

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" D " BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER,
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1073/AHD/2019
निर्धारण वर्ष/Asstt. Year: 2015-2016

Shri Amit Ramniklal Tilva, 401, Kishan Heights, Near Deco World, Opp. Akota Stadium, Baroda. PAN: ADNPT9775H	Vs.	J.C.I.T., Circle-21, Baroda.
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And

आयकर अपील सं./ITA No. 1409/AHD/2019
निर्धारण वर्ष/Asstt. Year: 2016-2017

D.C.I.T., Circle-2, Baroda.	Vs.	Shri Amit Ramniklal Tilva, 401, Kishan Heights, Near Deco World, Opp. Akota Stadium, Baroda. PAN: ADNPT9775H
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(Applicant)		(Respondent)
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Assessee by :	Ms Urvashi Shodhan, A.R
Revenue by :	Shri Purushottam Kumar, Sr.D.R

सुनवाई की तारीख / **Date of Hearing** : **30/03/2022**
घोषणा की तारीख / **Date of Pronouncement**: **20/04/2022**

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed at the instance of the Assessee and the Revenue against the orders of the Learned Commissioner of Income Tax(Appeals)-12, Ahmedabad. ITA No.1409/Ahd/2019 is a quantum appeal arising in the matter of assessment order passed under s.143(3) of the Income Tax Act,

1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2011-2012 and ITA No.1073/Ahd/2019 is a penalty appeal passed u/s 271(1)(c) of the Income Tax Act, 1961 relevant to the Assessment Year 2015-16.

2. The assessee has raised the following grounds of appeal:

1. The Ld. Commissioner of Income Tax (Appeals) has erred in law and on the facts of the appellant's case in confirming the action of the Ld, A.O. in levying penalty U/s. 271(1)(C) of the Act of the 1,38,500/-.

*2. Both the lower authorities have erred in law and on facts & circumstances of the appellant's case in not appreciating the fact that no penalty U/s.271(1)(C) of **the Act can** be levied.*

3. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before hearing of the appeal.

3. The solitary issue raised by the assessee is that the learned CIT-A erred in confirming the penalty levied by the AO under the provisions of section 271(1)(c) of the Act.

4. Briefly stated facts are that the assessee in the present case is an individual who was subject to search under section 132 of the Act vide dated 22nd of September 2015. Thereafter, the notice under section 153A was issued to the assessee to file the return of income dated 25-05-2016. The assessee in response to such notice filed the return of income dated 8 July 2016 declaring total income at ₹ 10,14,160.00 only.

4.1 Besides the return in response to the notice issued under section 153A of the Act, the assessee also filed return of income under the provisions of section 139(4) of the Act on the same date i.e. 8 July 2016 declaring same amount of income of ₹ 10,14,160.00 only.

4.2 In the assessment framed under section 143(3) read with section 153A of the Act, the income disclosed in the return by the assessee was accepted by the AO as the total income of the assessee vide order dated 27 December 2017.

4.3 However, the AO was of the view that the assessee has declared the income in the return filed under section 139(4) of the Act after getting the notice issued under section 153A of the Act dated 25 May 2016. As such, the assessee has not filed any return of income within the time as provided under section 139(1) of the Act which should have been filed on or before 31 July 2015. Furthermore, both the returns i.e. under section 153A and 139(4) of the Act, were filed on the same date 8 July 2016. Accordingly, the AO treated the return filed under section 139(4) of the Act as void.

4.4 According to the AO the income was disclosed by the assessee in consequence to the search conducted under section 132 of the Act and initiation of the assessment proceedings under section 153A of the Act. Thus he was of the view that the assessee has concealed the particulars of income for ₹ 10,14,160.00 declared in the income tax return and thus levied the penalty of ₹ 1,38,500.00 being hundred percent of the amount of tax sought to be evaded under the provisions of section 271(1)© read with explanation 1 of the Act.

5. Aggrieved assessee preferred an appeal to the learned CIT-A.

6. The assessee before the learned CIT-A submitted that there was time available for filing the return of income for the year under consideration under the provisions of section 139(4) of the Act. Thus, the income was disclosed by the assessee in such return filed under section 139(4) of the Act. The assessee has also filed the return of income under the provisions of section 153A of the Act declaring the same amount of income which was accepted in the assessment proceedings. Thus, it cannot be alleged that the assessee has concealed the particulars of income. Furthermore, there is no variation between the income declared by the assessee and assessed by the Revenue. Therefore, the question of levying any penalty does not arise.

6.1 However, the learned CIT-A was of the view that the penalty in the instant case is to be levied under explanation 5A to section 271(1)(c) of the Act which is deeming provisions. As per the explanation 5A to section 271(1)(c) of the Act if the assessee is found to be the owner of money, bullion, jewelry or any income based on any other document which relates to the previous year which has ended before the date of search and the due date for filing the return of income has expired but the assessee has not filed the return of income, then the income declared by the assessee in the return of income shall be deemed to have concealed the particular of income.

6.2 According to the learned CIT-A, in the case on hand, the due date for filing the income should be treated as provided under the provisions of section 139(1) of the Act and not under the provisions of section 139(4) of the Act. Likewise, the criteria for imposing the penalty under the provisions of section 271(1)(c) of the Act is difference between the income declared in the return filed before the date of search viz a viz the return filed in response to the notice under section 153A of the Act. Admittedly, in the given case, there was no return filed by the assessee before the date of search for the year under consideration. Therefore the income declared by the assessee after the date of search in response to the notice issued under the provisions of section 153A becomes the concealment of income. Thus, the income declared by the assessee under the provisions of section 139(4) of the Act which was filed after the date of search cannot be taken into consideration so as to reach whether the assessee has concealed the particulars of income/furnished inaccurate particulars of income. Thus the learned CIT-A confirmed the penalty levied by the AO.

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

8. The learned AR before us contended that there was the time-limit available for filing the return of income under the provisions of section 139(4) of the Act. The

due date referred under explanation 5A to section 271(1)(c) of the Act denotes to the provisions of filing the returns of income under section 139 of the Act. As such the provisions of explanation 5A to section 271(1)(c) of the Act does not make any distinction between the return filed under section 139(1) viz a viz 139(4) of the Act. According to the learned AR, the return filed under section 139(4) of the Act declaring total income of ₹ 10,14,160.00 was a valid return and the same was accepted in the assessment proceedings. Accordingly, in the absence of any variation between the income filed by the assessee and the income assessed by the revenue, there cannot be any penalty on account of concealment of income.

9. On the contrary the learned DR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. The facts of the case have already been elaborated in the preceding paragraph which are undisputed. Therefore, for the sake of brevity and convenience, we are not inclined to repeat the same. There is no dispute to the fact that the penalty in the instant case was levied under explanation 5A to section 271(1)(c) of the Act which is applicable to the particular assessment years. In other words it is applicable for the search conducted on or after 1st day of June 2007 with respect to the previous year which has ended before the date of search and the income found in the search was not disclosed in the return of income filed by the assessee or the due date for filing the return of income was expired but the assessee has not filed the return of income. The relevant extract of the provisions of explanation 5A to section 271(1)(c) of the Act 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 he 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."

10.1 Admittedly the return of income was not filed by the assessee before the date of search. Hence, the provisions specified under clause 'a' cannot be applied in the instant case. Thus the question arises whether the case of the assessee falls under clause 'b' as discussed above i.e. the time-limit for filing the return of income for the relevant previous year has expired and the assessee has not filed the return of income. The answer stands in negative. It is for the reason that the assessee admittedly has furnished the return of income within the due date as specified under the provisions of section 139 of the Act. In fact, there are different dates provided under section 139(1) of the Act for filing the returns of income. For example, there are different dates for filing the return of income under section 139(1) of the Act depending upon the status of the assessee, turnover of the assessee etc. Likewise, under the provisions of section 139(4) of the Act, there is extended time available for filing the return of income even the time specified under section 139(1) of the Act has expired. On reference to the provisions of explanation 5A to section 271(1)(c) of the Act as discussed above, it is imperative to note that the word due date has been mention and not the due date as specified under the provisions of section 139(1) of the Act. Thus to our understanding, even the assessee files the return of income during the extended time provided under section 139(4) of the Act, it shall be interpreted as if the return of income has been filed within the due date. In holding so we draw support and guidance from the order of Mumbai tribunal

in the case of ITO versus Gope M. Rochlani reported in 49 taxmann.com 46 wherein it was held as under:

14. In our considered opinion, once the legislature has not specified the "due date" as provided in section 139(1) in Explanation 5A, then by implication, it has to be taken as the date extended under section 139(4). In view of the above, we hold that the assessee gets the benefit / immunity under clause (b) of Explanation to section 271(1)(c) because the assessee has filed its return of income within the "due date" and, therefore, the penalty levied by the Assessing Officer cannot be sustained on this ground. Even though we are not affirming the findings and the conclusions of the learned Commissioner (Appeals), however, as per the discussion made above, penalty is deleted in view of the interpretation of Explanation 5A to section 271(1)(c). Consequently, the ground raised by the Revenue is treated as dismissed.

10.2 In view of the above and after considering the facts in totality, we hold that the assessee has not contravened any of the provisions provided under explanation 5A to section 271(1)(c) of the Act so as to attract the provisions of penalty on account of concealment of income. Accordingly we set aside the finding of the learned CIT-A and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is hereby allowed.

10.3 In the result the appeal filed by the assessee is allowed.

11. Coming to ITA No.1409/Ahd/2019, an appeal by the Revenue.

12. The interconnected issue raised by the Revenue is that the learned CIT-A erred in deleting the addition made by the AO for ₹1,82,69,800.00 and 14,79,250.00 on account of cash and jewellery found during the search.

13. The AO in the assessment framed under section 143(3) of the Act has made the addition of unaccounted cash and jewellery of ₹ 1,82,69,800.00 and 14,79,250.00 which were found in the course of search conducted under section 132 of the Act. Aggrieved assessee preferred an appeal to the learned CIT-A who deleted the addition made by the AO by observing as under:

5.3 During the appeal proceedings it has been submitted that in the petition made before the Settlement Commission, the capitalization of additional income declared to the extent of Rs.8,03,21,751/- was claimed and in the order u/s 245D(4) dated 31/05/2018, the Settlement Commission had -granted said capitalization which included unexplained cash of Rs.1,82,69,800/- and unexplained jewellery of Rs.19,82,500/- (though the addition made was of Rs.14,79,250/- only on account of the jewellery). The extract of order u/s 245D(4) has already been produced as part of appellant's submission. Accordingly, it has been contended by the appellant that no part of gold ornament and cash found was unexplained and it has been prayed that therefore the additions are required to be deleted.

5.4 The order u/s 245D(4) has been gone through and in view of the said order, there remains no case of addition of Rs.1,82,69,800/- on account of cash found and of Rs.14,79,250/- on account of jewellery found because otherwise it would become a case of double taxation which is not permitted under the law. The AO is directed to delete these additions. The related grounds succeed.

14. Being aggrieved by the order of the learned CIT-A, the Revenue is in appeal before us.

15. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

16. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the additions made by the AO in the assessment framed under section 143(3) of the Act has already been offered to tax before the settlement commission as evident from the finding of the learned CIT-A as discussed above. At the time of hearing the learned DR has not controverted the finding given by the learned CIT-A. Accordingly, we hold that there cannot be any addition in the year under consideration for the amount of income as discussed above otherwise it would lead to the double addition which is unwanted under the provisions of law. Accordingly, we do not find any infirmity in the order of the learned CIT-A and therefore we decline to interfere in his order. Hence the ground of appeal of the Revenue is hereby dismissed.

16.1 In the result the appeal filed by the Revenue is dismissed.

17. In the combined results the appeal filed by the Assessee is **allowed** whereas the appeal filed by the Revenue is **dismissed**.

Order pronounced in the Court on 20/04/2022 at Ahmedabad.

**Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

Ahmedabad; Dated
Manish

(True Copy)
20/04/2022

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**