

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr ARJUN LAL SAINI, ACCOUNTANT MEMBER

आ.अ.सं./ITA No.388/SRT/2018 (AY 2008-09)

(Hearing in Virtual Court)

Shri Maheshbhai M Pandya, 9, Dipkiran Co-Op. HSC, Society, Nr.N.H.-8, GIDC, Vapi-396195 PAN No. AFUPP 6452 J	Vs	Income Tax Officer, Ward-6, Vapi,
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से /Assessee by	Written Submission
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr-DR
सुनवाई की तारीख/Date of hearing	14.08.2023
उद्घोषणा की तारीख/Date of pronouncement	16.08.2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by assessee is directed against the order of Ld. Commissioner of Income-tax (Appeals), Valsad [for short to as “Ld. CIT(A)”] dated 23.03.2018 in confirming the penalty levied by Assessing Officer under section 271(1)(c) of Income Tax Act, 1961 (“the Act”) on 29.04.2016 for the assessment year 2008-09. Initially this appeal was adjudicated vide order dated 20.09.2022 in ex parte proceedings as neither the assessee nor his representative appeared despite service of notice of hearing of appeal. However, the order dated 20.09.2022 was re-called in assessee’s Miscellaneous Application (MA) No.17/SRT/2023, vide order dated 26.06.2023. Thus, this appeal was taken up for hearing

afresh. We find that at the time of hearing MA No. 17/Srt/2023, the dated of hearing afresh was fixed on 28.07.2023, despite fixing the appeal for hearing in the presence of representative of assessee, neither the assessee nor his Authorized Representative appeared nor filed any application for adjournment on the part of assessee. However, the assessee filed detailed written submission on 28.07.2023 *wherein* relied on certain decisions mentioned therein.

2. Today (14.08.2023) again none appeared on behalf of assessee nor filed any adjournment application, therefore, we decide to hear the submission of Ld. Senior Departmental Representative (Ld. Sr-DR) for the Revenue and to consider the written submissions filed on behalf of assessee. The assessee in his submissions, submits that assessee filed his return of income for assessment year 2008-09 on 11.07.2008 declaring income of Rs.4,40,646/-. Subsequently case of assessee was re-opened under section 147. Notice under section 148 was served upon the assessee on 28.10.2015. In response to notice issued under section 148, the assessee filed his return of income declaring income at Rs.15,30,788/-. His assessment was completed under section 143(3)/147 on 28.10.2015, in accepting returned filed in response to notice under section 148 of the Act. The Assessing Officer initiated penalty under section 271(1)(c) by taking view that assessee concealed

income while filing his return of income and levied penalty of Rs.2,61,800/-. On appeal before 1d CIT(A), the assessee in his submissions stated that there was no variation in the return of income filed in response to notice issued under section 148 of the Act, while passing assessment order, the Assessing Officer initiated penalty. The Assessing Officer while levying penalty held that the assessee has not shown Long Term Capital Gains (LTCG for short) while filing original return of income. The assessee has referred the provision of Section 148 and submitted that on going through the proviso of Section 148, it became clear that before making assessment under section 147, the Assessing Officer has issued notice in requiring the assessee to file his return of income and any such return filed under section 147, replace his original return of income, for such purpose, such returned filed is treated as returned filed under section 139. The alleged concealment of income as shown in the return of income under section 148, which is nothing but return under section 139 and the question of applicability of provision of penalty under section 271(1)(c) does not arise. In support of assessee's submission, assessee relied upon the decision of Hon'ble jurisdictional High Court in the case of Kirit Dahyabhai Patel Vs Assistant Commissioner of Income-tax [2017] 80 taxmann.com 162 (Guj)/[2015] 280 CTR 216 (Guj)[03-12-2014].

3. On the other hand, Ld. Sr-DR for the Revenue supported the order of lower authorities and also relied on various case laws relied by Id CIT(A) in his order.
4. We have considered the submissions of both the parties and have gone through the order of lower authorities carefully. We also deliberated case law relied by lower authorities as well as assessee in his written submission filed. We find that assessment order under section 143(3) r.w.s 147 was completed on 28.10.2015. The assessing officer while passing the re-assessment accepted return income, filed in response to notice issued under section 148 of the Act. Meaning thereby the assessing officer accepted return of income Rs.15,30,788/- without variation.
5. We find that Assessing Officer, in para-4 of assessment order, recorded that assessee has purchased agricultural land on 30.10.2002 for a consideration of Rs. 37,500/-. The land in question was converted into a non-agricultural land on 01.12.2003. During the financial year, the assessee sold non-agricultural land at sale deed value of Rs.11.61,000/- and stamp valuation authority valued the land for the purpose of stamp duty at Rs.12,19,824/- and provision of Section 50C is applicable. The assessee has accepted the sale consideration of Rs.12,19,824/- for the purpose of computation of long term capital gain (LTCG). On the LTCG, the assessee paid due tax. Thereafter, the Assessing

Officer initiated penalty proceedings for concealment of particulars of income and levied penalty vide order dated 29.04.2016. Before levying penalty, the Assessing Officer recorded that show cause notice under section 274 r.w.s., 271(1)(c) was issued to assessee on 18.04.2016 to file reply by 22.04.2016. The Assessing Officer further recorded that in response to show cause notice, assessee made prayer for adjournment. The Assessing Officer instead of adjourning case of assessee recorded that he has considered the submission made by assessee and not accepted the same. The Assessing Officer levied the penalty @ 100% tax sought to be evaded by invoking Explanation-1 to under section 271(1)(c) and held that assessee concealed income to the extent of Rs.11,55,374/-.

6. Aggrieved by the penalty, assessee filed appeal before Ld. CIT(A). Before Ld. CIT(A) assessee filed detailed written submission. The submission of assessee was duly recorded in para-3.2 in the order of Ld. CIT(A). The assessee in his submission, submitted that in return of income, assessee has accepted capital gains earned on sale of non-agricultural land and paid tax along with interest and assessee has no intention to evade the tax. To support his written submission, assessee relied on various case law that there was no *mens rea* in his action while filing original return of income as well as returned in response to notice under section 148. Once his

revised assessment was accepted, there is no question on levying penalty. The Ld. CIT(A) after considering the written submission of assessee held that assessee is claiming that there was no wilful intention of concealment of income, however, assessee in the original return of income failed to disclose LTCG and the return was not revised until notice issued under section 148 was not issued and served upon the assessee. The ratio of decision of Hon'ble Apex Court in the case of MAK Data (P.) Ltd. Vs. CIT (2013) 358 ITR 593 (SC) is squarely applicable on the fact of this present case. On the *bona fide* and reasonable explanation, the Ld. CIT(A) held that during assessment proceedings, penalty was already initiate so there is no need to record mandatory satisfaction. Further aggrieved, the assessee has filed present appeal before the Tribunal. We have already recorded the submission of both the parties in above para (supra).

7. We find that assessee in his written submissions has mainly relied on the decision of Hon'ble jurisdictional High Court in the case of Kirit Dahyabhai Patel (supra) wherein it was held that return of income filed in response to notice issued under section 153A is to be considered as returned filed under section 139 of the Act, for the purpose of penalty imposed under section 271(1)(c) to be levied on the income assessed over and above the returned income. We find High Court further held that assessment made on the

returned filed in response to notice under section 153A, therefore the returned is to be considered for the purpose of penalty initiated under section 271(1)(c) and penalty is to be levied on the income assessed over and above returned income, if any, thus, no penalty can be levied when returned is accepted by Assessing Officer. We are conscious of the facts that assessment in the present case is completed under section 147. Going by the language of section 148, that any such return filed under this section, replace his original return of income, for such purpose, such returned filed is treated as returned filed under section 139. We find that the ratio of decision of Hon'ble jurisdictional High Court in the case of Kirit Dahyabhai Patel (supra) and is squarely applicable on the facts of the present case. Hence, we direct the Assessing Officer to delete the penalty levied under section 271(1)(c) vide order dated 29.04.2016.

8. The case law relied by Ld. CIT(A) in the case of MAK Data (P.) Ltd. (supra) in his order is not applicable on the facts of the present case. In the said case, when the Assessing Officer called upon the assessee to produce the evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of the transactions, the assessee simply folded up and surrendered a sum. The assessee merely stated that with a view to avoid litigation and buy peace and to

channelize the energy and resources towards productive work and to make amicable settlement with the Income tax department, it surrendered the income under the head 'income from other sources. However, in the present case the assessee in the return of income in response to the notice under section 148 has offered capital gain and paid tax of Rs. 4,03,262/-. Thus, the facts of the present case are at variance. In the result, all the grounds of appeals raised by the assessee are allowed

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

Order pronounced in the open court on 16/08/2023.

Sd/-
(Dr ARJUN LAL SAINI)
[लेखा सदस्य/ACCOUNTANT MEMBER] [न्यायिक सदस्य JUDICIAL MEMBER]
Surat, Dated: 16/08/2023
Dkp. Out Sourcing Sr.P.S

Copy to:
1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

// True Copy //

By order

Sr. Private Secretary /Private Secretary
/Assistant Registrar, ITAT, Surat