

**IN THE INCOME-TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER &  
SHRI BIJAYANANDA PRUSETH, ACCOUNTANT MEMBER  
आयकर अपील सं./ITA Nos.571 to 573/SRT/2023**

**Assessment Year: (2009-19)  
(Physical court hearing)**

Manish Banshilal Jariwala 4/1710, Begumpura, Nawabwadi, Main Road, Surat- 395 003	<b>Vs.</b>	Income Tax Officer, Ward-2(2)(3), Surat, Aaykar Bhavan, Majura Gate, Surat-395 001
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ANCPJ 6207 F</b>		
<b>(अपीलार्थी/Appellant)</b>		<b>(प्रत्यर्थी /Respondent)</b>

**आयकर अपील सं./ITA Nos.574 and 575/SRT/2023**

**Assessment Year: (2010-11)  
(Hybrid hearing)**

Manish Banshilal Jariwala 4/1710, Begumpura, Nawabwadi, Main Road, Surat- 395 003	<b>Vs.</b>	Income Tax Officer, Ward-2(2)(3), Surat, Aaykar Bhavan, Majura Gate, Surat-395 001
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No: ANCPJ 6207 F</b>		
<b>(अपीलार्थी/Appellant)</b>		<b>(प्रत्यर्थी /Respondent)</b>

<b>निर्धारिती की ओर से /Appellant by</b>	Shri P.M.Jagasheth, CA
<b>राजस्व की ओर से /Respondent by</b>	Shri Mukesh Jain, Sr-DR
<b>सुनवाई की तारीख/Date of Hearing</b>	10/03/2025 & 13.03.2025
<b>उद्घोषणा की तारीख/Date of Pronouncement</b>	24/03/2025

**आदेश / ORDER**

**PER BIJAYANANDA PRUSETH, AM:**

This group of five appeals by the assessee emanate from separate orders passed under section 250 of Income-tax Act, 1961 (in short 'the Act') of National Faceless Appeal Centre, Delhi [for short to as "NFAC/Ld. CIT(A)"]

dated 20.06.2023 for assessment years (AYs) 2009-10 and 2010-11, which in turn arise out of separate assessment orders passed u/s 144 r.w.s 147 of the Act on 23.03.2015 and 20.03.2015. In ITA Nos.571/SRT/2023 & 574/SRT/2023, the assessee has challenged the estimated additions of Rs.2,00,000/- each and additions of Rs.1,56,68,372/- and Rs.26,17,315/- on account of alleged fictitious sales in AYs 2009-10 and 2010-11 respectively. In ITA No.572/SRT/2023, ITA No.573/SRT/2023 (AY 2009-10) assessee has challenged the levy of penalty u/s 271B and 271(1)(c) of the Act and ITA No.575/SRT/2023 (AY 2010-11) assessee has challenged the levy of penalty u/s 271(1)(c) of the Act. In both quantum appeals, the facts are common and grounds of appeals raised by the assessee are similar except variance of amounts. Hence, with the consent of the parties, all the appeals are clubbed and heard together and are decided by this consolidated order for sake of convenience and brevity. The appeal in ITA No.571/SRT/2023 for AY 2009-10 is treated as “**lead**” case. The grounds raised by the assessee are as follow:

*“1. On the facts and in the circumstances of the case as well as the 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 issuing the notice u/s 148 of the I.T. Act, 1961.*

*2. On the facts and in the circumstances of the case as well as the 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.2,00,000/- on estimation income of business.*

3. *On the facts and in the circumstances of the case as well as the 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.1,56,68,372/- on account of alleged fictitious sales to the Fortune Group of companies on protective basis.*

4. *On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax (Appeals) has not offered adequate opportunities to hear the case and passed ex-parte order and hence the case may please be set aside and restored back to the CIT(A) or AO.*

5. *It is therefore, prayed that the above addition may please be deleted as learned Members of the Tribunal may deem it proper.*

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

2. Ground No. 1 has not been argued by the Ld.AR of the assessee. Hence, same is dismissed as not pressed.

3. Facts of the case in brief are that assessee did not file his return of income for AY 2009-10. Information was received by AO from ITO Ward-1(2), Surat that the assessee has made bogus transaction in FY 2008-09 (AY 2009-10). The report of the ITO includes information gathered by the Investigation Wing, Surat. The AO went through the report of the Investigation Wing and observed that the enquiry by the Investigation Wing led to discovery of various concerns operating from the office address at 5001, World Trade Centre, Ring Road, Surat which belongs to the Fortune Group of concerns, wherein assessee is proprietor two concerns, namely, Jay Ambe Textile and M.B. Textile. The assessee made fictitious sales of Rs.1,56,68,372/- to Fortune Group of

concerns. The AO issued notice u/s 148 of the Act on 20.03.2014 but no reply was filed nor anyone attended on behalf of assessee. Again, AO issued various notices and show-cause notice but they were not replied to. Hence, AO estimated regular business income of assessee at Rs.2,00,000/-. He also added the bogus sales of Rs.1,56,68,372/- to the income of the appellant on protective basis. He also initiated penalty proceedings u/s 271(1)(c) and 271(1)(b) of the Act.

4. Aggrieved by the additions made by AO, assessee filed appeal before CIT(A). After correcting the deficiency in the appeal filed, the CIT(A) issued various notices which is at para-4 of the appellate order. The appellant sought adjournment twice which was duly granted. However, appellant did not file any reply. The CIT(A) has referred to various decisions and observed that assessee has not pursued appeal despite being granted several opportunities. He, therefore, proceeded to decide the appeal on the basis of facts on merit. He stated that AO has passed a speaking order with detailed discussing on the issues involved in the order and mere facts mentioned in Form-35 cannot be considered in absence of supporting documentary evidence and submissions. The appellant failed to bring anything on record to support the grounds of appeal and counter the additions made by AO. Accordingly, he dismissed the grounds and appeal of the assessee.

5. Further aggrieved by the order of CIT(A) assessee has filed present appeal before the Tribunal. The Ld. AR at the outset, submitted that the appeal

is squarely covered by the decision of this Tribunal in case of Pinky Manishkumar Jariwala, wife of assessee in ITA Nos. 280-282/SRT/2022 dated 28.08.2023. He has filed copy of the order and submitted that similar addition of Rs.2,00,000/- and addition of Rs.38,12,933/- on account of fictitious sales was deleted by this Tribunal (supra). He, therefore, requested that addition made in the present appeal the addition may be deleted.

6. On the other hand, Ld. Senior DR for the Revenue supported the orders of lower authorities.

7. We have heard both parties and perused the materials available on record. We have also carefully gone through the order of the ITAT in the case of Pinky M. Jariwala (supra). We find that the appellant in the said case is wife of the appellant and facts are also similar to the facts of the present case. After considering the submissions of both sides, the ITAT allowed the three appeals filed by wife of appellant (supra) by stating as under:

*“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 M7s 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.”*

7.1 The facts of the present appeal and grounds raised by the appellant are similar to the decision discussed above. We find no reason to differ from the above decision. Accordingly, grounds of the appellant are allowed.

8. In the result, appeal filed by assessee in ITA No.571/SRT/2023 is partly allowed.

### **ITA No.573/Srt/2023**

9. The assessee has raised following grounds:

*“1. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax (Appeals) has erred in confirming the action of the Assessing Office in levying penalty of Rs.52,80,874/- 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 the law on the subject, the learned Commissioner of the Income Tax (Appeals) has not offered adequate opportunities to hear the case and passed ex-parte order and hence the case may please be set aside and restored back to the CIT(A) or AO.*

*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.”*

10. The facts leading to imposition of penalty in the present case is similar to the case of Pinky M. Jariwala (supra). The ITAT in the said case deleted the penalty because quantum addition was deleted by it. Further, the Tribunal relied on the decision of Hon'ble jurisdictional High Court in the case of Bhailal Manilal Patel vs. CIT (2014) 49 taxmann.com 539 (Guj) where the Hon'ble Court held that penalty could not be initiated where the assessment order is a protective assessment. It was held that there can be protective assessment but there cannot be protective penalty. Before any penalty can be levied, the income has to be assessed as conceal income in the hands of 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 AO, no charge of concealment can be made against the person in whose hands income is added on protective basis. Only the person upon whom substantive assessment is made would be liable for penalty, provided the conditions precedent for imposition of penalty are satisfied. In view of the above reasons and following the judgment of the Hon'ble High Court, penalty was deleted in case of Pink M Jariwala (supra). Since the facts are similar, the penalty levied u/s 271(1)(c) in case of the appellant is also deleted.

11. In the result, appeal filed by assessee in ITA No.573/SRT/2023 is allowed.

**ITA No.572/SRT/2023**

9. The assessee has raised the following grounds:

*“1. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax (Appeals) has erred in confirming the action of the Assessing Office in levying penalty of Rs.78,340/- u/s 271B of the Income Tax Act, 1961.*

*2. On the facts and in the circumstances of the case as well as the law on the subject, the learned Commissioner of the Income Tax (Appeals) has not offered adequate opportunities to hear the case and passed ex-parte order and hence the case may please be set aside and restored back to the CIT(A) or AO.*

*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.”*

10. The AO has levied penalty u/s 271B of the Act due to failure of assessee to get his books of account audited and furnished audit report in the prescribed Form No.3CB and 3CD as required u/s 44AB of the Act. As the gross receipt for the year under consideration was Rs.1,56,68,372/-. The AO levied penalty u/s 271B at Rs.78,340/- being ½ per cent of gross receipt of Rs.1,56,68,372/-. The CIT(A) confirmed the penalty because no details documents or submissions were provided by the appellant during the appellate proceedings.

11. The Ld. AR submitted that there cannot be audit report in case of fictitious sales. Since the sale itself was not there, the question of getting the account audited is not possible.

12. On the order hand, Ld. Sr-DR for the Revenue supported the order of lower authorities.

13. We have heard both the parties and perused the materials available on record. We have already deleted the entire addition in quantum appeal in ITA No.571/SRT/2023 (supra) including the addition on account of fictitious sales. Since the addition itself is deleted, penalty imposed on such addition by AO cannot survive. The AO is accordingly, directed to delete the penalty. This ground of assessee is allowed.

14. In the result, assessee's appeal in ITA No.573/SRT/2023 is allowed.

**ITA Nos. 574 and 575/SRT/2023 (AY 2010-11)**

15. As recorded earlier, grounds of appeal raised in quantum appeal ITA No.574/SRT/2023 and penalty imposed u/s 271(1)(c) is similar except variation of amount as of in quantum and penalty imposed u/s 271(1)(c) in AY 2009-10 wherein we have partly allowed the appeal of assessee and penalty deleted. Therefore, following reasons given in above decision, the appeal of assessee in ITA No.574/SRT/2023 is partly allowed and ITA No.575/SRT/2023 is allowed.

16. In combined result, ITA No.571 and 574/SRT/2023 are partly allowed and ITA Nos. 572, 573 and 575/SRT/2023 are allowed. Registry is directed to place one copy of this order in all appeals folder/case files.

Order pronounced in accordance with Rule 34(3) of the ITAT Rules, 1963 on 24/03/2025 in the open court.

**Sd/-**  
**(PAWAN SINGH)**  
**न्यायिक सदस्य/JUDICIAL MEMBER**  
सूरत /Surat  
दिनांक/ Date: 24/03/2025  
Dkp Outsourcing Sr.P.S\*

**Sd/-**  
**(BIJAYANANDA PRUSETH)**  
**लेखा सदस्य/ ACCOUNTANT MEMBER**

आदेश की प्रतिलिपि अद्योषित/ Copy of the order forwarded to :

- **अपीलार्थी/** The Appellant
- **प्रत्यर्थी/** The Respondent
- **आयकर आयुक्त/** CIT
- **आयकर आयुक्त (अपील)/** The CIT(A)
- **विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, सूरत/** DR, ITAT, SURAT
- **गार्ड फाईल/** Guard File

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By order/आदेश से,

**सहायक पंजीकार**  
**आयकर अपीलीय अधिकरण, सूरत**