

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD – BENCH ‘SMC’

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER

आयकर अपील सं./ ITA No. 3196/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2010-11

Shri Divyesh Chhaganlal Patel C/27, Uma Flats, Behind Vishram Nagar Society Gurukul Road, Memnagar Ahmedabad 380 052. PAN : ABEPP 0203 B	Vs	ITO, Ward-7(1)(5) Ahmedabad.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
Assessee by :	Shri Pritesh Shah, AR
Revenue by :	Shri N.K. Goel, Sr.DR

सुनवाई की तारीख/Date of Hearing : 13/11/2019

घोषणा की तारीख /Date of Pronouncement : /11/2019

**ORDER**

Assessee is in appeal before the Tribunal against order of Id.CIT(A)-7, Ahmedabad dated 10.10.2016 passed for the Asstt.Year 2010-11.

2. Sole grievance of the assessee in this appeal is that the Id.CIT(A) has erred in confirming imposition of penalty of Rs.7,34,685/- by the AO under section 271(1)(c) of the Income Tax Act.

3. Brief facts of the case as it emerges from the relevant record are that the assessee was salaried employee of the State Government undertaking. He filed his return of income on 1.9.2010 showing total income at Rs.3,49,624/-. The same was processed under section 143(1); however, the case of the assessee was selected for scrutiny assessment as

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per CASS and issued and served notice under section 143(2) of the Act. On the basis of AIR information received, it revealed to the Department that assessee has deposited cash of Rs.25,30,000/- in his saving bank account no.20045821969 with State Bank of India, Civil Hospital, Ahmedabad. The Id.AO called for bank statement from the bank, and he noticed the cash deposits in the assessee's account as under:

<i>Date</i>	<i>Amount deposited</i>	<i>Remarks</i>
09/10/2019	25,00,000	Cash deposited
09/10/2019	-	Rs.12,00,000 withdrawal by cheque no.275346
09/10/2019	-	Rs.13,00,000 withdrawal by cheque no.275347
10/11/2019	7,000	Cash deposited
10/11/2019	8,000	Cash deposited
14/12/2019	15,000	Cash deposited
<i>Total</i>	25,30,000/-	

4. The Id.AO sought explanation from the assessee source of the cash for making the deposits and also show caused as to why the above cash deposits should not be treated as deposits made from undisclosed income. However, the assessee in his reply denied having made such deposits in the bank and contended that these were mistakes committed by the bank officials. It was contended by the assessee that when the Bank committed the mistake, to reverse the said entry, the assessee was asked to give two cheques on the same day i.e. for Rs.12.00 lakhs and Rs.13.00 lakhs. They were simple paper transactions at the instance of the bank without physical movement of cash, and therefore, no addition

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could be made to the income of the assessee. The ld.AO did not satisfy with the explanation of the assessee, and he made addition of Rs.25.00 lakhs to the income of the assessee. Action of the AO was challenged before the ld.First Appellate Authority, but of no avail. Accordingly, the ld.AO initiated penalty proceedings by issuance of notice under section 274 r.w.s 271(1)(c) of the Act. In the penalty proceedings, the assessee reiterated its submissions, but did not satisfy the ld.AO, who imposed penalty of Rs.7,34,685/- being minimum penalty levable under section 271(1)(c) of the Act. Action of the AO was confirmed by the ld.first Appellate Authority. Assessee is now before me in further appeal.

5. With the assistance of the ld.representatives, I have gone through the record carefully. It is pertinent to mention here that the assessee had challenged addition on which penalty has been imposed vide quantum appeal in ITA No.362/Ahd/2014. This appeal has been dismissed by me on merit, and orders of the Revenue authorities stand confirmed. However, while going through the impugned penalty order, I am of the view that the same has to be analysed from different angle. A perusal of the penalty order would indicate that the ld.AO has imposed penalty under section 271(1)(c) of the Act without recording any categorical finding, whether it is being imposed for concealment of income or furnishing inaccurate particulars of income. The ld.AO just in one-line held that penalty has been imposed "for concealing true particulars of income and furnishing inaccurate particulars of income." Hon'ble Gujarat High Court in the case of Snita Transport P.Ltd. Vs. ACIT, (2014) reported 42 taxmann.com 54 (Guj) has propounded that the Assessing Officer ought to have recorded categorical finding for the breach for

which he imposing penalty upon the assessee. The discussion made by the Hon'ble Court in para-9 is worth to note. It reads as under:

*"9. Regarding the contention that the Assessing Officer was ambivalent regarding under which head the penalty was being imposed namely for concealing the particulars of income or furnishing inaccurate particulars, we may record that though in the assessment order the Assessing Officer did order initiation of penalty on both counts, in the ultimate order of penalty that he passed, he clearly held that levy of penalty is sustained in view of the fact that the assessee had concealed the particulars of income. Thus insofar as final order of penalty was concerned, the Assessing Officer was clear and penalty was imposed for concealing particulars of income. In light of this, we may peruse the decision of this Court in case of Manu Engineering Works (supra). In the said decision, the Division Bench came to the conclusion that language of "and/or" may be proper in issuing a notice for penalty, but it was incumbent upon the Assessing Authority to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by them. If no such clear cut finding is reached by the authority, penalty cannot be levied. It was a case in which in final conclusion the authority had recorded that "I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income." It was in this respect the Bench observed that "Now the language of "and/or" may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the IAC to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear cut finding was reached by the IAC and, on that ground alone, the order of penalty passed by the IAC was liable to be struck down."*

6. As per the above judgment if an Assessing Officer used expression "or" in between the concealment of income/furnishing inaccurate particulars, then that show cause notice be not fatal to the proceedings, but while visiting the assessee with penalty the Id.AO ought to have recorded a specific finding, for which breach, he has visited the assessee

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with penalty i.e. whether he has visited the assessee with penalty for concealment of income or furnishing inaccurate particulars of income. In the penalty order he cannot use both the expression. While issuing show cause notice under section 274 r.w.s. 271(1)(c) of the Act for inviting explanation of the assessee, as to why penalty under section 271(1)(c) of the Act be not imposed upon the assessee, can use expression "or" between furnishing inaccurate particulars vis-à-vis concealment of income. However, while adjudicating the issue regarding imposition of penalty, the Id.AO has to record a conclusive finding for which he is imposing the penalty, i.e. whether he is imposing penalty for furnishing inaccurate particulars of income or for concealment of income. The Id.AO cannot use phrase that "penalty is being imposed for furnishing inaccurate particulars/concealment of income". This phraseology does not disclose the formation of opinion at the end of the Assessing Officer, and such penalty order is not sustainable. Thus, I cancel the impugned penalty and allow the appeal of the assessee.

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

**Pronounced in the Open Court on 14<sup>th</sup> November, 2019.**

**Sd/-  
(RAJPAL YADAV)  
JUDICIAL MEMBER**

**Ahmedabad; Dated, 14/11/2019**