

**IN THE INCOME TAX APPELLATE TRIBUNAL
“RAJKOT” BENCH, RAJKOT**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SMT. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos. 475 & 476/Rjt/2015
(निर्धारण वर्ष / Assessment Years. : 2006-07 & 2007-08)

Deputy Commissioner of Income Tax Morbi Circle, Morbi	बनाम/ Vs.	M/s. Italica Floor Tiles Pvt. Ltd. Bandhunagar, Morbi
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCL2816C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

&

आयकर अपील सं./I.T.A. No. 480/Rjt/2015
(निर्धारण वर्ष / Assessment Year: 2008-09)

Deputy Commissioner of Income Tax Morbi Circle, Morbi	बनाम/ Vs.	M/s. Vrundavan Ceramics Pvt. Ltd. 8-A, National Highway, Survey No. 143/2, Village: Dhuva, Tal. Wankaner, Dist. Rajkot
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACV9308B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	Shri Anil Kumar Das, Sr. D.R.
प्रत्यर्थी की ओर से / Respondent by :	Shri Mehul Ranpura, A.R.

सुनवाई की तारीख / Date of Hearing	19/12/2019
घोषणा की तारीख /Date of Pronouncement	20/12/2019

आदेश/ORDER

PER PRADIP KUMAR KEDIA - AM:

The captioned appeals by the Revenue are directed against the Commissioner of Income Tax (Appeals)-1, Rajkot. The relevant details are tabulated as under:

ITA Nos.	Name of assessee	AY	CIT(A)'s order dated	AO's penalty order dated	AO's order under Section
475/Rjt/15	M/s. Italica Floor Tiles Pvt. Ltd.	2006-07	27.07.15	21.03.14	271(1)(c) of the Income Tax Act, 1961 (in short 'the Act')
476/Rjt/15	-Do-	2007-08	-Do-	-Do-	-Do-
480/Rjt/15	M/s. Vrundavan Ceramics Pvt. Ltd.	2008-09	28.07.15	-Do-	-Do-

2. We shall take ITA No.475/Rjt/2015 concerning AY 2006-07 as a lead case for adjudication.

ITA No.475/Rjt/2015 - AY- 2006-07 (in case of M/s. Italica Floor Tiles Pvt. Ltd.)

3. The Revenue is aggrieved by the order of the CIT(A) whereby the penalty under s.271(1)(c) of the Act amounting to Rs.55,94,938/- levied by the AO was deleted by the CIT(A).

4. The CIT(A) found the penalty to be unsustainable in law for the following reasonings:

“6. I have perused the written submission, assessment order, penalty order, order of the ld. CIT(A) on the quantum appeal and the Hon. ITAT on the quantum appeal. The ld. AR of the appellant had taken up the case of the appellant on following multiple grounds.

- a. Penalty is not leviable where the profit itself is worked out on estimation basis.*
- b. Penalty is not leviable on notional income.*
- c. Penalty not leviable where the case has not reached its finality.*

- d. *The decision of the Hon. Gujarat High Court in the case covered under VAT on a similar issue, has been decided against the Revenue.*
- e. *The decision of the Hon. ITAT Hyderabad on similar issue has been decided against the Revenue.*
- f. *Penalty is not leviable where two opinions exists.*
- g. *Addition by itself does not justify penalty*

In support of all the above arguments, the Id. AR of the appellant has made exhaustive and deep arguments in the case. Further, as pointed out by the Id. AR of the appellant, similar to the action of the Income tax department, the Sales tax department had also initiated punitive action against all the manufacturers in whose case suppression of evasion of excise duty was alleged by the Excise department. One such case was that of M/s. Futura Ceramics P. Ltd, The Hon'ble High Court of Gujarat has in the case of the said Futura Ceramics Pvt. Ltd., Vs. State of Gujarat Through The Secretary, in Special Civil Application No. 6500 of 2012 held that:

"The question, however, is whether on a mere show cause issued by the Excise Department, the Sales tax Department can make additions for the purpose of collecting tax under the Gujarat Value Added Tax Act without any further inquiry. If the Assistant Commissioner of Commercial Tax has utilized the material collected by the Excise Department; including the statements of the petitioner and other relevant witnesses and had come to an independent opinion that there was in fact evasion of excise duty by clandestine removal of goods, he would have been justified in making additions for the purpose of VAT Act. In the present case, however, no such exercise was undertaken. All that the Assessing Officer did was to rely on the show cause notice issued by the Excise Department. Nowhere did he conclude that there was a case of clandestine removal of goods without payment of tax under the VAT Act. Merely because the Excise Department issued a show cause notice, that cannot be a Ground to presume and conclude that there was evasion of excise duty implying thereby that there was also evasion of tax under the VAT Act. It is not even the case of the Department that such show cause notice proceedings has culminated into any final order against the petitioner. We wonder what would happen to the order of reassessment, if ultimately the Excise Department were to drop the proceedings without levying any duty or penalty from the petitioner.

All in all, the Asstt. Commissioner has acted in a mechanical manner and passed final order of assessment merely on the premise that the Excise Department has issued a show cause notice alleging clandestine removal of the goods. Such orders therefore, cannot be sustained and is accordingly quashed. When the order is ex facie illegal and wholly untenable in law, mere availability of alternative remedy would not preclude us from interfering at this stage in a writ petition".

Besides, the appellant also relied upon the decision of Hon'ble ITAT, Hyderabad Bench "A" has in the case of M/s Varalaxmi Granites (p) Ltd., Hyderabad vs. DCIT in ITA No. 1435 to 1438/Hud/2010 as can be seen supra.

The argument of the ld. AR that no penalty can be levied where the addition is made on estimation basis, also has substantial force. Moreover, the above decision of the Hon. Gujarat High Court also upholds the fact that the very addition stands on a shaky ground. I also find that the quantum order on which penalty has been levied was an assessment order passed u/s. 143(3) r.w.s. 147 of the I T Act. Since the very proceeding of reopening has been cancelled by the Hon. ITAT, therefore, the penalty no longer survives. Hence, the impugned order which is contested by virtue of the present appeal, is also cancelled and accordingly the penalty proceedings stand deleted. Hence, duly respecting the judicial principles viz., the decision of the Hon. Gujarat High Court and the decision of the Hon. ITAT Rajkot Bench in the appellant's own case wherein the very reopening of proceedings have been cancelled, the present penalty order which is contested by virtue of the present appeal, is also cancelled and accordingly the penalty proceedings stands deleted. The AO is therefore directed to cancel the penalty.

7. *In the result, the appeal is **allowed.**"*

5. When the matter was called for hearing, the learned AR for the assessee pointed out, at the outset, that the additions made in the quantum proceedings itself stood deleted by the order of the co-ordinate bench of the ITAT in ITA Nos. 122 to 124/Rjt/2013 & 166 to 168/Rjt/2013 concerning A.Ys. 2005-06 to 2007-08 order dated 16.01.2018 (in case of M/s. Italica Floor Tiles P. Ltd.) and ITA Nos. 117 & 142/Rjt/2013 concerning AY. 2008-09 order dated 25.05.2015 (in case of M/s. Vrundavan Ceramics Pvt. Ltd.). The appeal filed by the Revenue against the order of the ITAT also has been dismissed by the Hon'ble Gujarat High Court in Pr.CIT vs. M/s. Italica Floor Tiles P. Ltd. R/Tax Appeals Nos. 1135 to 1140 of 2018 judgment dated 17.09.2018. The copy of the order was placed on record.

6. The learned DR for the Revenue did not offer any comment in rebuttal except for the reliance on the penalty order passed by the AO.

7. Having regard to the submissions made on behalf of the assessee and also taking into account the fact that additions/disallowances in the quantum assessment giving rise to the penalty consequences in question has

been reversed by the co-ordinate bench of Tribunal, the very basis for imposition of penalty under s.271(1)(c) of the Act has ceased to exist and does not survive any more. Hence, conclusion drawn by the CIT(A) towards deletion of penalty does not call for any interference.

8. In the result, appeal of the Revenue is dismissed.

9. For the similar reasons, the appeal of the Revenue in other captioned appeals against deletion of penalty by CIT(A) under s.271(1)(c) of the Act are also dismissed.

10. In the combined result, all three appeals of the Revenue are dismissed.

This Order pronounced in Open Court on 20/12/2019

Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER
Ahmedabad: Dated 20/12/2019

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रहित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By ORDER

Deputy/Asstt.Registrar
ITAT, Rajkot