

**आयकरअपीलीयअधिकरण,सुरतन्यायपीठ,सुरत**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**SURAT BENCH, SURAT**  
**BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER**  
**AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**  
**आ.अ.सं./I.T.A No.3133/AHD/2014 & 307/AHD/2015**  
**निर्धारणवर्ष/Assessment Year: 2009-10**

Semadri Bhagvan Pradhan, 176, Indira Nagar, Hira Baug, Varachha Road, Surat <b>[PAN: AKSPP 3368 C]</b>	Vs.	Income Tax Officer, Ward-9(4), Surat.
<b>अपीलार्थी / Appellant</b>		<b>प्रत्यर्थी/Respondent</b>
राजस्वकीओरसे /Revenue by		Shri P.M. Jagasheth, CA
निर्धारितीकीओरसे /Assessee by		Smt. Anupama Singhla, Sr. DR
<b>सुनवाईकीतारीख/ Date of hearing:</b>		05.12.2019
<b>उद्घोषणाकीतारीख/Pronouncement on:</b>		09.12.2019

**आदेश /O R D E R**

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

1. These two appeals filed by the Assessee are directed against the order of Ld. Commissioner of Income Tax (Appeals)-V, Surat [in short “the CIT(A)”] dated 08-09-2014 and the order of Ld. Commissioner of Income Tax (Appeals)-III, Surat [in short “the CIT(A)’] dated 23-12-2014 for the assessment year 2009-10 respectively.

2. Additional grounds during the course of appellate proceedings, the assessee has raised additional grounds, which are 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 enhancing the addition to the tune of Rs.40,81,465/- u/s.251(10) of the I.T. Act, 1961 on account of cash deposited in Bank accounts treated as alleged unexplained cash deposits.*
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 not offered adequate opportunity to hear the case, hence, the case may please be allowed and set aside to the CIT(A), Surat.*

3. *I am filling herewith the Additional Grounds of appeal which may kindly be taken on record, and oblige.*

3. The ld. counsel submitted that additional ground be admitted as it is emanating from the appellate order wherein the CIT(A) has enhanced the addition to the tune of Rs.40,81,465/- in support of this the ld. counsel is placed reliance on the decision of Jute Corporation of India Ltd v. CIT (1991) 187 ITR 688 (SC).

4. *Per contra*, the ld. Departmental Representative (DR) has opposed the admission of additional ground.

5. We have heard the rival submissions and perused the relevant material available on record. We find that the additional ground is an extension of the original ground taken by the assessee in respect of addition of Rs.6,76,372/- made on account of peak balance and GP additions, which has been enhanced by the CIT(A) to Rs.40,81,465/- resulting in further the addition of Rs.34,01,665/-. Hence, the additional ground is the emanating from the appellate order of the CIT(A), therefore same is allowed to be admitted in the light of the decision of Hon'ble Supreme Court in the case of Jute Corporation of India Ltd.(supra).

6. Now, we will proceeded on merits of both the grounds with additional ground and the original ground of appeal, in respect of addition of Rs.6,76,372/- which has been enhanced to Rs.40,81,465/-. Since, both the grounds are inter-connected, the same are being considered together.

7. Brief facts of the case are that the AO had received an AIR information that the assessee has made deposits of Rs.34,01,055/- in his saving bank account with ICICI Bank Limited during the year under consideration. Therefore, the assessee was asked to explain the source of cash deposited in the said bank account. However, no response has been received from the assessee, therefore, after verification of the bank statements of the ICICI Bank, the AO noted that peak balance has been reflected at Rs.1,12,972/- on 18-09-2008. The AO further noted that as far as the remaining credit of Rs.28,17,000/- is concerned, the GP of the same at the rate of 20% was estimated which work out to Rs.5,63,400/-. Accordingly, the AO made addition of Rs.6,76,372/- being peak balance of Rs.1,12,972/- and GP @ 20% of Rs.28,17,000/- i.e. Rs.5,63,400/-.

8. Being aggrieved, the assessee carried the matter before the Id. CIT(A). However, the CIT(A) observed that the addition has been made by the AO is without any basis as no details have been given that how the peak credit has been worked out and what is the basis the GP, as no explanation regarding source of cash deposits have been provided by the appellant, therefore the working of the peak credit is erroneous and incorrect, hence a notice to the enhancement u/s.251(1) r.w.s 251(2) was issued to the assessee on 13-02-2014 asking as to why, the cash deposit of Rs.34,10,055/- should not be treated as income from undisclosed sources. In respect of which, it was explained that the assessee has not filed his return of income for AY 2009-10 for the simple reason that his income does not exceed the amount which is taxable as

per income tax. The assessee used to deposit specific amount to cash with the ICICI Bank account and withdrawal the same as required through ATM. However, the deposit of cash and withdrawal of cash are the same amount with some minor difference, hence the question of any addition does not exist. However, the AO, in spite of this, added peak credit as income of the assessee and subsequently made estimate 20% net profit of the same. However, the CIT(A) was not convinced and accordingly treated the whole amount of cash deposit of Rs.34,01,055/- as income from undisclosed income sources, accordingly the addition of Rs.6,76,372/- made by the AO was enhanced to Rs.40,81,465/-.

9. Being aggrieved, the assessee filed this appeal before this Tribunal. The ld. counsel submitted that the Bank account with the ICICI bank account shows the cash deposits and the equal amount of cash withdrawals through ATM. The ld. AO has adopted peak on the basis that the entire amount of deposits in the bank account cannot be considered as income of the assessee. The ld. counsel submitted the chart showing cash deposits and cash withdrawals, according to which peak balance is as on 18-09-2019 comes to at Rs.1,68,025/- as against Rs.1,12,972/- considered by the AO. This is due to the fact that the assessee has considered both the saving bank accounts and worked out the peak. The ld. counsel contended that additions can only be made of peak amount and not entire cash deposits. The ld. counsel supported his view by placing reliance on the decision of Hon'ble Gujarat High Court in the case of CIT v. Tirupati Construction Company (2015) 55 taxmann.com 308 (Guj.), wherein it was held that where the AO did not

consider explanation as tender by the assessee, the amount recorded in assessee's diary and also overlooked as peak credit working given by the assessee to the income, it was directed that income to be determined on the basis of highest peak of unexplained receipts and payments. The ld. counsel further placed reliance on the decision of Co-ordinate Bench of Surat in the case of Smt. Prativa Naresh Chidipal v. ITO [ITA No. 1150/AHD/2014 dated 10-08-2018], wherein the bench held that the entire cash deposits cannot be considered as undisclosed income of the assessee, hence, the benefit of cash withdrawal is required to be considered. The ld. counsel further placed reliance in the case of Patel Prahladbhai Harjivanbhai v. ITO [ITA No.1347/AHD/2012, ITAT Ahmedabd 'C' Bench, dated 15-03-2013], wherein on the basis of cash withdrawals and cash deposits. No addition was held to be sustained.

**10.** *Per contra*, the ld. Sr. DR supported the order of the ld. CIT(A), enhancing the addition made by the AO and submitted that the assessment was made u/s.144 as assessee is not furnished any explanation thereto. The Bank accounts were not disclosed by the assessee; therefore the addition has been rightly made.

**11.** We have heard the rival submissions and perused the relevant material available on record. We find that the bank account of the assessee is showing cash deposits and simultaneously cash withdrawals within a day or today. Therefore, the entire cash deposits cannot be treated as unexplained as there is the debit and credit on both account. It is further discernable from the pattern of cash deposit as reflected from the bank account that these deposits are simultaneously being

withdrawn. Therefore, in such a situation the only course of action is to consider the peak balance for addition, which is supported by various decisions cited by ld. counsel. We find that the peak balance as on 18-09-2019 is at Rs.1,68,025/- accordingly the addition of Rs.40,81,465/- is restricted to peak balance of Rs.1,68,025/-. Accordingly, all the above grounds of appeal are partly allowed.

**12.** In the result, the appeal of the assessee is partly allowed.

**In ITA NO. 307/AHD/2015, for the A.Y. 2009-10:-**

**13.** These all grounds relates to confirming the penalty of Rs.1,76,700/- u/s.271(1)(c) of the Act.

**14.** Brief facts are that the AO has levied a penalty of Rs.1,76,700/- for concealment of income of Rs.6,76,372/- being peak balance of Rs.1,12,972/- and GP addition of Rs.5,63,400/-.

**15.** Being aggrieved, the assessee carried the matter before the CIT(A). Further, the CIT(A) confirmed the same by observing that the assessment was made u/s.144 of the Act and no explanation was furnished against the penalty order in spite of opportunities given to the assessee.

**16.** Being aggrieve, the assessee filed this appeal before this Tribunal. The ld. counsel referred the last page of the assessment order by which penalty proceedings initiated u/s.271(1)(c) r.w.s 274 for inaccurate particular thereby the concealing the income. The ld. counsel placed reliance on the decision of Hon'ble Gujarat High Court in the case of CIT v. Manu Engineering Works (1980) 122 ITR 306 (Guj.), and submitted that for imposing penalty the AO should give on the definite basis of

concealment and or furnishing of inaccurate particular of incomes. Therefore, when the assessee has not filed any return of income there is no question of furnishing inaccurate particulars of income, therefore penalty imposed by the AO is not sustainable in law. The ld. counsel further placed reliance on the decision of Gujarat High Court in the case of CIT v. Lakhdhir Lalji (1972) 85 ITR 77 (Guj.), wherein the penalty proceedings having been initiated against the assessee on the basis of concealment of income and imposed on the basis of furnishing of inaccurate particulars of as income is held not to be justified. The ld. counsel also relied in the case of CIT v. Samson Perichery [2017] 392 ITR 4 (Bom.)

**17.** *Per contra*, the ld. DR supported the order of the lower authorities.

**18.** We have heard the rival submissions and perused the relevant material available on record. We find that the penalty u/s.271(1)(c) was initiated for furnishing inaccurate of particular of incomes, whereas the penalty has been imposed by the AO on account of concealment of income. Therefore, the penalty is not tenable in law, in the light of decision of Hon'ble Bombay High Court in the case of CIT v. Samson Perinchery (2017) 392 ITR 4 (Bom.), wherein it was held that where the AO was initiated penalty proceedings for furnishing inaccurate particulars of income and imposing penalty for concealment of income, the order imposing penalty had to be made only on ground of which penalty proceedings had been initiated and it could not be on fresh ground of which assessee had no notice, penalty has to be deleted.

Considering these facts, further placing reliance in the case of Manu Engineering (supra), Lakhdhir Lalji (supra) and Samson Perichery (supra), we are of the considered opinion that penalty levied u/s.271(1)(c) is not sustainable in law as no specific charge was levied, hence it is cancelled. Accordingly, the appeal of the assessee is allowed.

**19.** In the result, the appeal of the assessee in ITA No.3133/AHD/2014 for the AY 2009-10, is partly allowed and in ITA No. 307/AHD/2015 for the AY 2009-10 is allowed.

**20.** Order pronounced in the open court on 09.12.2019.

Sd/-  
**(SANDEEP GOSAIN)**  
**JUDICIAL MEMBER**

Sd/-  
**(O.P.MEENA)**  
**ACCOUNTANT MEMBER**

सुरत/ Surat, दिनांक Dated: 9<sup>th</sup> December, 2019/S. Samanta, PS  
Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

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**By order**  
**Assistant Registrar, Surat**