

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No. 1273/Ahd/2014
&
I.T.A. No. 3402/Ahd/2016
(Assessment Year : 2010-11)

R.B.Z. Jewellers Pvt. Ltd., 1 st Floor, Rembrandt, Opp. Associated Petrol Pump, C.G. Road, Ahmedabad-380 006	Vs.	ACIT, Circle – 5, & DCIT, Circle – 3(1)(2), Ahmedabad.
---	-----	---

[PAN No. AADCR 9484 R]

(Appellant)

..

(Respondent)

Appellant by :	Shri Vartik Chokshi, A.R.
Respondent by :	Shri S. K. Dev, Sr. D.R.

Date of Hearing	18.07.2019
Date of Pronouncement	30.07.2019

ORDER

PER Ms. MADHUMITA ROY - JM:

Both the appeals filed by the assessee are directed against the order dated 07.03.2014 passed by the Commissioner of Income Tax (Appeals)-XI Ahmedabad arising out of the order dated 08.02.2013 passed by the ACIT, Circle-5, Ahmedabad under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to “the Act”) and against the order dated 20.10.2016 passed by the Commissioner of Income Tax (Appeals)-9, Ahmedabad arising out of the order dated 22.02.2016 passed by the Assessing Officer under section 271(1)(c) of the Act respectively both for Assessment Year 2010-11.

Since both the appeals relate to the same assessee and interconnected, we have heard these two matters analogously and are being disposed of by a common order.

ITA No. 1273/Ahd/2014 for A.Y. 2010-11:

2. At the time of hearing of the instant appeal, the Learned Counsel appearing for the assessee submitted before us that he was not pressing the quantum appeal being ITA No.1273/Ahd/2014 for A.Y. 2010-11 and hence the same is dismissed as not pressed.

ITA No.3402/Ahd/2016 for A.Y. 2010-11:

3. The assessee-company engaged in the business of manufacturing and trading in gold and silver ornaments, filed its return of income on 10.07.2010 through electronic media declaring total income at Rs.3,32,65,740/- which was processed u/s 143(1) of the Act. It is relevant to mention that a survey action u/s 133A of the Act on 03.02.2010 was conducted and during the course of survey proceeding cash of Rs.10,34,931/- was found which according to the survey officials was not recorded in the books of accounts. The assessee was, therefore, asked to explain the said unaccounted cash by and under an order sheet entry dated 08.01.2013 whereupon the assessee submitted that the assessee is having retail customers who had given advances for making gold ornaments and jewellery as per designs day before survey. The said cash was belonging to those various customers. Since the assessee were disturbed and were not been able to complete their orders, and since the cash was received

one day before the survey the same could not be recorded in the books of accounts. The assessee's such plea was not found acceptable by the Learned AO and treating the said undisclosed cash of Rs.10,34,931/- as unexplained money u/s 69A he added the same to the total amount of the assessee. Penalty proceeding was also initiated for concealment of income. Such assessment proceeding was completed on 08.02.2013.

It is relevant to mention that during the course of assessment proceeding, it was found that the valuation of excess stock found was taken as per weighted average method, which was observed as not correct by the Learned AO and thus the case of the assessee was re-opened u/s 147 of the Act to ascertain correct amount of stock. Reason for such reopening was also recorded on 18.03.2015 notice whereof was served upon the assessee. The assessee thereafter filed its return of income at Rs.3,43,00,668/- and paid tax on 19.03.2014, which is appearing at Page 13 of the Paper book. Upon considering the same the reassessment proceeding finally was dropped on 08.02.2016 by the DCIT, Circle – 3(1)(2), Ahmedabad which is also being part of the record at Page 68 and 69 of the Paper Book.

On the other hand, penalty proceeding was finalized upon levy of penalty of Rs.3,55,000/- by the Learned DCIT for concealment of income by the assessee on the basic premise that the assessee failed to produce any document in support of his contention that the said amount found unaccounted to the tune of Rs.10,34,931/- belongs to the customers neither the same was entering in the books of accounts; no staff of the assessee could explain its origin, neither could produce the documents and/or register. The said sum, therefore, remained unexplained since no explanation was forthcoming from the assessee and the same has been treated as unexplained cash u/s 69 and

added to the total income of the assessee because of the particular reason that the assessee had not voluntarily disclosed it thus this is the concealed income in terms of the provision of explanation 1 of section 271(1)(c) of the Act since the assessee failed to substantiate that the said cash / advance was received from customers. In appeal, the Learned CIT(A) with the following observation confirmed said penalty levied by the Assessing Officer with the following observation:

6. *I have carefully considered the rival contention, case law relied upon as well as the observations made by the A.O. in the assessment order. It is observed A.O. has imposed penalty of Rs.3,55,000/- u/s.271(1)(c) of the Act, It is seen that appellant had filed Return of Income on 10/07/2010 declaring total income of Rs.3,32,65,740/- . The only addition of Rs.10,34,931/- was made to the returned income and total income was assessed at Rs.3,43,00,671/- u/s. 143(3) of the Act. CIT(A) has confirmed the addition of Rs.10,34,931/- vide order No.CIT(A)XI/264/ACIT Cir.5/2012-13 dtd. 07/03/2014. It is observed from the order of assessment u/s.143(3) passed on 08/02/2013 that survey was conducted on the appellant on 03/02/2010. During the course of survey, unaccounted cash of Rs.10,34,931/- was found. The said amount was not recorded in the books of the appellant. Appellant has failed to explain or reconcile the said amount. During the assessment proceedings, appellant tried to explain that this amount pertains to certain customers who had given advance for making gold ornaments and jewellery just a day prior to the date of survey. However, A.O. has refused to accept the explanation given by the appellant and had made addition of cash found during the course of survey to the total income of the appellant.*

7. *During the appellate proceedings appellant had again tried to explain before the then CIT(A) that the cash of Rs.10,34,931/- belonging to its customers. However, according to CIT(A) names and the advance given by the customers mentioned during the appellate proceedings were not mentioned before the A.O. Thus, CIT(A) was of the opinion that it is an afterthought and refused to accept the explanation of the appellant. During the appellate proceedings appellant has relied upon the ground that addition of Rs.10,34,931/- was made under deeming provisions of the Act i.e. section 69A. It has relied upon various case law that the penal provisions would not be applicable*

in case addition has been under the deeming provisions i.e. section 69A of the Act. It is a matter of fact that cash amounting to Rs.10,34,931/- was found during the course of survey It is-also a matter of fact that appellant was not able to explain source of cash as well as name of the customers, from whom it had received advance. No where appellant had mentioned, about details of source of cash found during the course of survey. Therefore, A.O. had no option but to consider the cash found during the survey as income of the appellant. Section 69A categorically provides that where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion jewellery or valuable article is not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of acquisition of the money, bullion, jewellery or other valuable article, or the explanation offered by him is not, in the opinion of the A.O. satisfactory, the money and the value of the bullion, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year. During the assessment proceedings appellant had failed to explain the source of cash found during the course of survey. During the appellate proceedings, appellant had tried to explain by giving names and quantum of funds advanced by two persons. CIT(A) has rightly rejected explanation given by the appellant as an after thought and had confirmed addition of Rs.10,34,931/-. As the appellant failed to disclose the said amount in its Return of Income as well as failed to explain nature and source of acquisition of this cash to the A.O. as well as before CIT(A), I am of the considered opinion that Appellant has concealed its income as per explanation 1 of section 271(1)(c) .of the Act. Therefore, penalty of Rs.3,55,0007- levied u/s.271(1)(c) of the Act is hereby confirmed. Ground No.1 & 2 raised by the appellant are hereby dismissed.”

4. Heard the respective parties, perused the relevant materials available on records. It appears from the records that neither in the assessment proceeding nor before the appellate authority in quantum appeal, neither during the course of penalty proceeding or in penalty appeal assessee was asked to give the details of those customers in order to enable the Revenue to issue summons upon those customers to enquire into the veracity of the stand taken by the

assessee before authorities below. It is the duty incumbent of the authorities below to make an effort to come to a conclusion that cash in question good in such circumstances have been received for making jewellery for various customers in advance.

During assessment proceeding in reply to the show-cause dated 08.01.2013 the assessee replied as follows:

"Excess cash found of Rs.10.34 lac - In this connection, it is submitted that we have retail customers, who gives advance for making gold ornaments & jewellery as per designs, day before survey. Such cash is belonging to various customers, as after survey, we were disturb and were not able to complete their orders, therefore, such cash was refunded to customers, As the cash was received before 1 day and returned after some days, no recording was made in the books of accounts."

*4.3 The submission of the assessee has been duly considered but is not found acceptable. This is because the assessee has not produced any evidence in support of its contentions. Furthermore, the assessee has itself accepted that the amount was never recorded in the books of accounts even after the Survey. The assessee has not even offered the said unaccounted cash for tax in its ITR for AY 2010-11. In light of these facts and circumstances, **the undisclosed cash of Rs.10,34,931/-is treated as "Unexplained Money" as per S-69A of the IT Act and added to the assessee's income. Penalty proceedings are initiated u/s 271(1)(c) for concealment of income.**"*

Neither the Learned CIT(A) asked for the details of the parties who has made the advances of the unexplained amount of Rs.10,34,931/- during the quantum appeal as it appears from the record before us. Thus no enquiry was conducted by the authorities below so as to come to a concrete conclusion without any surmise and conjecture which can result into levy of penalty for concealment of income by the assessee without keeping any further avenue to question such action of the authority. In this aspect, we have carefully

considered the judgments relied upon by the Learned AR passed by the Jurisdictional High Court in the matter of National Textiles-vs-CIT reported in [2001] 114 Taxman 203 (Guj.) the relevant portion whereof is as follows:

24. In the instant case, the cash credits were not satisfactorily explained by evidence and documents. The parties who had advanced the alleged temporary loans were neither disclosed with their particulars nor any supporting documents were on record. Only 2 entries were explained. The accountant who had arranged the loans was not produced stating that he had left the service and relations with him are strained. On this state of accounts and evidence in the quantum proceedings, the department was justified in treating the cash credit as income of the assessee but merely on that basis by recourse to Explanation 1, penalty under section 271(1)(c) could not have been imposed without the department making any other effort to come to a conclusion that the cash credits could in no circumstances have been amounts received as temporary loans from various parties. The assessee in the quantum proceedings failed to produce the accountant but the department also in penalty proceedings made no effort to summon him. Applying the test (ii) discussed above, therefore, it was a case where there was no circumstance to lead to a reasonable and positive inference that the assessee's case - that the cash credits were arranged as temporary loans, was false. The facts and circumstances are equally consistent with the hypothesis that it could have been sundry loans in small amounts obtained from different parties. In our opinion, therefore, even taking recourse to Explanation 1, same circumstances or state of evidence on which the cash credits were treated as income, could not by themselves justify the imposition of penalty without anything more on record produced by the assessee or the department.

25. In the conclusion, all the questions posed, which are inter-related to the main question of imposition of penalty under section 271(1)(c), are answered in favour of the assessee and against the revenue. The reference is, accordingly, answered and be informed to the Tribunal. In the circumstances, the parties shall bear their own costs."

As it is a well settled principle of law that the penalty proceedings is separate and independent from that of the assessment proceeding, and it is

incumbent upon the Assessing Officer seeking to impose penalty u/s 271(1)(c) to establish that the income in respect of which penalty for concealment was sought to be levied was indeed the income of the assessee and that too, of the assessment year in question. But in the instant case the addition impugned was made u/s 69. In this respect we need to see the pronouncement of Section 69 of the Act which is as follows:

*“Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, **if any**, maintained by him for any source of income, **and** the assessee offers no explanation about the nature and source of the investments **or** the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments **may** be deemed to be the income of the assessee of **such financial year.**”*

However, as it appears from the records that the authorities below have failed to give to a concrete finding that the unaccounted amount of Rs.10,34,931/- is definitely belongs to the assessee with supporting documents thereto. But for the purpose of levying penalty it has to be established by the authority levying penalty that it was appellant's income without any surmise and conjecture in order to satisfy the conditions prevailing u/s 271(1)(c) of the Act, which has been failed to make out by the Revenue before us. Alternatively, imposing penalty on the basis of an addition made under the deeming provision u/s 69A is not permissible under the settled principle of law which has been decided in plethora of judgment including in the matter of M/s. Dishman Pharmaceuticals and Chemicals Ltd-vs-The ACIT in ITA No.1138/Ahd/2011. It has been time and again decided that penalty proceedings is entirely distinct from assessment proceedings and howsoever relevant and good, the findings in assessment proceedings may not be conclusive so far as penalty proceedings are concerned. It is well settled that

the parameters of judging the justification for addition made in the assessment proceeding is different from the penalty imposed on account of concealment of income or filing of inaccurate particulars of income and that certain disallowance and/or additions could legally be made in the assessment proceedings on the preponderance of probabilities but no penalty could be imposed under section 271(1)(c) of the Act on preponderance of probability and the Revenue has to prove that the claim of the assessee was not genuine or was inflated its tax liability. Further merely because that additions have confirmed in appeal or no appeal has been filed by the assessee against additions made, it cannot be the sole ground for coming to the conclusion that the assessee has concealed any income and in that view of the matter the penalty imposed on the basis of an addition made u/s 69 which creates legal fiction whereby cash are deemed to be unexplained for want of necessary evidences has been deleted by the Learned Tribunal in the matter of M/s. Dishman Pharmaceuticals and Chemicals Ltd.-vs-The ACIT in ITA No.1138/Ahd/2011 for A.Y. 2004-05.

Taking into consideration, the entire facts of the matter the judgment relied upon by the Learned DR passed by the Hon'ble Gujarat High Court in the matter of LMP Precision Engg. Co. Ltd.-vs-DCIT reported in [2009] 183 Taxman 12 (Gujarat) and the judgment passed by the Co-ordinate Bench in ITA No.256/Rjt/2014 for A.Y. 2009-10 have been found to be not applicable on the count of different set of facts.

Further we are of the considered view that there should not be any scope for preponderance of probabilities while levying penalty against an assessee by the authorities below particularly when addition has been made on a deeming fiction u/s 69A as discussed above and specially in the absence of any enquiry

conducted by the authorities below, which is duty incumbent upon them not only in the penalty proceeding but also in the quantum proceeding penalty cannot be levied. At the cost of repetition we must say that the judicial pronouncement does not give any scope to the authorities below to levy the penalty upon the assessee on surmise and conjecture and/or on preponderance of probabilities and thus unless it is proved by the authorities below in the instant case that the amount found during survey proceeding to the tune of Rs.10,34,931/- has been concealed by the assessee with corroborated evidence imposition of penalty is not permissible because of the particular reason that for initiation of a penalty proceeding a quasi judicial enquiry is required to be held by the authorities below and we do not appreciate any latches on the part of the authorities below in conducting such enquiry and to impose punishment without having any concrete finding for concealment of income by the assessee. Therefore, we find no justification in imposing the impugned penalty against the assessee and hence we delete the same. Hence, assessee's appeal is disposed off.

5. In the combined result, assessee's appeals in ITA No.1273/Ahd/2014 is dismissed as not pressed and in ITA No.3402/Ahd/2016 is allowed.

This Order pronounced in Open Court on	30/07/2019
---	-------------------

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad; Dated 30/07/2019
PritiYadav, Sr.PS

Sd/-
(Ms. MADHUMITA ROY)
JUDICIAL 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)-XI and 9, 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

.....