

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।
**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD**

**BEFORE SHRI RAJPAL YADAV,
HON'BLE VICE-PRESIDENT
AND
SHRI T.S. KAPOOR
HON'BLE ACCOUNTANT MEMBER**

**ITA.No.1456/Ahd/2018
निर्धारण वर्ष/Asstt.Year : 2008-09**

Shri Jethanand Khemchand Luhana 27/2, Ankur Society Bamroli Road, Godhra 389 001 PAN: AASPL 5243 D	Vs	DCIT, Cent.Cir.1 Baroda.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Nirmitt Mehta, AR
Revenue by :	Shri Vinod Tanwani, Sr.DR

सुनवाई की तारीख/Date of Hearing : 03/03/2020
घोषणा की तारीख /Date of Pronouncement: 4/03/2020

आदेश/O R D E R

PER RAJPAL YADAV, VICE-PRESIDENT

Assessee is in appeal before the Tribunal against order of Id.CIT(A)-12, Ahmedabad dated 23.3.2018 passed for the assessment year 2008-09.

2. Sole grievance of the assessee is that the Id.CIT(A) has erred in confirming the penalty of Rs.2,22,058/- which was imposed by the AO under section 271(1)(c) of the Income Tax Act, 1961.

3. Brief facts of the case are that a search under section 153A of the Act was carried out at the premises of Dhanjimama group of cases on 3.7.2012. A notice under section 153A was issued upon the assessee, and he filed his return of income on 14.8.2014 declaring total income at Rs.1,65,30,860/-. The assessee has disclosed additional income of Rs.9,98,000/-. The facts with regard to disclosure of this additional income, and how the Id.AO has initiated penalty proceedings *qua* this additional income is being noticed by the AO in the brief assessment order dated 31.1.2015. The relevant part reads as under:

“4. The assessee in his return of income has offered additional income of Rs. 9,80,000/- which is as per the disclosure of additional income made during the course of search proceedings. This additional income has been offered due to search action and the findings thereof, thus the amount of Rs. 9,80,000/- is undisclosed income of the assessee. Therefore, penalty proceedings u/s 271(1)(c) of the IT Act are initiated for this default.

5.1 During the assessment proceedings, it was observed that the assessee had sold one capital (land) on 4.8.2007 i.e. F.Y.2007-08 (A.Y.2008-09) resulting into taxable capital gain. As against this, the assessee had made Investment in the residential house property and accordingly a deduction u/s 54F to the tune of Rs.50 lacs was claimed in the return of income filed by the assessee u/s 139(1) of the IT Act in the regular course. However, while filing the return u/s 153A of the IT Act, the assessee had revised the claim to Rs.40,20,000/- as against the original claim of Rs.50 lacs thereby withdrawing the claim to the extend of Rs.9,80,000/-.”

4. He initiated penalty proceedings under section 271(1)(c) read with Explanation-5A, and thereafter imposed penalty of Rs.2,22,068/-. Appeal to the CIT(A) did not bring any relief to the assessee.

5. The Id.counsel for the assessee at the very outset submitted that during the course of search no material was found exhibiting the fact that the assessee has made excessive claim under section 54F of the Act in his original

return of income. The assessee himself has voluntarily withdrawn part of the claim, and disclosed additional income. The AO has not made any reference to the seized material in the assessment order. He took us through para 4 and 5.1 of the assessment extracted (supra). Thus, on the strength of the Tribunal's order in ITA No.1266/Ahd/2019 and others, he contended that no penalty can be imposed upon the assessee. On the other hand, the ld.DR relied upon the order of the ld.CIT(A).

6. With the assistance of the ld.representatives, we have gone through the record carefully. *Explanation 5A* appended to section 271(1)(c) has a direct bearing on the controversy, and therefore, we deem it appropriate to take note of this *Explanation*, which reads as under:

"[Explanation 5A.—Where, in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of—

(i) any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income for any previous year; or

(ii) any income based on any entry in any books of account or other documents or transactions and claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of search and,—

(a) where the return of income for such previous year has been furnished before the said date but such income has not been declared therein; or

(b) the due date for filing the return of income for such previous year has expired but the assessee has not filed the return,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.]"

7. A perusal of the above *Explanation* would indicate that this *Explanation* could be invoked if during the course of search any incriminating material representing any money, bullion, jewellery other valuables articles or things or entry in any books of accounts found during the course of search, based on such material, addition is being made. This *Explanation* cannot be invoked simply for the reason that, had the search not been carried out, the assessee would not have disclosed this additional income. Somewhat an identical situation was considered by the ITAT, Rajkot Bench in the case of Shri Mansukhbhai R. Sorathia and Others, in IT(SS)A.No.46 to 52/RJT/2012, wherein question before the Tribunal was, when no money, bullion, jewellery or book entry was found at the time of search, and only evidence against the assessee is an admission of additional income made in the statement under section 132(4), whether such admission tantamount to disclosure of money, bullion, jewellery or diary and income disclosed is to be considered as concealed income or not? This aspect has been considered by the Tribunal, wherein it has been held on the strength of authoritative pronouncement of Hon'ble High Courts that solely on the basis of declaration, addition is not possible. Therefore, respectfully following the above decision of the ITAT, Rajkot Bench, we find force in the contention of the Id.counsel for the assessee and delete the impugned penalty.

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

Order pronounced in the Court on 4th March, 2020 at Ahmedabad.

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT

Ahmedabad; Dated 04/03/2020