आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी' मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री आर. सी. शर्मा, लेखा सदस्य, एवं श्री अमरजीत सिंह, न्यायिक सदस्य, के समक्ष
BEFORE SHRI R.C.SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.3903/M/13, I.T.A.3904/M/13 & I.T.A.3905/M/13
(**निर्धारण वर्ष /** Assessment Year: 1994-95, 1996-97 & 1998-99)

M/s. CSANGO Ground Floor, Narang Manor, Plot No.96-B, 15th Road, Bandra (West), Mumbai-400050	**बनाम**/ Vs.	Income Tax Officer 12(2)2 Room No.123B, Aayakar Bhawan, M.K.Road, Mumbai-400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACFC4614L		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri K.Gopal & Jitendra Singh
Department by:	Shri Ajay Modi

सुनवाई की तारीख / Date of Hearing: 28.09.2015
घोषणा की तारीख /Date of Pronouncement: 03.02.2016
आदेश / O R D E R

PER AMARJIT SINGH, JM:

The above mentioned appeals have been filed by the assessee against the different orders passed by the Commissioner of Income Tax (Appeals)-10, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 1994-95, 1996-97 & 1998-99. The assessee has challenged the quantum of assessment for the year of

1998-99 whereas in other appeals the assessee has challenged the penalty order of Assessing Officer confirmed by the CIT(A) under order challenged.

2. At the very outset the learned Departmental Representative has argued that all the appeals have been filed by 104 days delays therefore these appeals are liable to be dismissed on this score alone. On the other hand learned representative of the assessee assailed the said contentions. To condone the delay, assessee filed an affidavit stating therein that after the adjudication by the CIT(A), the Tax Consultant prepared the appeal and forwarded to the Accountant but the Accountant left the office without informing anybody. The papers were lying with the Accountant till he came back from leave. Accountant also forgets to file the appeal, however handed over the paper about the asking of management. No doubt there is no proper explanation for filing the appeal delayed but by going through the case on merit we are of the view that the matter of controversy is required to be adjudicated on merits in the interest of justice. Therefore, in the said circumstances the delay is hereby condoned.

ITA NO. 3905/M/13:-

3. In ITA No. 3905 the assessee has raised the following grounds of appeal:-

"1. The Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as "Ld.

CIT(A)] erred in passing the order dated 17th October, 2012 upholding the Assessment Order passed under section 143(3) r.w.s. 254 of the Income Tax Act, 1961 [hereinafter referred to as "the Act"] dated 20th November, 2009 without appreciating the facts and circumstances of the case.

2. The Ld. CIT(A) erred in upholding the action of the Ld. A.O. in making addition of Rs.5,08,890/- under section 50 of the Act treating the same as Short Term Capital Gains without appreciating the facts and circumstances of the case. The Appellant, therefore prays that the addition made by the Ld. A.O. is not at all justified and the same may be deleted.

3. The Ld. CIT(A) failed to appreciate that the net worth of the Firm was Rs.1,55,45,380/- and the purchase consideration received was the same. Hence, there is no difference in the purchase consideration received and the net worth of the Firm. Therefore, the addition of Rs.5,08,890/- under section 50 of the Act is not at all justified and the same may be deleted."

4. The assessee did not file the return of income for A.Y. 1998-99. It was ascertained from the assessment record that the assessee firm was converted into Private Limited Company. Thereafter the notice u/s.148 of the Income Tax Act, 1961(in short "the Act") was issued on 29.10.2001. In response to this notice assessee did not file any return of income. Therefore the assessment was completed u/s 144 r.w.s 147 of the Act on 24.03.2003 determining the total income of the assessee to the tune of

Rs.5,08,890/-. It was also observed that the assessee firm was corporatised with the name of M/s. Csango Industries Pvt. Ltd for an assigned consideration of Rs.1,55,00,000/-. The Assessing Officer found that the net worth of the firm was to the tune of Rs.1,49,91,115/- as per the capital accounts of the partners. Thus the difference amount to the tune of Rs.5,08,885/- was assessed as the income of the assessee firm under the head of Short Term Capital Gain as per provisions of section 50 of the Act. Thereafter, the matter went upto the Income Tax Appellate Tribunal and under the direction of the Hon'ble Income Tax Appellate Tribunal the assessee was given an opportunity to attend on 24.08.2009 and Shri Anil Mandavat C.A. attended the proceedings before the Assessing Officer but did not file the details of working as to how the consideration for the assignment of business to the tune of Rs.1,55,00,000/- was arrived at. He was again called but did not appear hence the Assessing Officer assessed the income to the tune of Rs.5,08,890/- and CIT(A) confirmed the said order. Therefore, the assessee is before us.

5. We have heard the arguments advanced by the learned representative of the parties and perused the records. The appellant has taken the four issues but the main issue of the appellant is in connection with the addition of Rs.5,08,890/- on account of the difference between the net worth of the firm i.e. Rs.1,49,91,115/- which converted upto net worth of the company to the tune of

Rs.1,55,45,380/-. The assessee was a firm which was converted in to Company for a consideration of Rs.1,55,00,000/-. The net worth of the firm was worked out to the tune of Rs.1,49,91,115/- as per the details produced before the Department. Thus, there was a difference of Rs.5,08,885/- which was assessed as Short Term Capital Gain by the Assessing Officer. The explanation of the assessee was that the loan amount of Rs.5,55,715/- was not considered while determining the net worth of the firm. However, agreement with regard to conversion of the firm to the company was produced and according to the clause 6 of the agreement all liabilities of the firm were to be taken over by the company. The assessee has explained that the loan amount was in connection of the car which was not the asset of the firm. Apparently, the loan has been shown in the firm's books of account and the interest on said loan was debited in the firm's accounts and claimed as deduction. Therefore, in the said circumstances how it can be segregated from the firm is not understandable. Nothing came in to the notice that the loan liability does not belong to the firm and the liability is not required to be taken up by the newly converted company. Therefore, in the said circumstances the matter was considered by the learned CIT(A) rightly therefore, in the said circumstances we found no ground to interfere with the order passed by the CIT(A) in question hence dismiss the appeal of the assessee.

ITA NO.3903/M/13 & ITA 3904/M/13:-

6. In ITA No. 3903 the assessee has raised the following grounds of appeal:-

> *1. The Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as "Ld. CIT(A)] erred in passing the order dated 22.10.2012 upholding the order dated 21.04.2010 passed by Ld. A.O. levying concealment penalty of Rs.4,36,365/- under section 271(1)(c) of the Act without appreciating the facts and circumstances of the case. The levy of penalty under section 271(1)(c) of the Act is not justified and same may be deleted.*
>
> *2. The Ld.CIT(A) failed to appreciate that the Appellant neither concealed any particular of income nor he has furnished any incorrect particulars of income. Therefore, the levy of penalty erred in confirming the action of the Ld. A.O. in levying concealment penalty of Rs.4,36,365/- under section 271(1)(c) of the Act is without any basis and the same may be deleted.*
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> *3. The Ld. CIT(A) erred in levying concealment penalty of Rs.4,36,365/- under section 271(1)(c) of the Act without appreciating fact that the addition was made by estimating the G.P. Rate during the year. Hence the levy of concealment penalty is not justified and same may be deleted.*
>
> *4. The Ld. CIT(A) failed to appreciate the fact that the Appellant has shown true and correct Gross Profit in its Books of account and the Ld. A.O. has not rejected the Books of Account of the Appellant while making the additions on*

account of the Gross Profit rate. Therefore, confirming the addition made by the Ld. A.O. estimating the Gross Profit rate is not justified and therefore the same may be deleted.

7. In ITA No. 3904 the assessee has raised the following grounds of appeal:-

"1. The Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as "Ld. CIT(A)] erred in passing the order dated 22.10.2012 upholding the order dated 21.04.2010 passed by Ld. A.O. levying concealment penalty of Rs.8,74,706/- under section 271(1)(c) of the Act without appreciating the facts and circumstances of the case. The levy of penalty under section 271(1)(c) of the Act is not justified and same may be deleted.

2. The Ld. CIT(A) failed to appreciate that the Appellant neither concealed any particulars of income nor he has furnished any incorrect particulars of income. Therefore, the levy of penalty erred in confirming the action of the Ld. A.O. in levying concealment penalty of Rs.8,74,706/- under section 271(1)(c) of the Act is without any basis and the same may be deleted.

3. The Ld. CIT(A) erred in levying concealment penalty of Rs.8,74,706/- under section 271(1)(c) of the Act without appreciating fact that the addition was made by estimating the G.P. Rate during the year. Hence the levy of concealment penalty is not justified and same may be deleted.

4. The Ld. CIT(A) failed to appreciate the fact that the Appellant has shown true and correct Gross Profit in its Books of Account and the Ld. A.O. has not rejected the Book of Account of the Appellant while making the additions on account of

the Gross Profit rate. Therefore, confirming the addition made by the Ld. A.O. estimating the Gross Profit rate is not justified and therefore the same may be deleted."

8. Now coming to the penalty appeals for the A.Y.1994-95 and 1996-97 wherein the penalty levied by the Assessing Officer to the tune of Rs.4,36,365/- & Rs.8,74,706/- have been confirmed by the CIT(A) are concerned. Both the orders were passed by the Assessing Officer speaks that the quantum assessment for the relevant assessment year has been confirmed by the Income Tax Appellate Tribunal, Mumbai Bench in ITA No.1862&1863/M/2001 dated 12.08.2009. Therefore, the penalty proceeding were initiated against the assessee and the Assessing Officer levied the penalty mentioned above in accordance with law. We have perused the order dated 12.08.2009 on record which speaks about the confirmation of order passed by the CIT(A) which speaks about the dismissal of the appeal of the assessee on the ground that the finding of the CIT(A) has already been confirmed by the Income Tax Appellate Tribunal in ITA Nos. 2763/M/01 for A.Y.1994-95 and ITA No.2765/M/01 for A.Y.1996-97 while disposing the appeal of the Revenue. The reasons for dismissed of appeal dated 12.08.2009 is based upon the findings of the revenue appeals in ITA Nos. 2763/M/01 for A.Y.1994-95 and ITA No.2765/M/01 for A.Y.1996-97 decided on 31.10.2007. The relevant

paragraph number 23 of the said judgement is hereby reproduced as under for ready reference:-

> *"23. From the above, we find that learned CIT(A) has decided this issue in favour of the assessee by following the tribunal Judgement in the case of M/s. Metro Shoes Ltd. as per ITA Nos.1668,1751,2015 and 2016/Mum/99 dated 17.1.2000. Learned CIT(A) has reproduced relevant paras of this Tribunal Judgement in his order, which has been reproduced by us also as above. It is also noted by learned CIT(A) that ultimately, Hon'ble Minister of Cooperation, Maharashtra State passed an order dated 1.10.99 allowing the appeal of Shramik Leather Equipment and Hand Gloves Industrial Co-operative Society Ltd., against the order of de-registration and thus, at least this society is found to have been absolved of the charge of issuing bogus bills. It is also observed by learned CIT(A) that the assessee sometimes made purchases directly from the workers while it asked them to obtain the bills from the society and cheque was also issued in the name of the society; and in this regard, it is held by learned CIT(A) that it does not establish that bogus or inflated bills were obtained that the purchase is made directly from the workers and if such workers procured bills from their respective society and the assessee has made payment directly to the society by cheque, it cannot be said that it obtained bogus or fictitious bill. We also find that learned CIT(A) has considered GP rate shown by the assessee in various years and it is observed by him in Para No.3.3 of his order that the assessee itself has shown GP rate of 29.5% to 32.40% during A.Y.1988-89 to 1990-91. It is also observed by learned CIT(A) that GP rate of 22.66% has been accepted by the department in the original assessment order after necessary scrutiny for A.Y. 1992-93. On this basis learned CIT(A) has came to the conclusion that no addition is called for in the GP rate for these years where GP rate declared by the assessee is 22.66% or more, and on this basis, it was held by him that no addition on account of low GP is called for in A.Y.1989-90 to 1992-93 and in A.Y.1995-96 and for A.Y.1997-98, rate of GP declared by*

the assessee was 20.98%, but the same was also accepted by learned CIT(A) as reasonable in view of the fact that in this year, the business has increased by 8 times. For A.Y.s 1993-94, 1994-95 and 1996-97, learned CIT(A) has not accepted GP rate declared by the assessee; and hence has directed the Assessing Officer to adopt GP rate of 20% fir A.Y.1996-97. After considering facts of the present case in its entirety, particularly the fact that the same of the assessee is not appearing in Annexure-III of the letter dated 18.10.1996 issued by Dy. Commissioner of Police addressed to Commission, City-13, Mumbai and also in view of the fact that it is admitted position that the entire sales of these tainted societies were not found bogus and no direct evidence was found that bogus or inflated bills were procured by the assessee in the present case we are of the considered opinion that no inference is called for in the order of the learned CIT(A) on this issue also because he has decided the issue after examining full facts in proper perspective. We, therefore, uphold the order of learned CIT(A) on this issue also in all these years."

9. The above said findings speaks that the Assessing Officer assessed the income of the assessee on GP rate on the basis of estimation and the case of the assessee was reopened on the basis of letter dated 18.10.1996 issued by Dy. Commissioner of Police, Mumbai and according to the Annexure III the name of the assessee was not appeared. Observations has also been recorded that the entire sale of the tainted society were not found bogus and no direct evidence was found that the assessee collected the bogus or inflated bills. In the present case reopening of the assessment of relevant years i.e.1994-95 and 1996-97 are not under challenge however the penalty orders are under challenge. Therefore, law relied by the

representative of the assessee cited as [2008] 6 DTR (Mumbai) (Trib) 297 has to no use. Moreover, with regard to the similar facts and circumstance of the present case the co-ordinate bench of Mumbai in ITA No. 93/M/2011 dated 10.04.2015 titled as Rishabh Impex is of the view that the assessment passed on purely estimation basis does not attract the penalty provision u/s. 271(1)(c) of the Act. In this regard we also found support of law settled in [2014] 360 ITR 385 titled as Whitelene Chemicals (Hon'ble Gujarat High Court) wherein it is held that the rejection of books of account on the basis of fair Gross Profit rate does not amount the concealment of income and concealment of particulars to evade the tax and no penalty is leviable on the basis of such grounds. In an another case cited as [2014] 44 taxmann.com 9 (Rajasthan) cited as Commissioner of Income Tax Vs. Krishi Tyre Retreading & Rubber Industries, the Hon'ble High Court of Rajasthan is of the view that where addition had been sustained purely on estimate basis and no positive fact and finding was found so as to even make such addition, no penalty is leviable under section 271(1)(c). In view of the observations made above we are of the view that the order dated 22.10.2012 for A.Y.1994-95 & 1996-97 in question are wrong against law and facts and are not liable to be sustainable in the eyes of law therefore these orders are hereby ordered to be set aside. Therefore the said appeals are hereby allowed.

10. In result the penalty appeals for 1994-95 & 1996-97 are hereby ordered to be allowed and appeal for A.Y.1998-99 is hereby ordered dismissed.

Order pronounced in the open court on 3rd February, 2016.

Sd/-	Sd/-
(R.C.SHARMA)	(AMARJIT SINGH)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 3rd February, 2016

MP

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**