आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

सर्वश्री वसीम अहमद, लेखा सदस्य एवं मधुमिता रॉय, न्यायिक सदस्य के समक्ष।

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SMT MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 888/Ahd/2014
(**निर्धारण वर्ष** / Assessment Year : 2009-10)

Smt Joyti Sunil Maniyar, C/o. Ketan H. Shah, Advocate 903, Sapphire Complex, C.G. Road, Navrangpura, Ahmedabad.	**बनाम**/ Vs.	ITO, Ward – 2(4), Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AGEPA 2433 K		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से/ **Appellant by** :	Shri Ketan Shah, A.R.
प्रत्यर्थी की ओर से/**Respondent by:**	Shri Lalit P Jain, Sr. D.R.

सुनवाई की तारीख/ **Date of Hearing**	08/10/2018
घोषणा की तारीख /**Date of Pronouncement**	01/01/2019

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals)–II, Ahmedabad [CIT(A) in short] vide appeal no.CIT(A)-II/Wd.2(4)/294/2013-14 dated 10.02.2014 arising in the matter of penalty order passed under s.271(1)(c) of the Income Tax Act, 1961(here-in-after referred to as "the Act") dated 20.06.2012 relevant to Assessment Year (AY) 2009-10.

2. The grounds of appeal raised by the assessee are as under:-

"The following grounds are without prejudice to each other.

In view of the facts and circumstances of the case, the learned Assessing Officer/Commissioner of Income Tax (Appeals) erred -

1. *The Learned Commissioner of Income Tax (Appeals) erred in confirming the penalty order under sec.271(1)(c) inter alia erred in giving finding that the assessee has concealed the particulars of income in reference to the sale of property of Rs.30,46,950/-. It is prayed that the penalty levied may please be cancelled.*
2. *The Learned Commissioner of Income Tax (Appeals) has erred in not appreciating the facts that the concerned Accountant has filed affidavit and thereafter he has not been cross examined by the Assessing Officer, and as such, the factual aspect brought to the notice by the Accountant in the affidavit is required to be believed in toto, and therefore, the penalty levied may please be cancelled on the ground of 'bona fide' of the assessee.*
3. *Without prejudice, the learned Commissioner of Income Tax (Appeals) has erred in not appreciating the fact that the property in dispu e was purchased by the parents of the assessee at Jodhpur by their source of income and ultimately it has been sold by them at Jodhpur, and hence, the sales consideration has not been given to the assessee nor the same has been reflected in any bank account at Ahmedabad, and therefore, this factual aspect may please be considered as reasonable cause' and the penalty order may please be quashed.*

The appellant reserves its right to add, amend, alter or modify any of the grounds stated hereinabove either before or at the time of hearing."

3. The assessee has also raised the additional grounds of appeal vide letter dated 14.06.2017 as reproduced under:-

"1. The learned C.I.T.(Appeals) has erred in not appreciating the facts that the penalty notice u/s.274 r.w.s. 271(1)(c) dated 15.12.2011

as well as 15.05.2012 is itself bad in law since there is no such specific allegation in reference to two limbs of section 271(1)(c), and therefore, consequential penalty order passed u/s.271(1)(c) is itself bad in law and void."

4. The only issue raised by the assessee in its original grounds of appeal is that Ld. CIT(A) erred in confirming the penalty of Rs. 5,71,406/- under the provision of Section 271(1)(c) of the Act.

5. Briefly stated facts are that the assessee in the present case is an individual and filed her return of income dated 25.03.2010 declaring total income of Rs. 43,950/- under the head business and profession. The assessee in the year under consideration has sold a piece of land situated at 671, Samanvay Nagar Pal Road, Khasara, District Jodhpur Rajasthan. The piece of land was sold for Rs. 30,41,000/- dated 26.05.2008. However, the assessee failed to declare any income under the head capital gain on account of such sale of the plot. Therefore, the AO worked out the capital gain on the sale of such plot of land for Rs. 26,57,708/- only. The necessary computation of capital gain for Rs. 26,57,708/- stands as under:

Sr. No.	Date of Sale	Date of Purchase	Sale Value	Purchase value	Index Cost	Gain
1	26.5.2008	16.06.2005	30,41,000	19400+304680	26504+356788	26,57,708

Because of the above, the AO added a sum of Rs. 26,57,708/- as long-term capital gain to the total income of the assessee vide order dated 15.12.2011 u/s 143(3) of the Act.

5.1 The assessee in its assessment order initiated the penalty proceedings u/s 271(1)(c) of the Act on account of concealment of income for such capital gain.

5.2 Subsequently, the AO issued a notice u/s 274 / 271(1)(c) of the Act dated 15.12.2011 for initiating the penalty proceedings.

5.3 The assessee in compliance with that vide letter dated 13.01.2012 submitted that the accountant had been filing her return of income since the year 2006-07 who is 60 years of age.

5.4 The accountant was assigned the task to file the return of income for the year under consideration declaring the capital gain income. However, the accountant has not included the capital gain income in return filed by her. Therefore it was a mistake of the accountant who has not declared the capital gain income in return filed by her.

5.5 The assessee further submitted that the accountant brought the mistake of not declaring capital gain income in return filed by her. Accordingly, the accountant prepared a fresh return dated 01.08.2010 disclosing the income under the head capital gain. However, in the meantime, she (assessee) received a notice u/s 143(2), dated 31.08.2010.

Therefore the assessee decided to declare the income under the head capital gain during the assessment proceedings.

5.6 The assessee in support of his argument has also furnished the affidavit of the accountant dated 21.11.2011 which is reproduced as under:

> *"6.1 The attention is also drawn to the facts that, assessee's Accountant has firstly prepared the return as on 01.08.2010 and the tax / interest calculated thereon, on that date comes to Rs.7,35,400/-. However, the same was not paid because there was no fund in the account of the assessee. Copies of the computation of income (paper book page 41 & 42), return (paper book page 43 to 64) and challan as on 01.08.2011 (paper book page 40) are enclosed herewith. The tax payable on 01,08.2010 is Rs.7,35,400/-. The copy of ITR 4 is at paper book page 43 to 64.*
>
> *6.1.1 A copy of the sale deed of the property Is enclosed at paper book page 67 to 69; from which it is found that the assessee himself has given PAN No. and as such she was fully aware that if the LTCG is not shown in the return then it would be obviously detected by the Department by way of AIR.*
>
> *6.2 As on 01.08.2011, there was no such balance in the bank account of the assessee and as such though return prepared by the Accountant on 01.08.2010, the same was not filed and the assessee was waiting for the funds and meantime notice under sec.!42(l) dated 11.10.2011 received, so, it was decided to pay the tax during the course of hearing itself.*
>
> *6.3 That to make error is a nature for any human being including some time by Income Tax Officer also because that is the reason why section 263 take care of the error made by the Assessing Officer. So, that might be the error by the assessee also.*
>
> *7. In view of the aforesaid facts of the case and on going through*

the aforesaid affidavit, it is respectfully submitted that it was 'bona fide' of the assessee and the assessee lady has acted upon the advice of the concerned Accountant and there was Accountant's mistake to not to include the capital gain in the original return but it was not the mistake of the assessee lady.

8. The following case lows are relevant on the subject."

However, the AO disagreed with the contention of the assessee by observing as under:

i. The argument of the assessee that the accountant has committed a mistake by not incorporating the capital gain income in her return is not tenable It is because the assessee cannot be ignorant for the capital gain income earned during the year under consideration.

ii. The sale proceeds must have been deposited in the bank account of the assessee, and all the entries must be reflecting in the bank account. The accountant will normally verify the bank account of the assessee before the filing of income tax return.

iii. The notices u/s 142(1) were issued to the assessee on different dates, but the assessee did not accept her mistake for not disclosing capital gain income till a specific inquiry was raised to the assessee vide letter dated 11.10.2011 about the undisclosed income of capital gain.

Because of the above, the AO concluded that there is concealment of income and levied the penalty amounting to Rs. 5,71,406/- being 100% of the tax amount sought to be evaded on account of concealment of the particulars of income.

6. Aggrieved, assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that the AO had not examined the contents of the affidavit furnished by the accountant during the penalty proceedings. Therefore it has to be believed in totality. Besides, the accountant has not been cross examined by the AO. As such, the AO has not considered the affidavit, and no reason was assigned for the same. Accordingly, no defect was pointed in the contents of the affidavit.

6.1 There was no mala-fide act on the part of the assessee for not disclosing the income under the head capital gain.

6.2 Besides the above, the assessee also submitted that there was no fund available with her for the payment of income tax on the amount of undisclosed income of the long-term capital gain. Therefore, the same was not immediately accepted during the assessment proceedings. However, the Ld. CIT(A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

> *"The facts of the case and submissions have been carefully perused. It is observed the appellant had earned income by way of capital gains on sale of property during year in question which has not been denied by*

her. However, the said-Capital gain not offered to tax by her in the return of income. The plea taken by the appellant is that it was mistake of the accountant who prepared and filed the return. It has been discussed by the Assessing Officer that even after the issue of notice u/s.143(2) and 142(1), the reply was not filed by the assessee. It is only in response to notice u/s.142(1) dated 11.10.2011 when specific query regarding of the issue of capital gain on the land transaction of sale was raised by the Assessing Officer, the reply was filed.

Besides, it is seen that one argument was tak n by .the appellant that she had no funds in the bank account to pay the taxes. The Assessing Officer has also negated this argument also by mentioning that the appellant had credit balance with M/s.Shivam Agro Industries. However, this is immaterial that whether the appellant had funds or not. What matters is that the appellant did not disclose the fact of the capital gain in the return of income. In assessment proceedings also no satisfactory explanation was filed for non-disclosure of the fact of the capital gains. In penalty proceedings also the reply filed by the appellant was same that it was the mistake of an accountant whose affidavit was filed before the Assessing Officer.

In appellant proceedings also the AR has referred to the same contentions. It has also been mentioned that the parents of the appellant stay at Jodhpur whereas she lives in Ahmedabad with her parent-in-laws and the commission be treated as bona-fide mistake of the appellant for not showing the capital gains and there was reasonable cause with her for such default if any. The AR has also relied on many court decisions as mentioned above.

On careful consideration I am of the view, that no satisfactory or reasonable cause was explained by the appellant neither during assessment proceedings, penalty proceedings nor during appellate proceedings. The Appellant is an adult, educated lady and she is responsible for facts disclosed or not disclosed in the return of income. The deal involved huge amount of money and the transaction took place during the A.Y. in question. There was no ground for not showing the capital gain In the return, The plea of mistake of accountant is not acceptable. The case laws referred by the AR are also of to the

appellant in the matter as the facts are distinguishable. Thus, taking into account entire facts and the circumstances of the case, I hold that the Assessing Officer was justified in levying penalty u/s.271(l)(c) of Rs.571406/- in respect of Long Term Capital Gain which arose for sale of property at Rs.30,46,950/-."

Being aggrieved by the order of the Ld. CIT(A) assessee is in appeal before us.

7. The Ld. AR before us filed a paper book running from pages 1-150 and submitted that the assessee had disclosed her PAN in the sale deed which reveals that there was no mala fide intention of the assessee to conceal the long-term capital gain income. The accountant has committed mistake for not di closing the long-term capital gain in the income tax return. Therefore, the assessee should not have been panelized by way of a penalty u/s 271(1)(c) of the Act.

8. On the other hand, the Ld. DR submitted that the assessee was very much aware of her capital gain income at the time of return filing. It is because the assessee is well aware of her financial affairs. Therefore the assessee has not disclosed the capital gain income intentionally in her return.

8.1 In fact, the assessee offered long-term capital gain income when the Revenue detected it during the assessment proceedings. The Ld. DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions and perused the materials available on record. In the instant case, the penalty was levied by the AO on the capital gain not disclosed by the assessee in her income tax return. The Ld. CIT-A subsequently confirmed the view taken by the AO.

From the preceding discussion, we note certain undisputed facts as detailed under:

i. The assessee herself has accorded that the accountant has brought to the notice of the assessee about the mistake of not disclosing capital gain income in the return of income. This mistake was brought to the notice of the assessee dated 01.08.2010 wh reas the notice u/s 143(2) was issued on 31.08.2010. Thus, there was a time gap of almost one month between the date when assessee came to know about the fact of not di closing the capital gain income and the case selected under scrutiny. However, the assessee during this one month did not attempt to rectify her mistake by writing the letter to the AO.

ii. The assessee is under the obligation to sign the income tax return which she is supposed to sign after due verification. Thus it appears that the assessee was fully aware of the fact that the capital gain income has not been disclosed in the return of income. We find relevant to refer the different dates on which

notices were issued to the assessee during the assessment/penalty proceedings as detailed under:

Sr. No.	Section under/notices issued	Date of notice
1.	143(2)	31.08.2010
2.	142(1)	10.01.2011
3.	142(1)	15.02.2011
4.	142(1)	11.10.2011

9.1 In the notice issued u/s 142(1) dated 11.10.2011 a specific query was raised by the AO about the capital gain income. After that, the assessee vide reply dated 22.11.2011 conceded the fact of non-disclosing the capital gain income. From the above, it is transpired that the assessee did not offer the capital gain income *su moto* for a quite long time until the AO raised the specific query about the undisclosed income.

9.2 The overall conduct of the assessee and circumstances suggest that the assessee deliberately did not offer the capital gain income in her income tax return. In our considered view, non-availability of the fund cannot be an excuse for not disclosing the capital gain income earned by the assessee. The case law relied on by the assessee before the lower authorities are not relevant to the facts of the case on hand. Therefore, we are of the view that the assessee has concealed her particulars of income by not disclosing the long-term capital gain in her return of income. Therefore, we do not find any reason to disturb the finding of the Ld. CIT(A). Hence, the ground of the assessee is dismissed.

10. The second issue raised by the assessee in the additional ground of appeal is that there was no specific charge mentioned in the notice issued u/s 274 r.w.s. 271(1)(c) of the Act whether the penalty was initiated on account of concealment of income or furnished inaccurate particulars of income.

11. Indeed there is no specific charge in the notice issued u/s 274/271(1)(c) of the Act as alleged by the assessee. However, we note that there was a specific charge for concealment of income on the basis of which the AO levied the penalty in his order dated 20.06.2012. Therefore, we are of the view that he assessee cannot get immunity from the penalty on the ground that there was no specific charge in the notice issued u/s 274 of the Act.

In this regard we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of Snita Transport (P) Ltd. reported in 221 taxman 217 wherein it was held 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."

From the above judgment, it is clear that the defect in the notice issued u/s 274 of the Act cannot be fatal to the penalty proceedings initiated u/s 271(1)(c) of the Act. The judgment of Hon'ble Gujarat High Court in the case of *Snita Transport Company (supra)* being jurisdictional High Court is binding of own. Therefore, we cannot take any guidance in support of the assessee contention from the judgments delivered by the various Non- Jurisdictional High Courts.

We also note that the Hon'ble Supreme Court has dismissed the appeal filed by the Revenue in the case of CIT Vs. SSA's Emerald on the issue of defective notice. However, The Apex Court did lay down any law on

the issue of defective notice but outrightly dismissed the appeal filed by the Revenue. Therefore, we cannot take any shelter from the Judgment of Hon'ble Supreme Court in the case of *SSA's. Emerald* ***(supra).*** In this regard we note that order passed by the Hon'ble High court still holds the water even if SLP filed against such order is dismissed by the Apex court. The doctrine merger does not apply to the order of high court if SLP is not admitted by the Hon'ble Supreme Court against such order. In this regard we find support and guidance from the judgment of Apex court in case of Kunhayammed v. State of Kerala, (2000) 6 SCC 359 wherein it was held as under:

> *"We may refer to a recent decision, by Two-Judges Bench, of this Court in V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax 2000 (3) Scale 240, holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non- speaking order. Here the doctrine of merger applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court."*

From the above, it is clear that no principle was laid down by the Hon'ble Apex Court in the case of S.S.A. Emerald. Therefore, the principles laid

down by the Jurisdictional High Court in the case of *Snita Transport (Supra)* are applicable in the case on hand. Therefore, relying on the same we dismiss the additional ground of appeal raised by the assessee.

12. In the result, the appeal of the assessee is dismissed.

This Order pronounced in Open Court on	**01/01/2019**

sd/-
(मधुमिता रॉय)
न्यायिक सदस्य
(MADHUMITA ROY)
JUDICIAL MEMBER

Sd/-
(वसीम अहमद)
लेखा सदस्य
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 01/01/2019
Priti Yadav, Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-II, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad