

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai**

**Before Shri Shailendra Kumar Yadav, Judicial Member
and Shri Jason P. Boaz, Accountant Member**

ITA No. 5255/Mum/2012
(Assessment Year: 2009-10)

Smt. Deliben Seth 304/B, Pratiksha Tower R.S. Nimkar Marg Mumbai 400008	Vs.	ACIT, Central Circle -13 Old CGO Building Annex 11 th Floor, M.K. Road Mumbai 400020
PAN - AFNPJ6262P		

Appellant

Respondent

Appellant by:	Shri Dr. K. Shivram & Ms. Neelam C. Jhadhav
Respondent by:	Shri M.C. Om Ningshen

Date of Hearing:	01.09.2016
Date of Pronouncement:	02.09.2016

ORDER

Per Jason P. Boaz, A.M.

This appeal by the assessee is directed against the order of the CIT(A)-37, Mumbai dated 31.05.2012 for A.Y. 2009-10, partly sustaining the penalty levied under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. The facts of the case, briefly, are as under: -

2.1 In the course of search action under section 132 of the Act carried out at the business and residential premises of Prakash Steelage Group and its Directors on 09.02.2009, the assessee was found to be in possession of jewellery valued at ₹24,38,172/- out of which jewellery valued at ₹16,84,686/- was found to be unexplained. The assessee filed her return of income for A.Y. 2009-10 on 30.03.2010 declaring total income of ₹5,70,970/-. The assessment was completed under section 143(3) of the Act vide order dated 22.12.2010, wherein the total income of the assessee was determined at ₹22,55,650/- in view of the addition of

₹16,84,686/- on account of the unexplained jewellery. Penalty proceedings were initiated simultaneously in the order of assessment by issue of notice under section 274 r.w.s. 271 of the Act dated 22.12.2010.

2.2 In the course of penalty proceedings, before the AO, the assessee's submission that the gold jewellery of ₹10,70,315/- and diamonds of ₹6,14,371/- were received in inheritance and as gifts on various occasions, was found untenable by the AO as he found that the assessee's claim was not established by corroborative material evidences like, gift deeds and Wealth Tax Returns of the donees and the creditworthiness of the party from whom jewellery was inherited. In that view of the matter, the AO vide order dated 24.06.2011 levied penalty of ₹5,20,568/- on the assessee @ 100% of tax sought to be evaded.

2.3 Aggrieved by the order of the AO dated 24.06.2011 levying penalty of ₹5,20,568/- under section 271(1)(c) of the Act for A.Y. 2009-10, the assessee preferred an appeal before the CIT(A)-37, Mumbai. The learned CIT(A) disposed off the appeal vide order dated 01.08.2011 allowing the assessee partial relief. In the impugned order, the learned CIT(A) cancelled that portion of the penalty levied under section 271(1)(c) of the Act in respect of gold jewellery of ₹908.960 grams valued at ₹10,70,315/-. In respect of the diamonds valued at ₹6,14,371/-, the learned CIT(A) was of the view that since only diamonds worth ₹1,93,424/- were seized in the course of search, it is presumed that the search party was satisfied about the balance and therefore restricted the levy of penalty under section 271(1)(c) of the Act to the seized jewellery of ₹1,93,242/-.

3.1 The assessee, being aggrieved by the order of the CIT(A)-37, Mumbai dated 31.05.2012 confirming the levy of penalty under section 271(1)(c) of the Act for A.Y. 2009-10, in respect of diamond jewellery valued at ₹1,93,424/-, has preferred this appeal raising the following grounds: -

- 1. The Hon'ble Commissioner of Income tax (Appeals) (herein referred as "CIT(A)") has erred in confirming the portion of Penalty levied to the extent of Rs. 59,768/- on addition of Rs.1,93,424/- out of total penalty levied of Rs. 5,20,568/- on addition made of ₹16,84,686/- in the order passed U/s 143(3) of*

Income Tax Act, 1961. The aforesaid Penalty is upheld to the extent of Rs. 59,768/- in view of the jewellery to such extent was seized at the time of search and the same being added in the assessment U/s 143(3) of Income Tax Act, 1961. It is therefore prayed that penalty levied should be deleted.

2. *Your appellant craves to add, alter, or amend any of the grounds of appeal on or before the date of hearing of appeal.”*

3.2 The learned A.R. for the assessee was heard in support of the grounds raised (supra) seeking cancellation of the penalty levied under section 271(1)(c) of the Act in respect of unexplained jewellery of ₹1,93,424/- seized in the course of search under section 132 of the Act. The learned A.R. relied on the submissions made before the authorities below and before us relied on the following judicial pronouncements in support of the assessee's case that since the addition was made on estimation, penalty levied under section 271(1)(c) of the Act was not sustainable: -

- (i) Dresser-Rand India (P.) Ltd. (2013) 145 ITD 91 (Mumbai Trib.)
- (ii) Narayanshigh J. Deora (ITAT No. 5895/Mum/2010 dated 09.12.2011)
- (iii) Naresh Chand Agarwal (2013) 357 ITR (All) (HC)
- (iv) Bombaywala Readymade Stores (2015) 203 Taxman 313 (Guj) (HC)
- (v) Krishi Tyre Retreading & Rubber Industries (2014) 360 ITR 580 (Raj) (HC)
- (vi) Vijay Kumar Jain (2010) 325 ITR 378 (Chhattisgarh) (HC)
- (vii) Vikram Plastics (2012) 136 ITD 273 (Ahd) (TM)
- (viii) Aero Traders (P.) Ltd. (2010) 322 ITR 316 (Del) (HC)

3.3.1 Per contra, the learned D.R. supported the impugned order of the learned CIT(A) in respect of the sustaining of penalty levied under section 271(1)(c) of the Act in respect of unexplained jewellery of ₹1,93,424/-. According to the learned D.R., in the course of search and seizure action under section 132 of the Act in the case of Prakash Steelage Group on 09.02.2009, the assessee was found in possession of jewellery valued at ₹24,38,2172/- out of which jewellery amounting to ₹16,84,686/- was found to be unexplained (i.e. gold jewellery of ₹10,70,315/- plus diamonds of ₹6,14,371/-) which was not offered to tax in the relevant return of

income. The same was brought to tax in the assessee's hands and subsequently penalty under section 271(1)(c) of the Act was levied thereon. The learned D.R. submitted that on appeal, the learned CIT(A) cancelled the penalty levied upon gold jewellery amounting to ₹10,70,315/- and sustained the penalty under section 271(1)(c) of the Act in respect of ₹1,93,424/- out of ₹6,14,371/- worth of diamonds.

3.3.2 The learned D.R. contends that the judicial pronouncements cited by the assessee (supra) are distinguishable and not applicable to the facts of the case and therefore would not come to the rescue of the assessee. In the case at Sr. No. 1, i.e. Dresser-Rand India (P.) Ltd. (supra) the issue was the partial disallowance of the assessee's claim of repair and maintenance on the ground that the same were capital in nature. In those circumstances, the Coordinate Bench held that disallowance of expenses by treating them as capital in nature could not be basis for imposition of penalty. The learned D.R. contends that neither the issue in the cited case, nor the facts therein have any relation to the assessee's case as laid out above and therefore this case was not applicable to the issue in the case on hand.

3.3.3 In respect of the judicial pronouncements cited by the assessee at S. No. (ii) to (viii), the facts of all these cases relate to estimation of income, in some cases after rejection of books of account, wherein it was held that penalty under section 271(1)(c) of the Act cannot be levied on income estimated. They do not apply to the facts of the case on hand, wherein the unexplained diamonds amounting to ₹1,93,424/- was found and seized and brought to tax in the assessee's hands; not as estimated income. It is submitted that these cited cases being factually different are not be applicable to the facts of the case on hand and therefore would not come to the rescue of the assessee's rescue.

3.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record. The facts of the matter, as emanate from the record, are that pursuant to search and seizure action under section 132 of the Act in the case of Prakash Steelage Group on 09.02.2009, the assessee was found to be in possession of jewellery

amounting to ₹24,38,172/-, out of which jewellery of ₹16,84,686/- (comprising gold jewellery of ₹10,70,315/- plus diamonds of ₹6,14,371/-) was found to be unexplained, but was subsequently not offered to tax by the assessee. The same was brought to tax in the assessee's hands and penalty proceedings under section 271(1)(c) of the Act were simultaneously initiated. It appears that no appeal was preferred by the assessee against the order of assessment for A.Y. 2002-03.

3.4.2 In penalty proceedings, the AO proceeded to levy penalty under section 271(1)(c) of the Act on the jewellery of ₹16,84,686/- which was brought to tax in the assessee's hand as unexplained, as he was of the view that the claims of the assessee that she had received the same in inheritance and as gifts on various occasions was untenable, since the assessee was not able to prove here claims with corroborative material evidence. On appeal, the learned CIT(A) cancelled that portion of the penalty levied under section 271(1)(c) in respect of gold jewellery amounting to ₹10,70,315/-. He, however, upheld the levy of the said penalty in respect of the balance unexplained jewellery of ₹1,93,424/- which were seized on the presumption that the search party was satisfied about explanations put forth in respect of the balance diamonds of ₹6,14,371/-.

3.4.3 In our view, except for raising the grounds pleading for cancellation of penalty levied under section 271(1)(c) of the Act in respect of seized diamonds of ₹1,93,424/-, no material evidence has been furnished before us to controvert the findings of the authorities below that the diamonds of ₹1,93,424/- seized in search action under section 132 of the Act were unexplained. We have respectfully perused the judicial pronouncements cited by the assessee and humbly concur with the averments of the learned D.R. for Revenue that these judgements are clearly distinguishable on facts from the case on hand and pertain to issues of either (a) rejection of assessee's claim of whether expenditure was capital or revenue in nature (cited case at S. No. (1)) or (b) were cases where estimation of income was made and for both of which the Hon'ble courts had held that

penalty under section 271(1)(c) was not leviable. In our view, the case on hand stands on a different footing from the cited cases (supra), as there is neither rejection of the assessee claim of revenue expenditure as being capital in nature nor estimation of income in some cases after rejection of books of account; and therefore, would not come to the rescue of the assessee. In this factual and legal matrix of the case, as discussed above, we uphold the impugned order of the learned CIT(A) in confirming that penalty under section 271(1)(c) of the Act for concealment of income is to be levied in respect of the unexplained diamonds of ₹1,93,424/-. Consequently, the grounds raised by the assessee are dismissed.

4. In the result, the assessee's appeal for A.Y. 2009-10 is dismissed.

Order pronounced in the open court on 2nd September, 2016.

Sd/-
(Shailendra Kumar Yadav)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 2nd September, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -37, Mumbai*
4. *The CIT , Central-I, Mumbai*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.