

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” Bench, Mumbai**

**Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member**

**ITA No.7279/Mum/2017
(Assessment Year: 2001-02)**

M/s Pritesh Oxygen
A-902, Eversun Building,
Sahakar Nagar, Near Apna Bazar,
Andheri (West),
Mumbai – 400 053

Income Tax Officer
Ward-13(2)(4)
4th Floor, Aaykar Bhavan,
Mumbai- 400 020

Vs.

PAN – AACFP3959M

(Appellant)

(Respondent)

Appellant by: Shri Kapil Jain, A.R
Respondent by: Shri Abi Rama Kartikiyen, D.R

Date of Hearing: 28.03.2019
Date of Pronouncement: 03.04.2019

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-28, Mumbai, dated 19.09.2017, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short 'I.T Act'), dated 28.06.2017 for A.Y 2001-02. The assessee has assailed the order of the CIT(A) by raising before us the following ground of appeal :

“On the facts and circumstances of the case, the Learned Commissioner of Income Tax (Appeals) is not justified in sustaining the Levy of Penalty of Rs.1,28,402/-U/s. 271(1)(c) of the Income-tax Act.”

2. Briefly stated, the assessee firm which is engaged in the business of manufacturing and trading in oxygen had filed its return of income for A.Y. 2001-02, declaring total income of Rs. Nil. After scrutiny, the income of the assessee was assessed by the A.O vide his order passed under Sec. 143(3),

dated 26.02.2003 at Rs. 26,65,129/-. Aggrieved, the assessee carried the matter in appeal before the CIT(A)-XV, Mumbai, who by his order dated 21.07.2004 partly allowed the same. On further appeal by the assessee the ITAT, Mumbai vide its order dated 26.02.2009 restored the matter to the file of the A.O. Subsequently, pursuant to the directions of the Tribunal the A.O passed an order under Sec. 143(3) r.w.s 254 of the I.T Act on 27.12.2010 and determined the total income of the assessee at Rs.16,77,970/-, after *inter alia* making the following additions/disallowances :

Sr. No.	Particulars	Amount
1.	Disallowance of rent claimed to have been paid to Mrs. Shakuntala Goyal (wife of a partner) for hiring of oxygen gas cylinders.	Rs.1,15,000/-
2.	Addition u/s. 69 of the unexplained cash credits.	Rs.1,51,550/-
	Total	Rs.3,27,557/-

3. Aggrieved, the assessee assailed the order passed by the A.O under Sec.143(3) r.w.s 254 before the CIT(A). However, the CIT(A) not being persuaded to subscribe to the contentions advanced by the assessee, dismissed its appeal vide his order dated 29.02.2012. The assessee accepted the order of the CIT(A) and did not assail the quantum assessment any further in appeal before the Tribunal.

4. The A.O after receiving the order of the CIT(A), dated 29.02.2012, therein called upon the assessee to explain as to why penalty under Sec. 271(1)(c) may not be imposed on it. The explanation advanced by the assessee that no penalty was liable to be imposed did not find favour with the A.O. In fact, the A.O was of the view that the assessee had furnished inaccurate particulars of its income in respect of the addition/disallowance made on two issues viz. (i) suppression of the profits by raising an ingenuine claim of rent paid to Smt. Shakuntala Goyal (wife of the partner of the assessee) towards hiring of oxygen gas cylinders: Rs.1,15,200/-; and (ii) addition u/s 69 of 'unexplained cash deposits' in the bank account of the assessee firm: Rs.1,51,550/-. On the basis of his conviction that the

assessee had furnished inaccurate particulars of its income within the meaning of Sec.271(1)(c) the A.O imposed a penalty of Rs.1,28,402/- in the hands of the assessee.

5. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) in appeal before the CIT(A). However, the CIT(A) did not find favour with the contentions advanced by the assessee and dismissed the appeal.

6. The assessee being aggrieved with the upholding of the penalty u/s 271(1)(c) by the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the quantification of the penalty imposed by the A.O suffered from a clerical mistake. The Id. A.R took us through the order passed by the A.O under Sec. 271(1)(c) and submitted that the additions in respect of the disallowance of rent expenses (Rs.1,15,000/-) and unexplained cash credit (Rs. 1,51,550/-) which worked out to Rs.2,66,550/-, was however wrongly taken by the A.O at Rs.3,27,557/-. Adverting to the merits of the case, it was submitted by the Id. A.R that the assessee firm had entered into an 'agreement' with Smt. Shakuntala Goyal for taking on rent 400 gas cylinders @ Rs. 25/- per cylinder per month. It was submitted by the Id. A.R that the lower authorities pointing out certain infirmities in the aforesaid 'agreement' held the same as a bogus arrangement and disallowed the claim of expenses of Rs.1,15,000/- raised by the assessee. It was submitted by the Id. A.R that the assessee had entered into similar informal arrangements/agreements for taking on rent oxygen gas cylinders with other unrelated independent parties, the authenticity of which was however never doubted by the lower authorities. In the backdrop of the aforesaid facts, it was submitted by the Id. A.R that merely for the reason that the assessee had entered into a transaction for taking on rent oxygen gas cylinders with a related party viz. Smt. Shakuntala Goyal would by no means justify characterisation of the same as a sham transaction. Apart there from, it was submitted by the Id.

A.R that adverse inferences as regards the genuineness of the 'agreement' under consideration were based on trivial issues viz. (i) that the 'agreement' was not executed on a stamp paper; (ii) the 'agreement' was not witnessed by a third party; (iii) that the aforesaid party i.e Smt. Shakuntala Goyal who was wife of one of the partner had not taken any security from the assessee; (iv) that xerox copy of the 'agreement' filed by the assessee was found to have been executed on a single page; and (v) that the period for which the 'agreement' was executed was not specified and it was mentioned that the same would continue for a period as may be mutually agreed upon. The ld. A.R in order to drive home his claim that the assessee firm had entered into a genuine agreement for taking on rent oxygen gas cylinders from Smt. Shakuntala Goyal took support of the fact that the rent paid to her was lower than that paid to the independent third parties. Insofar the addition of Rs.1,51,550/- made by the A.O u/s 69 towards 'unexplained cash credits' in the Current Account No. 4364 with PNB, Branch: Bhavanagar was concerned, it was submitted by the ld. A.R that the source of the said cash deposits was primarily the amount of Rs. 2,60,000/- that was withdrawn by the assessee on 01.03.2011 and was re-deposited on various dates in the same bank account in the month of March, 2011. It was averred by the ld. A.R that the lower authorities had erred in not considering the availability of the amount of Rs.2,60,000/- with the assessee, which duly explained the source of the subsequent cash deposits aggregating to Rs.1,51,550/-.

7. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the ld. D.R that as the 'agreement' of the assessee for taking of oxygen gas cylinders on rent with Smt. Shakuntala Goyal (wife of partner of the assessee firm) was proved to be sham, therefore, the A.O had rightly imposed penalty in respect of the said amount under Sec.271(1)(c). Insofar imposition of penalty under Sec.271(1)(c) in respect of the 'unexplained cash credit' of Rs.1,51,550/- was concerned, it was submitted by the ld. D.R that as the assessee had failed to come forth with an explanation as regards the source of the said cash deposits, therefore, no infirmity did emerge from the orders of the lower

authorities as regards imposition of penalty under Sec.271(1)(c) in respect of the said addition.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the assessee had not further assailed the order passed by the CIT(A) wherein the aforementioned additions/disallowances made by the A.O under Sec. 143(3) r.w.s 254 viz. (i) disallowances of rent expenses paid to Smt. Shakuntala Goyal (Rs. 1,15,000/-); and (ii) addition of 'unexplained cash deposits' in bank account (Rs.1,51,550/-), had been confirmed by the said first appellate authority. As regards the disallowance of the rent expenses claimed by the assessee to have been paid to Smt. Shakuntala Goyal (wife of the partner of the assessee firm), we find that the assessee claims to have entered into a 'agreement' with her for supply of 400 oxygen gas cylinders at a rent of Rs.25/- per cylinder per month. However, the genuineness and veracity of the aforesaid arrangement was not accepted by the lower authorities for multiple reasons viz. (i) that the 'agreement' was not executed on a stamp paper; (ii) the 'agreement' was not witnessed by a third party; (iii) that the aforesaid party i.e Smt. Shakuntala Goyal, wife of one of the partner, had not taken any security from the assessee; (iv) that xerox copy of the 'agreement' filed by the assessee was found to have been executed on a single page; and (v) that the period for which the 'agreement' was executed was not specified and it was mentioned that the same would continue for a period as may be mutually agreed upon between the parties. In our considered view, though raising of doubts on the basis of infirmities in the aforesaid 'agreement' may lead to drawing of adverse inferences as regards the genuineness of the said arrangement, however, the same merely on the said count would not conclusively prove the falsity of the said arrangement. We find substantial force in the contention advanced by the ld. A.R that the assessee had taken the oxygen gas cylinders on rent from Smt. Shakuntala R. Goyal, a related party, at a rate which was lower than the rate at which similar transactions had been entered into with independent third parties. Apart there from, we find that the assessee had

entered into similar arrangements with third parties viz. (i) M/s Gaurav Merchantile Ltd. (Page 18 of 'APB'); (ii) Mitt Enterprises (Page 19 of 'APB'); (iii) M/s Madhav Industries Ltd (Page 29 of 'APB'); and (iv) M/s P.V.R. Ship Breaking Company (Page 21 of 'APB'). In fact, neither of the aforesaid 'agreements' are found to have been meticulously drafted and are in form of simple letters or correspondences authenticity of which have not been doubted at any stage by the revenue. We are in agreement with the observations of the lower authorities that the genuineness of the arrangement entered into by the assessee with Smt. Shakuntala Goyal cannot be irrefutably proved to the hilt on a perusal of the aforesaid 'agreement'. However, in our considered view though an unproved claim of the assessee would justify disallowance of the same as an expenditure, but merely on the said basis the assessee cannot be visited with penalty under Sec.271(1)(c). Our aforesaid view is fortified by the judgment of the 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."

We thus not finding ourselves to be in agreement with the view taken by the lower authorities, set aside the order of the CIT(A) and delete the penalty to the extent the same is relatable to the disallowance by the A.O of the rent expenses claimed by the assessee firm to have been paid to Smt. Shakuntala R. Goyal.

9. We shall now advert to the penalty imposed by the A.O as regards the addition made u/s 69 of the 'unexplained cash deposits' of Rs.1,51,550/- in the bank account of the assessee. We find that it is the contention of the

assessee that the cash deposits aggregating to Rs.1,11,550/- (spread over the period 05.03.2001 to 27.03.2001) were made out of the cash withdrawals of Rs.2,60,000/- from its bank account on 01.03.2001. In fact, it is the claim of the assessee that the amount of Rs. 2,60,000/- withdrawn from the bank account on 01.03.2001 was thereafter partly re-deposited on various occasions in the same bank account. The veracity of the claim of the assessee that it had made a cash withdrawal of Rs.2,60,000/- on 01.03.2001 is discernible from a perusal of its Current Account No. 4364 with PNB, Branch: Bhavanagar (Page 48 of 'APB'). In our considered view, the source of the cash deposits aggregating to Rs.1,11,550/- over the period 05.03.2001 to 25.03.2001 can safely be related to the cash withdrawal of Rs.2,60,000/- made by the assessee from its bank account on 01.03.2001, keeping in view the proximity between such deposits and withdrawals. We are of the considered view that though the assessee had failed to conclusively prove to the satisfaction of the A.O that the amount aggregating to Rs.1,11,550/- was deposited out of the cash withdrawal of Rs.2,60,000/- made on 01.03.2001 from its bank account, however, the said fact would not suffice imposition of penalty under Sec.271(1)(c) in the hands of the assessee. Apart there from, we may further observe that it is not the case of the revenue that the amount of Rs.2,60,000/- or any part thereof was found to have been utilised or invested by the assessee for some other purposes, as a result whereof the said amount would not be available with it for making the subsequent deposits in its bank account. We thus not being able to persuade ourselves to subscribe to the view taken by the lower authorities vacate the penalty imposed on the assessee under Sec.271(1)(c) in respect of the cash deposits of Rs. 1,11,550/-.

10. Insofar the cash deposit of Rs. 40,000/- made by the assessee in its bank account on 12.09.2000 is concerned, we find that it is the claim of the assessee before the lower authorities that the said amount was deposited out of the cash withdrawal made from the same bank account on 04.09.2000. We have perused the bank account of the assessee viz. Current A/C No. 4364 with PNB, Branch: Bhavnagar (Page 33 of 'APB') and find that

the assessee had made a cash withdrawal of only Rs. 30,000/- on 04.09.2000 from the said bank account. As observed by us hereinabove, keeping in view the proximity of the time gap between the aforesaid cash withdrawal on 04.09.2009 and the subsequent cash deposit on 12.09.2009, the source of the cash deposit of Rs.30,000/- (out of Rs.40,000/-) can safely be related to the aforesaid withdrawal. However, we find that the assessee has failed to explain the source of the balance cash deposit of Rs.10,000/- [Rs.40,000/- (-) Rs. 30,000/-]. In fact, the claim of the assessee that the entire amount of Rs.40,000/- deposited in the bank account was sourced from the withdrawal made on 04.09.2000 is found correct only to the extent of the cash withdrawal of Rs.30,000/- made by the assessee on 04.09.2000, while for the source of the balance amount of Rs.10,000/- remains unexplained. We thus in terms of our aforesaid observations delete the penalty imposed by the lower authorities as regards the cash deposit of Rs.30,000/- (out of total cash deposits Rs.40,000/-) made by the assessee in its bank account on 12.09.2000. Insofar the penalty imposed by the A.O under Sec. 271(1)(c) as regards the balance cash deposits of Rs.10,000/- (supra) is concerned, the same in the absence of any explanation is upheld. As a result, the penalty imposed by the A.O under Sec. 271(1)(c) in respect of the disallowance of rent charges of Rs.1,15,000/- and addition u/s 69 of 'unexplained cash credit' of Rs.1,41,550/- [Rs. 1,11,550/- (+) Rs. 30,000/-] is deleted.

11. In terms of our aforesaid observations the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 03.04.2019

Sd/-
(N.K. Pradhan)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 03.04.2019
Ps. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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