

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ, अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ **ITA.No.2456 and 2457/Ahd/2012**
निर्धारण वर्ष/ **Asstt. Year: 2005-2006 and 2006-2007**

Shri Manishkumar M. Punjabhai Prop: Om Investment F/311, Kavita Shopping Centre GPO Road, Anand 388 001. PAN : AFMPP 8137 L	ITO, Ward-1 Anand.
अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)

Assessee by	:	Shri Tushar Hemani
Revenue by	:	Shri Dinesh Singh, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : **22/07/2016**
घोषणा की तारीख /**Date of Pronouncement**: **01/08/2016**

आदेश/O R D E R

Present two appeals are directed at the instance of the assessee against the orders of the Id.CIT(A) dated 6.8.2012 and 16.8.2012 passed for the Asstt.Years 2005-06 and 2006-07.

2. Grievance of the assessee is that the Id.CIT(A) has erred in confirming the penalty of Rs.54,321/- and Rs.8,30,560/- in the Asstt.Years 2005-06 and 2006-07 respectively under section 271(1)(c) of the Income Tax Act, 1961.

3. Brief facts of the case are that the assessee has filed its return of income for the Asstt.Years 2005-06 on 30.10.2005 declaring total income at Rs.18,759/-. An assessment order was passed under section

143(3) vide which income of the assessee was determined at Rs.9,55,280/-. Penalty in the Asstt.Year 2005-06 has been initiated for two additions viz. (a) on account of cash credit under section 68 of Rs.3,20,000/- and (b) on account of unaccounted stock at Rs.1,14,188/-. The addition on account of unexplained cash credits stands deleted by the Id.CIT(A). Therefore, the Id.First Appellate Authority has confirmed the penalty *qua* the addition made on account of unaccounted stock of Rs.1,14,188/-. This way penalty has been confirmed at Rs.53,321/- in the Asstt.Year 2005-06.

4. In the Asstt.Year 2006-0-7, the assessee has filed his return of income on 30.12.2006 declaring NIL income. The assessment order was passed under section 143(3) on 29.12.2008 and income of the assessee was determined at Rs.25 lakhs. Penalty has been initiated against the assessee *qua* two additions viz. (a) on account of cash credit under section 68 Rs.25 lakhs, and (b) on account of closing stock of Rs.3,80,918/-.

5. Let me first take appeal for the Asstt.Year 2006-07. In this year, first amount considered by the AO for visiting the assessee with penalty is on addition of Rs.25 lakhs.

6. Brief facts of the case are that survey under section 133A was carried out at the premises of the assessee on 23.8.2005. The statement of the assessee under section 131 was recorded on 29.8.2005 and 2.9.2005. The assessee has admitted unaccounted income of Rs.25 lakhs being deposited in VijayBank, Sardargunj, Anand. When the assessee

filed return of income, he did not include this unaccounted income admitted during the course of survey. The AO confronted the assessee with regard to the alleged deposits in the Vijay Bank. The assessee contended that he is a partner in the firm, M/s.Manishkumar & Co. and money was withdrawn from M/s.Manishkumar & Company which was deposited in the bank account. This explanation of the assessee was rejected in the light of the statement given during the course of survey and addition of Rs.25 lakhs was made.

7. I find that similar addition was made in the Asstt.Year 2005-06, which is being deleted by the Id.CIT(A). The finding of the Id.CIT(A) in the Asstt.year 2005-06 on this issue reads as under:

“2. First ground of appeal is regarding addition of Rs.3,20,000/- u/s.68. The Assessing Officer found that appellant had credited Rs.6,70,000/-, out of which Rs.2,85,000/- was offered as income, being unexplained cash credit, for taxation. Since the appellant could not explain satisfactorily source of the balance amount, addition of Rs.3,20,000/- u/s.68 was made.

2.1. Before me, appellant submitted that he was a partner in M/s. Manishkumar & Co. and had introduced the cash in his capital account for business by withdrawing from the firm. Appellant filed the relevant pages of cash book of M/s. Manishkumar & Co. Appellant also filed copy of letter dated 30.11.2007 filed before the Assessing Officer, submitting that the cash was brought from M/s. Manishkumar & Co. Appellant further filed cash book extracts from books of Manishkumar & Co. and certified that the same were filed before the Assessing Officer during assessment proceedings.

2.2. I have considered the matter. Assessing Officer made the addition on the ground that nature of source of Rs.3,20,000/-

could not be satisfactorily explained by the appellant. However, the appellant had explained the source to be from M/s.Manishkumar & Co., the firm. The cash book of this firm showed sufficient cash balance on 2.2.2005, when Rs.3,20,000/- were paid to appellant. Addition of Rs.3,20,000/- is deleted.”

8. I will refer to the fact later on. Let me consider other amount in the Asstt.Year 2006-07 as well as in the Asstt.Year 2005-06. The second amount for which penalty has been imposed upon the assessee in both the years is common. The assessee failed to include a sum of Rs.1,14,188 and Rs.3,80,918/- in the closing account. The explanation of the assessee with regard to the alleged non-disclosure of the closing stock of shares was that the accountant inadvertently left out to include the value of certain shares in the trading and profit & loss account. The assessee further contended that it was insignificant from the point of the Revenue because the closing stock of one year was nothing but the opening stock of immediately succeeding year. According to the assessee, the addition is ultimately revenue neutral. But this explanation was rejected by the Id.AO while visiting the assessee with penalty.

9. The Id.counsel for the assessee, while impugning the orders of the Revenue authorities, raised two fold submissions. In his first fold of contentions, he pointed out that the penalty was initiated by the AO furnishing of inaccurate particulars of income, but ultimately, it was levied for concealing the income. Therefore, it is not sustainable in the eyes of law. The Id.counsel for the assessee made reference to the decision of the Full Bench of the Hon'ble Punjab & Haryana High court and other decisions which have been mentioned in the submissions of

the assessee filed before the First Appellate Authority which has been reproduced from page nos.5 to 13 o the impugned order in the Asstt.Year 2006-07.

10. In his second fold submissions, he contended that though the addition of Rs.25 lakhs was made by the AO on the basis of the statement given by the assessee during the course of survey, but the stand of the assessee taken during the course of assessment proceedings was not considered. The ld.AO did not verify the facts whether sufficient cash balance was available with the firm, M/s.Manishkumar & Co. where the assessee is partner and the amount had travelled to Vijay Bank account from this firm. The explanation of the assessee was not found to be false.

11. The ld.DR, on the other hand, contended that as far as first fold of submission is concerned, the ld.AO has initiated the proceedings for furnishing inaccurate particulars and concealment of income. But while impugning penalty, the ld.AO has recorded a specific finding that the assessee has concealed the income, and therefore, penalty has been imposed for concealing the income. There is no ambiguity in the finding of the AO.

12. Section 271(1)(c) of the Act has a direct bearing on the controversy which reads as under:

"271. Failure to furnish returns, comply with notices, concealment of income, etc.— (1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the of course of any proceedings under this Act, is satisfied that any person

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(a) and (b) **

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(c) has concealed the particulars of his income or furnished inaccurate particulars of such income. He may direct that such person shall pay by way of penalty.

(i)and (Income-tax Officer,)** ** *

(iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:

Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

13. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section is deeming provisions regarding concealment of income. The section not only

covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation-1 to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that

when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

14. In the light of the above, if I examine the facts of the present case, then it would reveal that in the Asstt.Year 2005-06, the addition of Rs.3.20 lakhs was made by the AO under section 68 of the Income Tax Act. The explanation of the assessee in that year was that he had withdrawn the cash from this firm, M/s.Manishkumar & Co., which was introduced in the capital account for business. This explanation of the assessee was accepted by the Id.CIT(A). According to the Id.CIT(A), the assessee has explained the source to be from the firm, M/s.Manishkumar & Co. On similar items, the explanation was not thoroughly examined by the AO in A.Y.2006-07. Thus, the explanation of the assessee was not found to be false. The assessee has given an explanation that money was withdrawn from the firm, and it was deposited in the Vijay Bank.

15. As far as non-disclosure of certain shares in the closing stock is concerned, the stand of the assessee is that inadvertent mistake was happened at the end of the accountant. This is the item which is revenue neutral and it was not going to affect materially to the Revenue. This explanation was rejected by the Revenue authorities on the ground that it is difficult to accept as to how the accountant has committed the mistake. To my mind, this will always be a difficult question, because,

there is no scientific instrument which can tests the mind of an individual as to how he has committed a particular negligence at a particular time. It is very subjective aspect, and it will always be difficult to bring demonstrative evidence of a particular state of mind while committing such mistake. But from circumstantial evidence, it can always be concluded that whether there was a *mala fide* intention for not including the value of particular shares in the closing tock. No such circumstance have been brought on record for falsifying the explanation of the assessee. Therefore, in view of the above discussion, I am of the view that the assessee does not deserves to be visited with penalty. I allow both the appeals and delete the impugned penalty.

16. In the result, appeals of the assessee are allowed.

Order pronounced in the Court on 1st August, 2016 at Ahmedabad.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 01/08/2016