

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट  
**IN THE INCOME TAX APPELLATE TRIBUNAL  
RAJKOT BENCH, RAJKOT**

*(Conducted Through Virtual Court)*

**BEFORE MRS.ANNAPURNA GUPTA, ACCOUNTANT MEMBER  
AND  
MISS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.117/RJT/2015  
Assessment Year :2009-10**

Prakash Sevantibhai Shah B-406, Kingston High Streets Nr.D-Mart, Hiranandani Gardens Powai, Mumbai 400 076.	Vs.	DCIT, Cent.Cir.2 Rajkot.
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<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/(Respondent)</b>
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Assessee by :	Shri Mehul Patel, AR
Revenue by :	Shri Shramdeep Sinha, Id.CIT-DR

सुनवाई की तारीख/**Date of Hearing** : **29/09/2022**

घोषणा की तारीख /**Date of Pronouncement**: **12/10/2022**

**आदेश/O R D E R**

**PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER:**

Present appeal has been filed by the assessee against order passed by the Id. Commissioner of Income-Tax(Appeals)-11, Ahmedabad [hereinafter referred to as "Ld.CIT(A) under section 250(6)) of the Income Tax Act, 1961 ("the Act" for short) dated 19.1.2015 pertaining to the Asst.Year 2009-10.

2. This is a recalled matter. In the first round of appeal, the appeal of the assessee was dismissed *ex parte* by the Tribunal vide order dated 6.9.2018. Thereafter, assessee filed Misc. Application being MA No.25/RJT/2019 seeking recall of the *ex parte* order. Considering the pleadings in the MA and submissions of the

ld.counsel for the assessee, the impugned *ex parte* order was recalled vide order dated 29.7.2022, and restored the appeal to its original number and listed for hearing afresh on merit. Accordingly, this matter has come up before us, and we proceed to adjudicate the same hereinafter as follows.

3. The ld.counsel for the assessee submitted before us that there are only two issues involved in the present appeal relating addition made on account of two investments made by the assessee remaining unexplained – one investment in flat amounting to Rs.66.00 lakhs and other in fixed deposits amounting to Rs.5.00 lakhs. The ld.counsel for the assessee contended that both before the AO and the Ld.CIT(A) the assessee had fairly conceded that he was unable to explain and substantiate the source of the above two investments made, but at the same time, he pointed out that when the penalty was levied on this addition made and the matter carried in appeal before the ld.CIT(A), the assessee furnished complete explanation of the source of both the investments, duly substantiating the same with evidences. The ld.CIT(A) sought report from the AO with respect to the explanation and evidences furnished by the assessee, and the AO in turn, after examining the details and evidences filed by the assessee, gave a finding of fact that both the investments stood duly explained by the assessee. He contended that noting this finding of the AO in remand proceedings, the ld.CIT(A) deleted the penalty levied in the case of the assessee. The Ld.Counsel for the assessee stated that in view of the fact that source of these investments had been accepted by the AO as explained, though in penalty proceedings, there was no question at all now for confirming the addition treating this investment as remaining unexplained. The ld.counsel for the assessee contended that Hon'ble Supreme Court, in an identical case where the assessee

had been unable to explain certain cash credit in quantum proceedings and had alternatively explained the same in penalty proceedings which explanation was accepted by the Revenue authorities also, held that there was no case at all for confirming the addition in quantum proceedings. He drew our attention to the decision of Hon'ble Apex Court in the case of Basir Ahmed Sisodia Vs. ITO, (2020) 116 taxamnn.com 375 (SC), copy of which was placed before us. Further, our attention was drawn to the explanation furnished by the assessee during the appellate proceedings in penalty levied in the case of the assessee at PB page no.1 to 5, pointing out therefrom that the assessee had explained the source of investment in FDR as out of maturity amount of earlier FDRs. and source of investment in flat being out of loan given by the employer, Backbone Construction Ltd. He contended that he had filed investment evidences by way of copy of bank statement for explaining source of investment in FDRs and in the case of investment in the property the confirmation from the employer was furnished along with bank statement showing receipt of loan from the employer. Our attention also drawn to identical submissions before the AO during the remand proceedings placed at PB Page No.6 to 7 along with all evidences as mentioned above furnished to him as under:

- i) *Confirmation cum ledger account of assessee from books of Backbone Construction P.Ltd.*
- ii) *Balance Sheet of Backbone Construction P.Ltd. with grouping as on 31.3.2009;*
- iii) *Acknowledgement of return filed by Backbone Construction P.Ltd.;*
- iv) *Bank statement of assessee.*

4. Our attention was also drawn to the remand report of the AO placed at PB Page no.19 to 22 and taking us more particularly to page no.22, where following was the finding of the AO accepting the assessee's explanation with respect to the aforesaid two investments:

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hence the same was disallowed and added to the returned income resulting in high demand.

It is noticed that the addition was made only because of loan confirmation from the lender could not be furnished during assessment proceedings. The same is available now. ( Copy of the confirmation ledger from the books of accounts of the lender viz Backbone Construction Pvt Ltd.) along with grouping of such loan in the balance sheet of M/S Backbone Constructions Pvt.Ltd. , the copy of Audited Balance Sheet , Grouping of schedule, copy of Acknowledgment of ITR filed by M/S Bckbone Constructions Pvt.Ltd. is attached herewith. The assessee also filed a written submission in response to details called for. The Assessee produced all the documentary evidences which has verified and on record.

4.4 During the course of remand proceedings and on the basis of details furnished and the same has been found to be in order.

4.5 In respect of an additional evidences and details of bank statements, copy of ledger account from the company., as per the directions of the Ld. CIT(A) u/s 250(4) of the Income Tax Act, on being enquired to the Assessee, the assessee, during the course of remand proceedings, has produced the bank statement, confirmation of loan given by the employer company etc.

5. In view of the above facts & circumstances of the case, according to my opinion which is based on the submission made by the assèssee at the appellate stage, it is submitted that the assessee has adequately explained the investment FDR Rs.5,00,000/- and investment in Flat Rs.65,00,000/-. Accordingly, the appeal of the assessee may be decided on merits of the case.

5. Referring to the above, the ld.counsel for the assessee pointed out that the AO had given categorical finding of the fact of both investments in FDRs of Rs.5.00 lakhs and investment in Flat of Rs.65 lakhs being adequately explained by the assessee. The ld.counsel thereafter drew our attention to the order of the ld.CIT(A) in penalty proceedings, while deleting the penalty, noting that the

AO in remand proceedings had found the assessee to have duly explained source of investment in FDRs and Flat. A copy of the order was placed in PB page no.25 to 32. Our attention was drawn to para-8 containing the decision of the Id.CIT(A) regarding the above finding as under:

### **DECISION**

8. The submission of the appellant and penalty order has been carefully considered. The only ground of appeal is against the levy of penalty of Rs.24,14,317/- by the Assessing Officer u/s.271(1)(c) of the Act. The AO levied penalty in respect of addition made to the returned income as under:

- (i) Unexplained interest income of Rs.3,022/-
- (ii) Unexplained investment in FDR Rs.5,00,000/-
- (iii) Unexplained Investment in Flat Rs.66,00,000/-

Penalty proceeding were initiated against these additions and a show cause notice was issued on 25/02/2016. The assessee has filed its reply on 09/03/2016. The A.O. passed the order levying penalty u/s 271(1)(c) considering that the assessee, a technical director in Backbone Constructions Pvt. Ltd., derives income from salary. During the course of assessment proceedings it was noticed that the assessee had received interest income of Rs.3022/- which was not offered to tax. Hence the same was taxed. On verification of seized loose papers file Ann(A) which contains pages from 1 to 32, it is noticed that the assessee had invested in fixed deposits with

HSBC, Powai Branch for Rs.5 lacs. The same stands unexplained and taxed. The assessee had purchased a property at B-406, Kingston Tower, Hiranandani Gardens, Powai, Mumbai for 66,00,000/- in June-2008. Regarding source of the same, the assessee has submitted that he has borrowed Rs. 66,00,000/- from the company M/S Backbone Constructions Pvt Ltd. in which he was working as a technical director. However, he fails to submit any proof in this regard. Hence Rs.66 lacs was taxed u/s 69 of the IT ACT, 1961. As the assessee failed to discharge the onus to establish genuineness of his claim to the above extent, penalty proceedings u/s 271(1)(c) are therefore attracted. Hence the penalty was levied on account of above. The penalty was levied on account of concealment of income and furnishing inaccurate particulars of income. Remand Report was called for from the AO to verify the factual position claimed by the appellant. The AO in the Remand report submitted vide letter dated 10.1.2018 stated that the appellant had adequately explained investment in FDR of Rs.5 lakh and investment in flat worth Rs.65 lakh. No adverse inference has been drawn by the AO upon the contentions of the appellant. Looking to these factual positions, additions made by the AO deserves to be deleted but as the appeal is pending before the ITAT, it will be decided by the ITAT. In such situation, when additions deserves to be deleted on the basis of remand report submitted by the AO, levying of penalty u/s. 271(1)(c) of the Act is not found justified at all. Hence, it is **deleted** on the additions to the extent of Rs.70 lakh (5,00,000 + 65,00,000). However, the appellant has not pressed addition of Rs.3022/- on account of interest income and hence penalty levied on such interest income is sustained. Therefore this ground of appeal is **partly allowed**.

6. The Id.DR, on the other hand, vehemently objected to the arguments of the Id.counsel for the assessee and heavily relied on the order of the ITAT in the first round, pointing out to the observation made in the said order to the effect that if the loan given by the employer to the assessee for purchase of flat remained unpaid it would take nature of salary income in the hands of the assessee. He contended that this observation of the ITAT in the first round needed consideration, more particularly in view of the fact that the assessee admittedly was no longer employee of the Backbone Construction Ltd. from whom loan had been taken and had not repaid the loan also, which had increased from Rs.65 lakhs taken by

the assessee to Rs.72 lakhs on account of interest being added to the same.

7. We have heard contentions of both the parties and we have also gone through orders of the authorities below, as also documents referred to by both the parties before us. The issue before us relates to the addition made in the hands of the assessee on account of investments in FDR of Rs.5 lakhs and Rs.65 lakhs in flat property remained unexplained. It is a fact on record that source of investments have been duly explained by the assessee in the appellate proceedings before the Id.CIT(A) in an appeal filed against penalty levied on the aforesaid two additions. It is also a fact that the AO himself had examined the explanation of the assessee with evidences filed and had accepted it as correct. Having so accepted the explanation of the assessee as correct, be that so in penalty proceedings, what stands and remains, as a matter of fact is that the AO accepted the assessee's explanation with regard to the source aforesaid two investments made by the assessee. The AO having given categorical finding of fact that the source of investment stands duly explained, there is no reason absolutely now to make addition on account of the same remaining unexplained in quantum proceedings. The reason for making addition was source of investment remained unexplained. The assessee having explained the source in penalty proceedings, and the AO having accepted the same investments, there was no room to hold that the investment remained unexplained, therefore, there is no reason at all to confirm the two additions made on account of aforesaid two investments. We draw support from the judgment of Hon'ble Apex Court in the case of Basir Ahmed Sisodia (supra) wherein in identical set of facts, Hon'ble Apex Court held that factual basis on which the AO had formed his opinion in assessment order, having been dispelled by

affidavits and statements of the concerned parties in penalty proceedings, there was no occasion for confirming the addition in quantum proceedings. The arguments of the ld.DR, we have noted, are based on the order of the ITAT passed on earlier occasion, which now stand recalled. Therefore, the aforesaid order does not exist at all in the eyes of law and no cognizance of any observation made in the said order can be taken. Even otherwise, the basis of addition made in the present case is the source of investment remaining unexplained. Now, the assessee having explained the source of investment, the ld.DR cannot make out a new case for confirming the addition by stating that though the source of investment stands explained by loan taken by the assessee from his ex-employer, but since this loan was not repaid by the assessee, therefore, it partakes the nature of income by way of salary. This definitely was not the case of the AO and in an appellate proceedings, the Department is debarred from improving upon the case of the AO. In view of the same, we delete the additions made on account of investment made in FDR of Rs.5.00 lakhs and Rs.65.00 lakhs in flat.

8. In view of the above, appeal of the assessee is allowed.

**Order pronounced in the Court on 12<sup>th</sup> October, 2022 at Ahmedabad.**

*Sd/-*  
**(SUCHITRA KAMBLE)**  
**JUDICIAL MEMBER**

*Sd/-*  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER**

Ahmedabad, dated 12/10/2022

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