

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT  
DB-II), MUMBAI**

**BEFORE SHRI C.N,PRASAD, JM**

**&**

**SHRI M.BALAGANESH, AM**

**ITA No.4619/Mum/2018  
(Assessment Year :2001-02)**

**ITA No.4620/Mum/2018  
(Assessment Year :2002-03)**

**ITA No.4621/Mum/2018  
(Assessment Year :2003-04)**

**ITA No.4622/Mum/2018  
(Assessment Year :2004-05)**

**ITA No.4623/Mum/2018  
(Assessment Year :2005-06)**

**ITA No.4624/Mum/2018  
(Assessment Year :2006-07)**

**&**

**ITA No.4625/Mum/2018  
(Assessment Year :2007-08)**

Jayant B Patel HUF B/27, Clifton Society Near Centaur Hotel Juhu, Mumbai – 400 049	Vs.	Deputy Commissioner of Income Tax, Central Circle-2(3) Mumbai
<b>PAN/GIR No.AAAHJIO81L</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri V. Chandrashekhar, Advocate
Revenue by	Ms. Samadha Mullanudi, Sr AR
<b>Date of Hearing</b>	<b>07/07/2020</b>
<b>Date of Pronouncement</b>	<b>13/07/2020</b>

### **आदेश / ORDER**

#### **PER BENCH:**

These appeals in ITA No.4619/Mum/2018, ITA No.4620/Mum/2018, ITA No.4621/Mum/2018, ITA No.4622/Mum/2018, 4623/Mum/2018 & 4624/Mum/2018 & 4625/Mum/2018 for A.Y.2001-02,2002-03,2003-04,2004-05, 2005-06, 2006-07 & 2007-08 respectively arise out of the order by the Id. Commissioner of Income Tax (Appeals)-48, Mumbai in appeal Nos. CIT(A)-48/I.T-42,44 & 48/DC CC2(3)/2017-18, CIT(A)-48/I.T-43,45,46 & 47/DC CC2(3)/2017-18 dated 14/06/2018, 31/05/2018 (Id. CIT(A) in short) in the matter of imposition of penalty u/s.271(1)(c) r.w.s. 274 & 271(1)(c) respectively of the Income Tax Act, 1961. Also include the details of Asst Year 2007-08.

2. At the outset, the Id. AR submitted that the only effective issue involved in all these appeals is as to whether the Id. CIT(A) was justified in confirming the levy of penalty u/s.271(1)(c) of the Act in the facts and circumstances of the case. He also submitted that A.Y.2001-02 being the first year in search assessment be taken up as the lead case. The Id. DR also agreed for the same. Hence, with the consent of both the parties, appeal for the A.Y.2001-02 is taken as the lead case and taken up for adjudication.

3. We have heard rival submissions and perused the materials available on record. We find that there was a search u/s.132 of the Act in the case of Shri Jayant B Patel and persons connected with him on 10/01/2007 in the premises of Cliffton society, Juhu. Pursuant to the search, notices u/s.153A of the Act were issued to the assessee for all the assessments years commencing from A.Y.2001-02 onwards. It is not in dispute that at the time of search, certain dairies numbered as A-1 to A-6 in the panchanama dated 10/01/2007 were found which admittedly contained certain transactions of undisclosed income. The assessee during the course of search had given a declaration statement u/s.132(4) of the Act accepting to the contents of the dairies and the related undisclosed income reflected thereon by duly substantiating the manner in which such undisclosed income was derived by him. It is not in dispute that the assessee had duly disclosed the transactions reflected in the said dairies in the returns filed pursuant to notice u/s.153A of the Act and paid taxes thereon. Hence, all the three conditions for claiming immunity from levy of penalty viz. declaration made u/s.132(4) of the Act by duly substantiating manner in which such undisclosed income was derived; including those undisclosed income in the return filed u/s.153A of the Act and the payment of taxes thereon were duly complied with by the assessee in the instant case. Hence, the case of the assessee falls within the Explanation-5, Clause-2 of Section 271(1)(c) of the Act wherein immunity from levy of penalty is squarely provided in the statute itself. We find that the Id. AO had levied the penalty as under for various assessment years:-

ITA No.	AY	On Income declared in return u/s.153A as Gross Profit on Dairy Business	On additions made by the Assessing Officer on transaction of Shares	Total
4619	2001-02	311,899	167,407	479,306
4620	2002-03	320,484	NA	320,484
4621	2003-04	331,193	16,322	347,515
4622	2004-05	304,040	NA	304,040
4623	2005-06	310,361	NA	310,361
4624	2006-07	161,058	NA	161,058
4625	2007-08	Nil	119,610	119,610
	<b>Total</b>	<b>17,39,035</b>	<b>3,03,339</b>	<b>20,42,374</b>

3.1. From the above table read together with the provisions of Explanation-5 Clause-2 of Section 271(1)(c) of the Act, it could be safely concluded that no penalty could at all be levied in the total sums of Rs.17,39,035/- as detailed in the aforesaid table for the A.Yrs. 2001-02 to 2006-07 since the same represents the income disclosed by the assessee in the returns filed u/s.153A of the Act, which would be eligible for immunity in terms of Clause-2 of Explanation-5 of Section 271(1)(c) of the Act. Hence, we are in agreement with the argument advanced by the Id. AR that no penalty at all could be initiated in respect of the said sums disclosed by the assessee in the returns filed u/s.153A of the Act.

3.2. The remaining penalty of Rs.3,03,339/- are levied as under:-

A.Y.2001-02	-	Rs.1,67,407/-
A.Y.2003-04	-	Rs. 16,322/-
A.Y.2007-08	-	<u>Rs.1,19,610/-</u>
<b>Total</b>		<b>Rs.3,03,339/-</b>

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3.3. We find from the perusal of the assessment order u/s.143(3) r.w.s.153A of the Act dated 16/12/2011 for the A.Y.2001-02 that the Id. AO while making three additions thereon had recorded his satisfaction as under:-

- (a) Addition towards unexplained cash expenditure of Rs.48,554/-  
- **penalty initiated for concealment of income.**
- (b) Addition on account of bogus long-term capital gains of Rs.5,14,965/- - **penalty initiated for inaccurate particulars of income or concealment of income.**
- (c) Addition made towards agricultural income treating the same as bogus of Rs.1,00,000/- - **penalty initiated for inaccurate particulars of income or concealment of income.**

3.4. Out of the aforesaid three additions, this Tribunal in the quantum appeal proceedings, had sustained addition towards bogus long term capital gain to the extent of Rs.4,84,965/- and addition towards unexplained cash expenditure to the tune of Rs.24,248/-.

3.5. We find that the Id. AO had levied penalty for the A.Y.2001-02 by applying the Explanation-5 to Section 271(1)(c) of the Act for the following three sums.

(a) Undisclosed dairy sales found during the course of search reflected in the return filed u/s.153A of the Act	- Rs.9,45,000/-
(b) Addition made towards bogus long term capital gain	- Rs.4,84,965/-
(c) Addition made towards unexplained cash expenditure	- <u>Rs. 24,248/-</u>
<b>Total</b>	<b><u>Rs.14,52,219/-</u></b>

3.6. We find that the Id. AO in page 3 in para 8 of his penalty order dated 31/07/2017 had mentioned in bold letters by supplying more emphasis thereon that the aforesaid three items would constitute undisclosed income of the assessee eligible for levy of penalty **for furnishing inaccurate particulars of income** (underlining and emphasis provided by us).

3.7. But we find that the Id. AO in para 12 of his penalty order had mentioned that the penalty is levied for **both concealment of income as well as furnishing of inaccurate particulars of income** by the assessee and accordingly, levied penalty of Rs.4,79,306/- for the A.Y.2001-02. The break-up of the said penalty is as under:-

Penalty for income disclosed in the return filed u/s.153A of the Act	- Rs.3,11,899/-
Penalty for additions made in the 153A assessment	- <u>Rs.1,67,407/-</u>
<b>Total</b>	<b><u>Rs.4,79,306/-</u></b>

3.8. We find that the Id. AR has also placed on record the copy of the show-cause notice issued u/s.274 of the Act r.w.s. 271(1)(c) of the Act dated 16/12/2011 for the A.Y.2001-02 wherein, we find that the Id. AO had not struck-off the relevant portion and had not specified the offence committed by the assessee i.e. whether the assessee has concealed his income or furnished inaccurate particulars of his income. With this factual background, the issue before us requires to be adjudicated.

4. It could be seen that originally in the assessment order, the Id. AO vide para 7.2 and para 7.3 page 8 had recorded his satisfaction that penalty proceedings are being initiated separately u/s.271(1)(c) of the Act for furnishing inaccurate particulars of income or concealment of income in respect of one addition and in respect of another addition penalty proceedings were initiated for concealment of income. But in the final penalty order vide para 8 thereon, he had recorded his satisfaction that penalty is leviable for furnishing inaccurate particulars of income. But again in para 12 of the same penalty order, the Id. AO states that penalty is levied for both concealment of income as well as furnishing of inaccurate particulars of income. This clearly shows the complete confused state of mind of the Id. AO and non-application of mind by the Id. AO by not clearly mentioning the specific offence committed by the assessee as to whether the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income. The divergent stand taken at the time of recording satisfaction in the assessment proceedings and at the time of framing of penalty order is very much evident from the aforesaid narration of facts. Hence, this is a classic case of both non-application of mind on the part of the Id. AO mentioning the specific offence and also initiating penalty on one limb of the alleged offence and levying penalty on the other limb of the alleged

offence thereon. Hence, the ratio laid down by the Hon'ble Jurisdictional High Court in the case of Samson Perinchery – ITA No.1154/2014 dated 05/01/2017 squarely becomes applicable to the assessee's case and respectfully following the said decision, the penalty levied for the A.Y.2001-02 in the sum of Rs.1,67,407/- deserves to be deleted.

4.1. The Id. DR vehemently placed reliance on the recent decision of the Hon'ble Bombay High Court in Ventura Textiles case in ITA No.958/2017 dated 12/06/2020 by drawing specific reference to para 26 of the said decision thereon. The main crux of the said decision is that the Hon'ble Bombay High Court had held that even if the penalty notice does not mention the specific charge of offence committed by the assessee, if the Id. AO has duly recorded his satisfaction in the quantum assessment order itself, the assessee is completely made aware of the offence committed by him and also the mind of the Id. AO. Subsequently, if the penalty is levied by the Id. AO on the very same limb for which satisfaction was recorded in the quantum assessment order, then the penalty levied would be sustainable in the eyes of law and cannot be struck down merely because there is a defect in the penalty notice. In other words, the Hon'ble Bombay High Court had observed that in the case of Ventura Textiles, the assessee was duly informed about the specific limb on which penalty is initiated by way of proper satisfaction recorded in the quantum assessment order. We find that this decision of Hon'ble Bombay High Court in the case of Ventura Textiles cannot be made applicable to the facts of the instant case and it is factually distinguishable as is evident from the aforesaid narration of facts.

4.2. We hold that the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Samson Perinchery in ITA No.1154/2014 dated 05/01/2017



would hold the field in the facts of the instant case. Respectfully following the said decision, the penalty levied for A.Y.2001-02 is hereby directed to be deleted.

5. Hence we hold that in respect of penalties levied for the additions made in the section 153A assessments, the decision rendered for A.Y.2001-02 for cancellation of penalty in the sum of Rs.1,67,407/- thereon would apply with equal force for deleting the penalties of Rs.16,322/- and Rs.1,19,610/- for the A.Yrs 2003-04 and 2007-08 respectively also, in view of the identical issue.

6. To sum up, we hold

(a) No penalty under Explanation-5 to Section 271(1)(c) of the Act could be levied in respect of undisclosed income found in the course of search but which were duly returned by the assessee in the return filed u/s.153A of the Act together with compliance of other conditions submitted in Clause-2 of Explanation-5 to Section 271(1)(c) of the Act which provides immunity to the assessee from levy of penalty. By this, the penalty levied for all the assessment years in the total sum of Rs.17,39,035/- is deleted.

(b) In respect of penalty on additions made during the course of assessments framed u/s.153A of the Act for three assessment years i.e. A.Yrs 2001-02, 2003-04 and 2007-08, we hold that the same is deleted for recording improper satisfaction on the part of the Id. AO by not mentioning the specific offence committed by the assessee in the quantum assessment order and also for initiating penalty on one limb and levying penalty on the other limb of the alleged offence. By this, the

penalty levied for three assessment years in the sum of Rs.3,03,339/- is deleted.

5.2. Accordingly, the grounds raised for all the assessment years are allowed.

**6. In the result, all the appeals of the assessee are allowed.**

Order pronounced on 13/07/2020 by way of proper mentioning in the notice board.

**Sd/-  
(C N PRASAD)  
JUDICIAL MEMBER**

Mumbai; Dated  
KARUNA, *sr.ps*

**Sd/-  
(M.BALAGANESH)  
ACCOUNTANT MEMBER**

13/07/2020

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)  
ITAT, Mumbai