Income Tax Appellate Tribunal - Ahmedabad

Sanjaybhai M.Mehta, Ahmedabad vs Department Of Income Tax on 20 February, 2014

आयकर अपीलीय अिधकरण,
अिधकरण, अहमदाबाद ऊयायपीठ 'ड४
ड४'
ड४ अहमदाबाद ।

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

ौी एन.
एन.एस.
एस. सैनी,
ी, लेखा सदःय एवं ौी कुल भारत,
भारत, ऊयियक सदःय के सम¢

BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA NO.	Assessment	Appellant	Respondent

Year 2498/Ahd/2011 2008-09 Sh. Sanjay M. Mehta, Income Tax Officer, Ahmedabad. Ward-6(3), PAN: ALYPM0485G Ahmedabad.

2639/Ahd/2011	2008-09	Revenue	Assessee
2902/Ahd/2012	2008-09	Revenue	Assessee

Revenue by : Sh. K.C. Mathews, Sr.D.R.
Assessee(s) by : Sh. M.K. Patel, AR

सुनवाई कa तार४ख/
/ Date o f Hearing : 20/02/2014
घोषणा कa तार४ख /Da te of Pronouncement: 28/02/2014

आदे श/O R D E R

PER SHRI N.S. SAINI, ACCOUNTANT MEMBER:

ITA Nos. 2498/Ahd/2011 and 2639/Ahd/2011 are cross appeals filed by the assessee and the Revenue against the order of Ld. CIT(A)-XI, Ahmedabad dated 09.08.2011. ITA No. 2902/Ahd/2012 is the

appeal of Revenue against the order of Ld. CIT(A) dated 08.10.2012.

2. In the appeal of the assessee, the sole ground of appeal is that the Ld. CIT(A) erred in confirming the addition of Rs 9,70,000/- u/s 68 of the Act.

3. In the appeal of the Revenue, the sole ground of appeal is that the Ld. CIT(A) erred in facts and on law in restricting the addition u/s 68 on ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 account of unexplained cash credit of Rs 9,70,000/- out of total addition of Rs 20,96,325/-, thereby deleting the addition of Rs 11,26,325/-.

4. As the facts and issue involved in both the appeals of the assessee and Revenue are common, they are being disposed of together as under;

5. The brief facts of the case are that the Assessing Officer observed that the assessee filed return of income on 16.09.2008 u/s 44AF of the Act showing income of Rs 96,000/-. The Assessing Officer by invoking the provisions of section 133(6) of the Act called for the bank statement of the assessee from Kalupur Commercial Cooperative Bank Limited and found there were cash deposits of Rs 20,96,325/-. Since the assessee could not explain the nature and source of the cash deposit in the bank, the Assessing Officer treated Rs 20,96,325/- as unexplained cash credit and added the same to the income of the assessee.

6. On appeal before the Ld. CIT(A), the Ld. AR of the assessee made the following submission:

> "1. At the outset, it is submitted that the various observations, which have been made by the A.O. for making addition are based purely on surmises, conjectures and personal presumptions as well as without proper verification/consideration of material and details available on record. That apart, the facts and basis on which the said observations have been made are itself based on mere hypothesis and probabilities devoid of merits and hard facts and realistic situation. Thus, it is contended that mere hypothetical situation based on A.O.'s own belief cannot be construed as unexplained credits as alleged so as to reject them while invoking the provisions of section 68 of the Act since the addition has been made on the basis of hypothetical situation without providing sufficient opportunity to appellant is not permissible to arrive at such a conclusion.
>
> 3. The observations of the A.O. based on the same are far from realities as well as without proper verification/consideration as well as understanding of the material and details available on record. The observations made by the A.O. are not only without proper appreciation ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 of the facts and circumstances of the case and the appellant's detailed submissions but have been made on the basis of piecemeal details without obtaining or calling for from the appellant the complete details prima facie with the sole intention of somehow justifying the pre- determined addition made by him. In this respect, following facts and chronology of evidences requires to be taken due cognizance of:-
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> (a) The appellant is small retail trader of kariyana, provision items residing at Sanand. For the years under consideration, the appellant filed the return of income showing total income at Rs.96,0007- under presumptive taxation under the provisions of Section 44AF of the Income Tax Act.
>
> (b) Since the appellant being, small trader, his entire sales is in cash. And that fact was communicated to the Id AO vide appellants letter dated 16/12/2010. The copy of letter is enclosed vide Annexure 1

(c) Since the appellant was not maintaining any books of account looking to the nature and size of business, he was offering income in the return of income on presumptive basis. The appellant is consistently following this practice of filing returns of income on presumptive basis since the very beginning. Please refer to statement of total income and acknowledgement of income from Assessment year 2009-10, AY 2008- 09, AY 2007-08, AY 2006-07, AY 2005-06 , AY 2004-05 vide Annexure 2, Annexure 3, Annexure 4, Annexure 5, Annexure 6 and Annexure 7 respectively.

It is submitted that as mentioned in Ground of Appeal No. 1 hereinabove, the A.O. has grossly erred in not giving opportunity to the appellant to forward and justify its case after furnishing of reply dated 16/12/2010. Further, the A.O. also did not care to convey the basis of the impugned addition and interpreted the details furnished in his own manner without confronting the appellant to explain the alleged discrepancies. Thus, the assessment order in dispute has been passed in gross violation of principles of natural justice and equity which speaks volumes of the predetermined and biased manner in which the assessment has been finalized with huge additions.

Thus as evident from the above fact, the appellant had duly furnished the requisite details as specifically required by the A.O. and maintained by the appellant.

4. Since the appellant is taxed under presumptive scheme of taxation and therefore he is not required to maintain any books of account. Under the circumstances, appellant can not be expected to explain any credit and therefore addition made U/s 68 on account of unexplained credit is illegal. The assessing officer before invoking the power under section 68 must be satisfied that there are books of account maintained by the assessee and the cash credit recorded in the said books of account. The existence of books of account is a condition precedent for invoking the power. Further, as held in Smt.Shanta Devi Vs CIT [1988] 171 ITR 532 (Punj & Har.), Annexure 8 a perusal of section 68 of the Act shows that in relation to expression 'books' the emphasis on the ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 word 'assessee' meaning thereby that such books have to be books of the assessee himself and not of any other assessee.

5. Since, the appellant is not maintaining any books of account, there is no question of any credit recorded in the books and hence addition made on this ground is illegal and therefore requires to be deleted. The learned Assessing Officer in her enthusiasm of making addition has not investigated as to how the appellant is assessed and under which provision he has filed the return of income. The learned Assessing Officer has not applied her mind and without verifying or investigating about books of account has made the addition U/s 68 of the Act which is not permissible in case of non-maintenance of books of account. The learned Assessing Officer has adopted the bank statement as basis of evidence of addition. Your appellant submits that bank pass book or a bank statement supplied by a bank to the assessee can not be regarded as a book of the assessee, that is, a book maintained by the assessee or under his instructions and for this contention, the appellant relies on the decision of CIT V Bhaichand S Gandhi. [1983] 141 ITR 67 (Bom). Under the circumstances, there is no credit at all in the books of the appellant and therefore the question of unexplained credit U/s 68 does not arise. The appellant, being small retailer since the very beginning of filing return of income has been taxed under presumptive taxation and therefore addition made U/s 68 is biased, mechanical and with prejudicial mind towards the appellant. It is therefore submitted before your honour to please delete the addition.

It is submitted that the appellant had duly furnished complete details of source of fund from whom amount have been received vide submissions made before AO. The learned assessing officer has erred in making the addition without issuing show cause notice proposing disallowance on this ground. And therefore the disallowance in its entirety is illegal and therefore be scrapped down.

6. It is then the AO 's duty to establish with evidences that the facts stated by the parties in their statements are not correct since the law of burden is canonized in common law doctrine "INCUMBIT PROBATIO QUl DIGIT NON QUI NEGAT", i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact.

7. Nevertheless, the A.O. apart from raising suspicions about the credit worthiness of the parties based on pure assumptions has not brought on record any material to justify such suspicions and assumptions. In the instant case, the A.O. did not carry any of his doubts to a logical conclusion by converting them into hard facts on the basis of evidences during the assessment proceedings.

8. Another interesting point to note is that there was still time left for completing assessment but the learned Assessing Officer had passed the order in hurried manner without investigating in to the facts the appellant case. The learned assessing officer has failed to discharge his duties in properly investigating the facts of the case. The learned Assessing Officer has powers to issue summons to parties to whom sales claimed to have been made and could have obtained the confirmations as well as statement of the parties. In stead ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 of doing these exercise, he passed the order in hurried manner with pre- determined mind set and made the addition which is wholly illegal, unjustified and therefore requires to be deleted.

9. Without prejudice to our ground that no addition should be made, your appellant submits that the learned AO ought to have considered and accepted the fact that credit entries are nothing but sales made in cash by the appellant particularly considering the nature of business of the appellant. It is further submitted that out of total amount received in the month of June 2007 for Rs.9,96,7007-, an amount of Rs.9,70,000/- are received from various agriculturists who are not having any bank account. The appellant is submitting herewith proof of being agriculturists being in namuna 7 and 12 Najirkhan Pathan Annexure 9, Mirkhan valikhan Annexure 10 and Prahaladbhai Annexure 11 and confirmation from various parties Najirkhan Pathan Annexure 12, Mirkhan valikhan Annexure 13 and Prahaladbhai Annexure 14.lt is therefore submitted that only Rs.21,600/- pertains to sales and can be considered as part of turnover on which presumptive taxation provision will be applicable.

10. Without prejudice to our ground that no addition should be made, your appellant submits that the learned AO ought to have considered and accepted the fact that credit entries are nothing but sales made in cash by the appellant particularly considering the nature of business of the appellant. It is further submitted that the amount of Rs.20,96,5257- ought to have been accepted as sales and net profit @ 5% of the turnover comes to Rs. 1,04,8167- and therefore in any event the addition can not be made more than Rs.8,8167- (Rs.1,04,816 @ 5% of Rs.20,96,3257- minus Rs.96,000 offered as income in return of income)."

7. On appeal, the Ld. CIT(A) observed that cash deposits in the bank account excluding the loans of Rs 9,70,000/- is to be treated as sales and the assessee will get the benefit accordingly of Rs 11,26,325/-. With regard to Rs 9,70,000/-, he observed that the assessee failed to furnish evidence to prove the generation of income by agricultural operation by the cash creditors and also to prove that they had enough income to advance the loan to the assessee confirmed the addition on account of loan of Rs 4,00,000/- from Nazir Khan Jivan Khan Pathan, Rs 2,70,000/- from Meer Khan Wali Khan, Rs 3,00,000/- from Shri Prahladbhai Rajabhai and made addition of the same to the income of the assessee.

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8. Being aggrieved by this order, the assessee is in appeal against sustaining of addition of Rs 9,70,000/- by the Ld. CIT(A) and the Revenue is in appeal against deletion of the addition of Rs

11,26,325/- by the Ld. CIT(A).

9. The Ld. AR of the assessee submitted before us that in the bank account in question, apart from cash deposits, there were also deposits by cheque. The Assessing Officer has accepted the source of cheque deposits as explained and has made addition in respect of cash deposits only. The Ld. CIT(A) made addition of Rs 9,70,000/- which were part of cheque deposits for which no addition was made by the Assessing Officer. Therefore, the Ld. CIT(A) has made addition for a new source for which no addition was made by the Assessing Officer and consequently, the addition of Rs 9,70,000/- was made without jurisdiction. The Ld. CIT(A) should have directed the Assessing Officer to treat the entire cash deposit of Rs 20,96,325/- as sale proceeds of the assessee.

10. On the other hand, the Ld. DR vehemently objected to the submissions of the assessee. He argued that no evidence was produced by the assessee to substantiate that the cash deposit of Rs 20,96,325/- was the sale proceeds of the assessee. Therefore, without any evidence, the said explanation of the assessee cannot be accepted. He further argued that if Rs 20,96,325/- represented the sale proceeds of the assessee which were deposited in the bank, then why the assessee in the return income filed had computed profits u/s 44AF on Rs 8,00,000/-. He therefore pleaded that the entire amount of addition of Rs 20,96,325/- should be sustained.

11. We have heard the rival submissions and perused the orders of lower authorities and material available on record. We find that in the ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 bank account maintained with Kalupur Commercial Cooperative Bank Limited, the opening balance as on 01.04.2007 was Rs 2283.72 and total deposit during the year was Rs 36,15,415/- comprising of cash deposits of Rs 20,96,325/- and cheque deposit of Rs 15,19,090/- and after withdrawal on some dates, the closing balance as on 31.03.2008 was Rs 65,834.38.

12. The month-wise break-up of cash deposit and cheque deposit are as under:

CHART SHOWING DESCRIPTION OF CASH DEPOSITED IN BANK ACCOUNT DURING FINANCIAL YEAR 2007-08 IN CASE OF SANJAY M. MEHTA MONTH CASH DEPOSIT CHEQUE DEPOSIT IN TOTAL DEPOSIT IN BANK BANK IN BANK A B C D April 3,13,025 3,13,025 May 1,24,700 1,24,700 June 5,96,700 4,00,000 (Najirkhan) 9,96,700 July 5,200 5,200 August 1,00,000 1,00,000 September 50,000 50,000 October 1,04,600 1,04,600 November 1,20,000 2,00,000 (Mirkhan) 5,62,400 1,50,000 (Prahabdbhai) 92,400 IPO refund December 2,32,100 92,400 IPO refund 4,02,110 77,6 10 IPO refund January 1,69,000 1,69,000 Prahaladbhai loan February 4,00,000 97.920 IPO 5,16,485 18,565 IPO March 50,000 77,000 Mirkhan 2,71,195 81,795 IPO 62,400 loan TOTAL 20,96,325 15,19,090 36,15,415 ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

12. We find that in the argument of the assessee as quoted by the Ld. CIT(A), the assessee explained that out of total deposits of Rs 9,96,700/- in the month of June' 2007, Rs 26,700/- was out of sale proceeds and Rs 9,70,000/- were loans from 3 persons comprising of Rs 4,00,000/- from Nazir Khan Jivan Khan Pathan, Rs 2,70,000/- from Mir Khan Wali Khan and Rs 3,00,000/- from Prahladbhai Rajabhai. From the copy of the bank statement filed before us, we find that out of Rs 9,96,700/-, Rs 5,96,700/- was by cash deposit and Rs 4,00,000/- was by transfer entry. Thus it is observed that Rs 4,00,000/- though deposited in the month of June' 2007 but its source was accepted by the Assessing Officer and was not part of addition of Rs 20,96,325/- made by the Assessing Officer. Therefore, we find that the assessee was not fully justified in contending that entire Rs 9,70,000/- which was confirmed by the Ld. CIT(A) was not part of Rs 20,96,325/- which was added by the Assessing Officer. We find that only Rs 4,00,000/- was not part of addition of Rs 20,96,325/- which was made by the Assessing Officer and balance amount of Rs 5,70,000/- comprised of Rs 2,70,000/- deposited in the

bank on 23.06.2007 and Rs 3,00,000/- deposited in the bank on 28.06.2007 were cash deposits and were part of Rs 20,96,325/- which was added by the Assessing Officer to the income of the assessee. Therefore, the assessee's contention that to the extent of Rs 4,00,000/- is found to be correct and in respect of Rs 4,00,000/- which was deposited by cheque on 28.06.2007 in the bank account of the assessee and as the source of the same was accepted by the Assessing Officer and no addition was made in respect of the same by the Assessing Officer, in our considered opinion, the Ld. CIT(A) was not justified in treating Rs 4,00,000/- as part of addition of Rs 20,96,325/- made by the Assessing Officer. We, therefore, restrict the addition made by the Ld. CIT(A) to the extent of Rs 5,70,000/- and delete the balance amount of addition of Rs 4,00,000/-. Keeping in view the ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09 nature of transactions in the bank account, we do not find any error in the order of the Ld. CIT(A) in treating the balance amount of cash deposits out of sale proceeds of the business of the assessee as no material is bought on record by the Revenue to show that the deposits could not have been out of the sale proceeds of the assessee. In view of our above findings, Rs 4,00,000/- was not part of cash deposit, consequently, we modify the order of the Ld. CIT(A) and direct the Assessing Officer to treat Rs 15,26,325/- as sale proceeds of the assessee. We, accordingly, modify the order of the Ld. CIT(A). Thus, the ground of appeal of the assessee is partly allowed and that of the Revenue is dismissed.

13. In ITA No. 2902/Ahd/2012, the sole ground of appeal taken by the Revenue is that the Ld. CIT(A) erred in law and on facts in deleting the penalty of Rs 3,05,000/- levied on the addition made by the Assessing Officer and subsequently confirmed by the Ld. CIT(A) in quantum appeal filed by the assessee.

14. The Ld. CIT(A) has decided the issue as under:

> "2. The only effective ground of appeal is against levy of penalty u/s.271(1)(c) of Rs. 3.05.000/-. The A.O. levied penalty u/s.271(1)(c) of Rs. 3.05.000/- the following against an addition made u/s.68 of the I.T. Act of Rs. 9.70.000/-. This addition has been made in respect of following loans:-
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> | | | | |
> |---|---|---|---|
> | (1) | Nazirkhan Jivankhan Pathan | Rs. | 4,00,000 |
> | (2) | Mirkhan Valikhan | Rs. | 2,70,000 |
> | (3) | Prahladbhai Rajabhai Total | Rs. | 3.00.000 |
> | | Total | Rs. | 9,70,000 |
>
> A copy of the penalty order is enclosed as Annexure-A to this order for ready reference:-
>
> 2.1 On this issue appellant vide its letter dated 4.10.2012 submitted as under:-
>
> ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09
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>
> "1. At the outset, it is submitted that the additions made by the A.O. are on account of rejection of plausible explanation furnished before him during the course of assessment. Thus, it is submitted that in the given circumstances and facts of the appellant's case, its case does not fall within the ambit, scope and rigors of the provisions of section 271(l)(c) of the Act.

2. That apart, it may be pertinent to note that the appellant furnished complete details, explanation and disclosure during the course of assessment proceedings. Thus, it is not a case of non-furnishing of any

details. It is merely a case of a plausible explanation with evidences furnished by the appellant being rejected by the A.O. Thus, it is contended that on facts and merits of the addition made, it is neither a case of furnishing of either inaccurate particulars of income nor concealment of income so as to bring the appellant's case within the scope and ambit of the provisions of section 271(l)(c) of the Act.

3. Your honours attention is invited to the show cause notice for levy of penalty dated 21/12/2010 (Annexure 6 page 42) and another notice by the successor AO dated 16/05/2011. (Copy enclosed Annexure 8 Page no.44) Neither of the notices above were containing finding about charge of penalty. The Id AO has not specified and was confused about charge of penalty and therefore failed to state any finding about charge of penalty. For levy of penalty U/s 271(l)(c), there is precondition for AO and in fact AO is duty bound to give finding about the charge of penalty. In other words, there must be a clear finding about the charge of penalty. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law.--Manu Engg. Works 122 ITR 306(Guj), New Sorathia Engg. Co 282 ITR, 642(Guj), Padma Ram Bharali 110 ITR 54(Gau). In view of the jurisdictional High court decision, the penalty levied in the case of appellant is illegal, bad in law and therefore requires to be deleted.

4. The appellant further submits that Penalty proceeding can be initiated on two charges i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. If proceedings are initiated on charge of concealment then penalty can not be levied on the charge of furnishing of inaccurate particulars of income and vice versa.(CTT-v- Lakhdhir Lalji 85 ITR 77(Guj)). In the facts of your appellant's case, the assessment order (Annexure 1 page 17 to 19) states about initiation of penalty proceedings on ground of furnishing of inaccurate particulars of income whereas the penalty is levied on the ground of concealment of particulars of income which is not permissible under the law and therefore penalty should be deleted.

5. In so far as the confirmation of addition of Rs.9,70,000/- on account of addition of unexplained credit U/s 68 of the Income Tax Act, it is submitted that though the appellant had furnished elaborate submissions on merits of the said addition, the Id CTT(A) confirmed the ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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same, (please refer further written submission at Annexure 3 page 32 to 34) Your appellant submits that he has not concealed anything since he was filing his return of income under presumptive scheme of taxation Us/ 44AF and hence was not required to maintain books of account.

Nevertheless, the facts and contentions put forth before the ITO vide appellant s letter dated 16-12-2010 (Annexure 12 page 50-51) and the submissions made before Hon'ble CIT(A) while dealing with quantum appeal and the chronology of the facts are reproduced hereunder so to properly appreciate the facts of the case more particularly the fact that no penalty is warranted on the said addition.

(a) The appellant is small retail trader of kariyana, provision items residing at Sanand. For the years under consideration, the appellant filed the return of income showing total income at Rs.96,000/- under presumptive taxation under the provisions of Section 44AF of the Income Tax Act.

(b) Since the appellant being, small trader, his entire sales is in cash. And that fact was communicated to the Id AO vide appellants letter dated 16/12/2010. The copy of letter is enclosed

(c) Since the appellant was not maintaining any books of account looking to the nature and size of business, he was offering income in the return of income on presumptive basis. The appellant is

consistently following this practice of filing returns of income on presumptive basis since the very beginning.

(d) The Ld. AO called for bank statement which was submitted. It was revealed by AO from the bank statement of KCCB that assessee has deposited cash of Rs.20,96,325/-in bank account on various dates. The Id AO asked vide order sheet dtd. 14/10/2010 to explain cash deposits in bank account. The appellant vide his letter dated 16/12/2010 submitted that the said cash is nothing but cash sales. Some other credits by cheques were in respect of loans from friends and relatives. The appellant is not having any other source of income. However, Id AO rejected the explanation given by the appellant and made addition of Rs.20,96,325/- to the extent of cash deposits in bank account. Since the appellant is taxed under presumptive scheme of taxation and therefore he is not required to maintain any books of account. Under the circumstances, appellant cannot be expected to explain any credit and therefore addition made U/s 68 on account of unexplained credit is illegal. The assessing officer before invoking the power under section 68 must be satisfied that there are books of account maintained by the assessee and the cash credit recorded in the said books of account. The existence of books of account is a condition precedent for invoking the power. Further, as held in Smt Shanta Devi Vs CIT [1988] 171 ITR 532 (Punj & Har.), Annexure 8 a perusal of section 68 of the Act shows that in relation to expression 'books' the emphasis on the word 'assessee' meaning thereby that such book's have to be books of the assessee himself and not of any other assessee.

(e) It is then the AO's duty to establish with evidences that the facts stated by the parties in their statements are not correct since the law of burden is canonized in common law doctrine "INCUMBIT PROBATIO QUI ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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DIGIT NON QUI NEGAT", i.e. burden lies upon one who alleges and not upon one who deny the existence of the fact.

(f) Nevertheless, the A.O. apart from raising suspicions about the credit worthiness of the parties based on pure assumptions has not brought on record any material to justify such suspicions and assumptions. In the instant case, the A.O. did not carry any of his doubts to a logical conclusion by converting them into hard facts on the basis of evidences during the assessment proceedings.

(g) Another interesting point to note is that there was still time left for completing assessment but the learned Assessing Officer had passed the order in hurried manner without investigating in to the facts the appellant case. The learned assessing officer has failed to discharge his duties in properly investigating the facts of the case. The learned Assessing Officer has powers to issue summons to parties to whom sales claimed to have been made and could have obtained the confirmations as well as statement of the parties. Instead of doing these exercises, she passed the order in hurried manner with pre-determined mind set and made the addition which is wholly illegal, unjustified and therefore penalty on this count is unjustified.

(h) The appellant submits that the learned AO ought to have considered and accepted the fact that credit entries are nothing but sales made in cash by the appellant particularly considering the nature of business of the appellant.

6. All the above submissions were made before Id CIT(A) while dealing with quantum appeal vide appellant's letter dated 22/07/2011 (Annexure 3 page 32 to 34)

7. The Id CTT(A) allowed an amount of Rs. 11,96,525/- accepting that it is cash sales but confirmed the balance addition of Rs.9,70,000/- on account of unexplained cash credit vide his order dated 09-08-

2011 (Annexure 2 page 20 to 31)

8. The appellant made rectification application dated 16-08-2011 (Annexure 4 page 35-36) stating that there was mistake apparent on record as the loan from various parties are through cheques only which are not subject part of addition and only cash deposits are added to the total income. Since the loans which are credited to bank account and which are received through cheques are accepted by AO are not to be decided and only question of cash deposits are under consideration. However, the Id CIT(A) treated it as loans and rejected appellants contention vide his order dated 24-08-2011 (Annexure 5 page 37 to 41)

9. On the basis of the above order, the Id AO proceeded to levy penalty on the ground that there is concealment of income. The appellant submits that it has submitted the details as required by AO, and it bank statement as well as explanation of each and every entry was made before AO vide letter dated 16-12-2010. (Annexure 12 page 50-51) There is no case of furnishing of inaccurate particulars of income or concealment of income but merely a case of rejection of plausible explanation on part of the A.O. and Hon'ble CIT(A) in spite of the fact ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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that the appellant had fully disclosed the particulars required. In case, where there is mere rejection of explanation, no penalty can be levied. Appellant relies on the following case laws Mere rejection of the plausible explanation furnished by the assessee does not warrant penalty u/s 271(1)(c) of the Act It is contented that in order to impose penalty u/s. 271(l)(c) on the basis of findings in the assessment proceedings something more than that requires to be brought on record to conclusively establish that the amount of addition is in fact and truth the concealed income of the assessee. Mere rejection of an otherwise plausible explanation of the assessee does not warrant/ attracts penalty u/s 271 (1) (c) of the Act. In support of the proposition of law that mere rejection of the plausible explanation furnished by the assessee does not warrant penalty u/s. 271(l)(c) of the Act, reliance is placed on the following decisions :

(a) CIT Vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC) "A glance at the provisions of section 271(l)(c) of the Income-tax Act, 1961, suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(l)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(l)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

"Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section

271(l)(c). If we accept the contention of the Revenue then in case of every return where the claim made is hot accepted by the Assessing Officer for any ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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reason, the assessee will invite penalty under section 271(l)(c). That is clearly not the intendment of the Legislature."

[Emphasis Supplied]

b) Hon'ble Rajasthan High Court in the case of Shiv Lal Tak vs. CIT (2010) 251 ITR 373 (Raj.) wherein inter alia, it is held as under:

"Though the expression "failure to return the total assessed income as not arising on account of any fraud or wilful negligence on part of the assessee" does not find place in Explanation 1 to section 271(l)(c) of the Income tax Act, 1961, yet clause (B) read with the proviso (ii) to section 271(1) makes it clear that where the difference between the assessed income and the returned income does not arise on account of any gross or wilful negligence on the part of the assessee, no penalty is leviable. The statute has clearly drawn a distinction between a deliberate false explanation furnished by the assessee and an explanation, which may not be false but is not accepted because the assessee was not able to substantiate it. While there is no relaxation in the rigour of the Explanation in raising a presumption against the assessee in the former case, in the latter class of cases, the statute itself relaxes its rigour by directing that where in respect of any amount, added or disallowed and any explanation is offered by such person which is not accepted because the assessee has failed to substantiate the same, but such explanation is bonafide and all the facts relating to the same and material to the computation of the total income have been disclosed by him, the Explanation shall not apply".

c) Reference is also invited to the recent decision of the jurisdictional court of law i.e. Hon'ble ITAT, Ahmedabad Bench in the case of G.ularat Credit Corporation Ltd, vs. Asstt CIT (2008> 113 ITD 133 f AhcU. wherein inter alia it is held as under:

"It is trite law that concealment proceedings are penal in character and under the substantive provisions of section 271(l)(c), it is for the department to prove that the assessee had concealed the particulars of his income or furnished inaccurate particulars thereof to bring the case of the assessee within the mischief of the main provisions of section 271(l)(c). Mere rejection off assessee's claim would not be sufficient to hold the assessee to be guilty of concealment. If there is no evidence on record except the explanation of the assessee which explanation is either found to be false or is unacceptable, it does not follow that concealment has been established. .

It is by virtue of Explanation only that the Assessing Officer has been given a right to raise a presumption to deem certain sum added to income or disallowed in computing the income of a person, to represent the income in respect of which particulars have been concealed, if the assessee did not furnish an explanation or when explanation furnished was found false; and also when such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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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.

In other words, in a later case, the Explanation exonerates an assessee, if that he is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

In the instant case, it was not the case of the revenue that the assessee had failed to offer an explanation or that its explanation was found false and, therefore, Part XA' of the Explanation did not hit the assessee.

The case of the revenue against the assessee was that it furnished inaccurate particulars of its income by making a wrong claim. On the facts and circumstances of the case, it was mere rejection of assessee's claim for loss that too on a different ground by the appellate authority and, therefore, it could not in any case be equated with concealment."

[Emphasis Supplied]

10. The learned assessing officer has erred in stating that appellant has concealed the particulars of income in view of the fact that the credit entries are nothing but cash sales made by the appellant and this fact was conveyed to Id AO as well as Hon'ble CIT(A), and since appellant is not maintaining any books of account, question of furnishing evidence does not arise. The copy of bank statement is enclosed herewith for your honours' kind perusal (Annexure 11 - page 47 to 49). The Id AO has erred in levying penalty on concealment ground because all relevant disclosures were made and all details required by AO were furnished. The details of cash entries were also given to AO vide appellant's letter dated 16-12-2010 (Annexure 12 page 50-51) Under the facts and circumstances, there is no justification in levy of penalty. Reliance is placed upon Hon'ble Supreme court decision in the case of 3CIT Vs Saheli Leasing & Finance Ltd 191 Taxmann 165. One of the basic principles laid down by the court was 'The AO must prove that a) There was concealment of income b) The return of income furnished by the assessee or documents submitted by the assessee during scrutiny proceedings is based on incorrect fact, falsity and untruth.' In the facts and circumstances of the case, the Id AO has failed to prove that the appellant has concealed its income and has failed to bring on record any sort of non disclosure or concealment and therefore penalty is requires to be deleted. 11. It must be noted that appellant, at any stage of proceedings, never tried to hide this fact and has properly disclosed the same. The Id CIT(A) has treated the balance credit as unexplained loans particularly in view of the fact that appellant has explained it as cash sales during assessment proceedings vide letter dated 16-12-2010 (Annexure 12 page 50-51) and in appellate proceedings vide his letter dated 22/07/2011 (Annexure 3 page 32 to34). Since the appellant had never intention to conceal its income, the penalty on this account is required to be deleted. From the above facts, ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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it is proved that appellant has neither furnished inaccurate particulars of income nor tried to conceal the income. The appellant has contended the amount of Rs.9,70,000/- as cash sales but it is treated as loans by CIT(A) and added U/s 68 of the Act. The issue is debatable and appellant has not accepted the order of CIT(A) and the appeal is pending before Hon'ble ITAT, Ahmedabad. In view of the fact that the item of addition is debatable, no penalty can be levied. Reliance is placed upon the following case law:

1. "S. 271 (l)(c): Penalty and debatable addition - Assessee having received only the initial payment ofRs.6 crores and not the last installment as per the terms of the property development agreement with the developer in the relevant assessment year 2002-03, it was justified in not offering the capital gains to tax in this assessment year more when the assessee has disclosed the said amount in return as advance and the AQ himself was not sure till the date of passing of the assessment order as to whether the assessee is liable to pay tax on the impugned amount and if so, in which assessment yea r and under

which head of income, and accordingly penalty under s. 271(l)(c) is not leviable. Metal Rolling Works Ltd Vs CIT (2011) 245 CTR (Bom) 113"

2. ACIT v. Enpack Motors Pvt. Ltd. - ITAT 'E' Bench, Mumbai Before D. Manmohan (VP) and R.K. Panda (AM) ITA No. 914/Mum./2008 AY: 2004-05; Decided on: 23/10/2009 Counsel for assessee / revenue: Arvind Dalai / S. K. Singh S. 271(l)(c) -- Penalty for concealment of income -- Additions/disallowances sustained by the appellate authority -- Whether sufficient ground for levy of penalty -- Since full disclosure of particulars of transactions were made and additions were on account of different view adopted, penalty cannot be imposed.

Copy of the above decision is at Annexure 14 page 53. From the above, it becomes apparent and understandable that the appellant had never the intention of hiding its income and in fact disclosed all relevant information and particulars of income. This in itself does not lead to penalty and therefore penalty of Rs.3,05,000/- on this ground is required to be deleted.

12. No penalty in case off bonafide mistake Reliance is placed on the following decisions in support of the proposition of taw that

(a) CIT vs. Skyline Auto Projects P. Ltd.(2004) 271 ITR 335 (MP) The question, which was involved in the appeal, was whether the Tribunal was justified in deleting the penalty imposed upon the assessee by the Assessing Officer under section 271(l)(c). In the opinion of the Tribunal, it was a case of a bona fide mistake rather than a ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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deliberate mistake on the part of the assessee white calculating depreciation on the assets of the assessee. It was found that the assessee was a new businessman and he could only claim depreciation for a fraction of the year and not for the full year that being the first year of starting the production as claimed by the assessee.

Held that there was no good ground for imposition of penalty by the taxing authorities. Thus, the Tribunal's order deleting penalty did not involve a substantial question of law.

(b) CIT vs. Nath Bros. Exim International Ltd. 288 ITR 670 (DelhD 'The Tribunal came to the conclusion that the assessee had disclosed all the facts and therefore, even though it had made an erroneous claim which could not be justified in law that by itself did not attract the penal provisions of law.

What is required to be considered is whether there was any enquiry that was required to be made by the Assessing Officer before concluding that the assessee had furnished inaccurate or false particulars. In this case we are of the view that no such enquiry was required to be made but there was only the need for application of the law. On the legal position, the Assessing Officer was not satisfied and did not agree with the assessee but that by itself is not a ground to invoke the penalty provision of the statute."

(c) CIT vs. Milex Cable Industries (20031 261 ITR 675 (Guj.) Held that it was not in dispute that before the proceedings with regard to initiation of penalty and rectification started, the assessee had informed the Assessing Officer, under his letter, that he had committed mistakes in totaling and this fact denoted that the assessee was not having guilty mind. It was true that the assessee had already received the notice, at the relevant time, but when the Tribunal had come to a conclusion that the assessee had no intention of concealing particulars of his income or misguiding the Assessing Officer by making incorrect totals, it would not be proper for the court to come to a different conclusion. It was not in dispute that whether a person is having guilty mind or what state of mind the person is having and determination thereof is a question of fact and as the Tribunal had already opined that the assessee

had not made any effort to conceal particulars of his income, it would be difficult for the Court to set aside the said finding so as to accept the view expressed by the Revenue before the Court In the instant case, mistakes were committed in totaling and the moment the assessee came to know about the mistakes committed in the books of account, while preparing the accounts for the subsequent year, infer his letter, the assessee informed the Assessing Officer about the mistakes committed. Looking to the fads stated hereinabove and more particularly in view of the fact that the Tribunal had come to a final conclusion that there was no case for imposing penalty and the mental ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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state of the assessee being a question of fact, it would not be proper to take a different view from the one which had been taken by the Tribunal.

(d) CIT vs. Deep Tools (P.) Ltd. (2004) 191 CTR 257 (P & H) The assessee had made a claim for deduction under section 80HHC as per certificate in Form No. 1OCCAC issued by its CA. The Assessing Officer pointed out errors in the said claim. The assessee filed a revised return by revising the computation statement. However, the Assessing Officer imposed penalty on the assessee. The Tribunal cancelled the penalty.

Held that there was nothing to show that mistake by the CA was not bona fide and mere fact that certificate issued by the CA was not in accordance with section 80HHC(4), was not enough to hold that the mistake was not bona fide. At any rate, as far as the assessee was concerned, no malafides could be attributed to it, as the claim for deduction was based on the certificate of the CA with whom no collusion had been proved. In view of findings recorded by the Tribunal that error of the CA was inadvertent and did not lack bona fides, cancellation of order of penalty was clearly justified.

(e) Smt. Beena Kak vs. HO (20011 70 TT3 375 podh.) Held that in the instant case, while claiming depreciation the cost of building was taken inclusive of cost of land covered within building whereas the depreciation was allowable on constructed structure of building only, thus excluding the cost of land. The assessee's plea that the accountant maintaining the accounts of the assessee did not segregate the cost of land and construction and opened one single ledger account for the same had not been controverted on record. This fact had also not been controverted that when the assessee came to know that the claim was erroneous she did not pursue the matter further and agreed for the disallowance of the same. The cost of land was undisputedly taken into consideration along with the cost of structure of building for the purposes of determining annual value of the building for the purposes of income from house property. It had also been the plea of the assessee that she being an MLA and also a Minister of State and so being busy in public service at Jaipur could not devote proper attention to her accounts. In that view of the matter, considering all the facts and circumstances of the case as also the legal position, it was clear that it was a matter of bona fide mistake and not a conscious concealment constituting deliberate defiance of the provisions of law. As such, the levy of penalty under section 271(l)(c) was not justifiable.

(f) Mahadeswara Movies v. CIT (1983) 144 ITR 127 (Kar.) "Along with the return, a profit and loss account had been filed as also a statement of adjustment. In regard to the amortization, the names of the films were specified and amounts were mentioned in respect of each one of the films. A comparison of the profit and loss account and the amortization statement would readily point out the discrepancy. No sooner it was pointed out, it was accepted as a mistake. The basic facts ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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had been disclosed and there was no attempt at suppression of any material fact."

(g) CIT v. Padma Rani Bharali F19831139ITR 759 (Gauhati)_ Held that no penalty u/s. 271(l)(c) of the Act was exigible in respect of a sum of Rs.24,591/- which was doubly debited in purchase account in respect of Hindustan Lever goods as a bona fide mistake was possible and there appeared to be no intention of the assessee for concealment.

(h) CIT v. ASK Enterprises f19981 230 ITR 48 f Bom. "The Commissioner (Appeals) cancelled the penalties levied u/s. 271(l)(c) of the Act holding that the mistake of not including the value of titanium dioxide in the closing stock was inadvertent and bona fide, and the Tribunal upheld the cancellation of penalty. The Bombay High Court rejected the application of Revenue under section 256(2) observing that the decision of Tribunal affirming the order of Commissioner (Appeals) canceling penalty was based on an uncontroverted finding of fact."

That apart, the following decisions are also required to be taken cognizance of:

1. CIT vs. Suresh Chandra Mittal (2001) 251 ITR 9 (SC)

2. GIT vs. P. Govindasamy (2003) 263 ITR 509 (Mad.)

3. Charan Bros. vs. ITO (2002) 120 Taxman 25 (Hyd.)

4. Hari Om Kumar Umesh Chand vs. ITO (2002) 124 Taxman 213 (Agra)(Mag.)

13. That apart, the following legal submission also requires to be taken cognizance of by your honour prior to any adverse inference.

Penalty proceedings and the assessment proceedings are distinct and separate and levy of penalty is not automatic irrespective of the facts and circumstances of the case

1. It is a settled law that the penalty proceedings and the assessment proceedings are distinct and separate. The findings in the assessment proceedings though relevant and good for making the quantum addition does not automatically justify the imposition of penalty as the regular assessment order is not the final word in penalty proceedings and howsoever relevant and good the findings in the assessment order may be they are not conclusive so far as the penalty proceedings are concerned. For the above proposition reliance is placed on the following decisions:

(i) Banaras Textorium Vs. OT (1988) 169 ITR 782 (All.)

(ii) CIT VS. DharamchandL Shah (1993) 204 ITR 462 (Bom.)

(iii) National Textile Corporation Vs. CIT(2000) 164 OR 209 (Guj.)

2. Reference is also invited to the decision of ITAT, Mumbai Bench in the case of Income-tax Officer. Ward-143(31il_vL-gmti Pramila ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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Pratap Shah r20061100ITD 160 (MUM.V wherein inter alia it is held as under:

'The basic question to be considered was as to whether levy of penalty was automatic irrespective of the facts and circumstances of the case. Such extreme view could not be accepted. There are certain fundamental principles with reference to the levy of penalty, which must be looked into and considered before levy of any penalty. The first principle is that penalty proceedings being quasi-criminal in nature, are quite distinct, separate and independent of assessment proceedings, and, consequently, findings recorded in assessment proceedings though relevant, are not conclusive for levy of penalty. The second principle is the foremost principle of rule of natural justice, i.e. no person should be

penalized or condemned without giving a reasonable opportunity of being heard. That principle is normally incorporated in penal provisions. However, such principle is bound to be observed even though not incorporated. The third principle is that levy of penalty is discretionary.

The conjoint reading of above principles leads to only one conclusion that levy of penalty can never be automatic Irrespective of the facts and circumstances of the case. The tax authorities must take into consideration the entire facts and circumstances of the case before levying any penalty. The opportunity of being heard is not a mere formality. Every person, against whom penal action is sought, has an inherent right to explain the facts and circumstances of the case to prove his innocence and, consequently, the tax authorities are bound to consider the same. The discretion is vested in the tax authorities and the same must be exercised judiciously after considering the facts and circumstances of the case. The technicalities should not come in the way of justice. The benefit of doubt must be given to the assessee. Accordingly, discretion must be exercised in favour of the assessee, if facts and circumstances of the case, prima facie, show the innocence of the person against whom penal action is sought.

If the facts and circumstances of the case show the bona fide of the assessee in not disclosing the income in the return, then penalty should not be imposed and the technicalities, if any, should not come in the way of justice. The Supreme Court in the case of Hindustan Steels Ltd. v. State of Orissa [1972] 83 ITR 26 has clearly held that authority competent to impose the penalty would be justified in refusing to impose penalty when there is technical or venial breach of the provisions of the Act. That judgment further provides in dear terms that all relevant circumstances should be taken into consideration before exercising the discretion vested in the authority."

3. It is contended that, it is by now settled law that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding and is separate and distinct from the assessment proceedings. Since the burden of proof in a penalty proceedings varies from that involved in an assessment proceeding, a ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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finding in an assessment proceeding, that a particular receipt is income cannot automatically be adopted as a finding to that effect in the penalty proceeding.

In support of the above proposition, reliance is placed on the following decisions apart from numerous other decisions on the same line:

(i) National Textile Corporation Vs. CIT (2000) 164 CTR 209 (Guj.).

(ii) CIT vs. Jataram Oil Mills (2001) 171 CTR 426 (Guj.) The Hon'ble Gujarat High Court in the above mentioned case of National Textile Corporation has inter alia held as under.

"...However, the addition made on, this count would not automatically justify imposition of penalty under S.271(l)(c) by recourse only to Explanation 1 below S.271(l)(c). No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If an assessee gives an explanation which is unproved but not disproved i.e., it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee."

14. General Principles in respect of levy of penalty u/s.

271(1)(c) of the Act

1. Further, penalty will not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct, contumacious or acted in conscious disregard of its obligations. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially; and on a consideration of all the relevant circumstances.

In the instant case, the explanation offered by the appellant in support of its contention is bonafide. There is no fraud or any gross or willful neglect on part of the appellant, the additions were made by the A.O. and confirmed by the CIT(A) only on account of non-consideration and non-appreciation of the correct facts of the appellant's case as well as legal position as stated hereinabove. The above contention is placed without prejudice to the fact that the A.O. having not invoked the Explanation-1 to Section 271(l)(c) in the assessment order or in the show cause notice proposing to levy the penalty, no opportunity was granted to the appellant to specifically rebut the said Explanation.

2. As regards discharge of negative burden by the appellant as laid down in Explanation-1 to section 271(l)(c) of the Act, it is submitted that assuming for a while that the said Explanation is attracted, the broad probabilities of the explanation offered by the appellant are such as may be believed, though not sufficient for conclusive proof, the initial ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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onus to prove such a negative fact can well be said to have been discharged by the appellant as held by the Hon'ble Patna High Court in the case of CIT Vs. Nipani Tobacoo Stores (1984) 145 ITR 128 (Pat.). It is contended here that the degree or standard of proof required in criminal or quasi-criminal cases is higher or stricter than that required in a civil case. In civil proceedings, the normal rule is that a fact can be said to be established if it is proved by a preponderance of probabilities.

The burden is on the department to prove the concealment under the main section of 271(l)(c) and it is only when the Explanation applies that the onus shifts to the appellant to prove that his explanation is not false. In support of the said proposition, reliance is placed on the decision of ITAT, Chennai Bench in the case of T.N. Sridharan Vs. IAC (1999) 70 ITD 48/65 TTJ 367 (Chennai) (T.M.)

3. It is further contended that in the instant case, it is neither a case of culpable or wilful omission nor deliberate concealment. A mere fact, that the cogent and reasonable explanation given by the assessee was not acceptable to the A.O. or the learned CIJ(A) is not sufficient to lead to the irresistible inference that there was a deliberate concealment or furnishing of inaccurate particulars of income on part of the assessee.

4. It is contended that the same circumstances or state of evidences on which an amount is treated as income in the quantum assessment could not by itself justify imposition of penalty without anything more brought on record by the department so as to lead to a conclusion that the amount represents assessee's income coupled with the fact that there was conscious concealment or Act of furnishing of inaccurate particulars.

5. Thus, in order to justify levy of penalty u/s. 271(l)(c) of the Act, there must be concrete material/evidence or circumstances leading to a conclusion that the amount of addition does represent assessee's income and the circumstances must show that there was conscious concealment or act of furnishing of inaccurate particulars. Explanation 1 of Section 271(l)(c) of the Act does not make the assessment order a conclusive evidence so as to establish that the amount assessed was in fact the income of the assessee.

In view of the above facts, contentions and legal position, the impugned penalty of Rs.3,05,000/- levied u/s. 271(l)(c) of the Act requires to be cancelled/quashed.

We hope the above submissions will be taken due cognizance of by your honour while deciding the appeal in question for which we shall ever remain grateful."

2.2 I have carefully considered the rival contentions. I have also perused various case laws relied upon by the appellant. It is seen that the A.O. has not made much discussion about the unsecured loans in the assessment order. The first appeal in this case was completed vide appeal No. CIT(A)-XI/282/10-11 dated 9.8.2011. In the appellate order ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

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it is clearly mentioned that the appellant has furnished affidavits from these creditors as well as proof of identity like copy of voter I.D.Card etc. The appellant has submitted the source of the these loans as agricultural income which the appellant was not able to substantiate and accordingly these unsecured loans were confirmed as the appellant has failed to discharge the onus cast upon him by the provisions of sec.68 to prove the creditworthiness of the creditors. Taking the entirety of the facts in view, I am of the considered view that the facts available on record may justify the addition u/s.68 and collection of higher revenue, however, these facts are not sufficient for levy of penalty. In this regard the appellant has rightly placed reliance on National Textiles vs CIT 164 CTR 209(Guj.) wherein it is held that penalty u/s.271(1)(c) could not have been imposed without the department making any other effort to come to a conclusion that the cash credit in no circumstance would have been amounts received as temporary loans from various parties. In this case, the assessee in the quantum proceedings failed to produce his accountant but the department also in the penalty proceedings made no effort to summon him. Applying the test (ii) as discussed in this case i.e. the circumstances must show that there was animus or conscious concealment or act of furnishing inaccurate particulars, therefore, it was a case where there was no circumstance to lead to a reasonable and positive inference in the assessee's case that the cash credits were arranged as temporary loans, was false." The ratio of this case will help the appellant as in the instant case there are no sufficient evidence to indicate that there was no circumstance to lead to a reasonable cause to infer that in the assessee's case, the cash credits were arranged as temporary loans was false. Secondly, there is nothing on record to prove the animus i.e. conscious concealment or act of furnishing inaccurate particulars of income. The Hon'ble ITAT in the case of ADIT International Taxation vs. Precision Drilling (Cyprus) Ltd. in ITA No.1604/Ahd/2009 dated 17.9.2009 has deleted penalty u/s.271(1)(c) with the following observations:-

"If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to reasonable and positive inference that the assessee's case is false, the assessee must be held to have proved that there is no mens rea or guilty mind on his part. Liven in this view of matter, the explanation cannot justify levy of penalty. Absence of proof acceptable to the department cannot be equated with fraud or willful default.

2.3 In the instant case also the appellant's contentions remained unproved but the same was not disproved by the A.O. Accordingly, I am of the considered view that penalty levied u/s. 271(1)(c) is untenable.

2.4 It is also a matter of record that in the assessment order the penalty u/s.271(1)(c) was initiated for furnishing of inaccurate particulars of income and thereby concealment of income. It unambiguously proves that the penalty u/s.271(1)(c) was initiated for furnishing of inaccurate particulars of income. The A.O. levied penalty u/s.271(1)(c) for concealment of particulars of his income and a clear- cut finding has been given in this regard in para 8.2 of the penalty ITA Nos. 2498 & 2639 of 2011 and ITA No. 2902 of 2012 Sanjay M. Mehta Vs ITO, Wd-6(3), Ahd For A.Y. 2008-09

order. These facts clearly indicate that the A.O. has failed to frame precise charge before imposition of penalty. On this reasoning itself the penalty is untenable. Reliance in this regard is made on CIT vs Lakhdhirlalji (1972) 85 ITR 77 (Guj.).

2.5 In view of above facts, I hold that penalty levied u/s. 271(1)(c) of Rs. 3,05,0007- is untenable and the same is ordered to be deleted. This ground of appeal is allowed.

15. The Ld. DR has relied on the order of the Assessing Officer and the Ld. AR of the assessee has relied on the order of Ld. CIT(A).

16. We have heard the rival submissions and perused the orders of lower authorities and material available on record. We find that no specific error in the order of the Ld. CIT(A) could be pointed out by the Ld. DR. We find that the penalty levied by the Assessing Officer was on the addition of Rs 9,70,000/- confirmed by the Ld. CIT(A) in quantum appeal. While deciding the quantum appeal of the assessee we have deleted Rs 4,00,000/- out of the quantum addition of Rs 9,70,000/-. Hence, we find no infirmity in the order of Ld. CIT(A) and accordingly, the same is confirmed and the ground of appeal of the Revenue is dismissed.

17. In the result, in ITA No. 2498/Ahd/2011 the appeal of the assessee is partly allowed and in ITA Nos. 2639/Ahd/2011 and 2902/Ahd/2012 the appeals of Revenue are dismissed.

Order pronounced in the Court on Friday, the 28th February, 2014 at Ahmedabad.

Sd/-	Sd/-
(KUL BHARAT)	(N.S. SAINI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad; Dated 28/02/2014
Ghanshyam Maurya, Sr. P.S.