

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD “B” BENCH**

**(BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT  
& SHRI MAHAVIR PRASAD, JUDICIAL MEMBER)**

**ITA. No: 3384/AHD/2015  
(Assessment Year: 2009-10)**

<b>Madhav Construction 16, Snehkunj Society Nr. Manekbaug Hall, SR Road, Ambawadi, Ahmedabad</b>	<b>V/S</b>	<b>Income Tax Officer, Ward- 9(2)(3), Ahmedabad</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**PAN: AANFM 8341D**

**Appellant by : Shri S. N. Divetia, AR  
Respondent by : Shri Mudit Nagpal, Sr. D.R.**

**(आदेश)/ORDER**

Date of hearing : 01 -11-2018

Date of Pronouncement : 01 -02-2019

**PER MAHAVIR PRASAD, JUDICIAL MEMBER**

1. This appeal by the Assessee is directed against the order of the Ld. CIT(A)-5, Ahmedabad dated 21.09.2015 pertaining to A.Y. 2009-10 and following grounds have been taken:

*1.1 The order passed u/s.250 on 21.09.2015 by CIT(A)-5 Abad for A.Y.2009-10 confirming penalty of Rs..2,97,660/- levied u/s.271(l)(c) by ITO, Ward 9(2), Abad is wholly illegal, unlawful and against the principles of natural justice.*

*1.2 The Ld. CIT(A) has grievously erred in not considering fully and properly the explanation furnished by the appellant.*

*2.1 The Ld. CIT(A) has grievously erred in law and on facts in upholding penalty of D.2,97,660 levied u/s.271(l)(c) on the ground that by failure to produce books of accounts, the appellant had furnished inaccurate particulars and concealed income to the extent of GP addition of Rs..9,63,300/-.*

*2.2 That in the facts and circumstances of the case as well as in law, the Ld. CIT(A) ought not to have upheld that the appellant had furnished inaccurate particulars and concealed income to the extent of GP addition of Rs..9,63,300 and thereby confirmed penalty of Rs..2,97,660 u/s.271(l)(c).*

2. In this case, assessment for A.Y. 2009-10 was finalized u/s.143(3) of the I. T. Act, on 12/12/2011 determining total income of Rs.23,46,301/- against the return income of Rs.4,31,390/- after making the following additions :-
- 1) Addition on account of cession of liabilities u/s.41(i) - Rs.9,51,611/-
  - 2) Addition on account of fall in GP - Rs.9,63,300/-

Penalty proceedings initiated u/s.271(l)(c) of the Act in respect of the above additions.

3. Another opportunity was given to the assessee vide this letter dated 20/1/2014 due to change to the incumbent of this office.
4. The assessee has submitted its reply vide letter dated 03/02/2014, the same areas under:-

*" During the course of scrutiny hearing, I/ we have-presented the audit report u/s.44AB as mandatorily required by the provision of income tax act, 1961 with audited balance sheet and profit & loss account. The audit has also been mandatorily done by the provision of objected the fall G.P. as being considered by then ITO just by comparing with previous year figure. GP has been differing from business to business and industry to industry depending upon the cycle of the process that the business is required. Construction of Residential project is spread over 3 to 4 years is general and hence cycle of the process only complete after that and full and final project cost arrived.*

*As per Accounting Standard 9 "Revenue Recognition" issued by the institute of Chartered Accountant clarified the point of recognition of revenue in particular when business cycle is spread over more than 1 year. It says, revenue can only be recognized when there will be certainty with regard to it.*

*Moreover, As 7 "Construction Contract" also stated that, when percentage completion method has been adopted, the mark up or sales work done value has to be arrived taking into consideration of receipts from the prospective member along with the cost incurred till a date.*

*The total cost incurred up to 31st March, 2008 as per percentage completion method is Rs.4,71,30,800 while during the year cost incurred with, mark up as per percentage completion method comes to Rs.2,50,20,805 totaling Rs. 7,21,51,605. And though member receipts upto 31st March 2009 was Rs.5,40,58,226/-. So cost or work done has been escalating due-to price rise and other things while member receipts has not been received in that space and this make some if uncertainty towards the business sale receipts which as per AS 9 prevent to being shown that much GP margin compared to previous it year. Although GP of whole project / scheme-has been remain 43.90% as evident by consolidated P & L A/c from 1.4.2006 to 31.3. 2013 attached herewith for your reference.*

5. Assessee reply is considered but found not acceptable. In this case, the addition made on account of cessation of liabilities of Rs. 9,51,611/- has been deleted by the ld. CIT(A)-XV, Ahmedabad vide appeal No. CIT(A)-

XV/ITO/9(4)/439/11-12 dated 4/02/2013, whereas the addition made on account of GP amounting to Rs. 9,63,300/- has been upheld.

6. During the course of assessment proceedings, it was observed that the assessee has declared GP @ 16.15% on the total turnover of Rs.2,50,20,805/- as compared to the GP @ 20.30% on the total turnover of Rs.3,42,17,760/-. The assessee was requested to produce books of accounts with bills and vouchers and documents by the then AO. However, the assessee failed to produce the books of account with vouchers and bills.
7. The assessee failed to comply the same. In absence of bills and vouchers and relevant documents the correctness and genuineness with transaction and expenses could not be verified. In view of this facts, the book result of the assessee was rejected by the then AO In view of the provision of section 145(3) of the I. T. Act. Since, there was a drastic fall in GP as compared to the preceding the year, the then AO estimated the GP @ 10% and accordingly made addition of Rs.9,63,300/-.
8. While confirming this addition, the Ld.-CIT(A)'s has stated that in absence of bills and vouchers and books of accounts (not produced before the AO as well as before him) and certificate from the Architect to certify such value of work done, the rejection of books of accounts by the AO was held justify.
9. It is further stated that in the case of R. K. Brothers (2003) 87 ITD 649 (All), it had been held that when concealment of income is apparent from record, penalty can be imposed even on the basis' of estimate of income. In the decision in the case of Kirit Dahyabnai Patel, dated 17/7/2009, reported in 285 DTR AMD (TM) (Trib) 380 it has been held that the fact of. penalty

- proceedings in some or1 the years may have been dropped, was not of material consideration. The plea that mens rea has to be established is not sustainable, following the decision of the Hon'ble Supreme Court in the case of Dharmendra Textile 219 CTR 617. The decision also upholds the applicability of section 271(l)(c) of the I. T. Act, 1961.
10. The assessee has furnished inaccurate particulars of income by showing lesser GP as compared to the preceding year with, regard to reduce its tax liability for the year under consideration.
  11. In view of the above it is established that the assessee has furnished inaccurate particulars of income and concealed the income as stated above and committed default u/s.274 r.w.s. 271(l)(c) of the I.T. Act. .
  12. And hence penalty was levied to the tune of Rs. 297660/-.
  13. Against the levy of penalty, assessee preferred first statutory appeal before the Id. CIT(A) who dismissed the appeal of the assessee.
  14. Now by way of second appeal, assessee has come before us.
  15. In the case, appellant is a partnership firm and engaged in the business of civil construction. During the course of asstt. Proceedings, the A.O. noticed that the appellant had disclosed GP @ 16.15% as against GP of 20.30% for the last year. Hence, the A.O. called upon the appellant to produce books of accounts with bills/vouchers and documents which the appellant failed to produce. Hence, the A.O. estimated GP at 20% and made an addition of Rs. 9,63,300/-.

16. Being aggrieved, assessee preferred appeal to Id.CIT(A) who confirmed rejection of the book result as well as estimation of cross profit rate for the identical reasons as canvassed by A.O.
17. On the other hand, appellant submitted the books of accounts were audited and same could not be produced before the lower authorities for sufficient cause and further contended that books of accounts were subject to tax audit and the same were prepared following the Accounting Standard by ICAI. And even the Id. CIT(A) had not called for certificate from architect.
18. In quantum proceeding in assessee's own case in ITA NO. 1454/Ahd/2013 for the assessment year 2009-10, the Co-ordinate Bench reduced lump sum gross profit percentage of 17% as against 20% and held the reduction of gross profit would meet the end of justice.
19. As we can see, this is the case of estimation of profit. In the instant case, the assessee applied a different gross profit and Id. A.O. and Id. CIT(A) adopted different estimates and it could not be said the assessee had concealed the particulars of income so as to attract penalty under 271(1)(c).
20. In the case of CIT vs. Birla Cotton Spinning & Weaving Mills Ltd., the Hon'ble High court has held that in the case of estimation of income or gross profit, penalty cannot be levied. In the case of ITO vs. J.K. Synthetics Ltd. ITAT held the real question is whether the assessee or had reason to believe that the estimate submitted by it were true at the time when assessee made them. Where assessee offer an explanation and adduce evidences, the nature of the evidence

may provide the material to come to the conclusion whether assessee deliberately filed false estimate.

21. Therefore in our considered opinion, in the case of estimation of gross profit wherein revenue authorities and ITAT differ with the conclusion in such cases, penalty cannot be levied.

22. In the result, appeal filed by the Assessee is allowed.

Order pronounced in Open Court on 01- 02- 2019

Sd/-

**(PRAMOD KUMAR)**  
**VICE PRESIDENT**

True copy

Ahmedabad: Dated 01/02/2019

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

Sd/-

**(MAHAVIR PRASAD)**  
**JUDICIAL MEMBER**

By ORDER

Deputy/Asstt.Registrar  
ITAT,Ahmedabad