

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4653/MUM/2018  
Assessment Year: 2006-07**

**&**

**ITA No. 4654/MUM/2018  
Assessment Year: 2007-08**

Kunal Nikunj Shah, 501,  
Gitanjali Garden, 68E, Napean  
Sea Road, Rungta Lane,  
Mumbai-400006

**PAN No. AACPS8482N**

**Appellant**

Vs. Joint Commissioner of  
Income Tax Range-16(2),  
Mumbai.

**Respondent**

Assessee by : Ms. Aarati Vissanji &  
Mr. Vijay Kumar S. Biyani, ARs  
Revenue by : Mr. V. Justin,

Date of Hearing : 17/10/2019  
Date of pronouncement: 22/10/2019

**ORDER**

**PER N.K. PRADHAN, AM**

The captioned appeals filed by the assessee are directed against the order passed by the Commissioner of Income Tax-(Appeals)-4, Mumbai [in short the 'CIT(A)'] and arise out of penalty levied u/s 271(1)(c) and 271(1)(b) of the Income Tax Act 1961, (the 'Act').

**ITA No. 4654/MUM/2018**  
**Assessment Year: 2007-08**

2. In the instant case, the Assessing Officer (AO) levied penalty of Rs.92,233/- u/s 271(1)(c) on the addition of Rs.2,74,007/-. In appeal, the Ld. CIT(A) confirmed the said penalty.

The Ld. counsel for the assessee submits that the quantum addition of Rs.2,74,007/- made by the AO has since been deleted by the Tribunal and therefore, the penalty of Rs.92,233/- levied by the AO does not survive. On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the CIT(A).

3. We have heard the rival submissions and perused the relevant materials on record. It is found that the ITAT 'A' Bench Mumbai in assessee's own case for the impugned assessment year (ITA No. 6068/Mum/2014) *vide* order dated 30.10.2018 held :

"17. In the present case, undisputedly Mr. Dipendu Bapalal Shah is owner of HSBC Bank account, Geneva and the appellants are discretionary beneficiaries which leads to positive inference that the appellants are not the owners of the said bank account and hence the additions under Section 69A cannot be sustained. In the present case before us, admittedly both the appellants namely Deepak B. Shah and Kunal N. Shah are discretionary beneficiaries of the "Balsun trust" created by Mr. Dipendu Bapalal Shah and the two appellants have not made any contribution nor done any transaction with said trust at all. In our opinion in the case of discretionary trust, the income of the trust could not only be added in the hand of beneficiary but the trustees are the representative assesseees who are liable to be taxed for the income of the trust. If the discretionary trust has made some distribution of

income during the year in favour of the discretionary beneficiaries only then the distributed income is taxable in the hands of the beneficiaries but nothing of the sort has happened nor two appellants have received any money as distribution of income by the discretionary trust. So long as the money is not distributed by the discretionary trust, the same cannot be taxed in the hands of the beneficiaries. Similarly, the present case for us, the deposits held in HSBC, Geneva account cannot be taxed in the hand of beneficiaries/appellants at all.”

Thereafter, following the decision in *CIT v. Smt. Kamilini Khatau* 74 Taxman 392 (SC) and *CWT v. Estate of HMM Vikrasinhji of Gondal* 45 taxmann.com 552 (SC), the Tribunal further held :

“So applying the ratio laid down by the Hon’ble Apex Court in the above said two decisions, we are of the considered view that the additions cannot be made and sustained in the hands of the appellants as the Balsun trust is a discretionary trust created by the Mr. Dipendu Bapalal Shah and said trust has neither made any distribution of income nor did the two beneficiaries/appellants receive any money by way of distribution. While the department has failed to bring any conclusive evidence to establish nexus between these two appellants and bank account in HSBC, Geneva and more so when the Mr. Dipendu Bapalal Shah has owned the balance in the HSBC, Geneva bank account , we are not in agreement with the conclusions of the CIT(A) in sustaining the additions equal to fifty percent of the peak balance in the hands of both the appellants. Considering the facts of the two appellants in view of various decisions as discussed hereinabove we hold that order of CIT(A) is wrong in assuming that the said money may belong to these two appellants and such conclusion is against the facts on record and based on surmises and presumptions. Accordingly we set aside the order of Id. CIT(A) and direct the AO to delete the additions made u/s 69A in respect of HSBC

Bank account for assessment years 2006-07 and 2007-08 in the case of both the appellants before us.”

3.1 It is well settled that where the additions made in the assessment order on the basis of which penalty for concealment was levied are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be deleted.

In the case of *K.C. Builders v. ACIT* (2004) 265 ITR 562, 569 (SC), the Hon'ble Supreme Court has ruled that where the additions made in the assessment orders on the basis of which penalty for concealment was levied are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled.

4. In view of the above position of law, we delete the penalty of Rs.92,233/- levied by the AO u/s 271(1)(c) and allow the appeal.

**ITA No. 4653/MUM/2018**  
**Assessment Year: 2006-07**

5. The issue herein is the levy of penalty of Rs.10,000/- by the AO u/s 271(1)(b) of the Act. The AO levied the said penalty for the reason that there was non-compliance by the assessee to the notice u/s 142(1) issued by him.

In appeal, the Ld. CIT(A) confirmed the above penalty on the reason that the assessee was obliged to submit the

information/documents called for u/s 142(1) of the Act and by not submitting such 'Consent Waiver Form', the assessee is liable for penalty u/s 271(1)(b) of the Act.

6. Before us, the Ld. counsel submits that the assessee had filed a reply to the notice u/s 142(1) on 13.01.2014 before the AO stating that the assessee denied specifically any ownership of the bank account number 5090172770 alleged by the AO. Also the appellant submitted before the AO that he was not having any bank statements/CDs.

Further our attention was drawn to para 13 of the order of the ITAT 'A' Bench, Mumbai in assessee's own case for the impugned assessment year, wherein it is clearly stated that the appellant had filed sworn affidavit dated 05.11.2011 stating that he was not aware of the existence of any of the accounts in HSBC, Geneva and that he never carried out any transaction in relation to the said account with HSBC Bank, Geneva nor received any benefit from the said account.

Thus the Ld. counsel submits that the assessee had complied with the notice u/s 142(1) issued by the AO during the course of assessment proceedings and there was no necessity of imposing penalty of Rs.10,000/- u/s 271(1)(b) of the Act.

On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the CIT(A).

7. We have heard the rival submissions and perused the relevant materials on record. In the instant case, it is mentioned by the ITAT 'A'

Bench Mumbai in its order dated 30.10.2018 at para 13 for the impugned assessment year (ITA No. 6067/Mum/2014) that (i) the appellants also filed sworn affidavit dated 05.11.2011 stating that they were not aware of the existence of any of the accounts in HSBC, Geneva and that they never carried out any transaction in relation to the said account with HSBC Geneva nor received any benefit from the said account, (ii) the appellant has also filed a clarificatory letter from HSBC Geneva stating that he has neither visited nor opened nor operated the bank accounts and that no payments have been received from them nor made to them in relation to the said account.

Further, it is found that the appellant had filed before the AO a reply to the notice u/s 142(1) on 13.01.2014 stating that he was not the owner of the said bank account number 5090172770. Further, it was explained by the appellant to the AO that to sign such a 'Consent Waiver Form' would tantamount to making a false statement/acknowledgement that he was in some manner concerned with the alleged bank account.

The main submission of the appellant before the AO in response to the show cause notice issued before imposing penalty u/s 271(1)(b) was that the non-submission of the 'Consent Waiver Form' is not a non-compliance to the notice u/s 142(1) of the Act.

In view of the above compliance by the appellant, we are of the considered view that the levy of penalty of Rs.10,000/- by the AO u/s 271(1)(b) is not justifiable. Accordingly, we delete it.

8. To sum up, the appeal filed by the assessee against the levy of penalty u/s 271(1)(c) for AY 2007-08 and penalty u/s 271(1)(b) for AY 2006-07 are allowed.

**Order pronounced in the open Court on 22/10/2019.**

**Sd/-**  
(VIKAS AWASTHY)  
JUDICIAL MEMBER  
Mumbai;

**Sd/-**  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Dated: 22/10/2019

*Rahul Sharma, Sr. P.S.*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)  
**ITAT, Mumbai**