

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH (SMC), SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 413/Srt/2023 (Assessment Year 2010-11)

(Physical hearing)

Mukeshbhai Kishorbhai Lakhani, 89, Aashirwad Row House, Near Sarthana Jakat Naka, Varachha Road, Surat-395006 (Gujarat) PAN No. ABPPL 9388 Q	Vs.	I.T.O., Ward-3(3)(3), Surat.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri P.M. Jaggasheth, C.A.
Department represented by	Shri Vinod Kumar, Sr. DR
Date of Institution of Appeal	13/06/2023
Date of hearing	15/09/2023
Date of pronouncement	15/09/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi (NFAC)/learned Commissioner of Income Tax (Appeals) (in short, the Id. CIT(A)) dated 25/05/2023 for the Assessment Year (AY) 2010-11 in confirming the penalty of Rs. 11.00 lacs levied under Section 271(1)(c) of the Income Tax Act, 1961 (in short, the Act) dated 26/02/2018. The assessee has raised following grounds of appeal:

- "1. On the facts and in the circumstances of the case as well as law on the subject, the Id. CIT(A) has erred in initiating penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961.*
- 2. On the facts and in the circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of the Assessing*

Officer has erred in levying penalty of Rs. 11,00,000/- u/s 271(1)(c) of the Income Tax Act, 1961.

- 3. It is therefore prayed that the above addition may please be deleted as learned members of the Tribunal may deem it proper.*
- 4. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of the hearing of the appeal."*

2. Brief facts of the case are that in case of assessee, the assessment was completed under Section 143(3) r.w.s. 147 of the Act on 31/08/2017. The Assessing Officer made reopening on the basis of information of undisclosed bank account with HDFC Bank. On the basis of information, the Assessing Officer recorded reasons and issued notice under Section 148 dated 30/03/2017. The Assessing Officer further recorded that despite giving repeated notice, the assessee furnished only return of income, balance sheet, profit and loss account and capital account. The Assessing Officer added entire credit/cash credit of Rs. 33,65,094/- in the bank account under Section 69 of the Act as unexplained investment. On appeal before the Id. CIT(A), the addition was upheld. In the meantime, the Assessing Officer levied penalty under Section 271(1)(c) of Rs. 11.00 lacs in order dated 26/02/2018. The penalty levied by assessing officer was more than 100% of tax sought to be evaded. 100% of tax sought to be evaded was Rs. 10,09,528/- only. Further in penalty proceedings, the action of levying penalty was confirmed. Further aggrieved, the assessee has filed present appeal before the Tribunal.

3. I have heard the submissions of the learned Authorised Representative (Id. AR) of the assessee and the learned Senior Departmental Representative (Id. Sr. DR) for the revenue. The Id. AR of the assessee submits that against the additions in the quantum assessment the assessee filed appeal before Tribunal, wherein the addition in the quantum assessment has been restricted to 5% in ITA No. 20/Srt/2023 dated 04/09/2023. Thus ultimately, the addition in the quantum assessment was restricted to estimated/ ad-hock addition. The Id. AR of the assessee submits that it is settled position under law that no penalty is leviable on estimated/ad hoc basis. To support such submission, the Id. AR of the assessee relied upon the decision of Tribunal in ACIT Vs. Shivam projects (2018) 97 taxmann.com 88 (ITAT Surat), Shri Arvindbhai D. Bhandari Vs ITO in ITA No. 2454/Ahd/2015 dated 14/11/2018 and Shri Ojas Ashokbhai Mehta Vs ITO ITA No. 296 & 297/Ahd/2013 dated 23/08/2013.
4. On the other hand, the Id. Sr. DR for the revenue supported the order of Id. CIT(A). The Id. Sr. DR. for the revenue submits that the transaction in the bank account was not disclosed by the assessee at the time of filing of return of income. The transaction in the undisclosed bank account was came to the notice of Assessing Officer subsequently, on the basis of which, the case was reopened and addition on the basis of cash/credit entry in the account was made. The Id. Sr. DR for the

revenue submits that principle of estimation of income cannot be made applicable on the facts of the present case as the bank account, credit wherein was not disclosed by the assessee.

5. In the short rejoinder submission, the Id. AR of the assessee submits that the assessee is not in the business of banking transaction, the assessee disclosed the profit earned on receipts, which was credited in his bank account. The explanation of assessee was not disproved or unproved by the Assessing Officer and fact remained the same that ultimately the Tribunal has estimated the income, which is nothing but the ad hoc addition and no penalty on ad hoc addition is sustainable.
6. I have considered the submissions of both the parties and have gone through the orders of the lower authorities carefully. I have also deliberated on various case laws relied by the Id. AR of the assessee. I find that it is undisputed fact that in the quantum assessment, the Assessing Officer made addition of entire credit/cash credit in the alleged undisclosed bank account. The addition was sustained in first appeal. However, on second appeal before the Tribunal, the addition in the quantum assessment was restricted to 5% of the credit entry in the bank account. Thus, ultimately the addition which was made by Assessing Officer which was the basis for levying penalty under Section 271(1)(c) was ultimately restricted to 5% by the Tribunal in ITA No. 20/Srt/2023 (supra). Thus, admittedly, the addition is sustained to the

extent of 5% being profit element on the credit in the bank account. The objection of Id Sr DR for the revenue that no penalty is leviable on the estimation of income, such principle of estimation of income cannot be made applicable on the facts of the present case as the bank account, credit wherein was not disclosed by the assessee. In my view that the objection of Id DR for the revenue is not maintainable at this stage. As at this stage, admittedly the additions in the quantum was restricted to estimation of profit on the credit/ cash deposit in the bank. In my view, the penalty order is not sustainable when ultimately the addition in the quantum addition was restricted to ad hoc basis/estimation basis, therefore, I direct to delete the same. In the result, grounds raised by the assessee are allowed.

7. In the result, this appeal of assessee is allowed.

Order announced in open court on 15th September, 2023.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 15/09/2023

**Ranjan*

Copy to:

1. Assessee –
2. Revenue –
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat