

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT (SMC) BENCH
BEFORE SHRI DR. A. L. SAINI, ACCOUNTANT MEMBER

आयकर अपील सं./ITA Nos.280 to 282/SRT/2022

Assessment Years: (2009-10)

(Physical Hearing)

Pinky Manishkumar Jariwala, 4/1710, Nawabwadi, Begampura, Surat – 395003.	Vs.	The ITO, Ward – 2(2)(3), Surat
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AHNPJ7591D		
(Appellant)		(Respondent)

Assessee by	Shri P. M. Jagasheth, CA
Respondent by	Shri Vinod Kumar, Sr. DR
Date of Hearing	23/08/2023
Date of Pronouncement	28/08/2023

आदेश / O R D E R

PER DR. A. L. SAINI, AM:

Captioned three appeals filed by the same assessee, pertaining to same Assessment Year (AY) 2009-10, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), [in short “the ld. CIT(A)”], National Faceless Appeal Centre (in short ‘the NFAC’), which in turn arise out of an assessment order passed by the assessing officer under section 144 r.w.s. 147 of the Act, and two penalty orders passed by Assessing Officer u/s 271(1)(c) and 271(1)(b) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. These three appeals filed by the assessee for Assessment Year 2009-10, are barred by limitation by one day. The assessee has moved a petition requesting the Bench to condone the delay. I have heard both the parties on this preliminary issue. Having regard to the reasons given

in the petition, I condone the delay and admit these three appeals for hearing.

3. Since, the issues involved in these three appeals, are common and identical; therefore, these appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

4. Now, I shall take assessee's appeal in ITA No.280/SRT/2022, for assessment year (AY) 2009-10, wherein the grounds of appeal raised by the assessee are as follows:

"1. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in re-opening the assessment u/s. 147 of the Act and notice u/s. 148 of the Act was issued.

2. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in making addition of Rs.38,12,933/- on account of alleged bogus sales on protective basis.

3. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in initiating penalty proceedings u/s.271(1)(c) of the Income Tax Act, 1961.

4. It is therefore prayed that the above addition may please be deleted as learned members of the tribunal may deem it proper.

5. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal."

5. Ground no.1 raised by the assessee has not been argued by Id Counsel for the assessee, therefore, I dismiss ground No.1, as not argued/pressed.

6. Ground no.3 raised by the assessee, relates to action of the assessing officer, in initiating penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961. I note that assessee has filed a separate appeal

in ITA No.281/SRT/2022 for AY.2009-10, against the penalty u/s 271(1)(c) of the Income Tax Act, therefore, I dismiss ground No.3 raised by the assessee in quantum appeal.

7. Succinct facts *qua* ground No.2 of the assessee's appeal, are that assessee before me is an Individual. The assessee has not filed her Return of income for the assessment year 2009-10. In assessee's case information was received from ITO, Ward-1(2), Surat, that during Financial Year 2008-09 relevant to AY 2009-10, the assessee has made bogus transaction. The information contained in the report of the investigation wing, Surat, is mentioned by the assessing officer in page No.1 to 3 of the assessment order. The assessing officer has gone through the report of the investigation wing, and observed that the inquiry conducted by Investigating wing, led to the discovery of several other concerns operating from the office address at 5001, World Trade Centre, Ring Road, Surat, which belongs to the Fortune Creations group of Surat, wherein the assessee is proprietor of two concerns, namely: i) P.M Textile and ii) Mihir Fabris with the Bank account Nos.71771010018729 and 71771010000091, held with Syndicate Bank, Surat. The assessing officer observed that during the year under consideration, the assessee has made fictitious sale to the tune of Rs.38,12,933/- to Fortune Creations Pvt. Ltd.

8. Therefore, assessing officer was of the view that income has escaped assessment to the extent of Rs.38,12,933/-. Accordingly, the notice u/s 148 of the I.T. Act has been issued by the assessing officer, on 20.03.2014, which was dully served upon the assessee on 21.03.2014. In response to notice u/s 148 of the I.T. Act, neither anybody attended nor any reply was filed on behalf of the assessee.

The assessing officer has also issued further notices under section 142(1) of the Act, however, assessee has not submitted reply before the assessing officer. Therefore, assessing officer proceeded to make addition under section 144 of the Act, based on best judgment. The assessing officer concluded that as the assessee is proprietor of two concerns, namely: i),P.M Textile and ii) Mihir Fabris and has made fictitious sale to the tune of Rs.38,12,933/- to Fortune Creations Pvt. Ltd. Therefore Rs.38,12,933/- was added in the income of the assessee on protective basis.

9. The assessing officer also estimated the assessee's regular business income of Rs.2,00,000/- in addition to income of Rs. 38,12,933/- in form of bogus sale as mentioned above.

10. Aggrieved by these two additions, the assessee carried the matter in appeal before the Id. CIT(A), who has confirmed the action of the Assessing Officer, observing as follows:

*“5.3.3 Clearly, the case involves bogus transactions and inflation of purchases by the main group, M/s Fortune Creations Group. When an assessee undertakes resorting to bogus purchases, normally, the name lender or fictitious seller charges a commission and issues sales entries as agreed. The payments are made in cheque and the entry provider returns the amount in cash, or in cheque through a circuitous way, after debiting / retaining his commission amount, ranging between 2 to 5%. But, when the inflation of purchases by the group is by use of close family members of the group, it is diversion of the funds of the group / company by inflating the expenses and reduction of profit of the group. The family member retains the entire amount received and there is no question of any commission payment. In the instant case the appellant has not explained the veracity of the transactions. She is a family member of the promoter/owners of the group. In these circumstances, the addition made by the Assessing Officer amounting to Rs.38,12,933/- is being upheld. **The Assessing Officer had made the addition on protective basis, i.e. if the main group would have accepted this transaction as their income, then this was not required to be added as the appellant's income. However, as no such evidence has been provided, this amount is to be treated as the income of the appellant.**”*

11. So far as the estimated business income of Rs.2 lakh is concerned, since the assessee has not clarified before the Id CIT(A), as to how much income had been earned by her during the year, therefore, Id CIT(A) upheld the addition made by the assessing officer to the tune of Rs.2 lakh.

12. Aggrieved by the order of Id CIT(A), the assessee is in further appeal before me.

13. Shri P. M. Jagasheth, Learned Counsel for the assessee, begins by pointing out that Assessing Officer has made protective addition of Rs.38,12,933/-, stating that the assessee has made fictitious sale to the tune of Rs.38,12,933/- to M/s Fortune Creation Pvt. Limited. The Ld. Counsel further submitted that the party to whom the assessee made the fictitious sale (Fortune Creation Pvt. Ltd), a substantive addition has been made by the Assessing Officer, which was confirmed by the Id CIT(A) also. Since the substantive addition has been made by the Assessing Officer in the hands of the M/s Fortune Creation Pvt. Ltd, and the same has been confirmed by the Id CIT(A) also therefore the protective addition to the tune of Rs.38,12,933/- made in the hands of the assessee under consideration should be deleted.

14. Shri Jagasheth, also submitted that the Assessing Officer has also made estimated addition of Rs.2,00,000/- in the hands of the assessee, without any base, therefore such estimated addition should also be deleted.

15. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which I have

already noted in my earlier para and is not being repeated for the sake of brevity.

16. I have heard both the sides and gone through the relevant material on record. It is seen that the assessment in this case was completed u/s.144 of the Act and assessing officer has made protective addition on account of fictitious sale to the tune of Rs.38,12,933/- to M/s Fortune Creations Pvt. Ltd. On appeal by the assessee, the Id CIT(A) held as follows:

“...The Assessing Officer had made the addition on protective basis, i.e. if the main group would have accepted this transaction as their income, then this was not required to be added as the appellant's income. However, as no such evidence has been provided, this amount is to be treated as the income of the appellant...”

17. I note that Id Counsel for the assessee, has submitted before me, the appellate order in respect of M/s Fortune Creation Pvt. Ltd, for assessment year (AY) 2009-10, vide order dated 09.09.2014 in appeal No.CAS-I/243/13-14, wherein the assessing officer made substantive addition in the hands of M/s Fortune Creation Pvt. Ltd, and on appeal by M/s Fortune Creation Pvt. Ltd, before Id CIT(A), the Id CIT(A) has confirmed the addition made by the assessing officer. Hence, I note that substantive addition in the hands of M/s Fortune Creation Pvt. Ltd, has already been made by the assessing officer, which was confirmed by Id CIT(A) also. I note that since the substantive addition has been sustained by the Id. CIT(A) in the hands of M/s Fortune Creation Pvt. Ltd. for assessment year 2009-10, vide order dated 09.09.2014, in appeal No.CAS-I/243/13-14, hence there is no loss to the Revenue. I am of the view that main group has accepted the impugned transaction as their income, therefore, protective addition in the hands of the

assessee needs to be deleted. Based on this factual position, I delete the protective addition of Rs.38,12,933/-, in the hands of the assessee.

18. I also note that Assessing Officer has made estimated addition of Rs.2,00,000/- in the hands of the assessee, without any base, hence the same is hereby deleted.

19. In the result, appeal filed by the assessee in ITA No.280/SRT/2022, is allowed.

20. Now, I shall take assessee's appeal in ITA No.281/SRT/2022, for A.Y.2009-10, wherein the grounds of appeal raised by the assessee, are as follows:

"1. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income-Tax (Appeals) has erred in confirming the action of the assessing officer in levying penalty of Rs.12,50,901/- u/s 271(1)(c) of the Income Tax Act, 1961.

2. It is therefore prayed that the above addition may please be deleted as learned members of the Tribunal may deem it proper.

3. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal."

21. Shri Jagasheth, Ld. Counsel for the assessee, pleaded that the penalty under section 271(1)(c) of the Act to the tune of Rs.12,50,901/- was imposed on the fictitious sale. Since the Assessing Officer has already considered the fictitious sale while making the addition, therefore no penalty can be imposed on the fictitious sale, as the fictitious sale is not a real income of the assessee, therefore penalty needs to be deleted.

22. Shri Jagasheth, also stated that assessing officer made quantum addition on protective bases, therefore, penalty under section 271(1)(c) of the Act, should not be imposed on protective addition, for this, ld

Counsel relied on the judgment of Hon`ble Jurisdictional Gujarat High Court in the case of Bhailal Manilal Patel vs. CIT, (2014) 49 taxmann.com 539 (Gujarat).

23. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

24. I have considered the submissions of Ld. Counsel for the assessee and Ld. Senior Departmental Representative (Ld. Sr. DR) for the Revenue. Since, I have deleted the quantum addition of assessee in ITA No.280/SRT/2022 for AY. 2009-10, vide para no.17 and 18 of this order, wherein I have deleted the entire addition made by the Assessing Officer. Since, I have deleted the entire addition made by the Assessing Officer, therefore the penalty imposed by the Assessing Officer, on the quantum addition needs to be deleted.

25. Besides, I also find merit in the submission of Id Counsel to the effect that penalty under section 271(1)(c) of the Act, should not be imposed on protective addition. Reliance can be placed on the judgment of Hon`ble jurisdictional Gujarat High Court in the case of Bhailal Manilal Patel vs. CIT, (2014) 49 taxmann.com 539 (Gujarat), wherein the Hon`ble Court has held as follows:

“5. Heard the learned advocates appearing on behalf of the respective parties. The short question, which is posed for consideration of this Court is, whether the Assessing Officer was justified in imposing/levying penalty under Section 271(1) (c) of the Act? It is the case on behalf of the assessee that the assessment order passed by the Assessing Officer was a protective assessment order and, therefore, the Assessing Officer as such could not have passed an order to initiate the penalty proceedings under Section 271(1)(c) of the Act and the Assessing Officer could not have levied the penalty under Section 271(1)(c) of the Act on the basis of the protective assessment order. On the other hand, it is the case on behalf of the revenue

that, as such and so held and observed by the tribunal that the assessment order passed by the Assessing Officer was in substance a substantive assessment order and not protective assessment order as contended by the assessee, the Assessing Officer was justified in levying/imposing the penalty under Section 271(1)(c) of the Act and, therefore, while considering the aforesaid question, it is required to be considered whether the assessment order passed by the Assessing Officer was in substance a substantive assessment order as held by the tribunal or a protective assessment order as contended by the assessee. Therefore, the entire issue will be based upon the fact whether the assessment order was protective assessment order or substantive assessment order. From the assessment order, it appears that the Assessing Officer has specifically observed as under;

"The unexplained and unaccounted promissory notes under consideration were found and seized from the residence of Shri Jitendra R. Patel who had claimed that these promissory notes belong to Shri Dhanveer J. Patel, who had given these to him for safe custody. It was confirmed by Shri Dhanveer J. Patel that he gave the said promissory notes to Shri Jitendra R. Patel but he had stated that the promissory notes belong to his father, mother, grandfather and uncles etc. The assessee, Shri Bhailal M. Patel had subsequently claimed that he was the individual owner of all the promissory notes worth Rs.37,65,000/-. This version has also been amended and it has been claimed that M/s. J.B. Patel & Co. in which he has 1/8 interest and remaining promissory notes worth Rs.35,65,000/- belong to him. Thus, there has been considerable inconsistency and constant variation in respect of ownership of unaccounted for and unexplained promissory notes. Proper verification regarding correct ownership is not possible because the promissory notes worth Rs.35,65,000/- do not show who is the real owner.

An order under Section 132(5) was passed in respect of above promissory notes in the case of Shri Jitendra R. Patel in which unexplained investment in promissory notes was held to be assessable as income of Shri Jitendra R. Patel. An order under Section 132(5) read with Section 132(7) has been passed in the case of Shri Bhailal M. Patel on 15/07/1988 in which income under Section 69 of the Act by way of unexplained investment in promissory notes has been held to belong to Shri Bhailal M. Patel as a protective measure.

Considering various aspects of the case, the income by way of unexplained investments in promissory notes, assessable under Section 69 of the Income Tax Act, is assessed in the hands of the present assessee as a protective measure. This protective assessment shall be treated as substantive assessment if and when income by way of unexplained investment in promissory notes worth Rs.37,65,000/- is finally excluded from income of Shri Jitendra R. Patel. Similarly, if such income is finally sustained in the assessment of Shri Jitendra R. Patel it will be accordingly excluded from the income of Shri Bhailal M. Patel"

5.1 It is also required to be noted at this stage that while passing the order to initiate the penalty proceedings under Section 271(1)(c) of the Act the Assessing Officer specifically observed that the penalty under Section

271(1)(c) of the Act be initiated in respect of income of Rs.5 lakhs, which has been assessed as protective measure.

5.2 Under the circumstances, we are of the view that the assessment order passed by the Assessing Officer was as such a protective assessment order and the same cannot be termed as substantive assessment order as observed and held by the tribunal.

5.3 The contention on behalf of the revenue that the assessee himself accepted that the seized promissory notes worth Rs.37,65,000/- belonged to him and the same may be included in his income is neither here nor there. What is required to be considered is how the Assessing Officer has considered the same and whether he has accepted the case of the assessee or not and whether he has passed the substantive assessment order or not. As observed hereinabove, it appears that the Assessing Officer has not accepted the statement of the assessee in toto. From the assessment order, it appears that as such the Assessing Officer was not sure with respect to the ownership of the promissory note worth Rs.37,65,000/- and, therefore, he has specifically observed that the income by way of unexplained investment in the promissory note is assessed in the hands of the assessee as protective measure. It is further observed that the said protective assessment shall be treated as substantive assessment if and when income by way of unexplained investment in promissory note worth Rs.37,65,000/- is finally excluded from the income of Shri Jitendra R., Patel and vice versa makes it very much clear that the assessment order passed by the Assessing Officer was a protective assessment order and the same cannot be termed and/or treated as substantive assessment order as observed by the tribunal.

5.4 Under the circumstances, we are of the opinion that the tribunal has materially erred in treating the assessment order as substantive assessment order without properly appreciating the order passed by the Assessing Officer and it is to be held that the assessment order as such was a protective assessment order.

5.5 Now in view of the aforesaid finding that the assessment order passed by the Assessing Officer was a protective assessment order, whether the Assessing Officer was justified in directing to initiate the penalty proceedings under Section 271(1)(c) of the Act and consequently was justified in levying the penalty under Section 271(1)(c) of the Act is concerned, there can be protective assessment but there cannot be protective penalty. It cannot be disputed that before any penalty can be levied the income has to be assessed as concealed income in the hands of the assessee. Where there is dispute as to whether such income allegedly concealed would be assessed in the hands of the assessee, unless the determination is made by the Assessing Officer, no charge of concealment can be made against the person in whose hands income is added on protective basis and the assessee is liable only if it is his income, which has been concealed. In other words the only person upon whom the substantive assessment is made would be liable for penalty, provided the conditions precedent for the imposition of the penalty are satisfied.

5.6 Under the circumstances, unless and until the substantive assessment is made and final assessment order is passed in case of the assessee adding the income in the hands of the assessee, even the initiation of the penalty proceedings are not permissible. There cannot be any initiation of the penalty proceedings with respect to the protective assessment order. The aforesaid is supported by the decision of this Court in the case of Bankim J. Shah (Supra). In the said case also penalty was sought to be levied under Section 271(1) of the Act on the protective assessment and to that it is held that there cannot be any protective initiation of the penalty proceedings. It is further observed and held that in a given case a particular income belong to A or B and although the Income Tax Officer reaches to the conclusion that the said income belongs to one of them, he may make protective assessment on the other hearing regard to the fact that the matter was likely to be carried in appeal. It is observed that such a protective assessment may be permissible under the law but there cannot be protective initiation of the penalty proceedings. It is further observed that as such the basis or foundation for initiation of the penalty proceedings is the requisite satisfaction as provided in Section 271(1) of the Act and as such satisfaction could not be reached when the Income Tax Officer himself believes that the income for which the assessee is charged for concealment or furnishing of inaccurate particulars does not belong to him and he is assessed only as a protective measure.

5.7 Even the same view has been taken by the Calcutta High Court in the case of Super Steel (Sales) Co. (Supra).

6. Under the circumstances, the tribunal has materially erred in in treating the order passed by the Assessing Officer as substantive assessment order.

7. Now so far as the prayer to remand the matter to the tribunal to assess the factual aspects whether the promissory notes are to be included and/or excluded in the income of Shri Jitendra R. Patel or not, as per the assessment order passed by the Assessing Officer is concerned, the same is rejected and consequently the question referred to this Court is held in favour of the assessee and against the revenue.”

26. As the issue is squarely covered by the judgment of Hon`ble Jurisdictional Gujarat High Court in the case of Bhailal Manilal Patel (Supra), hence respectfully following the binding precedent, I delete the penalty imposed by the Assessing Officer under section 271(1)(c) of the Act to the tune of Rs.12,50,901/-.

27. In the result, appeal filed by assessee in ITA No. 281/SRT/2022 is allowed.

28. Now coming to assessee's appeal in ITA No.282/SRT/2022 wherein the grounds of appeal raised by the assessee, are as follows:

"1. On the facts and in the circumstances of the case as well as law on the subject, the learned commissioner of the Income Tax (Appeals) has erred in confirming the action of the assessing officer in levying penalty of Rs.10,000/- u/s 271(1)(b) of the Income Tax Act, 1961.

2. It is therefore prayed that the above addition may please be deleted as learned members of the Tribunal may deem it proper.

3. Appellant craves leave to add, alter or delete any grounds either before or in the course of the hearing of the appeal."

29. I have heard both the parties. The Ld. Counsel for the assessee submitted that assessee could not respond the notices issued by the Assessing Officer during the assessment proceedings, due to circumstances beyond his control. However, the Ld. Counsel further submitted that the addition made by the Assessing Officer was on protective basis and moreover it is on account of fictitious sale, therefore such type of bogus addition / protective addition are not sustainable in the eye of law, therefore penalty under section 271(1)(b) of the Act may be deleted. On the other hand, Ld. Sr. DR for the Revenue submitted that the penalty was imposed by the Assessing Officer on account of default committed by the assessee and therefore, the penalty of Rs.10,000/- should be sustained. I have considered the submissions of the Ld. Counsel and Ld. Sr. DR for the Revenue and I am of the view that since I have deleted the entire quantum addition made by the Assessing Officer and I have also deleted the penalty imposed by the assessing officer, (on quantum addition), under section 271(1) (c) of the Act. Therefore, the penalty under section 271(1)(b) of the Act, imposed by the assessing officer, does not have any leg to stand. Once the foundation fails, the superstructure also fails i.e. the addition also is to be deleted. In this regard, I rely on the legal maxim "*Sublato fundamento cadit opus*" (meaning thereby that foundation

being removed, structure /work falls). Hence the initial action of the Revenue itself is not in consonance with law, then all the subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. I, therefore delete the penalty imposed by the Assessing Officer under section 271(1)(b) of the Act to the tune of Rs.10,000/-.

30. In the result, the appeal filed by assessee, in ITA No. 282/SRT/2022 is allowed.

31. In the combined result, these three appeals filed by assessee, are allowed.

Registry is directed to place one copy of this order in all appeals folder / case files.

Order is pronounced on 28/08/2023 in the open court.

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सूरत /Surat

दिनांक/ Date: 28/08/2023

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS
ITAT, Surat