

आयकर अपीलार्थ अधकरण, अहमदाबाद ँयायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
" SMC" BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And**

Ms. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No. 229/AHD/2018

नधाण वर्ष/Asstt. Year: 1990-1991

M/s Mardia Copper Extrusions Pvt. Ltd., C/o Mehta Lodha & Co., 105, Sakar-I, Near Gandhigram Railway Station, Off Ashram Road, Ahmedabad-380009. PAN: AABCM3848G	Vs.	D.C.I.T, Circle-2(1)(2), Ahmedabad.
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(Applicant)		(Respondent)
Assessee by :		Shri P.D. Shah, A.R
Revenue by :		Ms. Richa Rastogi, Sr. D.R

सुनवाई का तारख/Date of Hearing : 17/07/2019

घोषणा का तारख /Date of Pronouncement: 31/07/2019

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals), Ahmedabad dated 24/11/2017(in short "Ld.CIT(A)") arising in the matter of penalty order passed under s.271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dt. 20/02/2017 relevant to the Assessment Year 1990-1991.

The assessee has raised the following grounds of appeal;

- 1) *That the learned CIT(A) has erred in law and facts by confirming the penalty of Rs.16,66,271/ under section 271(10)(c) of the Act and therefore, the learned AO should be directed to delete the penalty levied under u/s.271(1)(c) of the Act.*
- 2) *That your appellant craves to add, alter or amend any grounds at the time of hearing.*

The issue raised by the assessee is that the Ld. CIT (A) erred in confirming the penalty levied by the AO for Rs. 16,66,271/- u/s 271(1)(c) of the Act.

2. Brief facts of the case are that the assessee is a Limited Company and engaged in the business of manufacturing of brass flats, pipes, rods, copper tubes, etc. including the income from other sources, i.e. commission from the sale of Polyester yarn, chemicals, and engineering goods and income of job receipts.

2.1 The assessee including its directors Sunil Mardia, Suresh Shah, Sudhir R Mardia in the year under consideration was subject to search u/s 132 of the Act. The search was conducted at the factory premises of the assessee as well as the residential premises of the directors. The AO framed the assessment u/s 143(3) of the Act, among other addition, after making an addition of Rs. 41,61,920/- only representing the GP @ 10% of the sale.

2.2 On appeal the Ld. CIT (A) deleted the addition on account of lower GP. The Revenue being aggrieved preferred an appeal before the Honøble ITAT where GP addition was made at Rs. 2,71,350.00 being 1% of the estimated sale of Rs. 2,71,35,000/-. However, the decision of the Honøble ITAT was

further examined by the Honøble High Court where the GP addition was confirmed at the rate of 5% on the estimated sales of Rs. 2,71,35,000/- amounting to Rs. 13,56,750.00 only.

2.3 The AO after the judgment of Honøble High Court further initiated the penalty proceedings and issued a notice to the assessee u/s 274 r.w.s 271(1)(c) of the Act.

2.4 The assessee in its reply submitted that the impugned penalty notice was not issued within the time limit in accordance with the provisions of section 275 of the Act. As such, the penalty order should have been passed after the order of Honøble ITAT.

2.5 The assessee also submitted that the jurisdiction of the assessee does vest with the Income authority based in Ahmedabad. Thus the notice was not issued by the AO having jurisdiction over the assessee.

2.6 The assessee also claimed that the penalty u/s 271(1)(c) cannot be levied merely on rejection/reduction of the claim made by it. As such, the penalty u/s 271(1)(c) is sustained where it can be proved that there was concealment or inaccurate particulars of income. Further to levy the penalty, there should be mens-rea, i.e. there was an existing guilty state of mind. The penalty cannot be levied mere change of opinion or on debatable point.

2.7 However, the AO contended that as per the provision of section 275 (IA) the order of penalty was to be passed within the expiry of six months from the end of the month in which the order of the CIT (A), or the Appellate Tribunal, or the Honøble High Court, or the Honøble Supreme Court is

received by the PCCIT or PCIT. As such the order of Honøble High Court was received by the PCIT on 26-08-2016, therefore, the penalty order was passed according to the provision of law and within the time as discussed above.

2.8 The AO also not accepted the other contentions of the assessee by observing that during the period of the search operation, it has been established that it was involved in unaccounted production and sales. Moreover, the director of the assessee company admitted said facts by giving his statement dated 24-01-1992. On perusal of the statement recorded, it can be seen that the assessee accounted only 1/10th of its actual production/sale. Moreover, the loss of material during the manufacturing operation was only 2% to 4% whereas the assessee recorded @ 13.90%. Thus the assessee was diverting its profit and reduced its GP by following the above practices. The AO further observed that the facts on the order of the ITAT as relied by the assessee in its case for A.Y. 1992-93 is different from the facts of the case in the year under consideration.

Thus the AO in view of the above held that the assessee concealed its income of Rs. 13,56,750/- (i.e. 5% of Rs. 2,71,35,000/-) including declaration of loss of Rs. 14,48,420/- aggregating to Rs. 28,05,170/- only. Thus the AO imposed the penalty u/s 271(1)(c) of the Act at Rs. 16,66,271/- only being 100% of the amount of tax sought to be evaded.

3. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) reiterated the submission as before the AO.

4. However, the Ld. CIT (A) after examining the submission of the assessee observed that the AO levied the penalty within the time as specified under the provision of section 275(IA) of the Act which authorized him to impose the penalty after the decision of Honøble High Court. The Ld. CIT (A) was of the view that the Honøble High Court in the case of Shanti Enterprises v/s ACIT (SLP No. 5717 of 2014) has clarified the word may that had been used in section 275(1A) as it creates an obligation upon the AO to pass consequential order.

4.1 The Ld. CIT (A) rejected the contention of the assessee that penalty has been levied based on estimation and debatable issue. The ld. CIT-A upheld the penalty as it was levied in consequence to the order of the Honøble Gujarat High Court which has been passed after considering all the relevant documents.

4.2 The Ld. CIT (A) after having a reliance on the Judgment of Honøble Gujarat High Court in the case of ACIT v/s Chandravillas Hotel reported in 29 Taxmann 492 rejected the contention of the assessee that penalty cannot be levied based on estimation.

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

5. The learned AR before us reiterated the submissions as made before the authorities below. The ld. AR also submitted that the order passed by the AO is barred by the limitation as specified under section 275 of the Act. The learned AR accordingly prayed to delete the addition made by the AO and confirmed by the learned CIT-A.

6. On the other hand, the learned DR vehemently supported the order of the authorities below.

7. We have heard the rival contentions of both the parties and perused the materials available on record. The 1st controversy arises for our adjudication whether the order passed by the AO is barred by the limitation. On perusal of the provisions of section 275(1)(a) of the Act, as applicable to the year under consideration, we note that the AO was under the obligation to pass the penalty order after the pronouncement of the order of the ITAT within the specified time. However, in the case on hand, the AO passed the penalty order after passing the judgment by the Honøble Gujarat High Court dated 20-02-2017. The relevant details of the orders /judgments are given as under :

- i. The date of the penalty order is 20-02-2017
- ii. The date of the ITAT order in quantum proceedings is 30-11-2006
- iii. The date of receipt of the Honøble High Court order in quantum proceedings 26-08-2016

Thus from the above, it is clear that the penalty order was passed by the AO, which is barred by the limitation. It is also a settled law that the penalty provisions shall be applicable as prevailed in the year under consideration.

7.1 As such the amendment was brought under the statute by inserting the provisions of section 275(1A) by the amendment Act 2006 which will not be applied to the year under consideration as such amendment cannot be applied retrospectively.

7.2 In holding so, we find support and guidance from the order of ITAT Amritsar in the case of ITO versus Sh. K.D. Bali in ITA No. 137/ASR/2014 dated 4th of July 2016. The relevant extract of the order is reproduced below:

We have heard the rival parties and have gone through material placed on record, We find that Assessing Officer had initiated the penalty proceedings on 31.12.1999 but did not pass an penalty order and it was only after the Hon'ble High Court decided the issue in favor of Revenue that penalty proceedings were revh ed. From the provisions of section 275(I A), we find that the provisions were included in the Act vide amendment Act, 2006 and it was applicable from 13.07.2006 whereas the case of the asscssee relates to assessment year 1994-95, therefore, at the time of filing of return for the assessment year 1994-95 the provisions of section 275(I A) were not applicable. The Hon'ble Supreme Cumi m the case of B.N. Sharma vs. CM reported at 226 ITR-442 (SC) has held thai the penalty imposable should be worked out on the basis of law in force at the time ot Illiit; of return which contained alleged concealment or miss-statement. We further find that the Delhi Bench of ITAT in ITA No. 2192 vide order dated 22.07.2011. for Ass. Year 19988-99 in the case of Cosmo Films ltd. vs. ACIT (supra) under similar facts and circumstances vide pars 10 to |7 has decided similar issue in favor of ussessee by holding as under:

"10. Thus as per section 275(l)(a) proviso, in order to be uithin limitation, a penalty order needs musi he passed, in the facts of the present case, within one year from the end of the financial year in which the order of the commissioner(A) is received by the Chief Commissioner or Commissioner, whichever is later in a case where the assessment order is subject matter of appealbefore the Commissioner(A) and the Conimissioner passes the order on or after 1.6.2003 disposing of scuh appeal.

12. Apropos the Department's contention thai the case is covered by the proviso to section 275(I A) rather than the proviso to section 275(l)(a) of the Act, it is seen that this is not correct. Section 275(I A) reads as follows:

"[(I A) In a case where the relevant assessment or other order is the subject-matter of an appeal lo the Commissioner (Appeals) under section 246 or section 246A or an appeal to the Appellate Tribunal under section 253 or an appeal lo the Nigh Court under section 260A or an appeal to lhe Supreme Conn under section 261 or revision under section 263 or section 264 and an order imposing or enhancing or reducing or cancelling penalty or dropping the proceedings for the imposition of penalty is passed before the order of the Commissioner (Appeals) or the Appellate Tribunal or the High Court or the Supreme Court is received by the Chief Commissioner or the Commissioner or the order of rev ision under section 263 or section 264 is passed, an order imposing or enhancing or reducing or cancelling penalty or dropping the proceedings for the imposition of penalty may be passed on the basis of assessment as revised by giving effect to such order of the

Commissioner (Appeals) or, the Appellate Tribunal or the High Court, or the Supreme Court or order of revision under section 263 or section 764.

13. As per section 275(1 A) of the Act. therefore, the limitation provided there under concerns cases where the assessment order or revision is under appeal at the relevant stage and an order imposing or enhancing or reducing or cancelling penalty or dropping the proceeding for imposition of penalty passed before the appellatant order is received by the Department or order of revision is passed. In such a situation, an order imposing or enhancing or reducing or canceling penalty or dropping the proceedings for the imposition of penalty may be passed on the basis of assessment as revised by giving effect to the appellate order or the revisional order.

14. However in: the present case, no order either imposing or enhancing or reducing or cancelling penalty or dropping the proceedings for the imposition of penalty stands passed. That being so. the provisions of section 275(1 A) are not applicable.

15. In view of the above, the penalty order is hit by the provision to section 275(1)(a) of the Act. Going by the para-meters laid down therein in the said section, the penalty order is clearly beyond the limitation provided therein.

16. Accordingly, the penalty order is cancelled, being barred by limitation, as above."

11. In the present case, the order of the Ld.CIT(A) in the quantum appeal was passed after 1.6.2003. i.e. on 31.7.2003 as available from the record. It was received by the Department on 7.8.2003 as unrebuttedly contended by the learned counsel for the assessee. Thus, as per the proviso to section 275(1)(a) of the Act, the penalty order ought to have been passed on or before 31.3.2005. i.e. within one year from the end of the financial year in which the Id. CIT(A)'s order was received back by the Department. The penalty order, however, got to be passed only on 28.7.2009, that being so, the contention of the assessee is correct. The penalty order is clearly barred by limitation provided by the proviso to 275(1)(a) of the Act.

Besides the above, we also note that the ITAT Ahmedabad in the own case of the assessee bearing ITA No. 105/AHD/2014 for the assessment year 1992-93

vide order dated 3-4-2017 involving identical issue has decided the appeal in favour of the assessee. The relevant extract of the order is reproduced as under:

11. *We have duly considered rival contentions and gone through the record. Section 271(1)(c) of the Income Tax Act, 1961 has direct bearing on the controversy. Therefore, it is pertinent to take note of the section.*

"271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person

*(a) and (b)** ** (c) has concealed the particulars of his income or furnished inaccurate particulars of such income.*

He may direct that such person shall pay by way of penalty.

*(i)and (Income-tax Officer,** ** (iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:*

Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

12. *A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this section is deeming provisions regarding*

concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation I appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

13. *In the light of the above, if we examine the facts of the present case, then it would reveal that as far as addition with respect to suppressed profit is concerned, it is an estimated addition which was significantly reduced by the Tribunal. This issue is a debatable issue as the addition made by the AO was deleted by the ld.CIT(A), and when the Tribunal restored these additions partly, then appeal of the assessee has been admitted by the Hon'ble High Court suggesting the question of law is involved. In such type of issue it cannot be said that the explanation submitted by the assessee in support of its addition as false, proving the fact that the assessee has concealed its income. Similarly, the assessee has given explanation with regard to the issue of bogus purchases. Its explanation was accepted by the ld.CIT(A) in the quantum appeal, but such conclusions of the ld.CIT(A) did not meet the approval of the Tribunal. But again, the Hon'ble High Court has admitted question on this aspect also. Therefore, it is also debatable issue. The ld.CIT(A) has considered both these aspects in the impugned order and deleted the penalty. After going through the order of the ld.CIT(A), we do not see any reason to interfere in it. Accordingly, the appeal of the Revenue is dismissed.*

14. *In the result appeal of the Revenue is dismissed.*

In view of the above, we are not convinced with the finding of the lower authorities qua the issue of the penalty discussed above. Hence the ground of appeal of the assessee is allowed.

Order pronounced in the Court on 31/07/2019 at Ahmedabad.

-Sd-
(Ms MADHUMITA ROY)
JUDICIAL MEMBER

(True Copy)
Ahmedabad; Dated 31/07/2019
Manish

-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER