

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

**BEFORE SHRI MAHAVIR PRASAD, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 5992/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2010-11)

M/s LASA 43, Lydia, Hill Road, Opp Elco Market Bandra (west), Mumbai-400 002	बनाम/ Vs.	ACIT 19(3), Room no. 301, 3 rd floor, Piramal Chambers, Mumbai-400 012
स्थायीलेखासं./जीआइआरसं./PAN No. AACFL6401E		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Ajay C. Gosalia, AR
प्रत्यर्थीकीओरसे/ Respondentby	:	Shri S. Michel Jerald, DR
सुनवाईकीतारीख/ Date of Hearing	:	04.11.2019
घोषणाकीतारीख / Date of Pronouncement	:	07.11.2019

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax - 48 in short referred as 'Ld. CIT(A)', Mumbai, dated 30.07.18 for Assessment Year (in short AY) 2010-11.

2. The brief facts of the case are that the return of income was filed by the assessee for AY 2010-11 on 25.09.10 declaring total income of Rs. NIL. During the assessment proceedings, AO observed that assessee has declared interest expenditure in its profit and loss account and further notice that assessee has borrowed funds from banks and NBFC's and such borrowed funds were given to associate enterprises M/s Choice Centre Dept Store Pvt. Ltd. to the extent of Rs. 1,53,25,631/- and incurred interest expenditure of Rs. 18,81,256.91/-. When the assessee was asked to substantiate, assessee submitted that the above loans were advanced to associate enterprises from the amounts borrowed from India Bulls and assessee could not recover any interest on such loan. Accordingly, AO disallowed the above interest as not relating to business. Further AO received information from Sales Tax Department, Maharashtra and accordingly, there were two parties who were engaged in hawala entries from whom assessee has purchased to the extent of Rs. 28,670/-. Since assessee could not substantiate the above purchases nor submitted any parties, accordingly AO disallowed

the purchases. Subsequently, assessee accepted the above assessment order and did not prefer any appeal before appellate authorities. Subsequently, AO initiated penalty proceedings u/s 271(1)(c) of the Act.

The reply filed by assessee has been duly considered After considering the reply of the assessee, it is observed that argument forwarded by the assessee to explain that no inaccurate details were furnished, are not found acceptable. As discussed in Paraj4 of the order passed u/s. 143(3) the assessee had advanced Rs 1,36,01,304/- to M/s, Choice Centre Dept Store P. Ltd. out of interest bearing funds without charging any interest and had incurred interest of Rs.18,89,256/- on funds so advance. The assessee accepted the addition and no appeal was filed against the addition. Since assessee is following mercantile system of accounting assessee was required to treat interest as income. It cannot be said that due to bad condition interest was not paid to assessee. And if interest, is not received it should have disallowed interest attributable to fund used for interest free loans as only those expenses which are incurred wholly arid exclusively for business are allowable u/s 37 of the act. These facts were known to the assessee. Similarly addition of 28,670/- was

made by disallowing purchase debited in account by taking hawala entry as discussed in para. 6 of the order. It is known fact that sales tax department found out several entities, which were giving bogus purchase bills. Assessee also had claimed certain expenses through such entities. By not filing appeal, it is accepted, I am therefore, satisfied that the assesses had furnished inaccurate particulars of income for which it is liable for penalty u/s 271(1)(c) of the Act.

Accordingly, penalty was levied at Rs. 6 lakhs u/s 271(1)(c) of the Act.

3. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and filed before him a detail submission, which is reproduced below:-

- 1. The appellant is in the business of retail trading of garments and accessories.*
- 2. As the appellant's group concern Choice Centre Departmental Store Pvt Ltd(CCDS) was in need of funds it decided to lend it to CCDS by borrowing funds from outside.*

3. Since appellant would have to pay interest on its borrowing, it was agreed with CCDS that CCDS - would reimburse the actual interest payable by appellant.

4. The appellant thus borrowed funds from Indiabulls and lent it to CCDS.

5. Since the appellant had never in the past carried out financing activities, and as it was not its business activity, it decided to follow cash system of accounting for interest receipts and payments on this activity.

6. Loan granted by Indiabulls was to be repaid in 120 equal monthly installments(EMI) which included both principal and interest.

7. Since the EMIs included interest payment of Rs 18,89,257, it was accounted as expenditure and debited to Profit & Loss A/c. However as the appellant did not receive any interest during the year from CCDS interest receipts could not be credited to Profit & Loss A/c.

•8. The appellant submits that no penalty can be imposed on disallowance of interest of Rs 18,89,257 for the following reasons :

- a. *Merely because the appellant did not file appeal against disallowance of interest due to there being huge loss of Rs 1,73,26,789 for the year and huge brought forward losses of Rs 70,33,252 of earlier years it would not mean that the appellant had accepted the disallowance.*
- b. *Interest receipt and payment from financing activities is chargeable u/s 56 under the head of income from other sources for which it followed cash system of accounting.*
- c. *It is engaged only in the business of trading and not in business of financing as can be seen from clause of its tax audit report and hence it was not obliged to follow mercantile system of accounting for accounting of interest on its financing activities as in the case of its business.*
- d. *Merely because the appellant erroneously did not show interest paid to Indiabulls separately under the head "income from other sources" would not mean that the appellant was obliged to follow mercantile system of accounting also for interest.*
- e. *Even if the interest payment to Indiabulls would have been shown under the head "income from other*

sources" the same would be entitled to setoff u/ss 70 &71 and hence total income / loss would have remained same. Thus the disallowance of interest itself was not justified and therefore it cannot be said that the appellant had furnished inaccurate particulars of its income.

f. No penalty can be imposed because of such improper disallowance of interest.

g. Without prejudice to the foregoing, the appellant submits that no penalty can be imposed merely for rejection of claim of expenses by the Id DCIT. On this proposition the appellant relies upon the decision reported in (2010) 322ITR 158 (SC) in the case of CIT v/s Reliance Petropioducts (P) Ltd.

h. Without prejudice to the foregoing, the appellant submits that in view of huge loss of Rs 1,73,26,789 for the year and brought forward losses from earlier year of Rs 70,33,252 there was no question of any mala fide intention in claiming the said interest as business expenses.

i. Without prejudice to the foregoing, the appellant submits that this being the first year of its financing activities and there being huge losses as aforesaid the

appellant had reasonable cause for failure, if any, to disclose interest payment under the head "income from other sources " and hence the imposition of penalty by the Id ITO on this ground may be deleted.

9. *The appellant submits that no penalty can also be imposed on addition of Rs 28,670 on account of alleged bogus purchases for the following reasons:-*

a. *The huge loss for the year of Rs 1,73,26,789 itself displaces the allegation of bogus purchases of such a small sum of Rs 28,670.*

b. *Without prejudice to the foregoing, the appellant submits that merely because the appellant did not file appeal against disallowance of purchase due to there being huge loss of Rs 1,73,26,789 for the year and huge brought forward losses of Rs 70,33,252 of earlier years, it would not mean that the appellant had accepted the addition of alleged bogus purchases.*

c. *Thus the appellant submits that merely for disallowance of purchases, it cannot be said that it had filed inaccurate particulars of income justifying imposition of penalty on this ground.*

10. *The appellant submits that a mere statement in penalty order that the Id ACIT had obtained prior*

approval of JCIT would not prove that he had obtained prior approval without which no penalty can be imposed upon the appellant. Further, the appellant submits that merely because the date of approval and the date of penalty order are same would not mean that approval was obtained prior to passing of penalty order. On this proposition the appellant relies upon the order of Mumbai Tribunal in ITA 8720/Bom / 95 dt 23/12/2002.

11. The appellant thus respectfully submits that the penalty of Rs 6,00,000/- levied upon it be deleted and / or suitably reduced."

4. After considering the submission of the assessee, Ld. CIT(A) confirmed the penalty order and dismissed the appeal of the assessee.

5. Aggrieved by the order of Ld. CIT(A), assessee preferred the appeal before us on the ground mentioned herein below:-

1. Penalty u/s 271 (1) (c);

a) *The Id. CIT(A) erred in confirming the levy of penalty of Rs 6,00,000 u/s 271(l)(c) of the IT Act, 1961 (the Act) by the Id. ACIT.*

b) *She erred in holding that:*

i) *It is not correct to say that there was no receipt of income by assessee ;*

ii) *Explanation 1 to s. 271(l)(c) was clearly attracted as the explanation given by the appellant was not bonafide;*

iii) *The excessive claim of expense amounts to furnishing of inaccurate particulars of income ;*

iv) *The appellant's argument that prior approval of JCIT cannot be verified is frivolous and a mere suspicion.*

c) *She failed to appreciate that:-*

i) *all the facts relating to deduction of interest payment were disclosed by the appellant;*

ii) *mere rejection of claim of deduction of interest did not mean that appellant had filed inaccurate particulars of income;*

iii) *The appellant was not required to follow mercantile system of accounting for interest income as the ACIT himself had admitted that appellant was not carrying on business of financing ;*

iv) *as this was its first year of undertaking financing activities, the appellant had reasonable cause in claiming interest as deduction under the head business income instead of under the head other sources;*

v) *merely because the appellant had not disputed additions by filing quantum appeal or that it had not shown financing activities separately did not mean that it had admitted having furnished inaccurate particulars of income;*

vi) *the appellant had no mala fide intention in claiming interest expenses since even without claiming the same, it had huge losses and no detriment was caused to the Revenue by claiming its deduction;*

vii) *prior approval of JCIT could not be assumed to have been obtained by the Id ACIT before imposing penalty.*

d) *The Id CIT (A) therefore ought to have deleted the penalty imposed upon the appellant.*

2. Each of the above grounds is without prejudice to one another.

3. The appellant craves leave to add to, alter, vary, modify, delete any of the above grounds of appeal.

6. Before us, Ld. AR submitted that AO has disallowed the interest expenditure on which assessee has advanced money to its associate company and incurred expenditure. Since assessee could not recover the interest expenditure which was advanced to the associate enterprises during this year, AO has disallowed the interest expenditure. Further assessee has not preferred any appeal before appellate authorities, it does not mean that assessee has accepted that it is furnishing of inaccurate particulars. Further he submitted that AO solely relied on the fact that assessee has not gone on appeal, accordingly he satisfied himself that assessee has furnished inaccurate particulars. Further, he brought to our notice that findings of Ld. CIT(A) at para no. 5, he submitted that Ld. CIT(A) has dismissed the grounds raised by the assessee by relying upon the decision in the case of Dharmendra Textile

Processors, wherein it was held that willful concealment is not an essential ingredient for attracting several liabilities, he submitted that the decision was in the matter of prosecution u/s 276 of the Act, not on penalty. However, Ld. CIT(A) observed that it is enough that AO has satisfied that any person has concealed particulars of income or furnished inaccurate particulars of income. But AO not only satisfied himself but also to demonstrate that assessee has concealed particulars of income. Further he submitted that assessee has already is in huge loss and by making inaccurate particulars of income, assessee does not make any benefit. Ld. CIT(A) further relied on the case of K. P. Madhusudhanan Vrs. CIT and CIT vrs. Gold Coin Health Food Pvt. Ltd. Ld. AR submitted that even though in the present case, assessee is having huge loss, but still AO has to brought on record whether assessee has really furnished inaccurate particulars of income. He brought to our notice annexure-4 of Form-3CD in which the auditor has clearly brought on record that transaction with related persons.

7. With regard to addition on bogus purchases, Ld. AR submitted that the addition made by the AO is materially less compare to total purchases made by the assessee. Assessee could not brought the supplier considering the insignificance of the purchases and also the suppliers are not traceable. It itself cannot be considered as furnishing of inaccurate particulars and prayed that penalty may be deleted.

8. Considering the rival submission and material placed on record, we notice from the records that assessee has borrowed funds from Indiabulls and advance to its associate enterprises in which one of the director is related to the partner in this firm. The assessee advanced this money, but could not realize any interest during this year nor brought on record anything received subsequently. No doubt the interest expenditure proportionate to the fund advanced to the associate enterprises is not relating to the business carried on by the assessee. Only reason, Ld. AR brought to our notice that assessee is on keeping a portion of the building for

which assessee is not paying any rental nor paid any advance towards the occupied property.

9. On careful consideration of the information available on record, we notice that AO has initiated penalty proceedings heavily relying on the fact that assessee has not gone on appeal for the disallowance of interest and bogus purchases, but it may be reasonable ground to make disallowance. However, in order to levy penalty, AO has to bring on record that assessee has deliberately furnished inaccurate particulars of income. However, we notice that to make addition, the relevant information were very much available on record as submitted by the assessee. The assessee intend to advance the funds to the associate concern without charging interest is one of the decision of the assessee. Since the beneficiary is associate enterprises and it is not anyway brought on record by the AO that assessee has submitted inaccurate particulars in order to claim the benefit. Since all the information were very much available on record

and accordingly, AO has made disallowance and assessee has accepted the mistake apparent on record. We do not see any reason that this is a fit case for penalty.

10. With regard to bogus purchase, we notice that AO has disallowed the purchase merely relying on the information from the Sales Tax Department and has not made any independent inquiry, but he has asked the assessee to prove the genuineness of purchases which assessee has failed to bring any supplier before AO. Considering the quantum of disallowance of purchase and the total purchases made by the assessee, the insignificance of the purchases made from unsubstantiated suppliers does not give a clear picture that assessee has deliberately furnished inaccurate particulars, therefore considering our above observation, we do not see that assessee's case is fit case for penalty. With regard to case laws relied upon by Ld. CIT(A) is distinguishable on facts of the case of assessee. Therefore, the penalty levied by

AO is deleted. Accordingly, grounds raised by the assessee are allowed.

11. In the net result, the appeal filed by the assessee stands **allowed.**

Order pronounced in the open court on 7th Nov 2019.

<i>Sd/-</i> (Mahavir Prasad) न्यायिकसदस्य / Judicial Member	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member
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मुंबई Mumbai; दिनांक Dated : 07.11.2019
Sr.PS. Dhananjay

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
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