

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत  
IN THE INCOME TAX APPELLATE TRIBUNAL  
SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER  
AND Dr. ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

(Virtual Hearing)

आ.अ.सं./I.T.A No.406/AHD/2015

निर्धारण वर्ष/Assessment Year: 2003-04

Jyotiben Jayvadan Kapadia & Rupesh Jayvadan Kapadia, L/h of Jayvadan Ramniklal Kapaida, A/2, Aamrakunj Society, Nr.PUjara Hospital, Ghod Dod Road, Surat. [PAN: ACHPK 3121 D]	V s.	The Deputy Commissioner of Income, Circle-3, Surat.
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

निर्धारितीकीओर से /Assessee by	Shri Manish Shah – AR
राजस्वकीओर से /Revenue by	Smt. Anupama Singla – Sr.DR

सुनवाई की तारीख/ Date of hearing:	26.04.2021
उद्घोषणा की तारीख/Pronouncement on:	26.04.2021

**आदेश / O R D E R**

**PER PAWAN SINGH, JUDICIAL MEMEBER:**

1. This appeal by the Assessee is directed against the order of Id. Commissioner of Income Tax (Appeals)-II, Surat hereinafter referred as “Ld.CIT(A)” dated 24.12.2014 for the assessment year (AY) 2003-04. The Assessee has raised following grounds of appeal:

*“1. The Ld.CIT(A) has grossly erred in confirming penalty on gift received from the different persons of Rs.9,07,224/-.*

*2. The Ld. CIT(A) has not considered the fact that all the donors having PAN No. and given gift declaration also to prove their willingness and genuineness.*

*3. The Ld. DCIT and Ld. CIT(A) has not taken into consideration that the assessee has voluntarily offered gift as additional income to buy peace of mind, avoid harassment and avoid further litigation and subject to non levy of penalty.*

- 4. The Ld. DCIT and Ld. CIT(A) has not made any proper justification for imposing penalty or considered the facts properly.*
  - 5. The relief as claimed by the Appellant may kindly be allowed in toto.*
  - 6. The Appellant reserves to the right to add, amend, alter or substitute any other grounds upto and at the time of hearing of this appeal.”*
2. Brief facts of the case are that the assessee is an individual filed, his return of income for the assessment year (AY) 2003-04 on 22.12.2004 declaring income of Rs.2,65,270/-. The case was selected for scrutiny and assessment case completed under section 143(2) of the Act dated 29.12.2006. The Assessing Officer (AO) while passing the assessment order made addition of Rs.9,07,224/- on account of non-genuine gifts.
3. On appeal before the ld. CIT(A), the addition on account of non-genuine gifts were confirmed. However, on further appeal before the Tribunal, the matter was set-aside / restored back to the file of the AO to examine the necessary evidence including the relationship of donors with the assessee. The assessee was also directed to furnish all necessary details/evidences. In the order giving effect to the order of the Tribunal, the AO issued notice under section 142(1) to the assessee on 11.03.2013 to furnish the details of donor along with copy of gift deeds and their income tax returns. The assessee vide his reply dated 23.03.2013 provided the name of donors, their PAN Numbers, addresses

and the amount of gifts. The assessee further stated, though the gifts are genuine but now, the donors are not cooperating with the assessee. Therefore, he is voluntarily declaring gifts as his additional income and filed revised return income including the amount of gifts as additional income and paying tax thereon. The explanation furnished by the assessee and the revised return was not accepted by the A.O. The AO held that the revised return of income is belated (time barred) and the explanation of assessee is not acceptable. The AO maintained addition of non-genuine gift in the assessment order passed under section 143(3) read with section 254 of the Act. The A.O. again initiated penalty under section 271(1)(c) of the Act.

4. The AO issued show cause notice under section 274 r.w.s 271(1)(c) of the Act dated 28.03.2013. The assessee filed its reply as recorded by the AO in para 5 of the penalty order. In the reply, the assessee reiterated that he has received gift from different donors in A.Y. 2003-04, he had already furnished the declaration deed from the donors. It was stated that the donors are his friends and made gift voluntarily, all donors are income tax payers. However, as of now they are not co-operating for income tax proceedings and that the assessee has voluntarily declared gift as additional income and paid the tax thereon. The reply of assessee was not accepted by the AO by taking view that revised return was

filed after issue of notice under section 142(1) of the Act on 11.03.2013. The time limited for filing revised return under section 139(5) of the Act has already expired on 31.03.2006. The assessee to file revised return at any time before expiry of one year from the end of relevant assessment year or before the completion of assessment, whichever is earlier. The assessee could not prove the creditworthiness of donor with source of gift or the donor were capable of giving of their respective amounts. The AO levied the penalty @100% of tax sought to be evaded on the addition of Rs.9,55,362/-. The AO worked out the penalty of Rs.3,18,454/- by his order dated 27.09.2013. On appeal before the Id.CIT(A) the penalty order was upheld. Further aggrieved, the assessee has filed the present appeal before this Tribunal.

5. We have heard the submissions of the learned Authorised Representative (AR) of the assessee and the learned departmental representative (DR) for the revenue and have gone through the orders of the lower authorities. The Id. AR of assessee submits that he has two fold submissions, first on technical/legal issue and second on merits of the case. The Id. AR submits that the AO while issuing notice under section 271(1)(c) r.w.s. 274 has not specified the specific charge by not striking out the inappropriate portion in the notice. The copy of notice dated 28.03.2013 is filed on record. The Id.AR further submits that while passing the assessment order in

order giving effect to the order of Tribunal on 28.03.2013, the A.O. has not specified the specific charge. The AO mentioned that penalty proceedings under section 271(1)(c) are initiated for the concealment of income by way of furnishing inaccurate particulars of income. Again while levying the penalty again not specify the specific charge and held that the assessee without reasonable cause failed to furnish the correct and complete particulars of his income and concealed the particulars of income. Thus, the AO while levying penalty has levied the penalty on different charge than the charge leveled while passing the assessment order. To support his contention, the ld.AR of the assessee relied upon the decision of Tribunal in Vijay Champak Patel vs. ITO in ITA No.281/AHD/2016 dated 09.10.2020, decision of Hon'ble Apex Court T. Ashok Pai Vs CIT 292 ITR 11 (SC), decision of Hon'ble Gujarat High Court in Nyan C Shah Vs ITA in Tax Appeal No.543 of 2012 and the decision of Hon'ble Bombay High Court in PCIT Vs Goa Costal Resorts and Recreation Pvt. Ltd., reported by [2020] 113 taxmann.com 573 (Bom).

6. On merits, the ld.AR for the assessee submits that the assessee disclosed all details particulars regarding the gifts from friends and relatives, received by assessee during the relevant financial year. The assessee filed copy of gift deeds, details of donor along with their PAN. In the restoration proceedings, the assessee approached the donor to confirm

the gift before the AO, however due to passage of time of more than ten years; none of the donor agreed to appear before the AO to avoid harassment and unwanted interrogations. The ld.AR submits that assessee offered the amount of gift as additional income and paid tax thereon. The ld.AR submits that mere non-proving the gift as genuine, though the gifts were genuine and voluntarily agreed to offer the same for taxation, no penalty is leviable on the assessee. To support his contention, the ld.AR relied upon the decision of Mumbai Tribunal *Earthmoving Equipment Service Corporation Vs DCIT*, [2017] 84 taxmann.com 51 (Mumbai Tribunal).

7. On the other hand, the ld.Departmental Representative (DR) for the Revenue submits that it is a fit case for levy of penalty. The assessee despite giving sufficient opportunity failed to prove the genuineness of gift. The assessee in a restoration proceedings again, failed to discharge his onus to prove the genuineness of gift. The assessee finding no other way has offered the gift as additional income. The offer of additional income of non-genuine gifts by assessee was not volunteer act of assessee. The assessing officer while passing the assessment order has clearly held that assessee concealed the income by not furnishing correct particulars of income. The AO has clearly spelt out the charge. The ld.CIT(A) while confirming the action of AO considered all the contentions of assessee and held that assessee has not disclosed true and

correct particulars of income and income with intention to evade tax, therefore, the AO rightly imposed the penalty under section 271(1)(c) of the Act. The ld.Sr.DR for the Revenue prayed for dismissal of appeal.

8. We have considered the rival submission of both the parties and have gone through the orders of Lower Authorities. We have also deliberated on various case laws relied by the ld. CIT(A) in the impugned order as well as the decision cited by ld. AR of the assessee. There is no dispute that in the computation of income the assessee claimed gift of Rs.9,07,224/-. The A.O. treated the gifts as not-genuine gifts in absence of sufficient evidence. On further appeal, the addition was upheld, however, on further appeal before the Tribunal, the matter was restored to the AO with the direction to assessee to furnish complete evidences. In restoration proceedings, the assessee in response to show cause notice dated 11.03.2013, vide his reply dated 23.03.2013 furnished the details of donors along with their PAN and stated that now the donors are co-operating with the assessee and that the assessee has offered the amount of gift as an additional income in revise return of income. The AO while passing the assessment order not accepted the revised return by taking view that revised return is beyond the prescribed period of limitation under section 139 (5) of the Act and initiated penalty. The AO initiated penalty for concealment of income

by way of furnishing inaccurate particulars of income. The contention of Id.AR of the assessee before this Tribunal is that assessee has not concealed any particulars of income, since the assessee could not bring all the donor before the AO as they were not co-operating. However, their complete particulars was provided to the AO. We have noted that the AO neither accepted the revised return of income nor investigated about the creditworthy of donor and genuineness of donor by issuing any notice under section 133(6) of the Act or summon under section 131 of the Act. The AO simply held that assessee concealed the income. We have further notices that the assessee voluntarily offered the amount of gift as additional income, therefore, the assessee has no right to challenge the action of AO in holding the gift as non-genuine. We are conscious of the fact that penalty proceedings are separate and independent. It is an admitted fact that assessee offered the additional income, though, after issuing notice under section 142(1) of the Act by AO. Further the assessee was having in position of certain evidence in the form of declaration, details of donor and PAN number which were furnished the AO. It is also an admitted fact that no efforts were made by AO by issuing any notice to the donor under section 133(6) of the Act or any summon under section 133(1) of the Act. Facts remaining same that a gift received by assessee was treated as non-genuine gift for the want of

complete evidence. In our view, this is a case where the assessee made a bonafide claim, it was accompanying with certain documentary evidence, and however, it was not conclusively proved for the want of confirmation from donor. The A.O. also made no efforts to bring and adverse evidence on record. Considering the fact and circumstances of the case, we are of the view that when the assessee mad a claim which was coupled with evidence, though it was not conclusively proved, it cannot be a fit case for levy of penalty under section 271(1)(c) of the Act. Therefore, we direct the A.O. to delete the penalty under section 271(1)(c) of the Act.

9. Considering the fact that we have deleted the penalty on merit by taking independent view, therefore, adjudication on the primary contention of assessee have become academic.
10. In the result, appeal of the assessee is allowed.

Order pronounced on 26<sup>th</sup> April 2021 by placing result on notice board.

**Sd/-**

**(Dr.ARJUN LAL SAINI)**

**(लेखा सदस्य/ACCOUNTANT MEMBER)**

**Sd/-**

**(PAWAN SINGH)**

**(न्यायिक सदस्य/JUDICIAL MEMBER)**

सुरत/ **Surat**, दिनांक **Dated:** 26<sup>th</sup> April 2021/**#SGR**

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

**By order**

/ / **TRUE COPY** / /

**Assistant Registrar, Surat**