

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

Before Sh. N. K. Saini, AM and Sh. Sudhanshu Srivastava, JM

ITA No. 2201/Del/2016 : Asstt. Year : 2001-02

ITA No. 2202/Del/2016 : Asstt. Year : 2002-03

ITA No. 2203/Del/2016 : Asstt. Year : 2003-04

ITA No. 2204/Del/2016 : Asstt. Year : 2004-05

Accurate Transformers Ltd., 8, Local Shopping Centre, 2 nd /3 rd Floor, Vardhman Siddarth Plaza, Savita Vihar, Delhi-110092	Vs	DCIT, Central Circle-22(New CC-28), New Delhi
(APPELLANT)		(RESPONDENT)
PAN/GIR No. AACCA7126L		

Assessee by : Sh. Amit Goyal , CA &

Sh. Nipun Mittal, CA

Revenue by : Sh. S. R. Senapati, Sr. DR

Date of Hearing : 15.02.2018

Date of Pronouncement : 26.02.2018

ORDER

Per N. K. Saini, AM:

These appeals by the assessee for the assessment years 2001-02 to 2004-05 are directed against the separate orders each dated 25.02.2016 of ld. CIT(A)-29, New Delhi.

2. Since, the issue involved is common and the appeals were heard together so, these are being disposed off by this common order for the sake of convenience and brevity.

3. At the first instance, we will deal with the appeal in ITA No. 2201/Del/2016 for the assessment year 2001-02. The only

grievance of the assessee in this appeal relates to the confirmation of penalty of Rs.1,42,033/- levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

4. Facts of the case in brief are that a search and seizure operation u/s 132 of the Act was carried out in Accurate Group of cases on 26.07.2006 and the assessee was also covered under search. Accordingly, notice u/s 153A of the Act was issued and served upon the assessee on 26.03.2007. In response to the said notice, the assessee filed its return of income declaring total income of Rs.1,63,78,980/-. However, the assessment was completed at an income of Rs.1,97,70,980/- by making the addition of Rs.33,92,000/- on account of scrap sales and Rs.50,000/- which was made in the original assessment to cover up the discrepancies.

5. Being aggrieved the assessee carried the matter to the Id. CIT(A) who although deleted the addition of Rs.33,92,000/- made by the AO on account of value of scrap sales but substituted the said addition by Rs.3,97,815/- which was disclosed by the assessee itself. Thereafter, the AO levied the penalty u/s 271(1)(c) of the Act on the said addition.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted as under:

".....1. At the outset it is submitted that there is no satisfaction recorded by the AO in the assessment order with regard to levy of penalty under section 271(1)(c). The AO has merely initiated the penalty proceedings by mentioning as such without even pointing out against which addition/disallowance, penalty is being initiated.

The Hon'ble Delhi High Court in the case of Madhu Shree Gupta 317 ITR 143 (Del), the Hon'ble Court held that the presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdiction fact which cannot be washed away as the provisions stands even today i.e. post amendment. The Hon'ble ITAT, Delhi Bench in the case of Global Green Co. Ltd. Vs. DCIT (ITA No. 1390/Del/2011) vide its order dated 13th July, 2012 has held that where there was no satisfaction discernible from the assessment order that the assessee has concealed income or furnished particulars, the penalty order will suffer from lack of jurisdiction to impose penalty.

Infact, the AO has not even mentioned as to whether the penalty being initiated is for "concealment" or furnishing of inaccurate particulars of income. Penalty proceedings can be initiated on two charges i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. If proceeding are initiated on charge of concealment then penalty cannot be levied on the charge of furnishing of inaccurate particulars of income and vice versa [CIT Vs Lakhdhir Lalji 85 ITR 77 (403)]. Thus 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 inaccurate particulars of income. In the absence of such findings, the order would be bad in law (Manu Engg. Works 122 ITR 306 (Guj); New Sarathia Engg. Co. (282 ITR 642) (Guj); Padma Ram Bharall 110 ITR 54 (Guj)... ”

7. It was further submitted that even on merit, this was not a case for levy of the penalty and stated as under:

“.....During the course of assessment proceedings, the assessee has suo-moto furnished to AO that value of scrap for the year is Rs.3,,97,550/-which was omitted to be shown in the return of Income. The AO however made addition of Rs.33,92,000/- as per his own methodology, Instead of income offered by the assessee.

In appeal, the ld. CIT(A) deleted the disallowance/addition made by the AO holding it to be non sustainable and upheld the addition only to the extent of Rs.3,97,850/- as offered by the assessee.

The AO has levied penalty of Rs.142033/- under section 271(1)(c) in respect of this addition of Rs.3,97,850/- offered by the assessee and sustained by the CIT(A). The ld. AO has grossly erred in imposing penalty under section 271(1)(c). The assessee has neither concealed any income nor furnished any inaccurate particulars of income.

It may be submitted that it is merely a case of bonafide omission that this amount of Rs.3,97,850/- was not included in the return of income. This happened because while filing the return of income, one of the seized paper being page no.37 of Annexure A-2/B-3 escaped the attention and because of it, the scrap sales amounting to Rs.3,97,850/- for AY 2001-02 was omitted to be included in the return of income. However, during the course of assessment proceedings the above amount of Rs,3,97,850/- were pointed out by the appellant himself as admitted by AO himself in the assessment order.

It is respectfully submitted that in the returns of income filed pursuant to search, various years comprised in the 6 years prior to search year, the assessee has declared income of Rs.2,69,93,835/- and as per the CIT(A) order, no addition made on account of scrap sales as made by AO has survived. The only further addition that has survived is which has been pointed out by the appellant during the course of assessment proceedings based on page no. 37 of seized annexure A-2/B-3. Your honour will appreciate that the assessee company declaring income of Rs.2,69,93,835/- could not any motive of concealing the small amount of Rs.3,97,850/-.....”

8. The reliance was placed on the following case laws:

➤ *CIT Vs Santosh Textiles (1997) 228 ITR 221 (Ker.)*

- *CIT Vs Hind Rajasthan Construction Co. (1979) 116 ITR 304 (Bom.)*
- *CIT Vs Globe Sales Corporation 145 Taxman 530*
- *CIT Vs JK Synthetics Ltd. 219 ITR 267 (Del.)*

9. The Id. CIT(A) after considering the submissions of the assessee observed that the assessee while filing the original return of income and also in the return submitted in compliance to the notice u/s 153A of the Act had not disclosed any income from sale of scrap. He further observed that during the search, the scrap sales to the tune of Rs.3,97,850/- had been found mentioned in the seized documents and the same had also been confirmed by the Id. CIT(A). Therefore, neither it was a declaration of such scrap sales *suo moto* by the assessee nor an inadvertent mistake or bonafide omission and that the concealment had been detected during the search. Therefore, the AO had rightly made the addition for such concealment. As regards to the reference to the objection of the assessee that the satisfaction was not recorded by the AO in the assessment order regarding initiation of penalty, the Id. CIT(A) observed that it was to be mentioned that this issue was not agitated or disputed before the AO during the penalty proceedings, therefore, the objection of the assessee was not tenable. The Id. CIT(A) sustained the penalty u/s 271(1)(c) of the Act levied by the AO.

10. Now the assessee is in appeal. The Id. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that one of the addition made in the assessment order was that of scrap sales of Rs.33,92,000/- which

was made by the AO on estimated basis i.e. @1% of total raw material consumed. It was further submitted that the assessee during the course of assessment proceedings *suo moto* furnished to the AO that value of scrap for the year under consideration amounting to Rs.3,97,850/- was omitted to be shown in the return of income. However, the AO made an addition of Rs.33,92,000/- but the Id. CIT(A) deleted the addition made by the AO holding it to be non-sustainable and upheld the addition only to the extent of Rs.3,97,850/- which was offered by the assessee. It was contended that non inclusion of Rs.3,97,850/- was merely a case of bonafide omission which happened because at the time of filing the return of income, one of the seized paper being page no. 37 of Annexure A-2/B-3 escaped the attention and due to that the scrap sales amounting to Rs.3,97,850/- was omitted to be included in the return of income. However, during the course of assessment proceedings, the above amount of Rs.3,97,850/- was pointed out by the assessee itself as admitted by the AO in the assessment order. Therefore, the penalty u/s 271(1)(c) of the Act was not leviable on the said addition offered by the assessee itself. It was further submitted that the AO in the assessment order has not recorded any satisfaction as regards to the concealment of income or furnishing of inaccurate particulars of income, he simply stated that penalty proceedings u/s 271(1)(c) of the Act had been initiated. The Id. Counsel for the assessee referred to page no. 41 of the assessee's paper book which is the copy of the notice u/s 274 r.w.s. 271 of the Act and stated that in the said notice, the AO had not mentioned as to whether the assessee had concealed the particulars of income or furnished

inaccurate particulars of such income in terms of explanation 1, 2, 3, 4 & 5. It was accordingly submitted that the penalty levied by the AO and sustained by the Id. CIT(A) was not justified. The reliance was placed on the judgment of the Honøble Karnataka High Court in the case CIT, Bangalore Vs M/s SSAøø Emerald Meadows, Bangalore in ITA No. 380 of 2015, order dated 23.11.2016 wherein the earlier judgment in the case of CIT Vs Manjunatha Cotton and Ginning Factory reported at 359 ITR 565 was followed (copy of the said order was furnished which is placed on record). It was further submitted that the SLP filed by the department against the aforesaid order was dismissed by the Honøble Supreme Court vide order dated 05.08.2016 in SLP CC No. 11485/2016 (copy of the said order was also furnished which is placed on record).

11. In his rival submissions, the Id. Sr. DR submitted that the legal issue now raised by the assessee had not been raised before the Id. CIT(A) and that the penalty levied was on the basis of addition made by the AO in consideration of the seized material. Therefore, the Id. CIT(A) was fully justified in confirming the penalty levied by the AO.

12. We have considered the submissions of both the parties and perused the material available on record. As regards to this objection of the Id. Sr. DR that the legal issue argued by the Id. Counsel for the assessee was not raised before the authorities before is concerned. It is noticed that the Id. CIT(A) in paras 5 to 5.3 of the impugned order mentioned the arguments of the assessee on the similar issue and adjudicated this issue. The relevant

findings have been given in para 7.6 of the impugned order which read as under:

“7.6 With reference to the objection of the appellant that the satisfaction was not recorded by the AO in the assessment order regarding initiation of penalty, it is to be mentioned that this issue was not agitated or disputed before the AO during the penalty proceedings and as mentioned above, while imposing penalty, the AO has given his clear finding in the penalty order. Therefore, this objection of the appellant is also not tenable.”

13. On the basis of aforesaid observations of the Id. CIT(A), it can safely be held that on the legal issue, the assessee argued the matter before the Id. CIT(A). In the present case, it is noticed that the AO in the assessment order dated 29.12.2008, simply stated that the penalty proceedings u/s 271(1)(c) of the Act have been initiated separately. He did not mention as to whether the penalty proceedings were initiated for furnishing of inaccurate particulars of income or concealment of income, so, there was no satisfaction of the AO. Moreover, the estimated additions which were made by the AO were deleted by the Id. CIT(A) and the only addition sustained was on account of scrap sales which was disclosed by the assessee itself. It is an admitted fact that no penalty proceedings were initiated by the AO in respect of that sustained addition which is evident from the copy of show cause notice dated 29.12.2008 issued by the AO wherein it has been mentioned as under:

“Whereas in the course of proceedings before me for the assessment year 2001-2002 it appears to me that you:

“Have without reasonable cause failed to comply with a notice under section 142(1)/143(2) of the Income Tax Act, 1961 dated... ..”

Have concealed the particulars of your income and furnished inaccurate particulars of such income in terms of explanation 1, 2, 3, 4 and 5.”

14. From the above, show cause notice (copy of which is placed at page no. 41 of the assessee's paper book), it is not clear as to whether the penalty proceedings u/s 271(1)(c) of the Act were initiated by the AO on account of concealment of income or furnishing of inaccurate particulars of income. Therefore, charge framed was not clear.

15. On a similar issue, the Honorable Karnataka High Court in the case of CIT M/s SSA's Emerald Meadows, Bangalore (supra) held as under:

“3. The Tribunal has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short ‘the Act’) to be bad in law as it did not specify on which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal, while allowing the appeal of the assessee, has relied on the decision of the Division Bench of this Court rendered in the case of Commissioner of Income Tax Vs Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.

4. In our view, since the matter is covered by judgment of the Division Bench of this Court, we are of the opinion, no substantial question of law arises in this appeal for determination by this Court. The appeal is accordingly dismissed.”

16. It is also relevant to point out that the SLP filed by the department against the aforesaid order has been dismissed by the

Honorable Apex Court vide order dated 05.08.2016. It is also noticed that the Honorable Karnataka High Court considered the ratio laid down in its own judgment in the case of CIT Vs Manjunatha Cotton & Ginning Factory reported at (2013) 359 ITR 565 (supra) wherein it has been held (head note) as under:

“Chapter XXI of the Income-tax Act, 1961, enacts provisions for the levy, imposition and collection of penalty. The general principles relating to penalty or concealment of income are: (a) penalty under section 271(1)(c) is a civil liability; (b) mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities; (c) willful concealment is not an essential ingredient for attracting civil liability; (d) existence of conditions stipulated in section 271(1)(c) is a sine qua non for initiation of penalty proceedings under section 271; (e) the existence of such conditions should be discernible from the assessment order or order of the appellate authority or revisional authority; (f) even if there is no specific finding regarding the existence of the conditions mentioned in section 271(1)(c), at least the facts set out in Explanation 1(A) and (B) should be discernible from the order which would by fiction constitute concealment because of deeming provision; (g) even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under section 271(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision contained in sub-section (1B).”

17. In the present case also as we have already pointed out in the former part of this order that the AO has not recorded the satisfaction in the assessment order as to whether the assessee concealed the income or furnished inaccurate particulars of income and also in the show cause notice issued u/s 274 r.w.s. 271 of the Act, the AO did not mention the specific charge on the basis of

which the penalty u/s 271(1)(c) of the Act was initiated i.e. whether it was for concealment of income or for furnishing of inaccurate particulars of income. He simply sent a printed form where all the conditions relating to Section 271 of the Act were mentioned. Therefore, the said notice would not satisfy a requirement of law because the assessee should know the ground which he has to defend specifically. We, therefore, by considering the totality of the facts and the ratio laid down by the Honøble Karnataka High court in the aforesaid referred to case, delete the penalty levied u/s 271(1)(c) of the Act by the AO and sustained by the Id. CIT(A).

18. As regards to the another appeals for the assessment years 2002-03 to 2004-05, the facts are identical as were involved in the appeal for the assessment year 2001-02 in ITA No. 2201/Del/2016 which we have adjudicated in the former part of this order. Therefore, our findings given therein shall apply *mutatis mutandis*.

19. In the result, the appeals of the assessee are allowed.

(Order Pronounced in the Court on 26/02/2018)

Sd/-
(Sudhanshu Srivastava)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 26/02/2018

Subodh

Copy forwarded to:

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2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR