

**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. 5108/Mum/2018

(निर्धारण वर्ष / Assessment Year: 1997-98)

Sudhir Vora Moheshwar Mension, 602, 6 <sup>th</sup> Floor, Bapubhai, Vashi Road, Vile Parle, Mumbai- 400056.	<b>बनाम/</b> Vs.	ACIT-CC-3(2) 18 & 19 Air India Bldg, Nariman Point, Mumbai- 400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAPV9690D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri A. L. Sharma	
Revenue by:	Shri V. Vinod Kumar (DR)	

सुनवाई की तारीख / Date of Hearing: 05/12/2019

घोषणा की तारीख /Date of Pronouncement: 19/12/2019

**आदेश / ORDER**

**PER AMARJIT SINGH, JM:**

The assessee has filed the present appeal against the order dated 04.06.2018 passed by the Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter referred to as the “CIT(A)”] relevant to the A.Y. 1997-98 in which the penalty levied by the AO has been order to be confirmed.

2. The assessee has raised the following grounds: -

“1 On the facts and circumstances of the case, the Ld. CIT(A) erred in holding that the penalty levied of Rs.170,000/- u/s 271(1)(c) on the quantum addition related to the commission income earned stands confirmed on the quantum as determined by the AO as per the direction of Hon'ble ITAT.

- b. *The Ld. CIT(A) erred in stating that penalty is confirmed inspite of the fact that Hon'ble Tribunal has set aside the assessment to the file of the AO and as such appellant submits that the penalty order is also to be set aside.*
3. *The appellant craves, leave to add, alter modify any ground of appeal before or at the time of hearing."*

3. The brief facts of the case are that the assessee filed his return of income on 29.10.1997 declaring total income to the tune of Rs.1,83,310/-. Thereafter, a search action was carried out in the case of the assessee on 24.09.1998. Thereafter, the assessment was completed on 28.03.2000 determining taxable income at Rs.5,79,84,610/-. Thereafter, the Hon'ble ITAT has set aside the assessment order, subsequently, the order u/s 143(3) r.w.s. 254 of the Act dated 17.11.2008 was passed at a total income in sum of Rs.1,25,29,699/- on account of following additions.: -

S. No.	Name	Amounts
1	Commission on hawala bills	Rs.8,55,330/-
2	Unaccounted sales proceeds	Rs.45,18,575/-
3	Subsidy received	Rs.29,300/-
4	Sundry Creditors	Rs.22,85,042/-
5	Loan Creditors	Rs.43,19,112/-
6	Opening Capital	Rs.3,39,000/-

Thereafter the penalty proceeding was initiated. Since the CIT(A) has confirmed the addition on commission of hawala bills in sum of Rs.3,81,631/- and Opening Capital in sum of Rs.23,584/-, therefore, the penalty in sum of Rs.1,70,000/- was levied. Feeling aggrieved, the

assessee filed an appeal before the CIT(A) who confirmed the order of the AO, therefore, the assessee has filed the present appeal before us.

**4.** We have heard the argument advanced by the Ld. Representative of the parties and perused the record. The AO has levied the penalty on account of Commission on hawala bills in sum of Rs.3,81,631/- and on account of Opening Capital in sum of Rs.23,584/-. The Ld. Representative of the assessee has argued that the Hon'ble ITAT on the ground of Commission of hawala bills has set aside the finding of the CIT(A) and remanded the issue before the AO, therefore, the penalty is not liable to be sustainable in accordance with law. It is also argued that the Opening Capital in sum of Rs.23,584/- was assessed on the basis of the estimation basis, therefore, no penalty is liable to be sustainable. The copy of order dated 29.08.2017 passed by Hon'ble ITAT in ITA. No.4621/M/2013 & 4622/M/2013 is on the file in which we noticed that the issue of Commission of hawala basis has been restored before the AO to decide the matter of controversy afresh. Apparently, at this stage, there is no demand of on account of Commission on hawala bills, therefore, the penalty is not liable to be sustainable in the eyes of law. Now, coming to the second point on the basis of which the penalty has been levied, is in connection with the Opening capital in sum of Rs.23,584/-. Appraisal of the Hon'ble ITAT order in the assessee's own case (supra) we observed that the finding of the CIT(A) has upheld by Hon'ble ITAT which has been assessed on estimation basis.

The penalty is not liable to be sustainable when the income has been assessed on estimation basis and in this regard. We also find support of law settled by the Hon'ble Delhi High Court in CIT vs. Aero Traders Pvt. Ltd., reported in 322 ITR 316 (Del), in which it is held that no penalty u/s 271(1)(c) can be imposed when income is determined on estimate basis. Similar view has been taken by the Hon'ble Punjab & Haryana High Court in the case of Harigopal Singh vs. CIT reported in 258 ITR 85 (P&H) and the Hon'ble Gujarat High Court in the case of CIT vs. Subhash Trading Company reported in 221 ITR 110 (Guj). In view of the foregoing precedents, it is apparent that when the bedrock of instant penalty is the estimate of net profit, the same cannot be sustained. Accordingly, we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty. Accordingly, we set aside the finding of the CIT(A) on this issue and delete the penalty.

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

Order pronounced in the open court on 19/12/2019.

Sd/-

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 19/12/2019

Vijay Pal Singh/Sr. PS

(AMARJIT SINGH)

न्यायिक सदस्य/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.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

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