

**IN THE INCOME TAX APPELLATE TRIBUNAL "A"**  
**(Virtual Court Hearing), BENCH KOLKATA**

**BEFORE SHRIWASEEM AHMED, AM & MS. MADHUMITA ROY, JM**

**आयकरअपीलसं./I.T.A Nos.2257 to 2263/Kol/2019**

**(निर्धारणवर्ष / Assessment Years: 2010-11 to 2016-17)**

<b>M/s Rungta Cements Pvt. Ltd.</b> Room No.301, Mangalan Building, 24, Hemant Basu Sarani, Dalhousi, Kolkata	<b>Vs.</b>	<b>DCIT, Circle-3(1), Kolkata</b>
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AACCR5445F</b>		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent)</b>

Appellant by : None

Respondent by : Shri Dhrubajyoti Roy, JCIT

सुनवाईकीतारीख/ Date of Hearing : 09/11/2020

घोषणाकीतारीख/Date of Pronouncement : 16/12/2020

**आदेश / ORDER**

**Per Ms. Madhumita Roy:**

The instant seven appeals filed by the assessee are against the order dated 08.08.2019 arising penalty order passed by the Commissioner of Income Tax (Appeals)-21, Kolkata for the assessment years 2010-11 to 2016-17 u/s 271(1B) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. None appeared on behalf of the assessee at the time of hearing of the matter and therefore we have heard the ld. DR and perused the relevant materials available on record before us.

3. The imposition of penalty of Rs.10,000/- u/s 271(1B) of the Act has been challenged by the assessee for non-compliance of the notice u/s 142(1) of the Act dated 28.11.2017 as it appears from the record and also submitted by the ld. DR

that in the course of assessment proceedings, notice u/s 142(1) of the Act along with detailed questionnaire was issued and duly served upon the assessee however no compliance has been made by the assessee. Penalty proceedings u/s 271(1B) of the Act was initiated; notice was issued on 29.12.17 upon the assessee. Final hearing was re-fixed on 18.05.2018. In the absence of any response from the assessee, the matter was finalized by imposing penalty as mentioned hereinabove. However as we also find from the records that a remand report dated 31.05.19 was furnished to the Id. CIT(A) by the Id. A.O wherefrom it appears that where the submission of the reply by the assessee relating to the penalty order u/s 271(1B) of the Act was filed wherein the assessee categorically mentioned that the permanent established of the assessee is at Ranchi and the details of the business are maintained in the said city further that there is no established at Kolkata. It appears that the assessee has complied with the notice u/s 142(1) of the Act though late as evident from the records before us. Therefore no penalty in the instant case is called for. However the Id. DR relied upon the order passed by the authorities below.

4. In this respect, we would like to rely upon the judgment passed by the Hon'ble Apex Court in the case of Hindustan Steel Ltd. vs. State of Orissa (1972) 83 ITR 26 ( SC) where it was held that penalty should not be imposed unless the assessee acted deliberately, the relevant portion of the said judgment reads as follows:

*“The Company supplied building material to the contractors at agreed rates. There was concurrence of the four elements which constitute a sale--(1) the parties were competent to contract; (2) they had mutually assented to the terms of contract; (3) absolute property in building materials was agreed to be transferred to the contractors; and (4) price was agreed to be adjusted against the dues under the contract. No serious argument was advanced before us that the supply of building material belonging to the Company for an agreed price did not constitute a sale. Under the Act penalty may be imposed for failure to register as a dealer: s. 9(1) read with s. 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct*

*contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out. Liability to pay sales tax is imposed by s. 4 of the Act. Every dealer whose gross annual turn over exceeds Rs. 10,000/is liable to pay tax during the ten quarters in question. The expression "dealer" was defined at the relevant time as meaning:*

*"Dealer' means any person who executes any contract or carries on the business of selling or supplying goods in Orissa whether for commission, remuneration or otherwise and includes any firm or Hindu Joint family, and any society, club or association which sells or supplies goods to its members.*

*Explanation .....*"

*A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. The expression "business" is not defined in the Act. But as observed by this Court in State of Andhra Pradesh v. Abdul Bakhi and Bros. (1) "The expression 'business' though extensively used is a word of indefinite import, in taxing statutes. it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure ."*

*The sales tax authorities and the Tribunal have held that the Company was carrying on business of selling or supplying materials to the contractors and with that view the High Court agreed. The Company purchased bricks manufactured by its own contractors and sold the bricks to the building contractors at a flat 30% premium over the purchase price in the case of "second class bricks" and 25% premium in the case of "First class bricks". Steel, cement and other materials were initially supplied at 3-1/2% premium over the purchase price paid by the Company. It was contended on behalf of the Company that merely because the price charged to the contractors exceeded the price paid by the Company for acquiring the materials, motive of the Company to carry on business in building materials for profit, cannot be inferred. The Company, it is true, maintained no separate accounts relating to the expenditure incurred by it for (1) [1964] 7 S.C.R. 664.*

*overhead and other charges in respect of those materials. Before the sales-tax authorities counsel for the Company also conceded that the Company had not maintained separate accounts from which. it could be proved that the transactions of supply of bricks, cement, steel and other commodities resulted in no profit. The High Court observed:*

*"It is the Stores Department of the company as a whole which deals with the purchase, storage and sale of all the goods required both for acquisition and issue of materials to be used for the construction and operation work of the Company ..... the. Company had to construct not only the buildings but also roads, railways, etc., acquire machinery and perform other multifarious activities connected with the establishment of steel plants and construction of the township. There is nothing in the statement to show that the Company had at any time even contemplated the allocation of the total expenditure incurred for the maintenance of its Stores Department between the expenditure incurred in respect of the goods namely bricks, cement, steel etc. and other goods. If such allocation was not even contemplated, it will be unreasonable to say that when these goods were sold to the building contractors at the prices mentioned above, the intention of the Company was merely to utilise the difference in price to meet the overhead charges in respect of these articles and that there was no profit making motive."*

*It is unfortunate that in submitting the statement of case the Tribunal stated no facts at all, and merely submitted the question which was submitted by the Company and the question which, in the view of the Tribunal, arose out of the order. Even in the order deciding the appeal, the facts found on which the conclusion was based were not clearly set out. The Tribunal observed that though the primary object of the Company was to establish a steel plant, the Memorandum authorised the Company to carry on "any trade or business" that it thought would be conducive to its interest. Observed the Tribunal:*

*"Judged in this light one cannot find anything wrong if in the initial stages when construction works were going on, the Company thought it prudent that instead of keeping its employees idle and bearing the cost of maintenance without any return, utilised them in some subsidiary business which would promote the interest of the Company and bring some return. With that end in view the company could as well have brought contractors to manufacture bricks in its lands, purchased the same from them, purchased cement, coal and other materials from dealers, opened a stores department and kept those materials so procured in its stores and thereafter effected sales of the materials to outsiders including its contractors. The Company knew that for speedy construction of its buildings and factory the contractors would require these materials and so the Company would not lose if it entered into such business. Rather that business would be in the interest of the Company. If the Company had no idea to enter into any business. there was no reason why it should have brought contractors to manufacture bricks, purchased the entire stock from them, stocked the same and thereafter sell the same to its building contractors."*

*But in so observing a very important piece of evidence appears to have been ignored by the Tribunal. Annexed to the form of the tender submitted by the contractors there are certain "general rules. and directions for the guidance of contractors." Paragraph 8 slated:*

*"The memorandum of work tendered for, and the schedule of materials to be supplied by the H.S. Ltd. and their issue rates, shall be filled in and completed in the office of the Divisional Officer before the tender form is issued. If a form is issued to an intending tenderer without having been so filled in as completed he shall request the office to have this done before he completes and delivers his tender."*

Then follow the conditions of contract of which condition No. 10 is material; it states---

*"If the specification or estimates of the work provides for the use of any special description of materials to be supplied from the Engineer-in-Charge's store, or if it is required that the contractor shall use certain stores to be provided by the Engineer- in-Charge (such materials or stores, and the prices to be charged therefor as hereinafter mentioned being so far as practicable for the convenience of the contractor, but not so as in any way to control the meaning or effect of this contract specified in the schedule or memorandum hereto annexed), the contractor shall be supplied with such materials and stores as required from time to time to be used by him for the purpose of the contract only, and the value of the full quantity of materials and stores so supplied at the rates specified in the said schedule or memorandum may be set off or deducted from any sums then due, or thereafter to become due to the contractor under the contract, or otherwise or against or from the security deposit. All materials supplied to the contractor shall remain the absolute property of the Company, and shall not on any account be removed from the site of the work, and shall at all times be open to inspection by the Engineer-in-Charge. Any such materials unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in- Charge's store, if by a notice in writing under his hand he shall so require;....."*

Attached to the tender form is the schedule which recites:

*"Recovery of rates of materials to be supplied by H.S.L., for the work of:*

*(1) Construction of brick masonry compound wall around plant area. Northern section Length 2.4. miles. (2) Construction of brick masonry compound wall around plant area. Southern section Length 2.30 miles. (3) Construction of brick masonry compound wail around plant area. Marshalling yard section Length 4.15 miles ."*

*It is followed by a table which sets out the Serial No. of the articles to be supplied, description of materials unit, rate and place of delivery.*

*It is clear from the terms of the tender and the schedule annexed thereto that the Company was to charge certain rates for the materials to be supplied by it. One of the contracts which has been produced before this Court states under the head "Rate": Rs. 5.94+3-1/2% storage charges against "cement in bags," Rs. 800.00+3 1/2% storage charges against "structural steel and M.S. rods", and "Rs. 41.25 for 1000 bricks" against "first class bricks". Apparently 3-1/2% over the specified rate was agreed to be paid by the contractors as storage charges in respect of cement and structural steel and M.S. rods. No. specific percentage was set out in respect of the bricks and an inclusive price was made chargeable.*

*Relying upon the terms of the schedule, counsel for the Company contends that the contractors and the Company expressly agreed that 3-1/2% over the agreed price of the goods was chargeable as storage charges. It is common ground that the rate mentioned 'against cement and structural steel is the price at which the goods were purchased' by the Company. If the Company was charging a fixed percentage on the price paid by it for*

*procuring such goods for storage and other incidental charges, it would be difficult to resist the conclusion that the Company was not carrying" on the business o.f selling cement and structural steel. There is of course no statement in the schedule that the price charged by the Company in excess of the price paid by the Company to its contractors for bricks was in respect of storage charges.*

*But neither the Tribunal nor the High Court has referred to this important piece of evidence and we are unable to decide these appeals unless we have an additional statement of facts in the light of the relevant evidence as to whether the excess charged over and above the price which the Company paid for procuring cement and steel (expressly called storage charge) and bricks was intended to be profit. If the Company agreed to charge a fixed percentage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the Company did not carry on business of supplying materials as a part of- business activity with a view to making profit.*

*The Tribunal's statement of case is bald and in recording its findings the Tribunal has ignored a very important piece of evidence. To enable us to answer the questions referred, it is necessary that the Tribunal should be called upon to submit a supplementary statement of the case on the questions whether the Company charged any profit apart from the storage charges for supplying cement and structural steel, and whether the difference between the price charged to the contractors and the price paid by the Company to its suppliers for bricks was not in respect of storage and other incidental charges. The Tribunal to submit the supplementary statement of case to this Court, within three months from the date on which the papers reach the Tribunal."*

5. Respectfully following the aforesaid judgment, we set aside the order passed by the Id. CIT(A) and direct the Assessing Officer to delete the penalty. The common order passed by the Id. CIT(A) in all appeals is set aside. This common order be placed in all case files.
6. In the result, all the assessee's appeals stand allowed.

Order is pronounced in the open court on 16.12.2020.

**Sd/-**  
**(Waseem Ahmed)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(Madhumita Roy)**  
**JUDICIAL MEMBER**

**कोलकाता /Kolkata;**  
**दिनांक/ Date: 16/12/2020**  
**RS**

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. The Appellant- M/s Rungta Cements Pvt. Ltd.
2. The Respondent- DCIT, Circle-3(1), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

True Copy

By Order

Assistant Registrar,  
I.T.A.T, Kolkata Benches,  
Kolkata.