(1)(c) of the Act is completely different procedure. Altogether, there has to be definite findings and specific evidence either for 'concealment of income' or 'furnishing of inaccurate particulars of income'. There cannot be any ambiguity or doubt in so far as the case of penalty is concerned. Probably, it is for this reason that the legal proposition goes that if the addition has been made on estimation basis, penalty u/s.271(1)(c) of the Act is not leviable. This more so, if there is any alternative argument and probability involved in the facts and circumstances, levy of penalty u/s.271(1)(c) of the Act is not justifiable. It is not the case that when addition has been confirmed, penalty is automatically imposed. In the instant case, when the assessee states that price of his house is lesser than the amount of expenditure he has alleged to have incurred for renovation which therefore is impossible, so this indicates that for the plausible view in the matter which is not entirely clarified in the order of Revenue Authorities.

13. Similarly with regard to the excess stock, the assessee has contended that it is physically not possible to store the stock found in his business premises because the space of store in godown was too small. This is also a matter of plausible view taken by the assessee which is not directly rebutted

by the Department. The ground mentioning for confirmation of addition is the own signature of the assessee in all pages in the inventory. Therefore, though the additions are confirmed but in the totality of facts and circumstances, levy of penalty u/s.271(1)(c) of the Act in the case of the assessee is not justifiable. Thus, in view of the matter, we set aside the order of Ld. CIT(Appeals) and direct the Assessing Officer to delete the penalty from the hands of the assessee.

14. In the result, penalty appeal of the assessee in ITA No.2881/PUN/2016 is allowed.

15. In the combined result, quantum appeal of the assessee is dismissed and penalty appeal of the assessee is allowed.

Order pronounced on 07th day of March, 2019.

Sd/-
R.S.SYAL
VICE PRESIDENT

Sd/-
PARTHA SARATHI CHAUDHURY
JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 07th March, 2019.

SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-2, Kolhapur.
4. The Pr. CIT-2, Kolhapur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

// True Copy //

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	06.03.2019	Sr.PS/PS
2	Draft placed before author	07.03.2019	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		