

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI  
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No.849/Mum/2016  
(निर्धारण वर्ष / Assessment Years:2007-08)

M/s Aishwariya Fashion Couture, Shop No. 1, Abu Baker Chawl, Irla Society Rd, Vile Parle (W) Mumbai-400 056	<b>बनाम/ Vs.</b>	Erstwhile ACIT 15(2), Now ACIT 25(2)(1), BKC, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN No. AALFA4309H		
<b>(अपीलार्थी /Appellant)</b>	:	<b>(प्रत्यर्थी / Respondent)</b>

अपीलार्थी की ओर से / <b>Appellant by</b>	:	Shri Ashok Suthar, A.R
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Rajesh Kumar Yadav, D.R

सुनवाई की तारीख / <b>Date of Hearing</b>	:	14.03.2018
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	25.05.2018

**आदेश / O R D E R**

**PER RAVISH SOOD, JUDICIAL MEMBER:**

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-37, Mumbai, dated 16.12.2015 which in itself arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 15.02.2013 for A.Y. 2007-08. The assessee

assailing the order of the CIT(A) had raised before us the following grounds of appeal:

- “1. On the facts of the case and in law, the learned CIT(A) has erred in confirming penalty u/s 271(1)(c) of the Income tax Act, 1961, of Rs.31,888/- in respect of disallowances of travelling expenses of Rs.94,735/- during the course of scrutiny assessment.
2. The Appellant craves leave to add, alter, delete or substitute the ground urged above.
3. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity.”

Still further, the assessee had raised before us the following additional grounds of appeal:-

- “1. The learned Commissioner of Income tax (Appeals) erred in confirming the order of the penalty passed by the learned Assessing Officer (Ld. A.O) under Sec. 271(1)(c) in so far as it is against the appellant, is opposed to law, weight of evidence, natural justice probabilities, facts and circumstances of the appellant’s case.
2. The Learned Commissioner of Income Tax (Appeal) erred in not accepting that the Ld. A.O failed to appreciate the fact that the order passed under section 271[1][c] of the Income-tax Act, 1961 is without assumption of proper jurisdiction as the mandatory conditions for invoking the provisions of section 271 [1][c] of the Act has not been complied with under the facts and circumstances of the case.
  - 2.1 The Learned Commissioner of Income Tax (Appeal) erred in not accepting that the Ld. A.O failed to appreciate the fact that the levy of penalty is not automatic and the Ld. A.O ought to have exercised his discretion before levying penalty under the facts and circumstances of the case.
  - 2.2 The Learned Commissioner of Income Tax (Appeal) erred in not accepting that the Ld. A.O failed to appreciate the fact that the Notice for initiation of penalty as to whether it is concealment of income OR furnishing of inaccurate particulars of income is not discernable from the notice issued and consequently the order of penalty should be held void under the facts and circumstances of the case.
  - 2.3 The Learned Commissioner of Income Tax (Appeal) erred in not accepting that the Ld. A.O failed to appreciate that the penalty proceedings are independent with that of the assessment proceedings under the facts and circumstances of the case.
  - 2.4 The Learned Commissioner of Income Tax (Appeal) erred in not accepting that the Ld. A.O failed to appreciate that the appellant has neither concealed any income nor furnished inaccurate particulars of income to warrant levy of penalty and therefore the penalty levied under section 271[1][c] of the Act requires to be cancelled.

3. *The Appellant denies himself liable for penalty imposed of Rs.31,888/- by the learned assessing officer under section 271(1)(c) of the Act under the facts and circumstances of case.*
4. *In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed and appropriate relief may be granted in the interest of justice and equity.*

2. We shall first advert to the admissibility of the additional grounds of appeal filed by the assessee. We find that the assessee by raising the aforesaid additional grounds of appeal had sought our indulgence for adjudicating the validity of the jurisdiction assumed by the A.O without putting the assessee to notice as regards the nature of default for which he was called upon to show cause as to why penalty under Sec. 271(1)(c) may not be imposed on it. We have heard the rival contentions of both the parties on the issue as regards the admissibility of the additional ground of appeal raised by the assessee. We find that as we have been called upon to adjudicate on a legal issue based on the facts available on record and no further investigation of facts in respect of the issue under consideration is required, therefore, admit the additional ground of appeal raised by the assessee before us.

3. Briefly stated, the facts of the case are that the assessee who is engaged in the business of sale of readymade garments, imitation and diamond jewellery had filed its return of income for A.Y 2007-08 on 12.10.2007, declaring total income of Rs.11,68,580/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. The case of the assessee was thereafter taken up for scrutiny assessment under Sec.143(2). The A.O while framing the assessment observed that the expenses claimed by the assessee were neither supported by any documentary evidence nor any justification was furnished. Being of the view, that in the absence of non-production of supporting bills and vouchers, the financial results of the assessee could not be accepted, the A.O rejected the books of accounts under Sc. 145 of the Act and assessed the income at Rs.48,77,686/-(i.e. 10% of gross turnover of Rs.4,87,76,867/- . Still further, the A.O made further additions/disallowances, viz. (i)

disallowance of expenses under Sec. 40(a)(ia): Rs.9,03,565/-; (ii) VAT payable: Rs.42,882/-; and (iii) addition of interest on FDR: Rs.11,452/-, and assessed the income at Rs.58,35,585/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the contentions advanced by the assessee before him, restricted the addition made by the A.O to an amount of Rs.94,735/- towards travelling expenses and Rs.45,154/- towards adhoc expenses, and as such partly allowed the appeal.

5. The A.O after the order passed by the CIT(A), issued a notice under Sec. 274 r.w.s. 271(1)(c), dated 14.12.2009, calling upon the assessee to show cause as to why penalty under Sec. 271(1)(c) may not be imposed in its hands. Though, the explanation of the assessee that no penalty in respect of disallowance of adhoc expenses was called for in its hands was accepted by the A.O, however, the latter was not persuaded to be in agreement with the claim of the assessee that no penalty was liable to be imposed in respect of the disallowance made out of travelling expenses. The A.O being of the view that the assessee had failed to establish a direct nexus of the travelling expenses incurred by Shri D. Gada with the business of the assessee firm, therefore concluded that the assessee had booked these expenses to suppress its true profits. The A.O holding a conviction that the assessee had furnished inaccurate particulars and concealed the income as regards the disallowance of travelling expenses of Rs.94,735/-, imposed a penalty of Rs.31,888/- under Sec. 271(1)(c).

6. The assessee carried the matter in appeal before the CIT(A). The CIT(A) not finding favour with the contentions advanced by the assessee before him that the A.O had erred in imposing penalty under Sec. 271(1)(c) in respect of disallowance of travelling expenses of Rs.94,735/-, upheld the penalty imposed by the A.O in context of the issue under consideration and dismissed the appeal.

7. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal tried to impress upon us that keeping in view the substantial turnover of Rs.4.5 crores for the year under consideration, it could safely be gathered that the assessee would not have purposively raised a wrong claim of travelling expenses of Rs.94,735/- in its return of income. The ld. A.R further submitted that as the assessee was not put to notice as regards the nature of default for which he was called upon by the A.O to show cause as to why penalty under Sec. 271(1)(c) may not be imposed on him, therefore, the assessee had as a matter of fact remained divested of any opportunity to put forth an explanation that no such penalty was liable to be imposed in its hands. The ld. A.R in order to fortify his aforesaid contention drew our attention to the 'Show cause' notice, dated 14.12.2009 issued by the A.O. The ld. A.R taking us through the aforesaid notice submitted that the irrelevant default was not struck off by the A.O in the 'Show cause' notice. It was thus submitted by the ld. A.R that as the A.O had failed to put the assessee to notice as regards the nature of default for which penalty was sought to be imposed in its hands, therefore, the penalty imposed by him under Sec. 271(1)(c) could not be sustained and was liable to be vacated. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. The ld. A.R in order to drive home his contention that the A.O had rightly imposed penalty under Sec. 271(1)(c), which thereafter had been upheld by the CIT(A), placed reliance on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Del).

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have perused the copy of the 'Show cause' notice issued by the A.O under Sec. 274 r.w.s. 271 of the Income tax Act, 1961, dated 14.12.2009 (Page 6-7 'APB'). We may herein observe that a bare perusal of the aforesaid 'Show cause' notice issued by the A.O under Sec. 274 r.w.s.

271 of the Act, dated 14.12.2009 (Page 6 of 'APB') clearly reveals that the said notice was issued by the A.O in context of the penalty proceedings under Sec.271(1)(b) of the Act. We find a clear mention of Sec. 271(1)(b) on both the front and backside of the said show cause notice. We are of the considered view that as the 'Show cause' notice, dated 14.12.2009 was issued by the A.O in context of the penalty proceedings under Sec. 271(1)(b) which were initiated while framing the assessment, therefore, the same would in no way assist the case of the assessee, which is in context of the levy of penalty under Sec. 271(1)(c) of the Act. We thus, in the absence of any such material having been placed before us, which could persuade us to conclude that the A.O had failed to put the assessee to notice as regards the default for which he was called upon to show cause as to why penalty under Sec. 271(1)(c) of the Act may not be imposed on it, therefore, dismiss the additional ground of appeal raised by the assessee before us.

9. We shall now advert to the maintainability of penalty imposed by the A.O under Sec.271(1)(c), as regards the addition of Rs.94,735/- towards travelling expenses that had been sustained by the CIT(A) while disposing off the quantum appeal of the assessee. We find that the CIT(A) had confirmed the addition of Rs.94,735/- for the reason that the assessee could not establish direct nexus of the travelling expenses of Shri D. Gada and the business of the assessee under consideration. We are of the considered view that the addition/disallowance of the travelling expenses of Rs.94,735/- pertaining to Shri D. Gada though had been upheld by the CIT(A) for the reason that the assessee could not establish direct nexus of the same with the business of the assessee, but it also remains as a matter of fact that the genuineness of such a claim of the assessee had not been disproved to the hilt by the lower authorities, which would justify imposition of penalty under Sec. 271(1)(c) in the hands of the assessee. We are of the considered view that though the failure on the part of the assessee to prove that the travelling expenses under consideration were incurred wholly and exclusively for its business, would inescapably lead to an addition/disallowance of the said expense while framing the assessment,

but are unable to persuade ourselves to subscribe to the observations of the lower authorities that the said fact in itself would justify imposition of penalty under Sec. 271(1)(c). We may herein observe that our aforesaid observations that an unproved claim of expenses cannot lead to levy of penalty, as long as the same is not disproved to the hilt, is supported by the judgment of the Hon'ble High Court of Bombay in the case of Hon'ble High Court of Bombay in the case of CIT Vs. Upendra V. Mithani (ITA (L) No. 1860 of 2009), dated 05.08.2009, wherein it was observed as under:-

*“The issue involved in the appeal revolves around deletion of penalty under Section 271(1)(c) of the I.T. Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that 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 the 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 view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs.”*

10. We thus, in terms of our aforesaid observations are unable to subscribe to the view arrived at by the CIT(A), and delete the penalty of Rs.31,888/- imposed under Sec. 271(1)(c) in the hands of the assessee. The order passed by the CIT(A) is set aside in terms of our aforesaid observations.

11. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 25.05.2018

Sd/-

Sd/-

(G.S. Pannu)  
ACCOUNTANT MEMBER

(Ravish Sood)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 25.05.2018

Ps. Rohit

**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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,  
उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT,**  
**Mumbai**