

**IN THE INCOME TAX APPELLATE TRIBUNAL
“RAJKOT” BENCH, RAJKOT**

[Conducted through E-Court at Ahmedabad]

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos. 215 & 216/Rjt/2022 & 72 &
73/Rjt/2023

(निर्धारण वर्ष / Assessment Year : Block Period: 1.4.89 to
8.6.1999)

Shri Jamnadas R Vikani 22, Kailashnagar, Mitadi Road, Manavadar	बनाम/ Vs.	The Deputy Commissioner of Income Tax Circle-1(1), Rajkot
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAVPV6232E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Mehul Ranpura, A.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Shramdeep Sinha, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	09/06/2023
घोषणा की तारीख /Date of Pronouncement	28/06/2023

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant four appeals at the instance of the assessee are directed against two sets of orders; two dated 16.07.2003 passed by the Commissioner of Income Tax (Appeals)-IV, Rajkot in ITA Nos. 215 & 216/Rjt/2022 & and other two orders dated 27.01.2023 passed by the Commissioner of Income Tax (Appeals)-13, Ahmedabad in ITA Nos. 72 & 73/Rjt/2023 (hereinafter

referred to as 'CIT(A)'), arising out of the orders both dated 25.07.2002 passed by the Learned JCIT, Junagadh Range-1, Junagadh, under Section 271D and 271E of the Income Tax Act, 1961 (hereinafter referred as to 'the Act') for the block period from 01.04.1989 to 08.06.1999.

2. We have heard the rival submissions made by the respective parties and perused the materials available on record.

3. Both the appeals being ITA Nos. 215 & 216/Rjt/2022 are time barred by 6901 days.

4. The appeals have been preferred by the assessee, a non-resident Indian, one of the partners in the partnership firm, namely, M/s. Kuldeep Ginning & Pressing Factory in the capacity of Karta of his Hindu undivided family and currently staying at USA. These appeals are having a chequered history. Initially, a search and seizure action under Section 132 of the Act was conducted at the premises of the appellant on 08.06.1999. Consequent to such search, the jurisdiction of the appellant was transferred to the Deputy Commissioner of Income Tax, Jamnagar and the assessment proceeding whereof was finalized under Section 158BC of the Act on 29.06.2001 for the block period ended on 08.06.1999 determining the undisclosed income of appellant at Rs.71,74,590/- on the alleged violation of the provision of Section 269SS and 269T of the Act by the appellant. Penalty proceedings under Section 271D & 271E of the Act was initiated separately culminating into levy of penalties of Rs.26,97,460/- & Rs.23,45,415/- respectively on 25.07.2002.

5. During the pendency of the assessment proceeding consequent to search, the appellant filed a settlement application before the Hon'ble Income Tax Settlement Commission, Additional Bench, Mumbai on 23.05.2001. It is

relevant to mention that in response to show cause notice issued by the JCIT dated 15.01.2002 as to why the penalty of Rs.26,97,460/- would not be levied on the alleged ground of contravening provisions of Section 269SS of the Act, the appellant by and under letter dated 03.03.2002 denied such allegation and further requested the said JCIT to keep such penalty proceeding in abeyance in order to avoid multiple proceedings as the settlement application filed before the Settlement Commission was pending. Such plea, needless to mention, was not found to be acceptable and penalties were imposed.

6. Prior to that being aggrieved by and/or dissatisfied with the order dated 29.06.2001, passed under Section 158BC of the Act, an appeal before the Ld. CIT(A)-IV, Rajkot, was preferred by the appellant on 09.08.2001. Subsequently separate appeals challenging the orders dated 25.07.2002 passed under Section 271D & 271E of the Act were duly filed by the appellant before the Ld. CIT(A)-IV, Rajkot.

7. On the other hand, the Hon'ble Settlement Commission admitted the settlement applications filed by the appellant on 01.04.2003. However, taking into consideration the provision of Section 245F(2) of the Act holding the Settlement Commission having exclusive jurisdiction on every aspect of the case of the appellant, the Ld. CIT(A)-IV, Rajkot on 16.07.2003, dismissed the appeals preferred by the appellant challenging the order passed under Section 158BC of the Act and 271D & 271E of the Act as well on the ground of maintainability itself. At this juncture, the assessee left for USA and started living there with his family.

8. On 28.05.2013, the Hon'ble Settlement Commission, ultimately, rejected the application on the ground of shortfall in payment of interest

stating that the proceeding before the Hon'ble Income Tax Settlement Commission had abated under Section 245HA of the Act since 31.07.2007.

9. Being aggrieved by and/or dissatisfied with the said order dated 28.05.2013 the appellant duly filed Special Civil Application before the Hon'ble Jurisdictional High Court at Gujarat on 15.01.2014, whereupon, partial relief was granted to the appellant on 26.07.2016. Hon'ble High Court was pleased to grant liberty to the appellant to file appeals before the Ld. CIT(A) latest by 31.08.2016 with an observation that the facts of the case were quite complicated and the statutory provisions even more so.

10. In terms of the liberty granted by the Hon'ble High Court at Gujarat, the appellant on 18.08.2016 duly filed appeal against the order passed under Section 158BC of the Act dated 16.07.2003. During the pendency of the said appeal before the Ld. CIT(A), on 12.02.2021 the appellant further opted for the Vivad se Vishwas Scheme (VSVS) for settling the tax issue in regard to the pending appeal under the said Scheme introduced by and under the Finance Bill, 2020 under Vivad se Vishwas Act, 2020, final order whereof was received on 19.04.2021 under the VSV, 2020 Scheme in Form No.5.

11. Before us, the appellant filed appeal being ITA No. 215/Rjt/2022 for the block period challenging the ex parte order of dismissal by the Ld. CIT(A)-3, Rajkot under Section 271D of the Act to the tune of Rs.26,97,460/- for the alleged contravention of provision of Section 269SS of the Act on the ground that the Settlement Commission was in seisin of the matter and had exclusive jurisdiction on every aspect of the case in terms of Section 245F(2) of the Act. Similarly another appeal being ITA No. 216/Rjt/2022 for A.Y. 2000-01 against the ex parte order of dismissal of by the Ld. CIT(A)-3, Rajkot on the

same ground confirming the order imposing penalty under Section 271E of the Act to the tune of Rs.23,45,415/- passed by the Ld. AO alleging contravention of the provision of Section 269T of the Act was filed by the appellant. Both the appeals are barred by limitation for 6091 days.

12. The appellant, however, on 13.11.2021 filed further two appeals before the Ld. CIT(A)-13 for recalling of the order dated 16.07.2003 levying penalty under Section 271D and 271E of the Act to the tune of Rs.26,97,460/- and Rs.23,45,415/- for contravention of provision of Section 269SS and 269T of the Act, respectively in view of the liberty granted by the Hon'ble Jurisdictional High Court to prefer quantum appeal before the Ld. CIT(A) on the new factual aspect of rejection of settlement application by the Hon'ble Income Tax Settlement Commission as the order of dismissal passed by the Ld. CIT(A) dated 16.07.2003 is only on the sole ground that it is none other than the Settlement Commission exclusively empowered to deal with every aspect of the case in terms of Section 245F(2) of the Act.

13. On 27.01.2023, both the appeals were rejected by the Ld. CIT(A)-13, Ahmedabad on the ground of lack of jurisdiction to recall the order dated 16.07.2003 passed by his predecessor. Hence, another two appeals before us.

14. Before, we deal with the merit of the matter, we find that the appeal being ITA No. 215/Rjt/2022 and ITA No. 216/Rjt/2022 are time barred by 6901 days. It is an admitted fact that these two appeals have been filed by the appellant challenging the order dated 16.07.2003 passed by the Ld. CIT(A)-4, Rajkot holding that the Settlement Commission had exclusive jurisdiction on every aspect of this case in terms of Section 245F(2) of the Act and the said penalty appeals were, therefore, not maintainable.

However, we have to consider certain aspects of this matter, particularly, the order passed by the Hon'ble Jurisdictional High Court in granting partial relief to the appellant by granting liberty to the appellant to file quantum appeal before the CIT(A) latest by 31.08.2006 appreciating the facts of the case were quite complicated and statutory provisions even more so.

15. It is pertinent to note that these two penalty appeals before us are actually arising out of the quantum appeal order dated 29.06.2001 and the liberty granted by the Hon'ble Jurisdictional High Court was also in respect of dismissal of appeal by the Ld. CIT(A)-4, Rajkot dated 16.07.2003 arising out of the said quantum order dated 29.06.2001 under Section 158BC of the Act. Further that, though these two appeals are against the penalty orders but the status of both these two penalty appeals and the quantum appeal in which liberty was granted by the Hon'ble Jurisdictional High Court on 26.07.2016 remained same as on 16.07.2003 i.e. the date of dismissal order of CIT(A)-4, Rajkot and also on the date of order on 26.07.2016 passed by the Hon'ble Jurisdictional High Court. In that event, the delay in respect to these two penalty appeals filed before us by the appellant, therefore, to be reckoned on and from the date of passing of such order granting liberty to the appellant by the Hon'ble Jurisdictional High Court on 26.07.2016. Further, relevant fact is this that the assessee further opted for benefit provided under the VSV Scheme, 2020 introduced by the Finance Bill, 2020 on 12.02.2021 which stood settled on 19.04.2021. It seems that as the penalty is a consequence of order of quantum, the status, whereof were really been revived as soon as the order of High Court granting liberty to the appellant dated 26.07.2016 was passed. However, the assessee failed to file penalty appeals in due time against the order dated 16.07.2003. The assessee ought to have filed these

appeals before us against the order for confirmation of levy of penalty imposed under Section 271D and 271E of the Act immediately after disposal of the application by the Hon'ble Jurisdictional High Court, but the same could not be done in due time. The assessee, however, has filed an application for condonation of delay explaining the inability in preferring these appeals before us with the following submissions:

"In connection with the above, Your Honours' above named appellant most respectfully begs to submit as under:

1. *The appellant, an individual, non resident of India, is currently assessed to tax by the Assistant Commissioner of Income-tax, International Taxation, Rajkot (hereinafter referred to as the "AO"). The appellant is one of the partners in the partnership firm M/s. Kuldeep Ginning & Pressing Factory in the capacity of Karta of his Hindu Undivided Family (hereinafter referred to as the "HUF"). The appellant derives income from interest and agricultural operations. Currently, he is staying at USA.*
2. *Search and seizure action u/s 132 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") had taken place at the appellant's premises, way back in 08.06.1999. Consequent to search, the jurisdiction of the appellant was transferred to Deputy Commissioner of Income-Tax, Jamnagar. The AO had finalized the assessment proceedings u/s 158BC, while the settlement application of the appellant was still pending before Hon'ble Settlement Commission, Additional Bench, Mumbai (said application was filed on 23.05.2001). The AO assessed the undisclosed income of the appellant at Rs 71,74,590/- vide order dated 29.06.2001 and alleged that the appellant had violated provisions of section 269SS and 269T of the Act and, proposed to initiate the penalty proceedings under section 271D and 271E separately.*
3. *Thereafter, the appellant's case was transferred to JCIT, Junagadh Range-1, Junagadh. The jurisdictional AO, initiated penalty proceedings against the appellant u/s 271D and u/s 271E of the Act. The AO issued show-cause notice dated 15.01.2002, requiring the appellant to show-cause as to why the penalty of Rs 26,97,460/- should not be levied on alleged ground of contravening provisions of section 269SS. In response to the same, appellant stated that it had not contravened provisions of section 269SS of the Act. Furthermore, the appellant requested to keep the penalty proceedings in abeyance in order to avoid multiple proceedings as the settlement application filed before the Hon'ble Settlement Commission was still pending. However, the jurisdictional AO did not consider the submission of appellant and passed order u/s 271D dated 25.07.2002, levying penalty of Rs 26,97,460/-.*
- 4.0 *Being aggrieved, the appellant had filed an appeal against the penalty order before CIT (A) - IV, Rajkot on 27.08.2002. In the meantime, Hon'ble Settlement Commission had admitted the settlement application of appellant on 01.04.2003. Thereafter, on 16.07.2003, Hon'ble Commissioner of Income-Tax (Appeals)-IV,*

Rajkot had dismissed the appeal of appellant by stating that settlement commission has exclusive jurisdiction on every aspect of this case in terms of section 245F(2) of the Act and hence, the present appeal does not survive.

- 5.0 *After lapse of almost ten years i.e. on 28.05.2013, settlement commission intimated to appellant that its settlement application is rejected as there has been shortfall in payment of interest and further stated that the proceedings before the Hon'ble ITSC are abated u/s 245HA of the Act since 31.07.2007. Being aggrieved by the order of Settlement Commission, the appellant had filed special civil petition before High Court of Gujarat, who had confirmed the action of Settlement Commission of rejecting the settlement application of appellant. However, High Court of Gujarat granted partial relief to the appellant and restored the right of appellant to file appeal before commissioner by stating that the facts of the case are quite complicated and the statutory provisions even more so. The High Court stated that the appellant can file its appeal to commissioner latest by 31.08.2016. Against this, the appellant had filed appeal against the assessment order passed by DCIT, Jamnagar on 19.08.2016 before CIT (A)-3,Rajkot.*
- 6.0 *The appellant ought to have requested the concerned CIT(A) to recall the appeal of the penalty order passed u/s 271D by JCIT, Junagadh on the background of Gujarat High Court's order, as the penal proceedings are emanated from the assessment order. However, due to unforeseen and unfortunate circumstances of the partners of the firm, the action to request the ld. CIT(A), to recall the appeal remain unattended. The circumstances which prevented the partners to act timely are as under:*
- i. *The appellant alongwith his family had permanently shifted to USA in 2003,*
 - ii. *The appellant and his wife Smt. KaushlyabenJamnadas are senior citizen having multiple health problems and could not attend the matters pending since 15-20 years.*
 - iii. *Thus, all the family members are staying at USA and the business being handled by an employee to whom power of attorney was given. However, this POA is not much conversant with the old matters and as such the delay occurred.*
- 7.0 *Thus, the appellant was prevented by reasonable and sufficient cause in requesting the concerned CIT (A) to recall the earlier appeal filed against penalty order.”*

16. At the time of hearing of the instant appeal, Learned Counsel appearing for the appellant submitted before us that the appellant along with his wife Smt. Kaushalya J. Vikani permanently shifted to USA in the year 2003. He has further drawn our attention to the affidavit affirmed by the appellant appearing at Page Nos. 115 & 116 of the paper book filed before us. The relevant portion whereof is as follows:



115

AFFIDAVIT

I, the undersigned, **Jamnadas Ramjibhai Vikani**, son of Ramjibhai Vikani aged 76 years residing permanently at 60, Harvey Ave Paramus, New Jersey, USA presently at 22-Kailashnagar Nagar Society, Mahadeviya Road, Manavadar, Dist. Junagadh-362630 state the following on solemn affirmation:

1. That the penalty orders u/s.271D & 271E were passed in my case vide orders dated 25.07.2002, levying penalties of Rs.26,97,460/- and 23,45,415/- respectively.
2. Being aggrieved, I have filed an appeal against the penalty orders before CIT (A) - IV, Rajkot on 27.08.2002. In the meantime, Hon'ble Settlement Commission admitted the settlement application of appellant on 01.04.2003. Thereafter, on 16.07.2003, Learned Commissioner of Income-Tax (Appeals)-IV, Rajkot passed order in the appeal by stating that settlement commission has exclusive jurisdiction on every aspect of this case in terms of section 245F(2) of the Act and hence, the present appeals does not survive.
3. After lapse of almost ten years i.e. on 28.05.2013, settlement commission intimated that my settlement application is rejected and further stated that the proceedings before the Hon'ble ITSC are abated u/s 245HA of the Act since 31.07.2007. Being aggrieved by the order of Settlement Commission, I had filed special civil petition before High Court of Gujarat wherein Hon'ble High Court has vide order dated 26.07.2016 held that I can file an appeal to commissioner latest by 31.08.2016. Against this, I had filed appeals on 19.08.2016 against the assessment order passed by DCIT, Jamnagar u/s.158BC for the block period ended on 29.06.2001 before CIT (A)-3, Rajkot.
4. I ought to have requested the concerned CIT(A) to recall the appeal of the penalty orders passed u/s 271D & 271E by JCIT, Junagadh on the background of Gujarat High Court's order, as the penal proceedings are emanated from the assessment order. However, due to unforeseen and unfortunate circumstances, the action to request the Id. CIT(A), to recall the appeal remain unattended. The circumstances which prevented to act timely are as under:

- i. I alongwith my family had permanently shifted to USA in 2003,

Jamnadas R. Vikani



117

- ii. I and my wife Smt. Kaushlyaben Jamnadas are senior citizen having multiple health problems and could not attend the pending matters in the last two decades.
- iii. All the family members are staying at USA and the business being handled by an employee to whom power of attorney has been given. However, this POA is not conversant with the old matters and as such the delay occurred.
5. Because of the circumstances as stated above there has occurred delay in filing appeals before the Hon'ble Income-tax Appellate Tribunal, Rajkot Bench, Rajkot. The delay in filing the appeals is not intentional but because of the inadvertent circumstances as stated above
6. That, I have opted the scheme for settling the tax issue under the scheme, introduced in finance bill - 2020 by Finance Minister under the Vivad Se Vishwas Act, 2020 and had paid due tax at the time of filing application. The said application has been accepted and I had received Final Order in the prescribed Form No - 5. Thus, I have been granted immunity from the imposition of penalty in respect of tax arrears for relevant previous year.

Whatever stated as above is true to the best of my knowledge and belief and nothing is concealed.

Place: Rajkot
Date: 15.02.2023



J. Vikani
(Jamnadas R. Vikani)



Page No. 49
Serial No. 1233
Receipt No. 1233
Date 15-2-23

Before Me
NIRAJ G. SOLANKI
NOTARY (GOVT. OF INDIA)
RAJKOT - GUJARAT



17. The Ld. Counsel, therefore, vehemently argued on the two aspects of the matter, mainly, health issue of the appellant's wife who shifted to USA in 2003 and visiting India for medical treatment; the supporting documents whereof have also been filed before us on 28.03.2023 by the Ld. Counsel appearing for the appellant annexed to the paper book filed. Page Nos. 1 to 5 of the said paper book consist of the medical papers of appellant's wife for F.Y. 2008-09 and Page Nos. 6 to 8 consist of the medical documents for F.Y. 2016-17. The said documents are reproduced hereinbelow:

Mrs. Kaushalya J. Viklani

①

SHALBY HOSPITALS
Opposite Karnavati Club
S.G. Highway, Ahmedabad

Name of Patient: Mrs. Kaushalya J. Vikani
IP No: 7006705
DOA: 3/02/09
Bed No: / ICU: 815
DOD: 9/02/09
Name of Admitting consultant: Dr. Vikram Shah

Date: 9/02/09

Discharge Summary

IP NO
7 0 0 6 7 0 5

Principal Diagnosis on admission:

- Osteoarthritis— Left knee joint.

Discharge diagnoses:

- Osteoarthritis— Left knee joint

Consultations: (Include name and specialty)

Name	Specialty
1. Dr. Nirav Shah	Physician

Procedures/Surgeries

Sr. No	Date	Procedure carried out by	Procedure	CPT Code
1	4/02/09	Dr. Vikram Shah & team	Left total knee joint replacement surgery	

Mrs. Kaushalya J. Viklani

SUMMARY:

A 57- years-old female patient, named **Mrs. Kaushalya J. Vikani**, known case of Hypothyroidism, under Rx presented to Shalby Hospitals on 26/4/07 with chief complaints of **pain in both knee(Left > Right) joint, since 10 months.**

The patient was examined and evaluated by orthopedic surgeon Dr. V.I. Shah & team and was advised appropriate laboratory investigations and x-rays of both knee joint. X-ray was suggestive of **osteoarthritis of Left knee joint.**

The patient was then diagnosed as a case of **osteoarthritis of Left knee joint** and surgical intervention in terms of **Left total knee joint replacement surgery** was advised and planned.

The patient was admitted to Shalby Hospitals on **3/02/09** under surgical care of Dr. V.I. Shah.

After admission, the patient was thoroughly evaluated and past medical history revealed known case of Hypothyroidism and past surgical history of cholecystectomy-2006, hysterectomy-2008 Abdominal T.L.

No H/O HT / DM / IHD / CRF / CHD / DOE / Asthma. The patient has no known drug allergy.

Pre-operative physician fitness and assessment was carried out by Dr. Nirav Shah.

After pre-anesthetic assessment and informed consent, the patient was operated for **Left total knee joint replacement surgery** by Dr. V.I. Shah on **4/02/09** under spinal anesthesia.

TREATMENT GIVEN DURING HOSPITALIZATION

Post operatively; the patient was managed medically by IV Antibiotics, IV Fluids, analgesics, symptomatic supportive drugs and proper post-operative physiotherapy.

Patient was detected Diabetes Mellitus at hospital and treatment was given accordingly.

The patient remained under regular follow up of Dr. V.I. Shah and team, anaesthesiologists and physiotherapists. Regular dressings of the operative site were done by orthopedic surgeon.

The patient gradually improved and is being discharged on **9/02/09** in stable haemodynamic condition with discharge medication and proper follow up advice.

Mrs. Kaushalya J. Viklani

TKR 4

3

DISCHARGE MEDICATIONS: As per separate medication list attached.

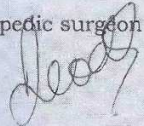
PHYSIOTHERAPY INSTRUCTIONS: Routine.

DIETARY INSTRUCTIONS: Anti diabetic diet

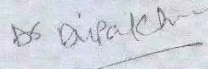
FOLLOW UP ON (specify date and name of Dr.): 21/02/2009 with all x-rays, reports, treatment papers and discharge medicines.

ATTACHMENTS (If any): All investigations reports, first consultation paper, physician fitness, separate discharge medication list and 3 (three) certificates.

Orthopedic surgeon



Medical Officer



Prepared by



Shalby Hospitals

Opp. Karnavati Club, S. G. Road,
P.O. Ambawadi Vistar, Ahmedabad-380015 (GUJARAT) INDIA
Tel. No. (079) 40203000 | Fax (079) 40203109
Website www.shalby.org | Email info@shalby.org



Date : 05/02/2009 I.P./OPD No. : 7006705
Patient Name : MRS. VIKANI KAUSHALYA JAMNADAS
Bed No. : 815
Referred By : Dr. VIKRAM I SHAH
Lab No. : 31011445
Created By : radno on 04/02/2009 23:51
Printed By : radsd on 05/02/2009 09:57

Department of Interventional & Diagnostic Radiology

REPORT

INVESTIGATION : X RAY LEFT KNEE AP / LATERAL (PORTABLE).

There are metallic implants seen in situ.
No loosening or break is seen in the implants noted.
No evidence of fracture, erosion or periosteal reaction seen.

IMPRESSION : NORMAL POST OPERATIVE APPEARANCE OF LEFT KNEE.

DR. MANISHA SHAH MD
Consultant Radiologist.

Shalby Hospitals

Reg. No. 1918



In - Patient Settlement Receipt

Receipt No : 7104716

Date : 09/02/2009

Received with thanks from - VIKANI KAUSHALYA JAMNADAS

The sum of Rupee : Two Lakhs Thirty Seven Thousand Forty Four Only.
Towards : Bill No 11146 - Rs. 0 , 11147 - Rs. 7044 ,

In - Patient No : 7006705

Class : Premier

Wing : MAIN WING

Cash :
Cheque :
Cr.Card :
Deposit Apply :On Bill No: 11147
Deposit Apply :On Bill No: 11147

7044
Nil
Nil
205000
25000

Rs. 237044

IPRAK

Received By





Shalby Limited

Opp. Karnavati Club, S.G. Highway
Ahmedabad-380 015, Gujarat (INDIA)
Phone : (079) 40203000 | Fax : (079) 40203109-3120
Website : www.shalby.org | E-mail : info@shalby.org



In - Patient Deposit Receipt

Receipt No : 9107340 Date : 15/02/2017
Received with thanks from - VIKANI KAUSHALYA JAMNADAS
The sum of Rupee : Two Lakhs Seventy Five Thousand Only.
Towards : Admission Deposit 275000

In - Patient No : 7079960

Class : Premier	Wing : MAIN WING
Cash :	Nil
Cheque : THE VERAVAL ME 00813010000926-7021	275000
Credit : 0	Nil
	Rs. 275000

Remark : THE VERAVAL ME-00813010000926-702157820050

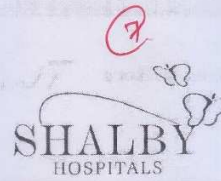
IPBRP 15/02/2017 17:21:11

Cheques are subject to realisation



Shalby Hospitals

Opp. Karnavati Club, S G Highway,
 Ahmedabad-380054 GUJARAT (INDIA)
 Tel. No. (079) 40203000 Fax (079) 40203109
 Website www.shalby.org Email info@shalby.org



Pre Operative Patient Fitness by Physician

Name of patient Kamlesh Jayant Utkam Age 57 Gender M
 Height _____ Weight _____ Occupation _____ Religion _____

Pre Operative Medical Examination by Dr. Ashish Abhaya

Present Complaints

Chest pain / Chest tightness	
Shortness of breath	
Paroxysmal nocturnal dyspnoea	
Cough / expectoration	
Fever	
Indigestion / hiatus hernia / APD	
Weakness of arms / legs	
Epilepsy / Blackouts / Seizures	<u>mt</u>
Excessive bleeding / blood clots	
Others	

Past Surgical History

<u>Cholecystectomy</u>	
<u>T/C</u>	
<u>Uterus</u>	

Past Medical History

Heart attack / angina / heart trouble / Heart failure	
Murmur / rheumatic fever / heart beat irregularity	
Asthma, bronchitis, Inhaler, COPD	
Hypertension	
Diabetes Mellitus	<u>mt</u>
Cerebrovascular accident	
Thyroid disorder <u>Hypothyroid</u>	<u>✓</u>
Epilepsy	
Jaundice / hepatitis / liver disease	
Any kidney problem	
Received anaesthesia in part	
Any reaction to anaesthesia agent	
Any family member has a reaction to any anaesthetic agent ?	
denture-caped or false tooth	
Pregnancy	
Steroids / Blood transfusion	<u>mt</u>
Tuberculosis	

Family History

Diseases	Relation
DM	
HT	
Tuberculosis	
Asthma	
IHD	<u>mt</u>
Cancer	
Others	

Levothyroxine

Drug History Thyronorm 50mg 1-0-0

8

Known allergies (If any) Nil.

Any Substance abuse Nil.

Functional Capacity Can climb 1st story who can

On Examination

Temperature	
Pulse	54
Blood pressure	120
Respiratory Rate	
SpO2 (baseline)	

General Examination

Pallor	
Clubbing	
Cyanosis	
Edema	None
LNE	

General Examination

System	Findings
Cardio-vascular systems	
Respiratory systems	
Gastrointestinal systems	Nil
Central nervous systems	

Final impression : Patient can be taken to surgery with ASA Grade II

Advice :

- 1 Blood sugar 5 times / day : FBS / BL / PPBS / BD / PDBS and insulin regularly
- 2 CCM during surgery. Avoid fluid overload. Keep for 1 day in ICU for observation
- 3 Chest physiotherapy / incentive physiotherapy / deep breathing exercises
- 4 Avoid Non-steroidel anti-inflammatory drugs.
- 5 Avoid nephrotoxic drugs.
- 6 Others

Any Non-steroidel anti-inflammatory drugs
 Hb 140 - 150 - M
 Hct 45 - 50 - M
 Hb 151 - 160 - M
 Hb 161 - 170 - M
 Hb 171 - 200 - M
 2 200 - M

Physician Name Dr. Anil A. Arora

Date : 22/01/2022

Physician Sign. [Signature]

Time : 10:30 AM

18. The above documents are sufficient enough to suggest poor health condition of the appellant's wife having multiple surgery, suffering from various illness, old age ailments too including thyroid disorder and were under constant medical treatment. We note that the Ld. DR has not been able to controvert such factual aspect of the matter. We find that these documents are sufficient enough to establish the fact of the appellants and his spouse being senior citizens, having multiple health issues, visiting India for health check-up and surgery, remained under constant medical supervision.

19. The other explanation that as the appellant is 76 years old, presently residing at New Jersey, USA, left for USA in 2003 not been able to take proper steps in the matter pending since 15 to 20 years and the business is being handled by his employee to whom power of attorney was given in the absence of appellant's son Shri Kuldeep Jamnadas who also left for USA in 2008 also requires proper consideration. According to the appellant, such attorney is neither conversant with such old matters, nor been able to take proper steps in the proceeding pending before the different judicial forums. In fact, there was, therefore, constant communication gap between the appellant and his constituted attorney in taking proper steps in the matter. Such explanation seems to be genuine considering the evidence/affidavit filed before us by the appellant coupled with the factual aspect of the matter as already narrated hereinabove.

20. Under these facts and circumstances of the case, particularly, the prolonged Court case, health problem and inefficient constituted attorney, we find 'sufficient cause' has been shown by the appellant in being unable to prefer the appeals before us within time. The same is found to be bonafide considering the factual matrix of the matter even though the appeal is filed

after delay. Neither, negligence on the part of the appellant is found in preferring the appeals before us. Nor thoroughly negligent in prosecuting his case is reflecting on the facts placed on record supported by sufficient evidence rather we find that in each and every occasion, the appellant pursued the matter before all the forums including the lower authorities, Hon'ble Income Tax Settlement Commission and the Hon'ble Jurisdictional High Court as well. In fact, in our considered opinion, in the case in hand the following should be taken into account in order to adjudicate the issue of condonation of delay:

- i. A liberal, pragmatic and justice oriented and non-pedantic view is required to be observed while dealing with the application for condonation of delay.
- ii. The terms 'sufficient cause' should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
- iii. Substantial justice being paramount and pivotal, the technical considerations should not be given undue and uncalled for emphasis.
- iv. No presumption can be attached to deliberate position of delay but, gross negligence on the part of the either Counsel or litigant is to be taken note which is not found in the case in hand before us.
- v. Apart from that we have to consider the prejudice theory; the appellant in this particular case would be seriously prejudiced in the event these applications in respect of penalty appeals are not allowed, keeping in view of

the particular fact that the assessee was all along and all through vigilant about his case, executed power of attorney and kept constant vigil and it is also required for the courts to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vi. The conduct, behavior and attitude of a party in relation to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties. However, the entire gamut of the facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

vii. While considering the aspect of condonation of delay, we are reminded with the Latin maxim 'Ubi Jus Ibi Remedium', meaning thereby, where there is a right, there is a remedy. When the law has established a right, there should be a corresponding remedy for its breach. This right to remedy is one of the fundamental rights historically recognized in all legal jurisprudence. This will apply to all regardless of one's place of origin, belief or way of living. They are based on shared values like dignity, equality, fairness, independence and respect. They are needed to be protected in case of any breach against them would happen and the legal maxim 'Ubi Jus Ibi Remedium' comes into play. This maxim states that the person whose right has been infringed has a right to enforce the infringed right through any action before the court. The two ingredients of this particular doctrine being 'jus' and 'remedium' to be considered in this aspect. 'Jus' means legal authority to do or demand something from and 'remedium' means rights of action. It simply gives us a meaning that if there is any violation of the legal right, then

the law provides a remedy to the affected person. Everyone in the vicinity has the right to have a good legal remedy by the tribunals for the acts which violates one's fundamental rights or human rights which are granted to him by the constitution or by any law in the vicinity. Here, the appellant before us, has ventilated its grievances initially before the First Appellate Authority but without any result due to the pendency of the application for settlement before the Income Tax Settlement Commission. After rejection of the application by the Settlement Commission the appellant filed appeal before the Hon'ble Jurisdictional High Court and obtained order on 26.07.2016 in favour of the appellant by way of liberty to file the appeal before the appropriate forum against the order passed in the quantum appeal. The said quantum appeal was also settled under the VSV Scheme, 2020. As the penalty is consequential to the order of quantum proceeding, the assessee filed appeals challenging the order of dismissal dated 16.07.2003 passed by the Ld. CIT(A)-4, Rajkot on the ground of pendency of the matter before the Settlement Commission. The assessee, has a right to approach the Court seeking remedy against the said orders and we cannot keep the assessee aside remediless, keeping in view of this fact of having no deliberate or willful violation or malafide intention on the part of the assessee in filing the appeal before us though the same is apparently after a long delay.

viii. While going through the entire records of the case, we do not find any fraud or misinterpretation by the assessee by taking recourse to the technicalities of law of limitation.

21. On this aspect, we are also enlightened by the ratio laid down by the Hon'ble Apex Court in the case of *Sardar Amarjit Singh Kalra & Ors. vs. Pramod Gupta & Ors.* in Appeal (civil) 1027-1028 of 1992 where this

particular maxim of 'Ubi Jus Ibi Remedium' has been recognized as fundamental principle of law and held that the duty of the Court is to protect the rights of the people and grant relief to the aggrieved party rather than denying it.

22. In fact, the 'sufficient cause' as it appears in the Act is to be interpreted and understood in its proper spirit as these terms are flexible enough to be applied liberally in the interest of justice even in the case of long delay. Applying the ratio laid down by the Hon'ble Supreme Court and considering the explanation so rendered by the appellant, we find that the appellant has been able to overcome the hurdle of condonation of long delay in preferring the appeals before us. We, therefore, with the aforesaid observations, condone the delay.

23. However, the impugned orders passed by the Ld. CIT(A) is only on the ground that the Hon'ble Income Tax Settlement Commission has exclusive jurisdiction on every aspect of this case in terms of Section 245F(2) of the Act and in terms of provision of Chapter XI-A. It is an admitted position that the Settlement Commission has already rejected the application filed by the assessee on 28.05.2013 on the ground of shortfall in the payment of interest and stated that proceeding before the said Commission had abated under Section 245HA of the Act since 31.07.2007. The order passed by the Ld. CIT(A) is, therefore, found to have no consequence. The observation made thereof has no meaning at this stage and no order need to be passed. In fact, the cause of action in preferring the appeals against the impugned orders dated 16.07.2003 at this stage does not subsist. Hence, appeals are dismissed as infructuous.

24. In the result, assessee's appeals in ITA Nos. 215 & 216/Rjt/2022 are dismissed as infructuous.

ITA Nos. 72 & 73/Rjt/2023

25. These two appeals are arising out of the orders both dated 27.01.2023 passed by the Ld. CIT(A)-13, Ahmedabad.

26. Before the said CIT(A), the appellant challenged the confirmation of penalty under Section 271D r.w.s. 269SS of the Act to the tune of Rs.26,97,460/- and levy of penalty under Section 271E r.w.s. 269T of the Act to the tune of Rs.23,45,415/- both dated 16.07.2003. Initially, when appeals were filed against order dated 25.07.2002 for levy of penalty under Section 271D and 271E of the Act to the tune of Rs.26,97,460/- and Rs.23,45,415/- respectively on 16.07.2003, the Ld. CIT(A)-4, Rajkot dismissed the said two appeals stating the Settlement Commission had exclusive jurisdiction on every aspect of this case in terms of Section 245F(2) of the Act and therefore the appeals were not found to be maintainable. These two appeals filed by the appellant on 13.11.2021 practically were for recalling of confirmation of penalty order passed by the Ld. CIT(A)-IV, Rajkot in view of the rejection of application by the Settlement Commission on 28.05.2013 and disposing of the Special Civil Application by the Hon'ble Gujarat High Court on 26.07.2016 restoring the right of the appellant to file the quantum appeal before the Commissioner stating that the facts of the case was quite complicated and the statutory provisions even more so. In fact, on this premise, the assessee preferred appeal before the Ld. CIT(A)-13, Ahmedabad on 13.11.2021 with the prayer for recalling of the orders passed by the Ld. CIT(A) dated 16.07.2003, whereby and whereunder the appeals were dismissed due to lack

of jurisdiction as the Hon'ble Income Tax Settlement Commission was in session of the matter and having exclusive jurisdiction on every aspect of this case in terms of Section 245F(2) of the Act. Therefore, the appeals preferred by the assessee before the Ld. CIT(A)-IV, Rajkot stood dismissed on 16.07.2003 only on maintainability ground and not on merit. Practically, the imposition of penalty under Section 271D & 271E r.w.s. 269SS and 269T to the tune of Rs.26,97,460/- and Rs.23,45,415/- respectively were not adjudicated on merit by any of the Ld. CIT(A). Even in the second round of litigation, the Ld. CIT(A)-13, Ahmedabad on 27.01.2023 dismissed these two appeals filed before it not on merit but found the same as not maintainable for this particular reason that the said Ld. CIT(A)-13, Ahmedabad is not conferred with the jurisdiction of recalling the order passed by his predecessor being CIT(A)-IV, Rajkot dated 16.07.2003. Again whether the issue of imposing penalty under Section 271D & 271E of the Act passed by the Ld. AO on 25.07.2002, is justified or not remained unadjudicated. We, however, cannot shut our eyes saying that the Ld. CIT(A) does not have any power to review the order passed by his predecessor, keeping in view the order passed by Hon'ble Jurisdictional High Court in granting liberty to the appellant to prefer the appeal against the order of appeal in quantum dated 16.07.2003, as the penalty is offshoot of quantum proceeding. Moreso, a litigant cannot remain remediless as because in the first juncture the CIT(A) dismissed the appeal as the Settlement Commission was in seisin of the matter and even in the second round, the Ld. CIT(A) does not have power to recall the order dated 16.07.2003 passed by his predecessor. The avenue to adjudicate the issue of penalty whether justifiable or not cannot be blocked in the way it has been done in this case. The latin maxim 'Lex Semper Dabit Remedium' plays the paramount role in the facts and circumstances of the case, meaning thereby,

the law will always give a remedy. In fact, every violation of a legal right should give rise to some form of remedy to the aggrieved party. This maxim coupled with the other maxim as we have already discussed in the forgoing paragraph being 'Ubi Jus Ibi Remedium', meaning thereby, where there is a right, there is a remedy to be applied herein in its proper perspective. Though, we do not want to make any comment on the approach taken by the Ld. CIT(A) in both the occasions but keeping in view the law of reasonableness and fairness which plays a prime role in rendering substantive justice to the litigant, in this case the appellant before us, we ultimately think it proper to adjudicate the issue by ourselves.

27. The present penalty proceedings emanate from the order passed by the Ld. AO dated 29.06.2001 under Section 158BC of the Act in respect of the Block Period ended on 08.06.1999. During the course of assessment proceeding, the Ld. AO recorded its finding at para 6 of assessment order that from the rough cash book being Annexure A-16, A-41 & A-75, it was found that the assessee has credited large amount in the name of Patel Cotton Company and the said account is operated as current account but no transaction has been recorded in the regular books of accounts. The said account was also reproduced in the assessment order; the assessee did not produce any evidence or confirmation in support of the said credits in the account. In fact, it is found from the records that the assessee has credited total of Rs.6,10,000/- and payment of Rs 6,05,000/- which was made in piecemeal. The peak credit has been considered as appellant's unexplained cash credit introduced during the block period and addition to the tune of Rs.4,30,000/- was made.

Paragraph 10 of the assessment order speaks of credit amount of Rs.11,87,460/- of the assessee and payment of Rs.8.52,415/- in the name of

M/s Patel Ginning Co. against which the peak of Rs.3,35,045/- was considered as undisclosed income of the assessee and added to the total income of the appellant.

28. Similarly, paragraph 12 of the assessment order records that Annexure A-75 and A-40 reflect various credits and debits amounting to Rs.9,00,000/- and Rs.8,88,000/- respectively in the name of Kuldeep Borewell which were neither found in the regular books of accounts. The peak credit of Rs.1,73,800 was added on account of undisclosed income of the assessee.

29. The total amount of credit of Rs.26,97,460/- was found to be in violation of section 269SS r.w.s 271D of the Act and payment of Rs.23,45,415/- as in violation of Section 269T r.w.s 271E of the Act. It is an admitted fact that the Ld. AO taxed the peak of these cash transactions in the hands of the assessee on account of undisclosed sources and therefore, initiation of proceedings under Section 271D and 271E is uncalled for as of the main argument advanced by Ld. AR before us. On the other hand, the Ld. DR relied upon the orders passed by the authorities below in imposing penalty and confirmation made thereof by the Ld. CIT(A).

30. The provision of Section 271D reads as follows:

“271D. [(1)] If a person takes or accepts any loan or deposit [or specified sum] in contravention of the provisions of section 269SS, he shall be liable to pay by way of penalty, a sum equal to the amount of the loan or deposit for specified sum) so taken or accepted].

h) Thus the provisions of section 271D would come into play only when the assessee is considered to have accepted the loan or deposits in contravention of provisions of section 269SS which prohibits acceptance of loan or deposits otherwise than by an account payee cheque or draft or use of electronic clearing system if the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregated amount referred in clause (b) is twenty thousand rupees or more. In the instant case on one side the AO has held that the entire receipts and payments recorded in the seized material do not reflect in the regular

books of account and the assessee could not furnish evidence related to its genuineness and as such the peak of receipts is held to be the undisclosed income of the assessee and simultaneously initiate and levy penalty u/s 271D holding it as loan or deposit from others is contradictory Once the AO has taxed the peak of the transaction in the hands of the appellant the question of holding the same as loan or deposit for the purpose of section 271D is ab initio void”

31. We further note that the finding of the Ld.AO to the effect that the peak of receipts recorded in the name of third parties is nothing but appellant's own undisclosed income has already reached finality as soon as the matter got settled under the Vivad Se Vishwas Act, 2020 on 19.04.2021 in respect of the appeal pending before the appellate forum arising out of the same assessment order dated 29.06.2001. Thus, there is no scope for illustration of the mechanism already adopted by the Ld. AO in imposing penalty as we find that the peak of appellant has been held to be the undisclosed income of the appellant and added to the income of the appellant.

On this aspect, we have considered the judgment relied upon by the Ld. AR passed by the Jurisdictional High Court in the case of CIT vs. Shyam Corporation, reported in [2013] 7 TMI 772, wherein receipt for which revenue intends to invoke the provision of Section 269SS or 269T of the Act as the case may be for imposing penalty under Section 271D or 271E of the Act as the case may be during the assessment proceeding treated as booking advance and consequently assessed as undisclosed income of the assessee invoking Section 68 of the Act, it has been held by the Hon'ble Court that in that event the same would, thereafter, not bear the character of loan or advances and thus decided against the Revenue. Respectfully relying upon the said ratio laid down by the Hon'ble Court, the initiation of penalty proceeding under Section 271D r.w. s. 269SS of the Act culminating into levy of penalty holding it as loan or deposit is, thus, found to be contradictory in the case in hand. Therefore, the same is bad, void ab initio and liable to be quashed. The identical ratio is also applied for initiation of penalty under Section 271E of

the Act culminating into imposition of penalty for alleged violation of provision of Section 269T of the Act. The same is, therefore, held to be bad and void ab initio and, thus, quashed.

32. Both the appeals filed by the appellant are, therefore, allowed.

33. In the combined result, ITA Nos. 215 & 216/Rjt/2022 are dismissed as infructuous and ITA Nos. 72 & 73/Rjt/2023 are allowed.

This Order pronounced on 28/06/2023
--

Sd/-

(WASEEM AHMED)

ACCOUNTANT MEMBER

Ahmedabad; Dated 28/06/2023

S. K. SINHA

True Copy

Sd/-

(MADHUMITA ROY)

JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

By order/आदेश से,

Deputy/Asstt. Registrar
ITAT, Rajkot