

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 881/JP/2014
निर्धारण वर्ष / Assessment Year : 2005-06

The ACIT, Central Circle- 1, Jaipur.	बनाम Vs.	M/s Gupta Emerald Mines Pvt. Ltd., Metro House, II Floor, M. G. Road, Mumbai.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AAACG 1223 G		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

राजस्व की ओर से / Revenue by: Smt. Seema Meena (JCIT)
निर्धारिती की ओर से / Assessee by : Shri S.L. Poddar (Adv.)

सुनवाई की तारीख / Date of Hearing : 10/04/2018
उदघोषणा की तारीख / Date of Pronouncement: 06/07/2018

आदेश / ORDER

PER: VIJAY PAL RAO, J.M.

This appeal by the Revenue is directed against the order dated 29.10.2014 of Id. CIT(A), Jaipur arising from the penalty order passed U/s 271(1)(c) of the I.T. Act for the assessment year 2005-06. The Revenue has raised the following grounds:-

" 1. Whether on the facts and in the circumstances of the case and in law, the order of the Ld. CIT(A)(C), Jaipur is justified in deleting the penalty of Rs. 17,20,000/- imposed by the AO U/s 271(1)(c) of the Act.

2. Whether on the facts and in the circumstances of the case and in law, the order of the Ld. CIT(A)(C), Jaipur is justified in deleting the penalty though the finding of the AO that assessee was reducing correct profit by making bogus purchases, has been confirmed by the Ld. CIT(A)(C) , herself.

3. Whether on the facts and in the circumstances of the case and in law, the order of the Ld. CIT(A)(C), Jaipur is justified holding that penalty U/s 271(1)(c), cannot be imposed on estimated additions despite the various judgments of Hon'ble High Courts mentioned by the AO in the penalty order in which concealment penalty on additions based on estimation has been upheld.

4. The appellant craves the right to amend alter or add to any of the grounds of appeal given above."

2. The brief facts emerging from record leading to levy of penalty are that the original return of income was filed by the assessee on 06.12.2006 declaring loss at Rs. 1,86,758/-. Thereafter a search and seizure operation was carried out on 20.05.2009 in the case of the assessee group. Pursuant to the search and seizure action a notice U/s 153A of the Act was issued on 22.07.2011. In response to the notice the assessee filed a return of income declaring loss at Rs. 1,86,758/- as it was declared in the original return of income. The assessment U/s 143(3) r.w.s. 153A was completed on 05.12.2011 at a total income of Rs. 50,45,040/- as a result of trading addition of Rs. 52,96,336/- was made by the AO. Thereafter the penalty order has been passed by the

AO imposing a penalty of Rs. 17,20,000/- U/s 271(1)(c) of the Act on 10.03.2014. The assessee challenged the order of imposing penalty before the Id. CIT(A) and contended that in the quantum proceeding the AO has made an addition by estimating the income at GP rate 17% which was restricted by the Id. CIT(A) to 15% resulting the trading addition sustained at Rs. 46,96,846/-. Thus, it was contended before the Id. CIT(A) that the addition made on estimation basis without any documentary evidence regarding suppression of sales or inflating purchase no penalty can be levied U/s 271(1)(c) of the Act. The assessee has also placed reliance on the decision of the Hon'ble Jurisdictional High Court. The Id. CIT(A) deleted the penalty on the ground that without any specific incriminating document found during the search the penalty is not sustainable.

3. Before us, the Id. DR has submitted that it was a case of accommodation entries on account of purchase made by the assessee from several parties. Therefore, when the AO has given a finding that the purchases shown by the assessee are not genuine because as many as 10 parties were found to be providing accommodation entries and hence, the purchases of the assessee could not subject to proper verification. The Id. DR has further submitted that it is not a simple case

of estimation of income by the AO but it is a case of unverifiable purchases shown by the assessee from the parties who are found to be providing accommodation entries. In support of her contention she has relied upon the decisions of Hon'ble Supreme Court in case of **Union of India vs. Dharamendra Textile Processors 306 ITR 277** as well as the decision of the Coordinate Benches of this Tribunal in case of **ITO vs. Bhansali Trading Corporation 42 ITR(T)254**. She has relied upon the order of the Assessing Officer.

4. On the other hand, Id. AR of the assessee has submitted that no incriminating document was found during search and seizure operation in the case of the assessee to show that the assessee has claimed bogus purchases. The stand of the AO regarding accommodation entries is not based on search conducted at the assessee's case but it based on search and seizure action in case of M/s Clarity Gold Pvt. Ltd. The Id. AR has further submitted that the AO estimated the income of the assessee by applying 17% gross profit which was restricted by the Id. CIT(A) in quantum appeal to 15%. Therefore, the addition sustained in the quantum appeal is based only on estimation and therefore, no penalty can be levied against such addition. In support of his contention he has relied upon the decision of Hon'ble jurisdictional High Court in

case of **Malpani House of Stones vs. CIT** in D.B. ITA No. 341/2005 vide order dated 01.03.2017 and submitted that the Hon'ble High Court has decided this issue in favour of the assessee.

5. We have considered the rival submissions as well as the relevant material on record. In the case of the assessee there was a search U/s 132(1) of the Act on 20.05.2009. During the course of search and seizure operation statement of the Director of the assessee was recorded. Undisputedly no incriminating document was found to show bogus purchases however, the statement of Shri Anil Kumar Lalwani was confronted with Shri Khushi Kumar Ameriya the director of the assessee. On the basis of these statements the AO during the assessment U/s 143(3) r.w.s. 153A of the Act rejected the books of accounts U/s 145(3) of the Act and then estimated the income of the assessee by applying GP @ 17% which has resulted a trading addition of Rs. 52,96,336/-. In the appeal against the assessment order the Id. CIT(A) has restricted the trading addition but by applying 15% GP rate instead of 17%. Thus, it is clear that the income was estimated by the AO without any incriminating material except the statement recorded during search. The Id. CIT(A) has considered the levy of penalty in para 4.3 of the impugned order as under:-

"4.3 I have carefully perused the order of the AO and submissions of the AR of the appellant and concur with the submissions of the AR of the appellant on the following grounds:

- i) The facts of the case are that:*
 - a) The search and seizure operations were carried out at business and residential premises of the assessee group on 20.5.2009.*
 - b) The assessee had filed its return u/s 139 of IT Act on 6.12.2006 declaring loss of Rs. 1,86,7583/- and subsequent to the search a return was filed in response to notice u/s 153A on 22.7.2011 declaring total loss of Rs. 1,86,758/-.*
 - c) An assessment u/s 143(3)/ 153A was completed on 5.12.2011 determining the income at Rs. 50,45,040/- after making an addition of Rs. 52,96,336/-. Penalty proceedings for furnishing inaccurate particulars and concealment of income were initiated under sec. 271(1)© on 5.12.2011.*
 - d) The assessee preferred an appeal before the CIT(A). The Id CIT(A) vide his combined order, ITA No. 382 and 383/2011-12, dated 21.2.2013 for A.Y. 2005-06 and 2006-07 confirmed the premises of the AO in the assessment order but reduced the trading addition made by the AO by estimating the GP rate at 15% resulting in a sustenance of trading addition at Rs. 46,96,846/-.*
 - e) Penalty u/s 271(1)(c) was imposed vide order dated 10.3.2014 holding the assessee guilty of concealment of income by way of making bogus purchases and reducing correct profit earned.*
- ii) The AO observed in the assessment order that during the course of search, Sh. K.K. Ameriya, the Managing Director of the Jaipur Branch of the concern had categorically admitted that bogus bills were being obtained from some of the concerns Whit had been found to be entry providers during the course of survey by the BCTT*

Wing of the Department. It was further observed that evidence was found during the course of search that there was suppression of turnover in A.Y. 2007-08.

The estimation of the GP at 17% by the AO was based on the case of the sister concern namely M/s Clarity Gold Pvt. Ltd. and Gem Mart Pvt. Ltd. who were also engaged in the same business and also on the fact that assessee had himself shown a GP rate of 18% in A.Y. 2009-10.

iii) The CIT(A) confirmed the observations of the AO regarding the admission by Sh. K.K. Ameriya of bogus purchases having been made by the different concerns of the group and that certain documents were seized pertaining to A.Y. 2007-08 to show that the assessee had suppressed his turnover during that A.Y. and on the basis of 'these pieces of evidence the GP rate was estimated at 15% pursuant to a similar finding in the case of M/s Clarity Gold Pvt. Ltd. on saint facts.

iv) On perusal of the order of CIT(A), it is seen that on page 12 para 8.1(ii) the Id. CIT(A) has observed that Sh. K.K. Ameriya admitted that bogus bills were obtained from different firms since F.Y. 2005-06 that is A.Y. 2006-07 and not A.Y. 2005-06 i.e. the year under consideration. Similarly the documentary evidence regarding suppression of sales pertained to A.Y. 2007-08. In Short; no specific incriminating evidence was gathered regarding bogus purchases for this, A.Y. during the course of the search either by way of statement or document. Therefore, the Explanation-5A to sec. 271(1)(c) is not applicable to the facts of the case of the appellant for this A.Y. However, it has been mentioned that there were certain parties that were found to be bogus entry providers. The AO has noted that purchases had been made from four parties that had been issuing bogus bills in the case of M/s Clarity Gold Pvt. Ltd. Therefore, an estimated trading Addition was made of R. 52,96,336/- by applying a GP rate of 17%.

It is pertinent to note that the Hon. ITAT Jaipur Bench vide its order in the case of Clarity Gold Pvt. Ltd. for A.Y. 2005-06 to 2009-10 dated 5.3.2014 has deleted the entire trading addition made on the same facts relied upon by the AO for making the trading addition in the case of the appellant.

Secondly, in absence of any specific evidence either by way of statement U/s 132(4) or documentary evidence pertaining to this A.Y. the provisions of Explanation-5A of Sec. 271(1)(c) are not applicable to the facts of the case. Instead the observations of Hon. Jurisdictional High Court in the case of CIT vs. Krishi Tyre and Retreading and rubber Industries (2014) 44 taxmann.com 9 (Raj) are applicable to the facts of the case. The Hon. High Court has observed as followed:

3. Brief facts may be observed that the respondent is a registered firm and is engaged in retreading of old (worn out) tyres of all vehicles. Besides the job work, the respondent-assessee was also selling such raw material to local parties. A survey operation came to be carried out at the business premises of the respondent on November 16, 1995, where some documents were found, which, according to the Assessing Officer, was not satisfactorily explained and, accordingly, on account of the said discrepancies, an estimated addition was made of Rs. 1,44,000. The respondent preferred an appeal against the said addition of Rs. 1,44,000, which came to be sustained by the Commissioner of Income-tax (Appeals) and on further challenge before the Income-tax Appellate Tribunal, the Tribunal modified the order passed by the lower authorities and restricted the addition to Rs. 1,00,000 by, inter alia, preferring to the fact that the addition was made on estimate basis by lower authorities and looking to the facts on record and the explanation of the assessee, part relief of Rs. 44,000 was granted, thereby sustaining an addition of Rs. 1,00,000 on estimate basis.....

9..... On a perusal of the facts stated hereinbefore, it transpired that the addition has been sustained purely on estimate basis and, in

our view, no positive fact or finding has been found so as to even make the said addition. It is, according to us, a pure guess work and, in our view, on such guess work or estimation, no penalty under section 271(1)(c) of the Act can be said to be leviable. For imposing penalty under section 271(1)(c) of the Act, the Assessing Officer has to clearly prove the conduct of the assessee, which in this case, has not been proved. Merely because the books of account of the assessee were rejected or estimated addition was made, in our view, no penalty is leviable. The assessee offered an explanation, which could not be termed as not bona fide. In the absence of any corroborative evidence to prove the charge of concealment, in our view, the penalty could not be imposed.”

The facts of the case of the appellant are same. Purchases were made from four parties who were held to be entry providers. Thereafter GP rate was estimated. Since the addition was made on estimation basis by the AO which was further reduced by CIT(A) on estimation and no specific incriminating documents were found during the search pertaining to this A.Y., penalty U/s 271(1)(c) cannot be imposed on such estimated additions in the case of the appellant.

Given the facts of the case discussed in detail above and the law applicable to those facts, the penalty of Rs. 17,20,000/- U/s 271(1)© for concealment of income is deleted.”

The facts recorded by the Id. CIT(A) are not in dispute and therefore, when the addition in the quantum proceeding is based on estimation then the decision of Hon'ble Jurisdictional High Court in case of **CIT vs Krishi Tyre and Retreading and rubber Industries 44 taxmann.com 9** as followed by the Id. CIT(A) as well as decision in

case of Malpani House of Stones vs. CIT (supra) are applicable in the case before us. The Hon'ble High Court in the case of Malpani House of Stones vs. CIT after considering the various decisions has held in paras 11 and 12 as under:-

"11. We have heard counsel for both the sides.

12. Taking into consideration the observations which are made by the Assessing Officer, CIT(A) and the Tribunal, the expenses or the credits which were shown by the creditors cannot be proved, therefore, no substantial tax is paid. Therefore, in that view of the matter, on the basis of the observations made by the Delhi High court and Gujarat High Court, in our view, the issue is required to be answered in favour of the assessee and against the department.

12.1 Therefore, the issue is answered in favour of the assessee and against the department."

6. As regards the decision relied upon by the Id. DR, we are of the view that when the addition is not based on any incriminating documents or evidence then the decisions could not help the case of the department. Accordingly, in view of the above facts and circumstances of the case, we do not find any error or illegality in the impugned order of the Id. CIT(A) qua this issue.

In the result, the Revenue appeal is dismissed.

Order pronounced in the open court on 06/07/2018.

Sd/-

(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-

(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 06/07/2018.

*Santosh.

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

1. अपीलार्थी / The Appellant- ACIT, Central Circle-1, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Gupta Emerald Mines Pvt. Ltd., Mumbai.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 881/JP/2014}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar