

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

**BEFORE SHRI PAWAN SINGH, JM &
SHRI S. RIFAUH RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 6567, 6605 & 6568/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2010-11, 2012-13 & 2013-14)

Satish Saraf, C-2201, Rustomjee Elenza, Near Inorbil Mall, Malad (W), Mumbai-400 064	बनाम/ Vs.	DCIT CC 4(3), Air India Building, Nariman Point, Mumbai 400 021
स्थायीलेखासं./जीआइआरसं./PAN No. AAGPS5830G		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri A. K. Ghosh, AR
प्रत्यर्थीकीओरसे/Respondent by	:	Shri V. Vinod Kumar, DR

सुनवाईकीतारीख/ Date of Hearing	:	27.11.2019
घोषणाकीतारीख / Date of Pronouncement	:	05.02.2020

आदेश / ORDER

PER S. RIFAUH RAHMAN (ACCOUNTANT MEMBER):

The present three (3) Appeals have been filed by the assessee against the order of Ld. Commissioner of Income Tax

(Appeals)-51, Mumbai, in short 'Ld. CIT(A)' dated 10.08.2017 for AY 2010-11, 2012-13 & 2013-14 respectively.

2. Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed of by this consolidated order. Firstly, we are taking ITA No. 6567/Mum/2017 for AY 2010-11 filed by the assessee.

3. The brief facts of the case are that a search and seizure operation u/s 132 of the Act was carried out on assessee's group company on 01.10.13 based on the information received from Investigation Wing, Gujarat. In the search proceedings, it was found that assessee indulged in giving accommodation entries in the form of loans /advances given by companies controlled and managed by assessee. In the statement recorded on oath u/s 132(4) of the Act on 01.10.13, the assessee in principal agreed that he is indulged in giving accommodation entries and no actual business was conducted in the concerns controlled by the assessee and his team.

4. The assessee in his post search statement voluntarily accepted to tax @ 0.03% of the accommodation entries. The AO found the commission @ 0.03% as reasonable and accordingly taxed. As per the above, the taxable amount was determined as per the below statement:-

Particulars	Amount of addition	A.Y. 2010-11	A.Y. 2011-12	A.Y, 2012-13	A.Y 2013-14	A.Y 20M-t->
Share application given by companies controlled & managed by group	1188000	226627	220023	109486	37693	--
Loans / Advances given by Companies controlled and managed by group	--	--	--	--	--	--
Share application given to Shirish through various companies and controlled by other operators in Kolkata & self controlled companies	3036000	435919	535665	38183	2200	--
LTCC in different companies	2454000	--	--	--	--	818000
Share application received from Shirish	1140000	217320	211565	105062	36113	--
Commodity trading profit	726000	57	154691	114663	90650	3025
Share application to other beneficiaries by other Kolkata operators	1449000	--	--	--	--	--
Sub contract agreement to various parties	948000	--	--	--	--	--
Amount to be taxed	11157000	879922	1121943	367395	166656	821025

5. Considering the above, the taxable income of the assessee, was determined at Rs. 8,79,922 as commission for providing accommodation entries and accordingly brought to tax. Subsequently, penalty proceeding u/s 271(1)(c) of the Act was initiated on concealment of income. In response, AR of the assessee submitted the following submissions:-

"In this respect, it is submitted that a search and seizure action was conducted in the case of Satish Saraf Group on 01.10.2013. Satish Saraf Group comprises of Shri Satish Saraf himself, Shri Shri Rajeev Jhunjunwala, Shri Rahul Jhunjunwala and Shri Vishal Bhuwania.

During the course of search, in the statement recorded u/s. 132(4) on 01.10.2013, Shri Satish Saraf has stated and accepted that he has acted as an intermediary for arranging accommodation entries between two parties. He also stated the varied rate of commission earned on different type of accommodation entries arranged by the group.

In the post search proceedings, Shri Satish Saraf in his statement recorded has voluntarily accepted to tax @ 0.03% of the accommodation entries arranged by him. Further, during the course of assessment proceedings,

your honour has recorded my statement u/s. 131 of the assesses on 03.03.2016. The relevant questions and answers thereof as reproduced on page 8 & 9 of the assessment order are extracted below:-

" Q.54 Please state the commission amount charged on accommodation entries given by you?

Ans. I have arranged for loans /advances, share application to other beneficiaries and sub-contract agreements wherein commission @ 0.01% to @ 0.05% was charged on the same.

Q.55 It is observed from the appraisal report that you are in receipt of commission ranging between @ 0.025% to 0.5% for various nature of accommodation entries. In this regard, you are requested to please explain as to why commission @ 0.5% should not be charged on the said accommodation entries?

Ans. Sir, I confirm that I have arranged for accommodation entries for which commission @ 0.025% to @ 0.05% was earned and hence request your good office to tax only 1 paise on all the accommodation entries.

Q.56 It is observed from the assessment records that for A. Y. 2011-12 you have offered 3 paise as

commission income for accommodation entry and accordingly why 3 paise should not be charged on the accommodation entry for share application, long term capital gains, sub-contracts. Please explain Ans. I confirm that copy of assessment order has been read and request to tax commission @ 0.03% of the accommodation entries.

Q. 57 Do you want to say anything?

Ans. Sir, I once again reiterate your good office to charge commission @ 0.03% on the accommodation entries..."

As rightly confronted by your honour in Q.56 that Shri Satish Saraf voluntarily offered 3 paise on accommodation entries and the assessee in reply has confirm that he has read the statement of Satish Saraf. However, the assessee requested to tax commission @ 0.02% of the accommodation entries. It may be noted that a survey action u/s. 133A took place on 26.08.2010 at the business premises of Shri Satish Saraf and in the statement recorded u/s. 131 dated 23.09.2010, in reply to Q No. 14 Shri Satish Saraf admitted that" on an average of 3 paise have been earned approximately 16.25 lakhs which I have received in current financial year. After Meeting

expenses of staff salary and office expenses etc. I voluntarily surrender an amount of Rs, 12,00,0001-in the current FY 2010-11 on which I agree to. pay taxes on schedule". Therefore, in the return of income filed u/s. 139, Shri Satish Saraf has offered 3 paisa as commission income for accommodation entries for the AY 2011-12. Accordingly, the total commission @ 3 paisa amounting to Rs. 16,25,000/- was offered as gross commission as against the same Shri Satish Saraf had claimed expenditure of Rs. 4 25,000/- and net commission income of Rs. 12,00,000/- was offered to tax for the AY 2011-12. It may be noted that the entire transactions upto the date of survey was considered in the hands of Satish Saraf The Ld. AO passed assessment order u/s. 143(3) on 18.06.2013 and he has accepted the gross commission income @ 3 paisa amounting to Rs. 16,25,000/- in the case Shri Satish Saraf. However, the AO disallowed expenditure of Rs. 1,00,000/- out of expenditure of Rs. 4,25,000/- claimed by Shri Satish Saraf.

In the assessment order, your honour has also admitted that Shri Satish Saraf in his post search statement has voluntarily accepted to tax @ 0.03% of the accommodation entries and a/so stated that the statement of the assessee to tax 0.02% is considered and found to be unacceptable. Therefore, finally your

honour has estimated the commission income @ 0.03% on the accommodation entries on the basis of the admission of Shri Satish Saraf and his earlier assessment order u/s. 143(3) for the AY 2011-12. While estimating the commission income @ 0.03% of the accommodation entries, your honour has not allowed any expenditure, which was allowed in the regular assessment order for the A Y 2011-12 in the case of Shri Satish Saraf. It may be noted in the regular assessment order for the AY 2011-12 in the case of Shri Satish Saraf, the AO allowed estimated expenditure @ 18.46% of the gross estimated commission income. Further, in the AY 2011-12 in the case of Shri Satish Saraf, the AO also dropped the penalty proceedings initiated u/s 271(1)(c).

It is submitted that since the assesses has voluntarily accepted to tax @ 0.02% of the accommodation entries and your honour has also estimated the commission income @ 0.03% in the assessment order passed u/s. 143(3) r.w.s 153A of the Act, no penalty is leviable u/s.27/(1)(c) of the Act. For this proposition, reliance is placed, on the following decisions:-

(i) Harigopal Singh vs. CIT reported in 125 Taxmann 2521258 ITR 85 (P & H).

(ii) CIT vs. Smt. K. Meenaksht Kutty 258 ITR 494(Mad).

(iii) CIT(A) vs. Valimkbhai H. Pate/ 280 ITR 487(Guj).

(iv) CIT(A) vs. Raj Bans Singh 276 ITR 351 (All).

(v) CIT vs. Lallubhai Jogibhai Pate/ 261 ITR 216(Guj)

(vi) CIT vs. Shivnarayan Jamnalal & Co. 232 ITR 311 (NIP).

(vii) Navjivan Oil Mills Vs. CIT[252 ITR 417 (Guj)]

(viii) CIT Vs. Ravail Singh & Co. [254 ITR 191 (P&H)]

(ix) CIT Vs. Sangrur Vanaspati Mills Ltd. [216 CTR 92 (P&H)]

(x) CIT Vs. DM/o/7 Rice Mills [256 ITR 447 (P&H)]

Reliance is further placed on the following decisions of various High Courts/ Tribunals wherein, it has been categorically held that penalty cannot be imposed in respect of additions made on the basis, of estimation of profit rate. These decisions are directly applicable to the facts of assesses's case and hence, no penalty could be imposed.

(a) CIT vs. V.K.L Mangal Sain 107 ITR 598 (All.)

(b) DCIT vs. Madad All Ansari & Co. 69 TTJ 279 (Jd.)

(c) ITO V. C, Chhotalal Textiles Pvt. Ltd. 95 TTJ 436 (Mum.)

In view of the above, we request your honour to drop the penalty proceedings initiated u/s.271(1)(c) of the Act."

6. Considering the above, AO rejected the contentions of the assessee and levied the minimum penalty of Rs. 2,30,930/- u/s 271(1)(c) of the Act.

7. Aggrieved with the above, assessee preferred an appeal before Ld. CIT(A) and made before him an elaborate submission including issue of defective notice u/s 274 of the Act. After considering the submission of the assessee, Ld. CIT(A) dismissed the appeal of the assessee and also dismissed the issue of defective notice u/s 274 of the Act. Ld. CIT(A) dismissed the grounds with the following observations:-

8.1.1 In the submissions made during appellate proceedings, the assessee has contended that the action of the AO of levying penalty u/s. 271(1)(c) is incorrect primarily for the following reasons :-

i) He had voluntarily agreed for addition of his unaccounted income of Rs 8,89,9227- at the rate of 0.03% on the accommodation entries provided.

ii) *The additions made by the AO are on estimate basis being 0,03% on the total accommodation entries provided by him.*

iii) *The AO while issuing the notice has not struck off the redundant words in the show cause notice issued u/s. 274 and therefore, as per the decision of the Karnataka HC in the case of Manjunatha Cotton and Ginning Factory (359 ITR 565), which has been followed by the Hon'ble Bombay HC in the case of Samson Perinchery in ITA No 1154 of 2014 vide order dated 05.01.2017, the penalty is invalid.*

Whether the agreed addition of unaccounted income of Rs 8,79,922/- can be considered as voluntarily:

8.1.2 *The assessee contends that its disclosure is voluntarily made and therefore it is not liable for levy of penalty. "Voluntarily" means out of free will i.e. without any compulsion. It has been held in the cases of **K.L. Swamy Vs. CIT (Kar) 239 ITR 386**, **Bhairav Lal Verma Vs. Union of India (All) 230 ITR 855** and **M.N. Rajaraman Vs. ACIT (ITAT, Chennai) 119 ITD 362** that if the department has incriminating material with regard to the undisclosed income, the disclosure made by the assessee cannot be considered to be voluntary. Further, in the cases of **P.C. Joseph &***

Bros. Vs. CIT (Ker) 240 ITR 818, CIT vs, Rakesh Suri (All) 331 ITR 458 and CIT vs. Sushma Devi Agarwal (ITAT, Kol-TM) 67 DTR 430, it has been held that simply because the assessee agreed for addition of undisclosed income subsequent to detection thereof and filed return in response to notice u/s. 148 offering the said amount as additional income, the assessee cannot escape levy of penalty u/s. 271(1)(c). In the said cases cited, it can be observed that even wherein the assessee had duly included the unaccounted income in its return of income but subsequent to the detection, the Hon'ble Courts have held that penalty u/s. 271(1)(c) is leviable. However, in the instant case, despite the admission made by the assessee in the statements on oath recorded in the course of the survey action and the subsequent search action of having earned commission income @ 0.03% of the accommodation entries provided, he filed his return of income u/s. 153A without including the said additional income admitted in course of the survey action and the subsequent search action. In course of the search assessment proceedings u/s 153A, statement on oath of the assessee was again recorded, wherein he once again admitted to have earned unaccounted income @ 0.03% of the accommodation entries provided and agreed that this unaccounted income may

be added to his total income. It can thus be observed that the assessee voluntarily agreed for including the said unaccounted income to his total income only after being thoroughly investigated and confronted at various stages viz. Survey action, search action and assessment proceedings. Thus, the claim of the assessee that he had voluntarily accepted the inclusion of the said amount to its total income is not acceptable.

*8.1.3 The facts of the case of the assessee are quite similar to the cases decided by the Hon'ble Supreme Court in the cases of Mak Data (P) Ltd (38 Taxman.com 448) and K P Madhusudanan (118 Taxman 224) wherein the assessees had come forward with an offer of undisclosed income in course of the assessment proceedings on being confronted with adverse evidences, however, the levy of penalty on the undisclosed income offered was upheld. **Therefore, the contention of the assessee that it had voluntarily offered the said undisclosed income and therefore penalty is not leviable, is rejected.***

Whether penalty is leviable even in cases where accounted income has been estimated:

8.1.4 It has further been contended by the assessee that the additions had been made by the AO on estimate basis and therefore, penalty u/s. 271(1)(c) cannot be

levied. From the sequence of events narrated in the proceeding paras, it can be observed that the assessee was taking a chance by sitting on a fence despite the fact that there was a survey action followed by a search action in his case wherein on the basis of incriminating documents and other evidences, the assessee had admitted to have earned unaccounted commission income at the rate of 0.03% of the accommodation entries provided. It is clear that the intention of the assessee was to take a risk and disclose a lesser income than what he was actually earning. In this case, the quantum of accommodation entries provided by the assessee has not been estimated but it is only the profit earned from providing of accommodation entries, which has been estimated @ 0.03%. Therefore, the benefit of non levy of penalty cannot be extended to the assessee. In support of this view, reliance is placed on the decision of the Hon'ble Delhi High Court in the case of **Kalindi Rail Nirman Enqq. Ltd. 51 taxmann. com 523 (Delhi)** wherein levy of penalty on the additions made by estimating the income of the assessee by applying rate of 11% (agreed by the assessee) on the gross receipts has been upheld. **Therefore, the contention of the assessee that penalty is not leviable in its case since the**

unaccounted income has been determined by the AO on estimate basis is rejected.

8. Aggrieved with order of Ld. CIT(A), assessee is in appeal before us.

9. Before us, Ld. AR submitted that AO has estimated the commission income @ 0.03% which was voluntarily disclosed by the assessee in the post search statement and brought to our notice page no. 9 of the paper book. He further submitted that AO cannot levy penalty when the income of the assessee was on estimation. For that purpose, he relied on case laws similar to the submission made before Ld. CIT(A). Further, he submitted that the notice issued u/s 274 of the Act was defective and the copy of the notice placed at page no. 1 of the paper book in which AO has not notified on which limb of the penalty charges, he is proceeding with. For that proposition, he said that the notice issued u/s 274 of the Act is defective and relied upon the following case laws:-

i) CIT vrs. Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 (Karnataka HC)

- ii) CIT vrs. Samson Perinchery (ITA No. 1154 of 2014) (Bom HC)
- iii) Kishor J. Janani in ITA No. 6138 & 6139/2011 (Trib.)
- iv) CIT vrs. SSA's Emerald Meadows (ITA No. 380 of 2015) (SC).

10. On the other hand, Ld DR submitted that no doubt the income offered by the assessee is voluntary. However, the assessee has come forward to accept the estimated income only due to proceeding u/s 132 of the Act. He objected to the submission of Ld. AR that penalty cannot be levied on estimation of income and he relied on case laws on which Ld. CIT(A) has heavily relied upon, in which Hon'ble Delhi High Court in the case of Kalindi Rail Nirman Engg. Ltd. 51 taxman.com 523 (Del) and with regard to defective notice u/s 274 of the Act, he relied upon the findings of Ld. CIT(A) at page no. 15 of the order.

11. Considered the rival submissions and material placed on record. We notice that assessee has disclosed the commission income earned from accommodation entries provided by him

which varies from transaction to transaction between @ 0.02% to 0.05% and assessee came forward voluntarily offered 0.02% as commission income. AO has estimated the same @ 0.03% and assessee has agreed the same and paid the relevant tax as applicable. Subsequently, AO initiated penalty proceedings and penalty was levied 100% of the tax sought to be evaded. Ld. CIT(A) has confirmed the penalty by relying on Kalindi Rail Nirman Engg. Ltd. (supra) that penalty on the additions made by estimating the income of the assessee is leviable. As per the decision relied by Ld. AR that penalty cannot be levied on the income which is estimated, whereas the case laws relied by the Ld. CIT(A) in the case of Kalindi Rail Nirman Engg. Ltd. (supra), wherein the Hon'ble Delhi High Court has confirmed the levy of penalty when the AO estimated the income in the following circumstances: -

Assessee is a railway contractor undertaking on turnkey projects and several discrepancies were noted in special audit conducted u/s 142(2A) of the Act. The Hon'ble Court noticed that the books of account maintained by the assessee were wholly not reliable and assessee has estimated the income at 3%, whereas

AO has estimated the income @ 11% on the gross contract receipt and gave due opportunity to the assessee to explain the discrepancy and also to show why the profit rate of 11% cannot be adopted. But, these opportunities were not availed by the assessee. Further, assessee was permitted to inspect the assessed documents and was given photo copies of the desired documents.

12. The Hon'ble Court further observed, which is reproduced below:-

12. We are bound by the ratio of the decision of this court. The number of discrepancies and irregularities listed by the special auditor in his report which are reproduced in the assessment order bear testimony to the fact that the books of account maintained by the assessee were wholly unreliable. If they were so, there can be no sanctity attached to the figure of gross contract receipts of Rs. 20,30,74,024 on which the assessee estimated 3 per cent, as its income. It is true that the Assessing Officer did not enhance the figure of gross receipts but that is not because he gave a clean chit to the books of account allegedly maintained by the assessee; he could not have given a clean chit in the face of the defects, discrepancies and irregularities

reported by the special auditor. In order to take care of those discrepancies he resorted to a much higher estimate of the profits by adopting 11 per cent, on the gross contract receipts. He gave due opportunity to the assessee to explain the discrepancies and also to show why the profit rate of 11 per cent, cannot be adopted but these opportunities were not availed of by the assessee. He also has recorded in the assessment order that the assessee was permitted to inspect the seized documents and was given photocopies of the desired documents (paragraph 7). This is not denied by the assessee. In these circumstances, the mere fact that the estimate was reduced by the Tribunal to 8 per cent, would in no way take away the guilt of the assessee or explain its failure to prove that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on its part. It appears to us that the assessee was taking a chance-sitting on the fence-despite the fact that there was a search towards the close of the relevant accounting year in the course of which incriminating documents were found. It appears to us that the intention of the assessee was to take a risk and disclose a lesser income than what it actually earned and rely upon the minor variations in the rate of profits adopted by the taxing authorities and the Tribunal as a defence in the penalty proceedings. The

plea-accepted by the Tribunal-that the assessee agreed to be assessed at 11 per cent, of the gross receipts only "to buy peace" and "avoid litigation" cannot be accepted by us in view of the judgment of the Supreme Court in MAK Data (P.) Ltd. (supra). The Tribunal, in our view, was in error in upholding the order of the Commissioner of Income-tax (Appeals) cancelling the penalty. We, accordingly, answer the substantial questions of law framed by us against the assessee and in favour of the Revenue.

13. From the facts of the above decision, it is clear that assessee has not come clean before the AO and not cooperated with the AO for even on proper estimation of the income and the assessee just took the chance sitting on the fence i.e. assessee took a risk and disclosed lesser income than what is actually earned. Whereas in the given case, that is not the issue but assessee has completely gave the information which is agreeable to the AO and cooperated to complete the assessment with real income. Accordingly, AO made reasonable estimation on the profit. Therefore, the case law relied by the Ld. CIT(A) is distinguishable, whereas assessee relies on following case law:-

(i) *Harigopal Singh vs. CIT* reported in 125 Taxmann 252/258 ITR 85 (P

&H).

(ii) *CIT vs. Smt K. Meenakshi Kutty* 258 ITR 494(Mad).

(iii) *CIT(A) vs. ValimkbhaiH. Patel* 280 ITR 487(Guj).

(iv) *CIT(A) vs. Raj Bans Singh* 276 ITR 351 (All).

(v) *CIT vs. Lallubhai Jogibhai Patel* 261 ITR 216(Guj)

(vi) *CIT vs. Shivnarayan Jamnalal & Co.* 232 ITR 311 (MP).

(vii) *Navjivan Oil Mills Vs, CIT*[252 ITR 417 (Guj)J

(viii) *CIT Vs. Ravail Singh & Co.* [254 ITR 191 (P&H)]

(ix) *CIT Vs. Sangrur Vanaspati Mills Ltd.* [216 CTR 92 (P&H)]

(x) *CIT Vs. Dhillon Rice Mills* [256 ITR 447 (P&H)]

Reliance is further placed on the following decisions of various High Courts/ Tribunals wherein, it has been categorically held that penalty cannot be imposed in respect of additions made on the basis of estimation of profit rate. These decisions are directly applicable to the facts of assessee's case and hence, no penalty could be imposed.

(a) *CIT vs. V.K.L Mangal Sain* 107 ITR 598 (All.)

(b) *DCITvs. Madad All Ansari & Co.* 69 TTJ 279 (Jd.)

(c) *ITO V. C. Chhotalal Textiles Pvt Ltd.* 95 TTJ 436 (Mum.)

14. Therefore, by considering the ratios of the above decisions and as held that the penalty cannot be imposed when the income of the assessee is estimated, we are inclined to follow the above decision and accordingly, the penalty levied on the estimation of income is **deleted**.

15. With regard to issue of defective notice, Ld. AR relied on various case law and submitted that the notice issued by the AO is defective since AO has not brought of record the reason for levy of penalty. We notice that in the assessment order, AO has made it clear that penalty proceedings are initiated separately for furnishing inaccurate particulars of income, therefore the AO has already indicated that why the penalty proceedings are initiated. Therefore, we reject the contention of the assessee that notice is defective.

16. Consequently, the appeal filed by the assessee stands **allowed**.

17. The facts and grounds of other appeals of assessee are similar to the facts in ITA number 6567/Mumbai/2017, therefore, the grounds raised in other appeals are also **allowed**.

18. In the net result, all the appeals filed by the assessee are **dismissed.**

Order pronounced in the open court on 5th Feb 2020.

<i>Sd/-</i> (Pawan Singh) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : Sr.PS. Dhananjay	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 05.02.2020
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
 2. प्रत्यर्थी/ The Respondent
 3. आयकरआयुक्त(अपील) / The CIT(A)
 4. आयकरआयुक्त/ CIT- concerned
 5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
 6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai