

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “A” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

**ITA. No: 570/AHD/2018
(Assessment Year: 2011-12)**

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| Kavitaben Luhana 1215/2, Opp. Swaminarayan Complex, Bamroli Road, Godhra PAN No. AATPL5996P | V/S | The Dy. Commissioner of Income Tax Central Circle- 1, Baroda |
| (Appellant) | | (Respondent) |

**ITA. Nos: 571 to 574/AHD/2018
(Assessment Years: 2010-11 to 2013-14)**

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| Rohit S. Luhana Opp. Swaminarayan Complex, Bamroli Road, Godhra PAN No. AAZPL 7925L | V/S | The Deputy Commissioner of Income Tax Central Circle-1, Baroda |
| (Appellant) | | (Respondent) |

**ITA. Nos: 575 to 577/AHD/2018
(Assessment Years: 2011-12 to 2013-14)**

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| Sheelaben D Manglani 1, Sant Kawar Ram Faliya, Baharpura, New Civil Hospital, Godhra PAN No. ADFPM4823K | V/S | The Assistant Commissioner of Income Tax Central Circle-1, Baroda |
| (Appellant) | | (Respondent) |

ITA. Nos: 578 to 580/AHD/2018
(Assessment Years: 2011-12 to 2013-14)

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| Ravikant D. Manglani 1, Baharpura, Godhara PAN No. AGJPM1372L | V/S | The Assistant Commissioner of Income Tax Central Circle-1, Baroda |
| (Appellant) | | (Respondent) |

Appellant by : Shri Ketan H. Shah, A.R.
**Respondent by : Smt. Aparna Agarwal, CIT/DR
and Shri Deelip Kumar, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 24 -12-2019
Date of Pronouncement : -01-2020

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. These 11 appeals are filed by the Assessee are directed against the order of the Ld. CIT(A) and all are arising from the search of same group of a Dhanjimama Group dated 03.07.2012. Only Assessee and Assessment Years are different otherwise facts and circumstances of all the Assessee are common. Therefore, for the sake of brevity, we would like to dispose of all the appeals by way of the common order.
2. In this case, we take up ITA No. 570/Ahd/2018 for A.Y. 2011-12 in the case of Kavitaaben Luhana, the assessee has taken following grounds of appeal:

1.00 IMPOSITION OF PENALTY TO THE TUNE OF RS. 26,05,572 /- ON ADDITION MADE ON ACCOUNT OF UNDISCLOSED INCOME.

1.01 On the facts and circumstances of appellant's case and m law, the Id. CIT (Appeals) has erred \n confirming the levy of penalty to the tune of Rs. 26,05,572-

under section 271(1)(C) of the Act by the Id. AO on addition made on account of disclosure of additional income while filing return as part of search proceedings.

While doing so, the Hon'ble CIT (Appeal) failed to appreciate that there was no addition made by the Id. AO during the course of assessment proceedings u/s 143(3) r.w.s 153A of the Act to the returned income under section 153A of the Act, and therefore appellant cannot be treated to be assessee concealing income.

1.02 Your appellant prays to hold so now and delete the impugned penalty.

2.00 YOUR APPELLANY CRAVES LEAVE TO ADD, AMEND AND /OR DELETE ALL OR ANY GROUND(S) TAKE HEREINABOVE.

3. Facts of the case as emanated from the penalty order:

"In this case, the disclosure of Rs. 84.75.630/- was made due to search and thus this amount was undisclosed income of the assessee for the specified year on which penalty proceedings u/s 271(l)(c) of the Act were initiated for concealment of particulars of income. A notice u/s 271(l)(c) dated 30.01.2015 was issued and duly served upon the assessee to show cause as to why penalty u/s 271(l)(c) of the IT Act should not be imposed. In response, the assessee did not submit any reply. Subsequently, the assessee was, in the interest of justice, given a final opportunity vide this office letter dated 14.05.2015 and was requested to either submit his explanation on or before 30.05.2015. as to why penalty should not be imposed or if he wishes to be heard in person, either he or his authorised representative may appear on or before that date. In response, the assessee filed his reply in this office on 10.06.2015. The contentions of the assessee are reproduced as under:-

"/ have received captioned letter dated 14/05/2015 with regards to penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961 ('the Act' for short) for A.Y.2011-12. In that respect I wish to submit as under:

1. I had filed return of Income for A.Y.2011-12 and assessment was completed u/s 153A r.w.s 143(3) of the Act without making any addition to my returned income. However, while passing assessment order for said assessment year, you have mentioned as under:

"The assessee in his return of income has offered additional income of Rs. 84,75,630/- which is as per the disclosure of additional income made during the course of search proceedings. This addition income has been offered due to search action and the findings thereof, thus the amount of Rs.84,75,630/- is undisclosed income of the assessee. Therefore, penalty proceedings u/s 271(l)(c) of the IT Act are initiated for this default." The said income of Rs. 84,75,630/- earned from profit on sale of land or building.

2. I further wish to inform you that though I have filed return u/s 153A of the Act and certain amount was declared as additional income in the return, the same does not amount to income being declared under search proceedings. The declaration of additional income in the return was a voluntary act. Therefore said additional income does not have a character of undisclosed income found in search proceedings. In view thereof no penalty is liveable u/s 271(l)(c) of the Act on that basis.

3. I further wish to inform you that, new section 271AAB of the Act relating to penalty where search has been initiated on or after 01.07.2012 is inserted by the Finance Act, 2012 and the same has been made effective from 01.07.2012. Therefore for any undisclosed income found during search proceedings there is separate penal provisions u/s 271AAB of the Act and penalty is not liveable u/s 271(l)(c) of the Act.

4. But ld. A.O. was not convinced with the plea of the assessee and imposed penalty of Rs. 26,05,572/-.
5. Against the imposition of penalty, assessee preferred first statutory appeal before the ld. CIT(A) who confirmed the action of the ld. A.O.
6. Now assessee has come before us.
7. In this case, a search /survey u/s 132/133A was conducted in the Dhanjimama Group of cases on 03.07.2012. In the search/survey proceedings, based on documents found, the partner of the assessee firm on behalf of the firm has disclosed an amount of Rs. 26,05,572/- for the year under consideration.
8. The revenue contention is that the disclosure of Rs. 26,05,572/- was made due to search and survey at the premises of Dhanjimama Group where assessee is partner of the firm.
9. On the other hand, ld. A.R. contention is that no search and survey has taken place at the premises of the assessee and assessee has voluntarily disclosed the income of the department. Thus, in such case, penalty cannot be imposed.

10. And further stated that in a recent decision of Supreme Court in the case of Rajkumar Gulab Badgjar 111 Taxmann.com 257 wherein it is held that wherein the returned income has been accepted u/s 153C and therefore, it is held that in such case, penalty cannot be imposed.

11. Ld. A.R. also cited an order of Co-ordinate Bench in the matter of Parag V. Chugh vs. DCIT in ITA Nos. 581 to 586/Ahd/2018 wherein in similar facts and circumstances of the case ITAT has decided the matter in favour of the assessee with following observation:

17. The assessee has disclosed additional income of 6,34,172.00 in pursuance to the return filed under section 153A of the Act. The AO accordingly on such additional income disclosed by the assessee levied the penalty at the rate of 10% of additional income being 63,417.00 under the provisions of section 271AAB of the Act. The learned CIT (A) also confirmed the order of the AO.

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

18. The learned AR before us submitted that there was no undisclosed income available to the assessee within the meaning of explanation (c) to section 271 AAB of the Act. Therefore, there cannot be any penalty.

19. On the other hand, the learned DR vehemently supported the order of the authorities below.

20. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the explanation © to section 271AAB of the Act has a direct bearing on the on the issue on hand which reads as under:

"48[Penalty where search has been initiated.

271AAB. (1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of July, 2012 49[but before the date on which the Taxation Laws (Second Amendment) Bill, 2016 receives the assent of the President50], the assessee shall pay by way of penalty, in addition to tax, if any, payable by him,--

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(c) "undisclosed income" means--

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has--

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or (B) otherwise not been disclosed to the 54[Principal Chief Commissioner or] Chief Commissioner or 54[Principal Commissioner or] Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.]"

From the above provision, it is clear that the penalty shall be imposed under section 271AAB of the Act where there is undisclosed income within the meaning of the explanation © to 271AAB of the Act. However, we note that there was no documentary evidence found by the search team suggesting that there was any undisclosed income of the assessee. As such the income disclosed by the assessee was voluntarily without having found any document in the course of search. We also note that there no reference made by the authorities below to the documents of incriminating nature having bearing on the income of the assessee in their respective orders. The Id. DR has not advanced any arguments against the contentions raised by the Id. AR for the assessee. In holding so we draw support and guidance from the order of the Tribunal in the case of ACIT Vs. Marvel Associates reported in 170 ITD 353 wherein it was held as under:

"9. Penalty u/s 271AAB attracts on undisclosed income but not on admission made by the assessee u/s 132(4). The AO must establish that there is undisclosed income on the basis of incriminating material. In the instant case a loose sheet was found according to the A.O., it was incriminating material evidencing the undisclosed income. In the penalty order the AO observed that loose sheet shows the cost per square feet is Rs.3571/- per sft. and assessee stated to have submitted in sworn statement cost per sq. feet at Rs.2200/- to Rs.2300/- per sq. feet. However neither the AO nor the Ld.CIT(A) has verified the cost of construction with the books and projections found at the time of search. The counsel argued that it was mere projection but not the actuals. The write up heading also mentioned that summary of the projected profitability statement. There is no evidence to establish that projections reflected in the loose sheet is real. No other material was found during the course of search indicating the undisclosed income. There was no money, bullion, jewellery or valuable article or thing or entry in the books of accounts or documents transactions were found

during the course of search indicating the assets not recorded in the books of accounts or other documents maintained in the normal course, wholly or partly. The revenue did not find any undisclosed asset, any other undisclosed income or the inflation of expenditure during the search/ assessment proceedings. Though a loose sheet of page No.107 of Annexure A/GS/MA/1 was found that does not indicate any suppression of income but it is only projection of profit statement. The amount of Rs.3571/- mentioned in the projections refers to cost and profit which is approximate sale price but not the cost as stated by the AO in the penalty order. The cost of construction in the projections projected at Rs.2177/- which is in synch with the statement given by the assessee. The AO was happy with the disclosure given by the assessee and did not verify the factual position with the books of accounts and projections and bring the evidence to unearth the undisclosed income. Neither the A.O. nor the investigation wing linked the cost of profit or cost of asset to the entries in the books of accounts or to the sales conducted by the assessee to the sale deeds. Therefore, we are unable to accept the contention of the revenue that the loose sheet found during the course of search indicates any undisclosed income or asset or inflation of expenditure. The Hon'ble ITAT Delhi Bench in the case of Ajay Sharma v. Dy.CIT [2013] 30 taxmann.com 109 held that with respect to the addition on account of alleged receivables as per seized paper, there is no direct material which leads and establishes that any income received by the assessee has not been declared by the assessee. An addition has been made on the basis of loose document, which did not closely prove any concealment or furnishing of inaccurate particulars by the assessee. Hence penalty u/s 158BFA (2) of the Act is not leviable. The facts of the assessee's case shows that there was no undisclosed income found during the course of search and no incriminating material was found, hence we hold that there is no case for imposing penalty u/s 271AAB of the Act, accordingly, we set aside the order of the lower authorities and cancel the penalty u/s 271AAB of the Act."

In view of the above, we are not convinced with the penalty levied by the authorities below. Hence we reverse the order of the authorities below and direct the AO to delete the penalty levied by him under section 271 AAB of the Act. Hence the ground of appeal of the assessee is allowed.

21. In the result the appeal of the assessee is allowed.

22. In the combined result, all the six appeals filed by the assessee are allowed.

12. Respectfully following the judgment of Hon'ble Supreme Court and in parity with the Co-ordinate Bench of ITAT, we allow the appeal of the assessee.

13. Now we come to ITA Nos. 571 to 574/Ahd/2017 for A.Ys. 2010-11 to 2013-14 in the case of Rohit S. Luhana, assessee has taken following grounds of appeal:

1.00 IMPOSITION OF PENLATY TO THE TUNE OF RS. 5,79,380 /- ON ADDITION MADE ON ACCOUNT OF UNDISCLOSED INCOME.

1.01 On the facts and circumstances of appellant's case and in law, the Id. CIT (Appeals) has erred in confirming the levy of penalty to the tune of Rs. 5,79,380/- under section 271(1)(C) of the Act by the Id. AO on addition made on account of disclosure of additional income while filing return as part of search proceedings.

While doing so, the Hon'ble CIT (Appeal) failed to appreciate that there was no addition made by the Id. AO during the course of assessment proceedings u/s 143(3) r.w.s 153A of the Act to the returned income under section 153A of the Act, and therefore appellant cannot be treated to be assessee concealing income.

1.02 Your appellant prays to hold so now and delete the impugned penalty.

2.00 YOUR APPELLANY CRAVES LEAVE TO ADD, AMEND AND /OR DELETE ALL OR ANY GROUND(S) TAKE HEREINABOVE.

14. Since on similar facts and circumstances of the case, we have given relief to the assessee in connected ITA No. 570/Ahd/2018. Thus, in parity with the said appeal, we allow the appeal of the assessee.

15. Now we come to ITA Nos. 575 to 577/Ahd/2018 for A.Ys. 2011-12 to 2013-14 in the case of Sheela D. Mangalani , assessee has taken following grounds of appeal:

1.00 IMPOSITION OF PENLATY TO THE TUNE OF RS. 61,43,570 /- ON ADDITION MADE ON ACCOUNT OF UNDISCLOSED INCOME.

1.01 On the facts and circumstances of appellant's case and in law, the Id. CIT(Appeals) has erred in confirming the levy of penalty to the tune of Rs. 61,43,750/- under section

271(1)(C) of the Act by the Id. AO on addition made on account of disclosure of additional income while filing return as part of search proceedings.

While doing so, the Hon'ble CIT (Appeal) failed to appreciate that there was no addition made by the Id. AO during the course of assessment proceedings u/s 143(3) r.w.s 153A of the Act to the returned income under section 153A of the Act, and therefore appellant cannot be treated to be assessee concealing income.

1.02 Your appellant prays to hold so now and delete the impugned penalty.

2.00 YOUR APPELLANY CRAVES LEAVE TO ADD, AMEND AND /OR DELETE ALL OR ANY GROUND(S) TAKE HEREINABOVE.

16. Since similar facts and circumstances of the case, we have given relief to the assessee in connected ITA No. 570/Ahd/2018. Thus, in parity with the said appeal, we allow the appeal of the assessee.

17. Now we come to ITA Nos. 578 to 580/Ahd/2018 for A.Ys. 2011-12 to 2013-14 in the case of Ravikant D. Mangalani, assessee has taken following grounds of appeal:

1.00 IMPOSITION OF PENLTY TO THE TUNE OF RS. 1,55,16,790 /- ON ADDITION MADE ON ACCOUNT OF UNDISCLOSED INCOME.

1.01 On the facts and circumstances of appellant's case and in law, the Id. CIT (Appeals) has erred in confirming the levy of penalty to the tune of Rs. 1,55,16,790/- under section 271(1)(C) of the Act by the Id. AO on addition made on account of disclosure of additional income while filing return as part of search proceedings.

While doing so, the Hon'ble CIT (Appeal) failed to appreciate that there was no addition made by the Id. AO during the course of assessment proceedings u/s 143(3) r.w.s 153A of the Act to the returned income under section 153A of the Act, and therefore appellant cannot be treated to be assessee concealing income.

1.02 Your appellant prays to hold so now and delete the impugned penalty.

2.00 YOUR APPELLANY CRAVES LEAVE TO ADD, AMEND AND /OR DELETE ALL OR ANY GROUND(S) TAKE HEREINABOVE.

18. Since similar facts and circumstances of the case, we have given relief to the assessee in connected ITA No. 570/Ahd/2018. Thus, in parity with the said appeal, we allow the appeal of the assessee.

19. In the result, all 11 appeals of the Assessee are allowed and we direct the A.O. to delete the penalty.

Order pronounced in Open Court on 16 - 01- 2020

Sd/-

Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 16/01/2020

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad