

IN THE INCOME TAX APPELLATE TRIBUNAL,
'D' BENCH, AHMEDABAD.

Before: Hon'ble Shri T.K. SHARMA, Judicial Member, and
Hon'ble Shri D.C. AGRAWAL, Accountant Member

ITA Nos.2823, 2825, 2827, 2829, 2831 & 2834/Ahd/2009

Assessment Years : 2000-2001, 2001-2002, 2002-2003, 2003-2004,
2004-2005, 2006-2007

Swarnaben M. Khanna, Surat (PAN : ADTPK 8860 B)	Versus	Deputy Commissioner of Income Tax, Central Circle-2, Surat
(Appellant)		(Respondent)

For the Appellant : Shri C.K. Mishra, Sr. D.R.

For the Respondent : S/Shri Rasesh Shah and Hardik Vora

ORDER

Per Bench :- These are the six appeals filed by the assessee against the order of Ld. Commissioner of Income Tax(Appeals)-II, Ahmedabad dated 01.07.2009. The first five appeals for the assessment years 2000-01 to 2004-05 are through a common order, whereas appeal being ITA No. 2834/AHD/2009 for the Assessment Year 2006-07 is through a separate order. All these appeals involved common facts and common issues and hence, they are taken up together for the sake of convenience.

2. Brief facts of the case are that a search and seizure operation was carried out at the premises of the assessee on 18.01.2006. Notice under section 153A(a) was issued to the assessee on 09.11.2006. The return of income was filed on 27.11.2006 giving details as under :-

A.Y.	Declared income	Date of return filed	Date of assessment	Assessed income	Addition	Penalty levied
2000-01	Rs.53,040/-	27.11.06	28.12.2007	Rs.78,540/-	Rs.25,500/-	Rs.4,078/-
2001-02	Rs.77,370/-	27.11.06	28.12.2007	Rs.1,78,488/-	R.1,01,118/-	Rs.26,389/-
2002-03	Rs.79,020/-	27.11.06	28.12.2007	Rs.91,154/-	Rs.12,134/-	Rs.2,275/-
2003-04	Rs.90,110/-	27.11.06	28.12.2007	Rs.3,66,400/-	Rs.2,76,290/-	Rs.80,740/-
2004-05	Rs.75,320/-	27.11.06	28.12.2007	Rs.1,88,320/-	Rs.1,13,000/-	Rs.25,496/-
2006-07	Rs.2,45,410/-	27.11.206	28.12.2007	Rs.5,99,030/-	Rs.3,53,620/-	Rs.1,16,409/-

The reasons for addition in respect of years are summarized as under :-

Assessment Year : 2000-2001 : During the course of assessment proceedings, The A.O. found that assessee has given a loan of Rs.25,500/-. No explanation of this loan was given. The Learned Commissioner of Income Tax(Appeals) also noted that no explanation before him has been given.

On the other hand, the Id. A.R. submitted that sundry loans of Rs.25,500/- was reflected in the balance-sheet, which was filed alongwith the return of income prior to search. The A.O. has not doubted the financial statements filed by the assessee and the addition has been made only on the basis of loans reflected in the balance-sheet. In fact, these loans are assets of the assessee and no addition can be made under section 68. He further submitted that these loans are explained by capital and other credits in the balance-sheet. In any case, the assessee has not contested the addition so as to avoid litigation and to buy peace.

Assessment Year : 2001-2002 :- During the course of assessment proceedings, it was found by the A.O. that assessee has deposited a sum of Rs.1,01,118/- in Mrinal Dyes & Chemicals. The assessee did not furnish any explanation of this investment either before the A.O. or before the Learned Commissioner of Income Tax(Appeals).

Assessment Year : 2002-2003 :- During the course of assessment proceedings, it was found by the A.O. that assessee has made an investment of Rs.12,134/- in Mrinal Dyes & Chemicals. The assessee did not furnish any explanation of this investment either before the A.O. or before the Learned Commissioner of Income Tax(Appeals).

The Id. A.R. submitted in respect of assessment years 2001-02 and 2002-03 that both the sums are standing as assets in the balance-sheet and are explained by various credits and capital of the assessee. Therefore, they cannot be said to be unexplained. The A.O. has made the addition for the sake of addition and the assessee has not contested just for buying peace.

Assessment Year : 2003-2004 :- During the course of assessment proceedings, it was found by the A.O. that assessee has made an investment of Rs.2,76,290/- in purchase of plot of land at Surat. The assessee did not furnish any explanation of this

investment either before the A.O. or before the Learned Commissioner of Income Tax(Appeals).

The Id. A.R. submitted that this amount is also reflected in the balance-sheet as investment prior to search as per the return filed by the assessee. It could not be said to be unexplained. The addition was not contested to buy peace.

Assessment Year : 2004-2005 :- During the course of assessment proceedings, it was found by the A.O. that assessee has deposited a sum of Rs.42,000/- in a Bank a/c. and also found to have given loan of Rs.71,000/- as under to various authorities :-

Sr. No.	Name of the person	Amount of loan
1.	Kekulbhai Choksi	Rs.17,000/-
2.	Hemaben Choksi	Rs.18,000/-
3.	Ekta Choksi	Rs.18,000/-
4.	Sangeta Khanna	Rs.18,000/-
	TOTAL	Rs.71,000/-

The assessee did not furnish any explanation of this deposit and investments either before the A.O. or before the Learned Commissioner of Income Tax(Appeals).

The Id. A.R. submitted that the amount deposited in the Bank was reflected in the Balance-sheet as cash balance and, therefore, it could not be treated as unexplained. The addition was made only on the basis that it was cash and deposited in the Bank. In fact, the assessee had also given loan to various parties from this Bank account, which is reflected as investment. The final balance at the end of the year is reflected as cash at Bank in the balance-sheet. There is nothing explained in these deposits. The addition has not been contested for ending the litigation.

Assessment Year : 2006-2007 :- During the course of assessment proceedings, it was found by the A.O. that assessee was in possession of cash of Rs.24,000/- at the time of search and also unaccounted jewellery amounting to Rs.3,29,620/-. The assessee failed to furnish any justification for the cash so found or the jewellery on her possession. It was just explained that entire jewellery belongs to herself and her daughter in law Smt. Sangita Khanna and, therefore, equal addition be made. Since during the course of search the assessee was found to be the owner of total jewellery of Rs.15,66,527/- but failed to furnish any justification about the jewellery of Rs.6,59,245/-. The A.O. was asked to explain the source of this jewellery and in

response to which the assessee requested as the jewellery belonged to herself and her daughter-in-law, therefore, addition should be made on equal amount, i.e. half in the hands of herself and half in the hands of her daughter-in-law. Accordingly, the A.O. added a sum of Rs.3,29,620/- in her hand and also initiated penalty proceedings. No explanation was furnished either before the A.O. or before the Learned Commissioner of Income Tax(Appeals) in respect of these additions for levying penalty.

In this year, the Id. A.R. submitted that cash and jewellery was found during the search. The addition was agreed with the A.O., no material was collected by him to show that it is unexplained. According to Id. A.R., jewellery is reflected in the books of accounts of assessee's husband and son but there is no narration of items in the books and hence, addition was made.

3. Since no explanation was furnished in respect of above addition before the Learned Commissioner of Income Tax(Appeals), the Learned Commissioner of Income Tax(Appeals) confirmed the penalty proceedings. He rejected the contention of the assessee that her case is covered by the decision of the Hon'ble Gujarat High Court in the case of New Sorathia Engineering Co. –vs.- CIT [(2006) 282 ITR 642] (Guj.). In this regard, he observed that A.O. has initially penalty proceedings both for concealment of income and furnishing inaccurate particulars of income. In this regard, we re-produce para 6 from the order of Learned Commissioner of Income Tax(Appeals) as under :-

“6. The ratio of the case law relied upon by the appellant is not applicable in this case. In that case (New Sorathia Engineering –vs.- CIT) the A.O. levied the penalty for using the word “concealment of income or furnishing inaccurate particulars of income”. It was upheld by the C.I.T.(A) and Tribunal and on those facts the Hon'ble High Court held that lower authority has not discussed whether penalty is for concealment of income or it is for inaccurate particulars of income and the penalty was not sustained.

However, in the present case, the fact is that penalty is leviable both for concealment of income and for filing inaccurate particulars of income. In the present case, the A.O. has used the words “concealment of income/furnishing inaccurate particulars of income”. In English language the “/” is also used for conjunction “and”, for example, “he is intelligent/ handsome person” means he is intelligent and also handsome person. The

facts of the present case suggests that the A.O. has used the “/” for denoting “and”. Therefore, penalty is levied both for concealment of income and furnished inaccurate particulars of income”. The penalty is also leviable under Explanation 5 to section 271(1)(c) of the Act”.

In view of these facts, it is held that levy of penalty is justified and the same is confirmed”.

This para is common in both the appellate orders.

4. We have heard both the parties and carefully perused the material available on record. The case of the assessee is that the facts of this case are squarely covered by the decision of the Hon'ble Gujarat High Court in the case of New Sorathia Engineering Co. (supra). It is incorrect on the part of Learned Commissioner of Income Tax(Appeals) to hold otherwise. The A.O. is required to give specific finding as to whether the case is covered by main provision or by Explanation. He has to specifically mention whether the assessee is guilty of concealment of income or furnishing inaccurate particulars of income. In this regard, similar decision dated 17.09.2009 has been taken by the Hon'ble ITAT, 'B' Bench, Ahmedabad in the case of Shreeji Gas Agency –vs.- ACIT in ITA No. 1518/AHD/2009.

5. Against this, the Id. Departmental Representative submitted that the above order of Tribunal cannot be relied upon in view of the decision of the Hon'ble Supreme Court in the case of K.P. Madhusudan –vs.- CIT (2001) 251 ITR 99, which has not been referred by the Tribunal in their order. In other words, if penalty notice is issued, then levy of penalty has to be considered both in terms of main section as well as within the meaning of Explanation to section 271(1)(c). The Hon'ble Gujarat High Court in the case of New Sorathia Engineering Co. –vs.- CIT also did not consider the decision of the Hon'ble Supreme Court, therefore, the decision of the Hon'ble Gujarat High Court in the case of New Sorathia Engineering Co. (supra) would not be binding, as against this levy of penalty has to be examined both in terms of main provision of section 271(1)(c) as well as Explanation to that section.

6. After examining the issue, we intend to agree with the Id. D.R. that the decision of the Tribunal in Shreeji Gas Agency's case (supra) will not be squarely applicable.

6.1. However, in the present case, we find that other loans/ investments are reflected in the balance-sheet filed by the assessee prior to search and it is only after examining the balance-sheet, the A.O. sought an explanation from the assessee which was explained as coming out of the funds as reflected in the balance-sheet. The A.O. considered that no specific explanation has been furnished in response to penalty notice issued by him and accordingly levied the penalty and so the Learned Commissioner of Income Tax(Appeals) confirmed the same on the similar ground. In our considered view, when items of investments are reflected in balance-sheet filed prior to the search, then the question of considering them unexplained does not arise. The addition has been made for want of some specific explanation so as to identify specific source of funds for making investment or giving loan. But that will not be sufficient for the purpose of levying penalty. What is required to be shown by the A.O. is that the assessee withheld certain material fact, which resulted in the investment not being satisfactorily explained. However, when apparently there is no reason for sustaining addition, then explanation of the assessee that it has agreed to the addition to buy peace and to put an end to the litigation is apparently bonafide and, therefore, the case of the assessee cannot be brought within the mischief of main provision of section 271(1)(c) or the Explanation (1) thereof. Thus in our considered view, penalty for the assessment years 2000-01 to 2004-05 cannot be levied. In respect of assessment year 2006-07, the explanation of the assessee is that this jewellery is reflected in the books of accounts of the husband, though there is no direct nexus. The explanation of the assessee is apparently bonafide, though may not be sufficient for not making addition. But for levying penalty it has to be shown that not only the explanation of the assessee is not bonafide but also that it has withheld some material facts from the A.O. Since there is no such finding, the case of the assessee can also not be brought into the mischief of Explanation (1) to section 271(1)(c). In our considered view, the explanation given by the assessee not only during penalty proceedings, but also during assessment proceedings should be considered while levying penalty under Explanation (1) to section 271(1)(c) of the

Income Tax Act, 1961. In view of this, we cancel the penalty for the assessment year 2006-07 also.

7. In the result, all the six appeals filed by the assessee are allowed.

This order is pronounced in Open Court on 29th January, 2010.

Sd/-

Sd/-

(D.C. AGRAWAL)
ACCOUNTANT MEMBER

(T.K. SHARMA)
JUDICIAL MEMBER

Dated: 29 /01/2010

Copy of the Order is forwarded to:

1. The Appellant
2. The Respondent
3. The CIT(A) Concerned
4. The CIT,
5. The DR, Ahmedabad Bench
6. The Guard File.

BY ORDER,

सत्यापित प्रति //True Copy//

ASST. REGISTRAR/ DEPUTY REGISTRAR
ITAT, Ahmedabad Benches,
AHMEDABAD.

Laha/Sr. P.S.