

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC” BENCH, MUMBAI**

BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 5436/Mum/2018
(निर्धारण वर्ष / Assessment Years : 2003-04)

ITO 19(3)(1) R.No. 202, 2 nd Floor, Mtru Mandir, Tardeo, Road, Mumbai.	बनाम/ Vs.	Ramesh B. Doshi A-1, Maniyar BLDG., Flat No. 34, 3 rd Floor, Near Film Centre, Tardeo, Mumbai.
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No. : AADPD3476E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri R. Bhoopathy, DR
प्रत्यर्थी की ओर से/Respondent by :	Shri Rajkumar Singh, AR

सुनवाई की तारीख / Date of Hearing	20/12/2019
घोषणा की तारीख/Date of Pronouncement	23 /12 /2019

आदेश / ORDER

PER R.C. SHARMA, A.M:

This is an appeal filed by the revenue against the order of the CIT(A) for the A.Y 2003-04, in the matter of order penalty imposed u/s 271(1)(c) of the Act.

2. As per the Ld. DR, even though tax effect in this appeal is less than 50 lakhs, however the case is covered by the exception in so far as reopening was made on the basis

- 2 -

of information received from external sources in the nature of law enforcement agency which is outside agency. Since, the reassessment was on the basis of information from the outside agency, consequential addition and penalty was levied with respect to the amount added during the reassessment proceedings, the case is not covered by the CBDT circular for not filing appeal in the case of tax effect less than 50 lakhs. On merits he argued that the CIT(A) not justified in deleting the penalty of Rs. 2,15,476/- levied u/s 271(1)(c) of the Act by estimating income on the transactions, during the course of reassessment proceedings.

3. I have considered the rival contentions and carefully gone through the orders of the authorities below and find from the record that penalty has been levied with respect to the addition made on account of alleged commission income earned by the assessee amounting to Rs. 7,35,527/-. During the course of appellate proceedings the CIT(A) observed that initiation and levy of penalty by issue of notice u/s 274 r.w.s 271(1)(c) of the Act was defective, therefore, in view of various judicial pronouncements, penalty was not leviable. CIT(A) deleted the penalty by

- 3 -

observing that addition made on estimation of income does not attract penalty u/s.271(1)(c). Precise observation of the CIT(A) is as under:

I have considered the facts of the case and submissions made by the assessee. it is seen from the facts available on record that the assessee is an individual and engaged in the trading business of automobile parts. The assessee filed return of income on 16.03.2004 declaring total income of Rs 2,36,540/-. Based on the information received from Investigation Wing, Mumbai pursuant to Search action conducted by Enforcement Directorate, Mumbai under the provisions of FEMA, the case was re-opened on approval from higher authorities. After analysis of the documents produced by the assessee, the A.O. established that the assessee was involved in hawala business and concluded the reassessment proceedings on 30.12.2010 u/s 143(3) r.w.s. 147 of Income-tax Act, 1961 by adding Rs 6,84,047/- (estimated @ 0.5% on the total amount of hawala transaction) in respect of commission income earned on hawala forex transaction and Rs 80,000/- in respect of cash seized during the search. Penalty u/s 271(1)(c) was initiated separately for furnishing inaccurate particulars of income. Subsequently, jurisdictional CIT(A) had confirmed the addition of Rs 6,84,047/- and deleted Rs 80,000/- made by the A.O. vide order No CIT(A) 27/16(2)(4)/303/2010-11 dated 20.09.2012. Consequently, after analysis of the submissions filed by the assessee during penalty proceedings and materials available on record, the A.O. levied penalty of 2,15,476/- @ 100% of the tax sought to be evaded u/s 271 (1)(c) of the Act on 21.03.2014 after receipt of necessary approval from the Addl CIT, Range - 16(2), Mumbai. Aggrieved by the said penalty, the appellant filed appeal against the addition relying on various case laws.

It is observed that the assessee moved Hon'ble ITAT, Mumbai against the appellate order of CIT(A) 27, Mumbai. During the course of appellate proceedings, the appellant submitted a copy of Hon'ble ITAT, Mumbai order ITA No 7304/Mum/2012 dated 06.05.2016 in its own case, wherein the A.O. was directed to

- 4 -

reduce the original addition by Rs 1,20,000/-. The Appellant contended to grant relief in respect of penalty imposed on the assessed income in accordance with Honble ITAT's order as penalty was levied by the A.O. before Hon'ble ITAT decided the case. The Appellant also contended against the penalty stating that the penalty has been levied on estimated commission income which has further been reduced by Hon'ble Tribunal. I found force in the assessee's submissions. I have gone through the assessment order, penalty order and appellate orders available on record. Mere fact that the addition has been accepted or is confirmed in quantum proceedings cannot be conclusive of penalty imposition. It is observed that the addition has been made only on the basis of estimate made by the A.O. It is settled position that when income is estimated, then there can be no question of imposing penalty u/s 271 (1)(c) of the Act. When estimation is done, it becomes nearly debatable in respect of the rate/percentage of estimation and depends upon various parameters. Numerous case laws exist on the context. The Hon'ble Delhi High Court in case of CIT Vs Aero traders Pvt Ltd (2010) 322 ITR 316 (Del) has held that no penalty can be imposed u/s 271 (1)(c) when income is determined on estimate basis. The similar view has been taken by:

a) *Hon'ble Punjab and Haryana High Court in Harigopal Singh Vs CIT (2002) 258 ITR 85*

b) *Honble Gujrat High Court in CIT Vs Subhash Trading Co 221 ITR 110*

c) *ITAT, Mumbai in ITO Vs Chhotalal Textiles (P) Ltd 95 TTJ 436*

d) *ITAT, Mumbai in Sonali A Shah Vs ITO ITA No 5720/M/2013*

e) *ITAT, Mumbai ITO Vs. Chempure 40 SOT 164 (2010).*

Hon'ble Courts have clearly held that penalty levied on estimated income does not comply with the settled principles of natural justice. Keeping in view the facts and circumstances of the case discussed above, I am of considered opinion that the additions on which penalty in dispute has been imposed is purely on estimation basis and the A.O. has not brought any material on record to establish any malafide intention of the assessee to evade tax in the return filed by the assessee. In view

- 5 -

of various judicial decisions available, the A.O. is directed to delete the addition of Rs. 2,15,476/- made u/s 271(1)(c) of Income-tax Act, 1961. This ground of appeal is therefore allowed.

In the result, appeal of the assessee is allowed.”

4. I have been considered the rival contentions and gone through the orders of the authorities below and I found that the Ld. CIT(A) has deleted the penalty on the plea that as per the various judicial pronouncements discussed in the appellate order, no penalty is imposable on addition made on estimation of income. The detail findings so recorded by CIT(A) has not been controverted by the Ld. DR, by bringing any material on record. Accordingly I do not find any reason to interfere in the order of the CIT(A) deleting penalty of Rs. 2,15,476/- u/s 271(1)(c) of the Act.

5. In the result the appeal of the Revenue is dismissed.

This Order pronounced in Open Court on	23/ 12/2019
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Sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Mumbai, Dated 23/12/2019

KRK, PS

- 6 -

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

उप/सहायक पंजीकार (Asst. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Mumbai

2. Other Member...
3. Date on which the approved draft comes to the Sr.P.S./P.S.....
4. Date on which the fair order is placed before the Dictating Member for pronouncement.....
6. Date on which the fair order comes back to the Sr.P.S./P.S..... 18.1.18
7. Date on which the file goes to the Bench Clerk..... 18.1.18
8. Date on which the file goes to the Head Clerk.....
9. The date on which the file goes to the Assistant Registrar for signature on the order.....
10. Date of Despatch of the Order.....