

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI AMARJIT SINGH, JM**

आयकर अपील सं/ I.T.A. No.5882/Mum/2016  
(निर्धारण वर्ष / Assessment Year: 2009-10)

ITO-5(2)(2) Room No.567, 5 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	<b>बनाम/</b> Vs.	M/s. Jayant Oil Products Pvt. Ltd. 5A, Manek, 11 LD, Ruparel Marg, Mumbai-400006.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACJ2717J		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Kumar Padmapani Bora (DR)	
Assessee by:	None	

सुनवाई की तारीख / Date of Hearing: 21/01/2020  
घोषणा की तारीख /Date of Pronouncement: 07/02/2020

**आदेश / ORDER**

**PER AMARJIT SINGH, JM:**

The revenue has filed the present appeal against the order dated 26.07.2016 passed by the Commissioner of Income Tax (Appeals) -10, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

2. The revenue has raised the following grounds: -

"1) *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty levied w/s 271(1)(c) of the I. T. Act. amounting to Rs.76,57,156/- without appreciating the fact that the assessment in where addition were made was confirmed by CIT(A) and the same is still pending before the Hon'ble ITAT.*"



3. The brief facts of the case are that the assessment of the assessee was completed on 29.12.2011 determining the total income to the tune of Rs.4,45,25,852/- against the returned income in sum of Rs.6,91,850/- u/s 143(3) of the Act. The assessee company was engaged in the business of manufacturing, trading and exporting of castor oils and derivatives. The assessing officer has completed the assessment u/s 144 r.w.s. 143(3) of the Act determining total income to the tune of Rs.4,45,25,852/- on 29.12.2011 by making additions/disallowance of sundry creditors and expenses mostly due to non-attending the hearings and non-furnishing of required details to the AO. The CIT(A) has also confirmed the addition due to non-attending and non-furnishing of required details. Thereafter, the penalty proceeding u/s 274 r.w.s. 271(1)(c) dated 29.12.2011 was issued and served upon the assessee. Thereafter, the penalty in sum of Rs.76,57,156/- has levied. The assessee filed an appeal before the CIT(A) who deleted the addition, therefore, the revenue has filed the present appeal before us.

4. We have heard the argument advanced by the Ld. Representative of the Department and has gone through the case carefully. The Ld. Representative of the revenue has argued that the CIT(A) has wrongly deleted the penalty, therefore, the finding of the CIT(A) is not justifiable, hence, is liable to be set aside. It is admitted that the Hon'ble ITAT while deciding the appeal of the assessee on quantum has remanded issue before the AO, therefore, at this stage there is no demand against the assessee. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.:-

*“5. I have carefully considered the facts of the case and submissions of the Id.AR. I have also gone through the decisions relied on by the Id.AR.*



*It is seen from the facts of the case that the AO has made the disallowance of sundry creditors since there was an increase of sundry creditors during the year when compare to earlier years to the extent of 1.65 cr. and no explanation was given to him as there was no representation before him from the appellant side and order was passed u/s 144 read with section 143(3) of the Act. Similarly, there was huge expenditure debited in the P & L A/c but the genuineness of the expenditure was not submitted to the AG as there was no representation before him at the time of assessment proceedings, as such the AG has disallowed 25% of such expenditure on ad hoc basis. Since there was similar non-compliance before the CIT(A) he has also confirmed the additions made by the AG by relying on certain court decisions. In my considered opinion the above additions on account of sundry creditors and ad hoc disallowance of expenditure will not attract penal provisions u/s 271(1)(c) as there was no furnishing of any inaccurate particular of income or concealment of any income. The CIT(A) has confirmed the additions not because of any merit in the addition but because of non-representation from assessee side during the appellate proceedings, which fact is evident from his order. Even though the additions made u/s 143(3) and confirmed by CIT(A) are still pending the before the ITAT for adjudication in my considered opinion such additions cannot attract the mischief of penalty u/s 271(1)(c) of the Act. I therefore, direct the AO to withdraw the penalty levied. The ground is allowed.”*

5. On appraisal of the above mentioned finding, we noticed that the CIT(A) has deleted the penalty on the basis of this fact that the no penalty is leviable on adhoc disallowance. Further, we noticed that the Hon'ble ITAT has set aside the quantum before the AO, therefore, at this stage there is no demand against the assessee, hence, the penalty is not leviable in view of the order dated 10.03.2017 The copy of the order is also on the file and the relevant para no. 5 is hereby reproduced as under.:-

*“5. We have heard the rival submissions, perused the orders of the authorities. In the course of assessment proceedings when the Assessing Officer required the Assessee to furnish various details it was submitted by the Assessee that there was an investigation going on in the Assessee company as it was an associate of Biotar Industries Ltd., wherein, CBI investigation and the legal proceedings from State Bank of India and its consortium banks for recovery of dues. For the purpose of investigation, CBI has taken away main server and various records, documents etc. of*



*Bitor including its group companies. It was also submitted before us that the records were seized by Sales Tax department also due to which necessary information could not be submitted in the course of assessment proceedings. The Ld. Counsel also brought our notice to the additional evidences and submits that Assessee made some efforts and obtained whatever possible records from various sources and the same are being furnished in the form of paper book containing 205 pages relating to the issues in respect of the additions/disallowances made. We find from the Ld. CIT (Appeals) that the additional evidences were not admitted mainly for the reason that the Ld. CIT (Appeals) is of the view that the Assessee is prolonging the proceedings, not cooperated, not submitted the required details asked for etc. Therefore, the Ld. CIT (Appeals) concluded that admission of additional evidences is not a matter of right and further it was held that there was no sufficient cause for not producing the evidences before the Assessing Officer which in our opinion is not proper and just. No doubt, the Appellate Authority is vested with the discretion whether to admit or reject an application for admission of additional evidences, but the Appellate authority should exercise the discretion judiciously. In this case, the approach of the Ld. CIT(Appeals) in rejecting the petition for admission of additional evidences is not exercised judiciously. In the circumstances taking the totality of the facts into consideration, we restore the issue to the file of the Ld. CIT (Appeals) to consider the petition for admission of additional evidences judiciously and to decide the appeal on merits. The Assessee is directed to cooperate with the proceedings with Ld. CIT (Appeals) and furnish the necessary information as called for. Thus, we restore this appeal to the file of the Ld. CIT (Appeals) and the same be disposed off in accordance with law after given adequate opportunity of being heard.”*

6. Since the quantum has been set aside by the Hon'ble ITAT and remanded the issue before the AO, therefore, in the said circumstances, we set aside the finding of the CIT(A) on this issue and remit the issue before the A.O to decide afresh in accordance with law. Needless to say, that an opportunity of being heard is required to be given in accordance with law.



ITA No. 5882/M/2016  
A.Y.2009-10

7. In the result, the appeal filed by the **revenue is hereby ordered to allowed for statistical purpose.**

Order pronounced in the open court on 07/02/2020

Sd/-

Sd/-

(SHAMIM YAHYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 07/02/2020  
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