

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**

**BEFORE SHRI RAM LAL NEGI, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

**आ.अ.सं./I.T.A. No.657/AHD/2013**  
**निर्धारण वर्ष/Assessment Year : 2009-10**

Shri Lavjibjhai Hirjibhai Sutariya, 44, Smat Nagar, L.H.Road, Surat - 395 003.	<b>Vs.</b>	The Assistant Commissioner of Income Tax, Circle - 8, Surat.
[PAN: AWDPS 7503 H]		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

**आ.अ.सं./I.T.A. No.531/AHD/2015**  
**निर्धारण वर्ष/Assessment Year : 2009-10**

Shri Lavjibjhai Hirjibhai Sutariya, 5, Anand Vatika, Laxmikant Ashram Road, Katargam, Surat - 395 004.	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle - 8, Surat. (Now Re-designated as DCIT, Circle-3(2), Surat.)
[PAN: AWDPS 7503 H]		
<b>अपीलार्थी Appellant</b>		<b>प्रत्यर्थी/Respondent</b>

निर्धारिती की ओर से /Assessee by	Shri P.M.Jagasheth - CA
राजस्व की ओर से /Revenue by	Shri O.P.Meena - Sr.DR

सुनवाई की तारीख/ Date of hearing:	27.03.2019
उद्घोषणा की तारीख/Pronouncement on:	28.03.2019

**आदेश /ORDER**

**PER O.P.MEENA, AM:**

- These two appeals filed by the Assessee are directed against the separate orders of learned Commissioner of Income Tax

(Appeals)-5 and CIT(A)-3, Surat(in short “the CIT (A)”) dated 22.01.2013 and 19.01.2015 respectively pertaining to Assessment Year 2009-10.

**2.** The grounds raised by the Assessee in ITA No.657/Ahd/2013 read as under :

- “1. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in making addition of Rs.43,11,500/- on account of alleged unexplained seized materials impounded Ann. A-3 during the survey proceedings treated as unaccounted income of the assessee.*
- 2. On the facts and in the circumstances of the case as well as law on the subject, the learned Commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in making addition of Rs.43,11,500/- on account of gross profit ration.*
- 3. It is therefore prayed that the above addition may please be deleted as learned members of the tribunal may deem it proper.”*

**3.** The assessee has raised an additional ground of appeal during the course of appellate proceedings before the Tribunal by stating that the ld.CIT(A) has not offered adequate opportunity to hear the case and passed ex-parte order, hence the case may please be restored back to the ld.CIT(A) or to the AO.

**4.** The ld.Counsel submitted that the additional ground raised by the assessee has a legal ground which does not require any additional facts, hence same may be allowed to be admitted in the interest of justice.

**5.** The ld.Sr.DR opposed to the admission of additional ground.

6. We have heard the rival submissions and find that the additional ground being legal is allowed to be admitted in the interest of justice in the light of decision in the case of National Thermal Power Company Ltd., vs CIT [1998] 229 ITR 383 (SC) wherein it was held that the additional ground of appeal can be admitted where the issue involved is pure question of law not involving any investigation of facts, accordingly the additional ground is admitted. Now we proceed with additional ground as well as grounds on merit in the following paras :

7. Brief facts of the case are that a survey u/s.133 of the Act was carried out in the case of assessee on 26.03.2009 wherein various documents were impounded. The assessee was asked to explain the same during the course of assessment proceedings, but the assessee failed to furnish any explanation or made any attempt to obtain copies impounded material. In absence of any details, the AO made addition of Rs.43,11,500/- on account of undisclosed income shown under agricultural income at Rs.29,27,000/- (page.27 & 28 of impounded material), Rs.8,68,000/- (page.29 of impounded material), Rs.4,65,000/- (page.30 of impounded material) and Rs.51500/- (page.40 of impounded material) and addition of Rs.316118/- was also made

on account of G.P. rate of 8% on the shown in construction receipts.

8. The assessee carried the matter before the Id.CIT(A) wherein it was requested that the assessee may be given an opportunity to produce evidences in support of his documents, accordingly Remand Report was called for. However, the assessee could not produce any documents during the course of Remand Report proceedings. Accordingly, the addition made by the AO was came to be confirmed.

9. Being aggrieved, the assessee has filed this appeal before this Tribunal. The Id.Counsel referred the submissions dated 26.12.2011 which are reproduced at page 4 of the assessment order according to which it was contended that the diary seized by the survey tem is undated and it is continuous documents, therefore it is very easy to prove with the year of diary. It was further referred that there are certain payments for light bill, and telephone bill as mentioned in the diary. The assessee called for copies of such bills from his village to substantiate that the financial details as mentioned in the diary does not belong to the year under scrutiny. Hence, no addition based on such diary can

be made. The Id.Counsel further submitted additional evidence under Rule 29 of Tribunal Rules 1963 along with the affidavit it was submitted that the assessment order was passed on 29.12.2011 whereas the assessee has obtained copies of electricity bill from PGVCL Electricity Company on 14.11.2014 as could be seen from the copy of ledger account offered at paper book, page 1 to 3 being additional evidence. Therefore, the assessee could not furnish the same before the Lower Authorities. Therefore, the additional evidence are in the shape of confirmation of copy of ledger accounts showing the amount of electricity bill raised and date of payment which clearly reveals the electricity bills are date 20.06.2005 to 15.03.2007 which are appearing in the seized impounded diary found during the survey. Therefore, it was requested that these evidences allowed to be admitted which are very essential to decide the case, hence, the entire assessment order may be set-aside to the file of the AO for decision after re-examination of the evidences in support of contention of the assessee that the seized notings and transaction mentioned in the diary does not pertains to the assessment year under consideration.

**10.** Per contra, the Id.Sr.Departmental Representative objected to the admission of additional evidence.

**11.** The Id.Counsel for the assessee placed reliance on the decision of Hon`ble Madras High Court in the case of CIT v. Indian Express (Madura) Pvt. Ltd. [1983] 140 ITR 705 (Madras) : [1983] Taxman 441(Madras): 33 CTR 314 (Madras):

*"It is well-settled now that while exercising its appellate jurisdiction, the Tribunal need not confine itself to the grounds which are set forth in the appeal memorandum or taken by leave of the Tribunal. Indeed, in the case of CIT v. Mahalakshmi Textile Mills Ltd. [1967] [66 ITR 710](#), the Supreme Court described the Tribunal's appellate jurisdiction in the widest terms possible saying that all questions, whether of law or of fact, which relate to the assessment of the assessee may be raised before the Tribunal and there is nothing in the Act which restricts the Tribunal to the determination of the questions raised before the departmental authorities. On the basis of these principles laid down by the Supreme Court, it must be held in this case that the assessee was not precluded from raising the new contention and the Tribunal was not precluded from examining and determining that contention, merely on the score that it had not been put forward at the earlier stages of the proceedings in assessment and in the first appeal.*

*The statutory provisions in section 254, which confers appellate jurisdiction on the Tribunal, clearly lays down that the Tribunal, in disposing of an appeal, may pass such orders thereon as it thinks fit. The expression 'subject-matter' has not been employed in this provision. Indeed in Mahalakshmi Textile Mills' case (supra), even the Supreme Court has understood the Tribunal's appellate jurisdiction as a jurisdiction to pass such orders on the appeal as it thinks fit without adding any gloss of their own to the expression. Therefore, both on principle and on precedent, there is no reason why the Tribunal must be precluded from handling a point which appertains to the assessee's assessment merely because nobody else had handled it before or because it had not occurred either to the assessee or to the department to raise and urge that point at earlier stages of the proceedings. Consequently, in the instant case, the Tribunal was justified in entertaining the additional ground raised by the assessee relating to a claim which was not raised either before the ITO or before the AAC."*

**12.** We have heard the rival submissions and perused the material on record. In the light of the above decisions and

respectfully following the decision of Hon'ble Madras High Court we allow to admit the additional evidence/ground raised by the assessee and the issue is set-aside to the file of AO with a direction to admit the additional evidence for fresh consideration of entire assessment. The assessment is therefore denovo set-aside to the file of the AO.

**13.** In the result, appeal of the assessee is allowed for statistical purposes.

**ITA No.531/Ahd/2015 for A.Y 2009-10 :**

**14.** The grounds raised by the assessee read as under :

- “1. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (appeals) has erred in confirming the action of the assessing officer in levying penalty of Rs.15,72,385/- u/s.271(1)(c) of the Income Tax Act, 1961.*
- 2. It is therefore prayed that the above addition may please be deleted as learned members of the tribunal may deem it proper.”*

**15.** The assessee has agitated against the confirmation of levy of penalty of Rs.15,72,385/- u/s.271(1)(c) of the Act. As we have set-aside the quantum of appeal to the file of the AO for fresh consideration vide ITA No.657/Ahd/2013 as discussed in the above part of this order. Therefore, the issue on which penalty is levied is stands set-aside to the file of the AO for fresh decision. Therefore, the penalty levied by the AO is no longer survive.

Accordingly, we delete the penalty levied by the AO subject to condition that the AO is free to re-initiate penalty proceedings u/s.271(1)(c) of the Act on finalization of the set-aside proceedings, if the circumstances so warrant or he thinks fit.

16. In the result, appeal of the assessee stands allowed.

17. Finally, in the result appeal in ITA No.657/Ahd/2013 is allowed for statistical purposes and appeal in ITA No.531/Ahd/2015 is allowed.

18. The order pronounced in the open court on 28.03.2019.

Sd/-

(RAM LAL NEGI)

(न्यायिकसदस्यतथा/JUDICIAL MEMBER)

Sd/-

(O.P.MEENA)

(लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER)

सुरत/ Surat, दिनांक Dated: 28<sup>th</sup> March, 2019/S.Gangadhara Rao, Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

/ / TRUE COPY / /

**Assistant Registrar, Surat**