

**IN THE INCOME TAX APPELLATE TRIBUNAL  
(DELHI BENCH 'C' : NEW DELHI)**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
AND  
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER**

**ITA No.13/Del./2016, A.Y. 2008-09**

**ITA No. 14/Del/2016, A.Y. 2008-09**

Income Tax Officer, Ward 51(5), New Delhi  (APPELLANT)	Vs.	M/s. Mbians International Inc. 170, M-floor, Gaffar Market, Karol Bagh, New Delhi <b>(PAN : AAOFM8028Q)</b> (RESPONDENT)
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ASSESSEE BY : None  
REVENUE BY : Shri Amit Katoch, Sr. DR

Date of Hearing : 23.01.2019

Date of Order : 27.02.2019

**ORDER**

**PER KULDIP SINGH, JUDICIAL MEMBER :**

Since both the aforesaid appeals are inter connected, the same are being disposed of by way of composite order to avoid repetition of discussion.

**ITA no. 13/Del/2016**

2. The appellant Income Tax Officer, New Delhi (hereinafter referred to as 'the revenue') by filing the aforesaid appeal, sought to set aside the impugned order dated 16/10/2015 passed by Ld. Commissioner of Income Tax(Appeals)-17, New Delhi qua the Assessment Year 2008-09 on the grounds inter alia that :

***“1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in reducing the addition made by the AO on account of bogus purchases of Rs. 66,17,470/- to 20% of such purchase.***

***2. On the fact and in the circumstances of the case, the Ld. CIT(A) has erred in reducing the addition of the account of bogus purchases to 20% of the addition without any cogent reasons there for.”***

**ITA no. 14/Del/2016**

3. The appellant Income Tax Officer, New Delhi (hereinafter referred to as 'the revenue') by filing the aforesaid appeal, sought to set aside the impugned order dated 16/10/2015 passed by Ld. Commissioner of Income Tax(Appeals)-17, New Delhi qua the Assessment Year 2008-09 on the grounds inter alia that :

***“1. On the facts and circumstances of the case, the Ld. CIT(A) has erred in reducing the penalty of Rs. 20,44,881/- u/s 271(1)(c) of the I.T.Act.”***

**ITA no. 13/Del/2016**

4. Briefly stated that facts necessary for adjudication of the controversy at hand are : Assessing Officer framed the assessment u/s 143(3) of the Act by making addition of Rs. 66,17,470/- on account of bogus purchases from M/s. Lotus Communications and M/s. Deepa Enterprises on the ground that the assessee has failed to file any evidence in the form of confirmation from aforesaid parties.

5. We have heard the Ld. DR for the revenue gone through the order passed by lower revenue authorities and documents brought on record.

6. Assessee carried the matter before the Ld. CIT(A) by way of filing the appeal who has restricted the addition to 20% of the bogus purchases which comes to 13,23,548/- and thereby deleted the remaining addition by partly allowing the appeal. Feeling aggrieved the revenue has come up before the Tribunal by way of filing the present appeal.

7. Undisputedly the assessee claimed to have made purchases from M/s. Lotus Communication and Deepa Enterprises to the tune of Rs. 63,85,071/- and 2,32,669/- respectively. It is also not in dispute that the assessee has failed to produce the original confirmation from these two parties during the remand proceeding as the confirmation filed before the AO was not legible. It is also not in dispute that the assessee has claimed that the payments were made in the subsequent years.

8. In the backdrop of the aforesaid facts and circumstances of the case when we examine para 5 of the impugned order passed by Ld. CIT(A) it is categorically recorded therein, “ that the assessee was asked by AO to produce evidence in support of genuineness of both the creditors, however, no confirmation or any subsequent

documents to substantiate genuineness of the creditors were furnished ; that even no detail with regard to the payment made to those creditors even in the subsequent year was filed nor the assessee has produced those person, before before AO; that no payment even till date was made to those persons and as such the above two parties appeared to be Hwala Operators from whom assessee has received entries in the shape of purchases; that the purchases were shown from those parties with intention to inflate the amount of purchases and to reduce the profit that purchases shown in the name of M/s. Lotus Communication and M/s. Deepa Enterprises were not genuine. However, the Ld. CIT(A) by relying upon the case of M/s. Unique Metal Industries proceeded to restrict the addition to 20% of the bogus purchases.

9. We are of the considered view that when the Ld. CIT(A) has categorically arrived at the conclusion that the assessee has failed to adduce any evidence to prove the genuineness of two creditors in question and that purchases shown by the assessee in the name of M/s. Lotus Communication and M/s. Deepa Enterprises were not genuineness, thus, bogus, as only entries have been received by the assessee in the shape of purchases, it is difficult to make out, as to how, the Ld. CIT(A) has restricted the addition made by the AO to 20%. Consequently appeal filed by the revenue is hereby

allowed by setting aside the findings returned by Ld. CIT(A) and the assessment order passed by AO is hereby restored.

**ITA no. 14/Del/2016**

10. Briefly stated that facts necessary for adjudication of the controversy at hand are : On the basis of assessment framed u/s 143(3) AO initiated the penalty proceedings u/s 271(1)(c) of the Act. Declining the contentions raised by the assessee, AO levied the penalty of Rs. 20,44,881/- @ 100% for concealment of income of Rs. 66,17,740/- on the ground that the assessee has concealed his particulars of income / furnished inaccurate particulars of income to evade the tax on concealed income.

11. Assessee carried the matter before Ld. CIT(A) by filing the appeal who has confirmed the penalty levied by AO by dismissing the appeal.

12. We have heard the Ld. DR for the revenue gone through the order passed by lower revenue authorities and documents brought on record.

13. Undisputedly assessee company has claimed to have made purchases from M/s. Deepa Enterprises and M/s. Lotus Communication to the tune of Rs. 66,17,740/-. It is also not in dispute that the assessee has failed to prove during quantum proceedings the alleged purchases made from them by producing

supporting evidences. It is also not in dispute that the quantum addition of Rs. 66,17,740/- has already been confirmed.

14. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower Revenue authorities and arguments addressed by the Id. AR to the parties, the sole question arises for determination in this case is:-

*“as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during assessment proceedings while interpreting the provisions contained u/s 271(1)(c) of the Act?”*

15. Bare perusal of the assessment order on the basis of which penalty proceedings have been initiated goes to prove that the Assessing Officer has not recorded valid satisfaction after applying his mind as to under which limb of Section 271(1)(c) ‘as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income’ rather proceeded to record that “penalty proceedings u/s 271(1)(c) are being initiated separately for default of the assessee for concealment of particulars of his income and furnishing inaccurate particulars of income”. Not only this even at the time of passing the penalty order the Assessing Officer was not clear enough if he has levied the penalty for concealing the particulars of income or for furnishing

inaccurate particulars of income rather proceeded to pass the following orders :-

*“Considering the above facts, I am satisfied that the assessee has concealed his particulars of income/furnished inaccurate particulars of income and has attempted to evade tax on such concealed income as per Section 271(1)(c) read with Explanation I thereto. Penalty imposable u/s 271(1)(c) read with Explanation I thereto on the amount of tax sought to be evaded is worked out as under :-*

<i>Income declared by the assessee</i>	<i>Rs. 43,920/-</i>
<i>Amount of income concealed</i>	<i>Rs. 66,17,740/-</i>
<i>Tax sought to be evaded on concealed income</i>	<i>Rs. 20,44,881/-</i>
<i>Minimum penalty imposable @ 100%</i>	<i>Rs. 20,44,881/-</i>
<i>Maximum penalty imposable @300%</i>	<i>Rs. 61,34,643/-</i>
<i>Penalty imposed @ 100%</i>	<i><u>Rs. 20,44,881/-</u></i>

16. Undisputedly, additions made against the assessee during quantum proceedings have already been confirmed. It is settled principle of law that the penalty cannot be imposed merely on the ground that additions made in the income of the assessee has been confirmed rather to proceed with imposition of penalty u/s 271(1)(c), the AO has to prove that there was concealment of particulars of income or assessee has furnished inaccurate particulars of such income.

17. Bare perusal of the assessment order as well as penalty order go to prove that at no point of time the assessee has been called upon to explain if he has concealed the particulars of income or furnished inaccurate particulars of such income. Hon’ble Karnataka High Court in case of **CIT vs. Manjunatha Cotton and**

**Ginning Factory & Ors. (supra)** dealt with the identical issue threadbare and came to the following conclusion :-

*“63. In the light of what is stated above, what emerges is as under: 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) Ever 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) & (B) it should be discernible from the said order which would by a legal 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 Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).*

*h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.*

*i) The imposition of penalty is not automatic.*

*j) Imposition of penalty even if the tax liability is admitted is not automatic.*

*k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the assessing officer in the assessment order.*

*l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.*

*m) If the explanation offered, even though not substantiated by the assessee, but is found to be 10 ITA No.4549/Del./2011 bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.*

*n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.*

*o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority. p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income*

*q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.*

*r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural*

*justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.*

*t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.*

*u) The findings recorded in the assessment proceedings in so far as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings."*

18. So, following the law laid down by Hon'ble High Court in **CIT vs. Manjunatha Cotton and Ginning Factory & Ors.** (**supra**), we are of the considered view that the AO has failed to fulfill the condition laid down u/s 271(1)(c) of the Act before levying the penalty which is not automatic. Even otherwise, when it is not discernible from the assessment order as to whether assessee has furnished inaccurate particulars of income or has concealed particulars of income so as to apply the deeming provisions contained under Explanation 1 (A) & 1(B) of the Act, the penalty u/s 271(1)(c) of the Act is not sustainable.

19. In view of what has been discussed above, we are of the considered view that AO/CIT (A) have erred in levying/confirming

the penalty of Rs.20,44,881/- which is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, the appeal filed by the assessee is hereby allowed.

**Order pronounced in open court on this 27<sup>th</sup> February, 2019.**

**Sd/-  
(B.R.R.KUMAR)  
ACCOUNTANT MEMBER**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated 27<sup>th</sup> /02/ 2019  
BR**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)-XXVI, New Delhi.
5. CIT(ITAT), New Delhi.

**AR, ITAT  
NEW DELHI**

Date of dictation	18.01.2019
Date on which the typed draft is placed before the dictating Member	18.01.2019
Date on which the typed draft is placed before the Other Member	27.0.2019
Date on which the approved draft comes to the Sr. PS/PS	27.02.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	27.02.2019
Date on which the fair order comes back to the Sr. PS/PS	27.02.2019
Date on which the final order is uploaded on the website of ITAT	27.02.2019
Date on which the file goes to the Bench Clerk	27.02.2019
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	