

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No. 7211/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2008-09)

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| Smt. Sonali A. Shah Prop M/s. Mannat Enterprises Flat No.301/302/302, Raj Prashar, 3 rd Floor, 95-F, Indrayan Road, Mumbai- 400054. | बनाम/ Vs. | ITO 21(2)(4) Mumbai |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADPA7722N | | |
| (अपीलार्थी /Appellant) | .. | (प्रत्यर्थी / Respondent) |
| Assessee by: | Shri Neelam C. Jadhav | |
| Revenue by: | Shri Chaudhary Arun Kumar Singh (DR) | |

सुनवाई की तारीख / Date of Hearing: 17/07/2019

घोषणा की तारीख /Date of Pronouncement: 19/07/2019

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 12.08.2016 passed by the Commissioner of Income Tax (Appeals)-38, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 2008-09 in which the penalty levied by the AO has been order to be confirmed.

2. The assessee has raised the following grounds: -

- “1. Penalty of Rs.47,09,550/- on Estimated GP additions of Rs.1,56,98,499/-



1. *The Learned CIT(A) failed to appreciate that there was neither concealment nor furnishing of inaccurate particulars of income, therefore, the penalty confirmed on Estimated GP additions may be deleted.*
2. *Without prejudice to the above, on the same facts the Honorable ITAT had deleted the penalty in Assessee's own ease in earlier year i.e. A.Y. 2007 - 2008, as the facts being identical, the penalty confirmed by the CIT(A) may be deleted.*

Penalty of Rs.65,19,472/- on addition u/s 41(1) of Rs.2, 17,37,574/-

1. *The Learned CIT(A) failed to appreciate that the Honorable ITAT in quantum proceedings had deleted the addition made u/s. 41(1) of Rs.2,17,31,574/-. Hence, the penalty cannot be sustained on deleted addition.*
2. *Without prejudice to the above, the creditors were paid in subsequent years, and hence, there is no question of cessation of liability within the meaning of sec. 4 1(1) of the Act. Therefore, penalty cannot be levied on the same.*
3. *The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal."*

3. The brief facts of the case are that the assessee filed her return of income on 13.09.2008 declaring total income to the tune of Rs.1,93,100 relevant to the A.Y. 2008-09. The assessment was completed u/s 143(3) of the Act on 30.12.2010 determining total income to the tune of Rs.4,70,39,160/-. The assessee was a proprietor of M/s. Mannat Enterprises and was engaged in the business of dealing in Iron & Steel Products, Textiles Fabrics and Clothes, etc. The assessee had shown gross profit of Rs.17.25 lakhs on a total turnover of Rs.21.87 crores during the year under consideration as compared to gross profit of Rs.20.61 lakhs on the turnover of Rs.20.56 crores shown in the immediately preceding year. The



assessee had declared gross profit of 0.77% approximately for the year under consideration. During the assessment proceedings, it was noticed that the assessee had inflated the purchases by obtaining the bogus purchase bills and had routed various transactions through banks by illegal means. The AO issued notices u/s 133(6) of the I.T. Act, 1961 to verify the purchases made by the assessee. The assessee failed to prove the purchases with supporting documents. The AO rejected the assessee books of account and gross profit was estimated @ 10% from Iron-Steel business and 20% from textile business. Similar enquiry was carried out by the AO in the current year. The AO issued the notice u/s 133(6) of the Act to various parties, the parties failed to confirm the transaction. The notice was also send to M/s. Kranti Textiles and M/s. Kishore Creations. However, these parties were not found at the their given address. The AO tried to verify the purchase from the other parties and arrived at this conclusion that the purchase in respect of 13 parties was not verifiable. Accordingly, the AO rejected the books of account and adopted the G.P. @ 20% in respect of textile business on total turnover of Rs.4,76,28,648/- and GROSS PROFIT @ 10% in respect of Iron-Steel on turnover of Rs.17,10,84,032/- and worked out the gross profit at Rs.2,66,34,132/- which resulted in addition of Rs.2,49,08,504/-. The AO further made the addition of Rs.2,17,31,574/- u/s 41(1) of the Act, on account of cessation of liability in respect of certain parties. The addition of Rs.1,20,526/-



was made on account of expenses which was personal in nature. The proceeding was initiated u/s 271(1)(c) of the I.T. Act, 1961. The assessee filed an appeal before the CIT(A) and CIT(A) upheld the books of account and estimated the GP @ 3% of turnover of Rs.17,10,84,032/- for Iron-Steel business which worked out to Rs.51,32,520/- as against Rs.1,71,08,403/- worked out by the AO. The CIT(A) has also re-assessment GP @ 15.20% of turnover of Rs.4,76,28,648/- for textile business which worked out to Rs.72,39,554/- as against Rs.95,25,729/- worked out by the Assessing Officer. Since the CIT(A) has confirmed the addition, however, reduced the gross profit, therefore, the penalty proceeding u/s 271(c) of the Act was initiated by issuance of notice and after the reply of the assessee, the penalty to the tune of Rs.1,10,74,728/- was levied. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who partly allowed the claim of the assessee and directed the AO to re-calculate the amount of penalty as per the provisions u/s 271(1)(c) of the I.T. Act, 1961. Feeling aggrieved, the assessee has filed the present appeal before us.

4. We have heard argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the assessee has argued that in the similar circumstances, the penalty was levied by AO in the A.Y. 2007-08 which was deleted by **Hon'ble ITAT vide order dated 07.11.2016 in ITA. No.5720/M/2013**, therefore, in the said circumstances, the



penalty is liable to be set aside on the similar grounds. It is specifically argued that the Hon'ble ITAT has also deleted the quantum, therefore, in the said circumstances, the penalty is not leviable in the interest of justice. However, on the other hand, the Ld. Representative of the Department has refuted the said contention. It is not in dispute that in the present case, the penalty has been levied on estimation basis. In the similar circumstances, the penalty has been levied by AO in the A.Y. 2007-08. The penalty has been deleted by Hon'ble ITAT for the A.Y. 2007-08 by virtue of order dated 07.11.2016. The relevant finding has been given in para no. 7 to 11 which is hereby reproduced as under: -

“7. We have heard the rival submissions and perused the orders of the authorities below and the case law relied on. In this case the assessee is into the business of textiles, iron and steel. There was a survey in the premises of the assessee and in the course of survey it was noticed that the assessee was showing very low gross profit on the turnover from the business of textiles as well as iron and steel. The Assessing Officer when requested for furnishing the details of godowns and warehouses addresses the assessee seems to have given evasive replies. The survey party has also found that the assessee is operating her business in a small place on a sharing accommodation without even any furniture/staff etc. The survey party also recorded a statement from assessee's husband who has stated that they did not have any opening stock or closing stock in both the business as they receive orders from the parties they place orders with the members directly and the material is supplied to the parties. The assessee raises bills on her client and in turn her suppliers also raise bills on the assessee. In the course of assessment proceedings, the Assessing Officer issued notices to various parties who have sold materials to the assessee. Many of the notices were returned unserved. However, assessee seems to have produced the confirmations before the Assessing Officer whereas notices were returned unserved. The Assessing Officer after noticing various discrepancies in the confirmations he treated such confirmations as dubious and non genuine. In view of all these discrepancies the



Assessing Officer rejected the books of accounts of the assessee and estimated the gross profit at 20% in respect of sales made in the textile business and 10% in sales made in iron and steel business. The Ld. CIT(A) sustained the action of the Assessing Officer in rejecting books of accounts and estimating of gross profit. However, the Tribunal while sustaining the rejection of books of accounts by the lower authorities as they are not reliable and at the same time held that the gross profit estimated in the iron and steel business and textile business is on higher side. The Tribunal reduced the gross profit rate by 5% in both the businesses of the assessee.

8. The Assessing Officer levied penalty holding that there is concealment of income or furnishing of inaccurate particulars which the Ld. CIT(A) sustained. On a reading of the orders of the lower authorities i.e. the assessment order and the Ld. CIT(A)'s order, we find that the books of accounts were rejected on noticing various discrepancies such as no proper confirmations from the parties, low GP rate, no proper stock records, no details of warehouses, godowns etc. We notice that it was not concretely established that there is concealment of income or furnishing of inaccurate particulars in this case. The books were rejected as they are not reliable and the addition was made by estimating the gross profit. The activity of the assessee in doing these businesses by placing orders with the dealers who supply the materials directly to the clients of the assessee and the assessee raising invoices on the clients and the dealers on the assessee is also not in dispute. In fact it is the finding in the survey report that assessee is keeping some margin from such sales. Therefore the lower authorities could not concretely prove that there is furnishing of inaccurate particulars or concealment of income in showing less GP in the businesses. Mere estimation of gross profit will not lead to furnishing of inaccurate particulars or concealment of income.

9. In the case of Commissioner of Income Tax vs. M.M. Rice Mills (2002) 253 ITR 17 (P & H) following the decision of Hon'ble Punjab High Court in the case of CIT vs. Metal Products of India (150 ITR 714) held as under: ITA No.5720/M/2013 Mrs. Sonali A. Shah & "merely because the addition had been made on estimate under the proviso to s. 145(1) by adopting the view that the gross profit shown in the books of account was too low as there were defects in the method of accounting employed, did not automatically lead to the conclusion that there was failure to return the correct income by means of fraud or gross or willful neglect".



10. In the case of Harigopal Singh vs. CIT (258 ITR 85) the Hon'ble Punjab & Haryana High Court held that where the assessment is made on estimate basis, no penalty under s. 271(1)(c) can be imposed. The Hon'ble High Court observed that there was a difference of opinion as regards the estimate of income of the assessee. Since the Assessing Officer and the Tribunal adopted different estimates in assessing the income of the assessee, it could not be said that the assessee had concealed the particulars of his income so as to attract cl. (c) of s. 271(1)(c) of the IT Act, 1961.

11. In the case of CIT vs. Nawab and Bros. (1977) 107 ITR. 681 (All), the Hon'ble Allahabad High Court held as under: "that the only reason why his books were rejected was that the assessee was not maintaining a day-to-day stock register. The correct income was determined by merely applying a flat rate on the returned turnover. In view of these facts, it could not be said that the assessee was guilty of either fraud or willful neglect in the matter and the assessee had discharged the burden that lay on him. The Tribunal was justified in law in cancelling the penalty."

5. On appraisal of the above mentioned order, it is quite clear that no penalty is liable to be sustainable if the addition raised on the basis of estimation on gross profit. It has also come into notice that the quantum has been deleted by Hon'ble ITAT in the assessee's own case in **ITA. No.2944/M/2013 for the A.Y.2008-09**. The relevant finding is hereby reproduced as under: -

"4.3. We have heard the rival submissions and perused the material before us. We find that the addition was made by the AO u/s.41(1) of the Act, that the AO had held that the creditors were not available on given addresses, that the FAA had called for a remand report from the AO with regard to the claim made by the assessee about payment made to the creditors in subsequent years, that in the remand report the AO had not mentioned anything about on the spot inquiry by the inspector, that there was change in office of the FAA, that the new FAA passed the order where he mentioned about the inquiry conducted by the inspector, that the ledger accounts of the parties show that the assessee had paid the money to the creditors in subsequent years. Once the payment to the creditors is proved by necessary documentary evidences there is no



justification for sustaining the order of the FAA. Therefore, reversing his order, we decide grounds no.4-5 in favour of the assessee."

6. Taking into account all the fact and circumstances of the case and also considering both the grounds on account of which the penalty levied discussed above the penalty is not leviable. Accordingly, we are of the view that the finding of the CIT(A) is not justifiable, therefore, we set aside the same and delete the penalty.

7. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 19/07/2019.

Sd/-

Sd/-

(RAJESH KUMAR)

(AMARJIT SINGH)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 19/07/2019

Vijay

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.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai