**IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI**

# BEFORE HON'BLE SH. G. S. PANNU, AM & HON'BLE SH. SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 5099/Mum/2016
(**निर्धारणवर्ष** / Assessment Year: 2009-10)

| | | |
|---|---|---|
| Global Jewellery Pvt. Ltd.<br>G-49, Gem &Jewellery Complex, Seepz,<br>Andheri(east)<br>Mumbai-400096 | **बनाम**/<br>Vs. | DCIT 9(3)(2)<br>Mumbai<br>Pin- |
| स्थायीलेखासं./जीआइआरसं./PAN No. AABCG5222E | | |
| (अपीलार्थी/**Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

| | | |
|---|---|---|
| अपीलार्थीकीओरसे/ **Appellant by** | : | Shri AnujKisnadwalla, AR |
| प्रत्यर्थीकीओरसे/**Respondentby** | : | Shri Saurav Kumar Rai, DR |

| | | |
|---|---|---|
| सुनवाईकीतारीख/ **Date of Hearing** | : | 31/05/2018 |
| घोषणाकीतारीख / **Date of Pronouncement** | : | 13/08/2018 |

आदेश / O R D E R

**Per Sandeep Gosain, Judicial Member:**

The present Appeal filed by the assesseeis against the order of Ld. CIT (Appeal) – 16, Mumbai dated 29.06.16 for AY 2009-10 on the grounds mentioned herein below:-

*Penalty amounting to Rs.4,21,792/- has been levied on the addition made on account of bogus purchases*

*The Ld. Commissioner of Income Tax (Appeals) erred in imposing penalty on account of addition made on bogus purchases.*

*The levy of penalty is wrong looking to the fact of the case and deserves to be deleted.*

*Miscellaneous:-*

*The appellant craves leave to add, alter or vary any of the grounds of appeal.*

2. At the very outset, Ld. AR appearing on behalf of the assessee drawn our attention to letter dated 30th May 2018 filed by the assessee for seeking admission of additional ground, which are reproduced below:-

*I. The learned CIT(A) ought to have held that the penalty order dated 25.03.2015 passed by the Assessing Officer u/s.271(1)(c) of the Act is bad in law and withoutjurisdiction.*

*II. The learned CIT(A) ought to have directed the Assessing Officer to compute correctly the penalty amount payable on addition of R5.3,36,6581-, which comes to R5.1,00,9971- as against R5.4,211 7921- wrongly levied by the Assessing Officer.*

*III. The appellant craves leave to add to, alter, amend and/or delete any of the grounds of appeal*

Ld. AR submitted before us that the additional grounds of appeal specifically brings out the issues and raised pure question of law. It was submitted that it will bring out error in quantifying penalty and goes to the roots of the matter. The necessary facts required for adjudication of the additional grounds of appeal and for issue of quantification are already on record and hence no new facts are required to be brought on record.

3. On the other hand Ld. DR requested for dismissal of application dated 30.05.18 for admission of additional grounds.

4. We have heard the counsels for both the parties on this application for admission of additional grounds, keeping in view the contents of the application and the judgments relied upon and also the facts of the case, we allow the application of assessee and admit the additional grounds moved by the assessee.

5. The brief facts of the case are thatassesseecompany filed its return of income for AY 2009-10 on 27.09.11 declaring total loss of Rs. 1,45,85,482/-. The case was selected for scrutiny and an assessment u/s 143(3) of the Act was completed on 20.11.11 determining the total loss of the assessee at Rs. 23,26,900/-. The assessee preferred an appeal against the assessment order dated 20.11.2011 which was partly allowed by the Ld.CIT(A) vide order dated 20.08.201, the effect to which was given by the A.O. vide order 17.06.2014 revising the net loss to Rs.1,02,83,619/- Subsequently, the case was re-opened by issuing notice u/s 148 and assessment u/s.1433) r.w.s. 147 was completed on 28.08.2014 assessing the total loss at Rs.99,46,961/- after disallows bogus purchases of Rs.3,36,658/- and penalty

proceedings were also initiated for concealment/furnishing inaccurate particulars of income. Thereafter an order u/s.271(1)(c) of the Act was passed on 25.03.2015 levying a penalty of Rs.4,21,792/- on the assessee.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties, **dismissed** the appeal of the assessee.

Now before us, the assessee has preferred the present appeal on the grounds mentioned above.

**Main Grounds & Additional Grounds No. I to III.**

6. Since all the grounds raised by the assessee are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in confirming the penalty made by AO u/s 271(1)(c) of I.T. Act, therefore we thought it fit to dispose of the same by this common order.

7. We have heard Ld. Counsels for both the parties at length and we have also perused the material placed on record as well as

the orders passed by revenue authorities and judgments cited before us. We find as per the facts of the present case, that assessee filed its return of income for AY 2009-10 on 27.09.11 declaring total loss of Rs. 1,45,85,482/-. Thereafter, the case was selected for scrutiny and an assessment u/s 143(3) of the Act was completed on 20.11.11 thereby determining the total loss of the assessee at Rs. 23,26,900/-, assessee preferred an appeal against the assessment order dated 20.11.2011 which was **partly allowed** by the Ld. CIT(A) vide order dated 20.08.201, the effect to which was given by the A.O. vide order 17.06.2014 revising the net loss to Rs.1,02,83,619/- Subsequently, the case was re-opened by issuing notice u/s 148 and assessment u/s.143(3) r.w.s. 147 was completed on 28.08.2014 assessing the total loss at Rs. 99,46,961/- after disallowing bogus purchases of Rs.3,36,658/- and penalty proceedings were also initiated for concealment/furnishing inaccurate particulars of income. Thereafter an order u/s.271(1)(c) of the Act was passed on 25.03.2015 levying a penalty of Rs.4,21,792/- on the assessee.

Ld. AR appearing on behalf of the assessee reiterated the same arguments as were raised before Ld. CIT(A) and also relied upon the written submission filed before Ld. CIT(A). It was submitted that the assessee had made genuine purchases from the parties and all the details were provided to AO. However, AO had made additions on the basis of list of suspicious dealers reported on the MAHAVAT website. It was further submitted that the assessee had provided all the necessary documents to prove the genuineness of purchases in the shape of bills, comparable bills, etc and the payment for the purchase of material had also been made by account payee cheques, which was reflected in the books of the assessee. It was further submitted that the assessee had not preferred any appeal against the additions made by AO just to avoid litigation and to buy peace of mind, but by that it does not prove the purchases made by assessee was bogus. Therefore, the penalty u/s 271(1)(c) of the I.T. Act levied by the AO was not sustainable as there was no concealment of particulars or furnishing of inaccurate particulars on behalf of the assessee.

Ld. AR also relied upon the orders passed by Coordinate Bench of Hon'ble ITAT in the case of **Earthmoving Equipment Service Corporation Vrs. DCIT,** wherein the Hon'ble ITAT in similar circumstances had deleted the penalty, the operative portion is contained in para no. 7 of the order and the same is reproduced below:-

> *7. On merits, Ld. AR has assailed imposition of penalty on various grounds and placed reliance on various judicial pronouncements which we have duly considered. We find that first of all Section 69C could not be applied to the facts of the case as the payments were through banking channels which were duly reflected in the books of account and therefore, there was no unexplained expenditure w) thin the meaning of Section 69C incurred by the assessee. Further, we find that the assessee was in possession of purchase invoices and various other documentary evidences qua these purchases. A bare perusal of the purchase invoices reveals that the assessee has purchased consumables etc. from the alleged bogus suppliers, which are connected, at least to some extent, business*

*of the assessee. The assessee, during quantum proceedings itself filed revised computation of income after disallowing the alleged bogus purchases by citing the reason that the suppliers were not traceable during assessment proceedings. Nevertheless, the assessee was in possession of vitalevidences in his possession to prima facie substantiate his purchases to some extent particularly when the payments were through banking channels. Merely because the suppliers could not be traced at the given address would not automatically lead to a conclusion that there was concealment of income or furnishing of inaccurate particulars by the assessee. The assessee made a claim which was bona fide and the same was coupled with documentary evidences but the same remained inconclusive for want of confirmation from the suppliers. Therefore, overall facts of the case do not justify imposition of penalty on the assessee and therefore, the same deserves to be deleted on merits of the case. All the cited case laws support the view taken by us in the matter. Therefore, by deleting the impugned penalties, we allow assessee's appeal.*

After having gone through the orders passed by the Coordinate Bench of ITAT, we find in this case that during the

assessment proceedings, assessee had placed on record all the documents with regard to purchase of the material in the shape of bills, invoices, etc. and had also proved that the payments to the parties were made through account payee cheques. Merely because the suppliers could not be traced at the given address would not automatically lead to a conclusion that there was concealment of income or furnishing of inaccurate particulars by the assessee. The assessee made a claim which was bona fide and the same was coupled with documentary evidences but the same remained inconclusive for want of confirmation from the suppliers. In these circumstances at the most, we can draw an inference that the claim made by the assessee remained *'unproved'*, but not *'disproved'*. Even, nothing was brought on record by the AO to prove that the claim of the assessee was false. This fact still remains under shadow of doubt. Under these circumstances, we doubt whether penalty can be levied as per law contained in the Income Tax Act. In this regard, we take guidance from the judgment of Hon'ble Gujrat High Court in the case of **National Textiles Corporation Vrs. CIT 249 ITR 125**

**(Guj.),** wherein it was held that if the assessee gives an explanation which remains *'unproved'* , but is not *'disproved'*, no penalty is imposable. Identical view was taken by **Hon'ble Bombay High Court** in the case of **CIT Vrs. Upendra Vrs. Mithani (ITA no. 180/Mum/2009).** Therefore, overall facts of the case do not justify imposition of penalty on the assessee and therefore, the same deserves to be deleted on merits of the case. All the cited case laws support the view taken by us in the matter.

Ld. AR also relied upon the orders passed by Coordinate Bench of Hon'ble ITAT in the case of **Shri DilipShirodkarvrs. ITO,** wherein the Hon'ble ITAT in similar circumstances had deleted the penalty, which is contained in para no. 9 of the order and the same is reproduced below:-

> *9. We have considered the entire facts and circumstances of the case. This fact is not denied that the land was situated in a village. Further, this fact is also not denied that the impugned land is described as agricultural land in the land records maintained with*

*the local authorities. This fact is also not denied that the assessee belonged to a rural background and he is not well educated. The assessee is apparently not aware of the 'nitty-gritties' of the income-tax proceedings. The assessee was personally present in the court room. He had apparently acted on the advice of other persons, who were indeed not competent enough to advise the assessee. These facts have nowhere been denied by the AD or Ld. CIT(A). The conduct of the assessee has been such that the moment he came to know that agricultural land may be situated within 8 kms of the municipal limits, and therefore, it may not be exempt from income-tax, he immediately revised the return of income and paid tax thereon. Although, the assessee withdrew the claim and paid taxes, the precise location of land and its distance from the municipal limit is still unknown. During the penalty proceedings also nothing was brought on record by the AO to prove that the claim of the assessee was false and distance of the land was actually less than 8 kms from the municipal limits. This fact still remains under shadow of doubts. During the penalty proceedings also, nothing was brought on record by the AO to prove that the claim of the assessee was false and distance of the land was actually less than 8 kms. The*

*addition has been made solely relying upon the revised computation sheet filed by the assessee. In the given circumstances, we find that it cannot be said that the claim was not bonafide at all. No mala fide intentions can be attached in this case. The nature of land is accepted by the AO to be agricultural land. It is admittedly located in a village. The only reason for disallowing the claim was the possibility of itslocation within the 8 kms radius of the municipality. The exact answer to this question is not available on record. Under these circumstances, the addition itself remains under the shadow of doubts. Under these circumstances, we doubt whether penalty can be levied as per law contained in the Income Tax Act. In this regard, we take guidance from the judgment of Hon'ble Gujrat High Court in the case of National Textiles Corporation vs CIT 249 1TR 125 (Guj),wherein it was held that if the assessee gives an explanation which remainsunproved, but, is not disproved, no penalty is imposable. Identical view was taken by Hon'ble Bombay High Court in the case of CIT vs UpendraV. Mithani (ITA No 1860 of 2009 Dt 5th August, 2009), wherein following observations were made:-*

> *"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 withthe view taken by the Commissioner ofIncome Tax (A).*

*TheCommissioner 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."*

*Thus, in view of facts of this case and aforesaid legal position, we do not find it to be a case of concealment of income or furnishing of inaccurate particulars of income, and thus not fit for levy of penalty. Therefore, penalty levied by the AO is directed to be deleted.*

After having gone through the aforementioned judgments passed by respective High Courts and by the Coordinate Bench of Hon’ble ITAT, we find that during the assessment

proceedings, assessee had submitted all the documentary evidence and in order to give an explanation which remains unproved, but was not disproved. Therefore, in such circumstances, no penalty was imposable. In this respect, Coordinate Bench of Hon'ble ITAT in the case of **Shri Dilip Shirodkar Vrs. ITO (supra)** had already decided the case of similar circumstances by referring the identical view taken by Hon'ble Bombay High Court in the case of **CIT vs Upendra V. Mithani (ITA No 1860 of 2009 dated 5th August, 2009),** wherein it was held that *"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."*

Therefore, considering the interest of justice and in view of the facts of the present case as well as aforesaid legal proposition, we do not find it to be a case of 'concealment of income' or furnishing of 'inaccurate particulars of income', and thus not fit for levy of penalty. Therefore, penalty levied by the AO is directed to be deleted. Resultantly, these grounds raised by the assessee are **allowed.**

8. In the net result the appeal filed by the assessee **is allowed.**

*Order pronounced in the open court on 13th August 2018*

| | |
|---|---|
| *Sd/-* | *Sd/-* |
| (G. S. Pannu) | (Sandeep Gosain) |
| लेखासदस्य / Accountant Member | न्यायिकसदस्य / Judicial Member |

मुंबई Mumbai;दिनांकDated : 13.08.2018
*Sr.PS. Dhananjay*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/** BY ORDER,

**.उप/सहायकपंजीकार**
(Dy./Asstt.Registrar)
**आयकरअपीलीयअधिकरण,** मुंबई/ **ITAT, Mumbai**