

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“SMC” BENCH, AHMEDABAD**  
**BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT**

ITA No. 2508/Ahd/2017  
Assessment Year : 2010-11

|   |     |  |
|---|-----|--|
| M/s Jalaram Investment,<br>Opp. Jain Temple, Gayatri Nagar,<br>Wanakbori, Tal. Thasra,<br>Dist. Kheda<br>[PAN : AAEFJ 9906 E] | Vs. | Income Tax Officer,<br>Ward-3,<br>Nadiad |
| <b>अपीलार्थी/ (Appellant)</b>   |     | <b>प्रत्यर्थी/ (Respondent)</b>          |
| Assessee by :   |     | Shri Mehul Talera, AR                    |
| Revenue by :  |     | Shri Dilip Kumar, Sr DR                  |

**सुनवाई की तारीख/Date of Hearing : 04/02/2020**  
**घोषणा की तारीख /Date of Pronouncement: 05/02/2020**

**आदेश/O R D E R**

The assessee is in appeal before the Tribunal against the order of learned CIT(A)-2, Vadodara dated 31.08.2017 passed for Assessment Year 2010-11. Though the assessee has taken three grounds of appeal which include sub-grounds also, but its grievances revolve around a single issue namely the learned CIT(A) has erred in upholding the penalty of Rs.84,850/- imposed by the Assessing Officer under Section 271(1)(c) of the Income-tax Act.

2. The brief facts of the case are that the assessee has filed its return of income on 22.09.2011 declaring total income of Rs.1,42,000/- and claimed refund of Rs.1,71,848/-. A notice under Section 148 of the Income-tax Act was issued on 06.05.2013 and in response to this notice, the assessee has filed its return of income on 02.07.2013 declaring total income of Rs.1,85,780/-. The learned Assessing Officer has passed an assessment order on 09.03.2015. He determined the total taxable income of the assessee at Rs.8,31,581/-. In the present appeal, our concern relates to the inclusion of additional income in the return filed in response to notice under Section 148 of the Act as well as the additions made and sustained by the CIT(A). These amounts are as under:-

*"In this return, the assessee disclosed additional income under the following heads:-*

|      |                     |   |                    |
|------|---------------------|---|--------------------|
| I)   | Donation expenses   | : | Rs.11,000/-        |
| II)  | Income-tax expenses | : | Rs.28,076/-        |
| III) | Excess depreciation | : | <u>Rs. 4,706/-</u> |
|      | Total               |   | <u>Rs.43,782/-</u> |

*While completing the assessment u/s 143(3) r.w.s. 147, the Assessing Officer made further additions which have been sustained in first appeal and the same are as under:*

|      |   |   |                |
|------|---|---|----------------|
| i)   | Commission income not disclosed           | : | Rs. 9,526/-    |
| ii)  | Disallowance of advertisement expenses    | : | Rs. 8,000/-    |
| iii) | Interest u/s 244A not disclosed           | : | Rs. 9,460/-    |
| iv)  | Disallowance of trade settlement expenses | : | Rs.2,10,800/-" |

3. The Assessing Officer has computed the penalty of Rs.84,850/- on above additions. The penalty order passed by the learned Assessing Officer has been confirmed by the learned First Appellate Authority.

4. While impugning the orders of the Revenue Authorities, the learned Counsel for the assessee has raised multiple propositions. In his first fold of contentions, he submitted that the penalty was initiated in the assessment order for furnishing inaccurate particulars of income. For buttressing his contentions, he took me to the last page of the assessment order wherein the Assessing Officer has observed that the penalty proceedings under Section 271(1)(c) of the Act have also been initiated separately for furnishing inaccurate particulars of income. He further contended that in the show-cause notice issued under Section 274 r.w.s. 271(1)(c) of the Act, learned Assessing Officer has again observed that the penalty proceedings have been initiated for concealment of income/furnishing inaccurate particulars of income. For buttressing this fact, he also took me to page no. 8 of the paper-book where copy of the show-cause notice dated 25.02.2016 has been placed on record. He

pointed out that in the penalty order learned Assessing Officer has not recorded any conclusive finding as to whether the assessee is being visited with penalty for concealment of income or for furnishing of inaccurate particulars of income. According to learned Counsel for the assessee, the penalty order is silent in this regard. The Assessing Officer has only observed that *"I am, therefore, satisfied that the assessee has committed a default within the meaning of section 271(1)(c) of the Act for which no explanation has been advanced by the assessee"*. According to the learned Counsel for the assessee, this observation is not in consonance with the requirement of law. He has to record a categorical finding as to whether the assessee is being visited with penalty for concealment of income or for furnishing inaccurate particulars of income.

5. In his next fold of submissions, he contended that the notice under Section 148 of the Act was issued by the Assessing Officer on 6<sup>th</sup> May 2013. Prior to that notice, the assessee itself could realize the mistake in its return and wrote a letter to the Assessing Officer on 22.03.2013 wherein the assessee itself had offered donation of Rs.6,302/- and Income-tax of Rs.1,00,982/-. According to the learned Counsel for the assessee, the items which have been considered for visiting the assessee with penalty on additional income declared by the assessee are concerned, those facts have already been brought by the assessee to the notice of Department before the initiation of reassessment proceedings. With regard to the additions made by the learned Assessing Officer are concerned, he pointed out that major items relate to disallowance of trade settlement expenses. The Assessing Officer made an addition of Rs.3,55,010/-, out of which learned CIT(A) has deleted Rs.47,567/- out of Rs.1,47,567/- relating to J.K. Securities Pvt Ltd and similarly Rs.96,641/- out of Rs.1,96,641/- incurred through J.K. Securities Pvt Ltd. In other words, against the total disallowance of Rs.3,55,010/-, learned CIT(A) has confirmed the addition to the extent of Rs.2,10,800/-. This is an ad-hoc disallowance and no penalty deserves to be levied upon the assessee *qua* this addition. Others are also ad-hoc

disallowances namely advertisement expenses, commission expenses and interest under Section 244A of the Act. Thus, learned Counsel for the assessee emphasized that no penalty ought to be imposed upon the assessee.

6. On the other hand, learned Departmental Representative contended that the assessee got information that a notice under Section 148 would be issued upon it; therefore, it had filed a letter dated 22.03.2013 admitting certain errors in its return. As far as the other items are concerned, learned CIT(A) considered all these facts and thereafter confirmed the penalty.

7. We have heard rival submissions and gone through the record. Section 271(1)(c) of the Income-tax Act, 1961 has direct bearing on the controversy. Therefore, it is pertinent to take note of the section.

*"271. Failure to furnish returns, comply with notices, concealment of income, etc.*

*(1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person*

*(a) and (b)\*\* \*\**

*(c) has concealed the particulars of his income or furnished inaccurate particulars of such income.*

*He may direct that such person shall pay by way of penalty.*

*(i) and (Income-tax Officer,\*\* \*\**

*(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:*

*Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,*

*(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or*

*(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

8. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section are deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of *Explanation I* to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any

explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given *bona fide* and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in *Explanation 1* appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations, then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

9. In the light of above, if I examine the facts, then it would reveal that before issuance of notice under Section 148 of the Income-tax Act, assessee itself has brought certain errors in its computation of income to the notice of the Department. Therefore, it shows that there is no deliberate attempt at the end of the assessee to withhold the information. Similarly, the Assessing Officer has made ad-hoc disallowance out of trade settlement expenses, advertisement expenses and commission income etc. Learned CIT(A) has already reduced the disallowance out of trade settlement expenses in the quantum proceedings. Thus, considering the explanation of the assessee, more so in the light of failure of the Assessing Officer to record a categorical finding as to whether the assessee is being visited with penalty for concealment of income or for furnishing inaccurate particulars of income, I am of the view that the assessee does not deserve to be visited with penalty. The penalty proceedings were initiated for furnishing of inaccurate particulars of income.

In the show-cause notice, the Assessing Officer has used both the options i.e. for concealment of income or for furnishing inaccurate particulars of income. So far as the show-cause notice is concerned, I am of the view that this defect is not fatal to the proceedings in view of the judgment of Hon'ble jurisdictional High Court in the case of Snita Transport P. Ltd. Vs. ACIT, (2014) reported 42 taxmann.com 54 (Guj) wherein the Hon'ble High Court has observed that for providing an opportunity to the assessee for explaining its position, the Assessing Officer may use expression "or" in between the 'concealment of income' and 'furnishing inaccurate particulars of income' in the show-cause notice; but for visiting the assessee with penalty, the Assessing Officer has to record a conclusive finding. The discussion made by the Hon'ble jurisdictional High Court in this regard in the case of Snita Transport P. Ltd. (supra), particularly para no. 9, reads as under:--

*"9. Regarding the contention that the Assessing Officer was ambivalent regarding under which head the penalty was being imposed namely for concealing the particulars of income or furnishing inaccurate particulars, we may record that though in the assessment order the Assessing Officer did order initiation of penalty on both counts, in the ultimate order of penalty that he passed, he clearly held that levy of penalty is sustained in view of the fact that the assessee had concealed the particulars of income. Thus insofar as final order of penalty was concerned, the Assessing Officer was clear and penalty was imposed for concealing particulars of income. In light of this, we may peruse the decision of this Court in case of Manu Engineering Works (supra). In the said decision, the Division Bench came to the conclusion that language of "and/or" may be proper in issuing a notice for penalty, but it was incumbent upon the Assessing Authority to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by them. If no such clear cut finding is reached by the authority, penalty cannot be levied. It was a case in which in final conclusion the authority had recorded that "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income." It was in this respect the Bench observed that "Now the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No*

*such clear cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."*

10. After examining the record with all possible angles and in the light of above judgment of Hon'ble Gujarat High Court in the case of Snita Transport P. Ltd. (supra), I am of the view that the assessee does not deserve to be visited with penalty. Accordingly, the appeal of the assessee is allowed and the penalty is deleted.

11. In the result, the appeal of the assessee is allowed.

**Order pronounced in the Court on 5<sup>th</sup> February, 2020 at Ahmedabad.**

Sd/-

**(RAJPAL YADAV)  
VICE PRESIDENT**

Ahmedabad; Dated 05/02/2020

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आदेश की प्रतिलिपि अग्रहित/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)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

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