

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.242/Ahd/2016

निर्धारण वर्ष/ Asstt. Year: 2008-2009

Dr.Mahesh B. Patel 13, Spandan Navrang Hospital VIP Road Karelibag, Baroda 390 018. PAN : AAZPP 1871 F.	Vs	DCIT, Cir.5 Baroda.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Tej Shah, AR
Revenue by :	Shri O.P. Meena, Sr.DR

सुनवाई की तारीख/Date of Hearing : 20/07/2016

घोषणा की तारीख /Date of Pronouncement: 01/08/2016

आदेश/ORDER

The assessee is in appeal before the Tribunal against the order of the Id.CIT(A)-1, Vadodara dated 16.12.2015 passed for the Asstt.Year 2008-09.

2. Solitary grievance of the assessee is that the Id.CIT(A) has erred in confirming the penalty of Rs.3,47,727/- which was imposed by the Id.AO under section 271(1)(c) of the Income Tax Act, 1961.

3. Brief facts of the case are that the assessee has filed his return of income on 30.9.2008 declaring an income at Rs.38,88,470/-. The assessee at the relevant time was running an orthopedic nursing home. His case was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. A perusal of the balance sheet, it revealed to the AO that the assessee has shown sundry creditors to the tune of Rs.10,11,020/- and salary payable at Rs.71,434/-. On further inquiry, it

revealed to the AO that the assessee has been following mix accounting system. For expenses, he has followed mercantile system of accountancy and for income he has been following cash system. The Id.AO has made reference to section 145 of the Income Tax Act and observed that sub-section 1 of section 145 prohibits the assessee to follow mix accounting system. The income was to be computed either cash or mercantile system of accounting. Accordingly, the Id.AO made addition of Rs.9,84,329/- and Rs.1,41,000/-. The finding of the AO reads as under:

“5. Hence, sundry creditors and salary payable of Rs. 10,11,020/- & Rs. 71,434/- of the Previous year relevant to A.Y. 2008-09 total of Rs. 10,82,452/- after deducting the credit liability of previous A.Y. i.e. 2007-08 of Rs. 97,825/- it comes to (Rs. 10,82,254/- - Rs. 97,825/-) Rs. 9,84,329/- which is not allowed as an expense debited in Profit and Loss account . Hence the amount of Rs. 9,84,329/- is added back to assessee's total income. Penalty proceedings u/s 271(l)(c) of the I.T.Act, 1961, 1961 is also initialed for furnishing of inaccurate

(Addition : Rs.9,84,329/-)

6. On perusal of the submission it was found that the assessee has made payment to Natwarlal N Suthar, Vishwas Construction exceeding Rs. 20,000/- in a day or Gross 50,000/- for Repairs and Maintenance but he has not made TDS on these payments. In addition to this the Assessee has also made payment of Rs. 65,000/- to D Seven advertising for advertisement in Gujarat Samachar but not deducted TDS. The assessee was show caused why not these expenses should not be disallowed as either no proof has been furnished or no TDS has been deducted. The assessee could not produced the TDS details. Hence the amount of 1,41,000/- (Natwarlal N Suthar 22,000/- + Vishwas Construction 54,000+ D Seven Advertising 65,0007-) on which TDS has not been made is being disallowed and added back to assessee's income.

(Addition: Rs. 1,41,000/-)”

4. The AO, thereafter, initiated penalty proceedings and issued notice under section 274 r.w.s. Section 271(1)(c) of the Income Tax Act. After

hearing the assessee, the Id.AO has imposed penalty of Rs.3,47,727/-. Appeal to the Id.CIT(A) did not bring any relief to the assessee.

5. The Id.counsel for the assessee contended that penalty was initiated for furnishing inaccurate particulars of income, whereas, it has been imposed for concealing of income. On the strength of Hon'ble Karnataka High Court decision in the case of CIT Vs. Manjunath Cotton & Ginning Factory, 359 ITR 565 and Hon'ble Gujarat High Court decision in the case of CIT Vs. Lakhdhir Lalji, 85 ITR 77, he contended that the AO has not shown what type of offence the assessee has committed. The AO has failed to charge for a particular allegation i.e. whether the assessee has furnished inaccurate particulars of income or concealed particulars income. On the other hand, the Id.DR relied upon the order of the AO.

6. I have duly considered rival contentions and gone through the record carefully. A perusal of the penalty order would indicate that the Id.AO has imposed penalty for furnishing inaccurate particulars. He has not imposed penalty for concealment of income. The AO has observed that the assessee has tried to evade tax by furnishing inaccurate particulars of income which lead to concealment of income. Thus, there is no confusion in the mind of the AO. I do not find any merit in the first fold of submission raised by the Id.counsel for the assessee.

6. In the next fold of submissions, it was contended by the Id.counsel for the assessee that the explanation given by the assessee was not found to be false. The assessee has been recognizing the income on cash basis, but keeping the expenditure on mercantile basis. It was a lapse under section 145(1) of the Income Tax Act. But there was no deliberate attempt at the end of the assessee to conceal particulars. The Id.DR, on the other hand, relied upon the order of the Revenue authorities below.

7. With the assistance of the learned representatives, we gone through the record carefully. Section 271(1)(c) of the Income Tax Act, 1961 has direct bearing on the controversy. Therefore, it is pertinent to take note of the section.

"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 course of any proceedings under this Act, is satisfied that any person

*(a) and (b)***

(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."

8. 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.

9. In the light of the above, if I examine the facts of the present case, then it would reveal that the Id.AO did not find any factual inaccuracy in the details of the assessee. The only difference in the stand of the assessee and the AO was a difference of opinion about the recognition of income or expenditure. The assessee has been accounting the expenditure on mercantile basis and recognizing the income on cash basis. Such type of method is not permissible in law, but it was not case of the AO that this method was adopted by the assessee with deliberate attempt to conceal certain things. The assessee has pointed out that under *bona fide* mistake, it might have been done, and the explanation of the assessee was not found to be false, therefore, I allow the appeal assessee and delete the penalty.

10. In the result, the appeal of the assessee is allowed.

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

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Ahmedabad; Dated 01/08/2016