

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

**BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

**ITA No. 3979/Mum/2019
(Assessment Years: 2011-12)**

ACIT – 12(2)(2) Rm. No. 262/145, 1 st Floor Aayakar Bhavan, Mumbai	बनाम/ Vs.	M/s. Harisons Steels Ltd., Plot No. Survey Gut No. 194, Nehroli Taluka Wada, Thane – 421312.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACH8891D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	Shri Gurbinder Singh, DR
प्रत्यर्थी की ओर से/Respondent by :	None

सुनवाई की तारीख / Date of Hearing	30/12/2020
घोषणा की तारीख/Date of Pronouncement	30/12/2020

आदेश / ORDER

PER PAVAN KUMAR GADALE - JM:

The revenue has filed an appeal against the order of Commissioner of Income Tax (Appeals) -20, Mumbai, passed u/s. 271(1)(c) of the Income Tax Act, 1961.

2. The brief facts of the case are that the assessee is engaged in the business of manufacturing of steel. The books of accounts are audited u/s 44AB of the

Act. The return of income was filed on 30.09.2011 with total income of Rs. 5,47,74,130/- and the return of income was processed u/s 143(1) of the Act. The assessment was reopened based on the information received from DGIT (Investigation Wing) that the assessee company has indulged in obtaining the bogus purchase bills and accounted in the financial statements. Therefore, the A.O has reason to believe that the income has escaped assessment and issued notice u/s 148 of the Act. Subsequently, the notice u/s 143(2) and 142(1) of the Act were issued. The A.O has provided the reasons recorded for reopening of the assessment to the assessee. The A.O has called for the information in respect of bogus purchases and confirmation from the parties. Since the A.O was not satisfied with the information and made addition of alleged bogus purchases of Rs. 42,40,288/- passed order u/s 143(3) r.w.s 147 of the Act dated 29.11.2013 determining total income of Rs. 5,90,14,420/-. Aggrieved by the assessment order the assessee has filed an appeal with the CIT(A), whereas, the CIT(A) considered the submissions of the assessee

and restricted the addition to 12.5% of the alleged bogus purchases and partly allowed the appeal.

Whereas, the A.O has initiated the penalty proceedings u/s 271(1)(c) of the Act in respect of claim of bogus purchase made by the assessee. The A.O found that the CIT(A) has sustained the addition at 12.5% of the bogus purchases and in spite of opportunities provided to the assessee no reply was filed. Finally A.O. levied the penalty u/s 271(1)(c) of the Act Rs.1,69,293/- for furnishing inaccurate particulars and passed order on 29.03.2017. Aggrieved by the order, the assessee has filed an appeal with the Ld.CIT(A), whereas the Ld. CIT(A) considering the submissions of the assessee and the decision of the Hon'ble High Court of Punjab and Haryana and has directed the A.O to delete the penalty as the income is assessed on the estimated basis and allowed the appeal. Aggrieved by the order, the revenue has filed an appeal with the Tribunal.

3. At the time of hearing none appeared on behalf of the assessee. We heard the submissions of the Ld. DR

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The grievance of the revenue is that, the CIT(A) has erred in deleting the penalty irrespective of the fact that the assessee has claimed bogus expenditure in the return of income and the assessment was reopened based on the information received from DGIT (Investigation Wing). Therefore, the order of the CIT(A) be set aside and allow the revenue appeal.

4. We heard the submissions of the Ld. DR and perused the material on record as none appeared on behalf of the assessee. The sole disputed issue envisaged by the Ld. DR that the CIT(A) erred in deleting the penalty overlooking the facts that the assessee has claimed bogus purchases in the books of accounts and also the information received from external sources is the exception to the monitory limit prescribed under CBDT instruction No. 3/2018 dated 11.7.2018 as amended on 20.08.2018. We find the Ld.CIT(A) has considered the submissions of the assessee and relied on the decision of Harigopal Singh Vs.CIT (2002) 258 ITR 85 (P&H) referred at page 3 para 5 to 5.2 of the order as under:

“5. Decisions on ground of appeal No.1

5.1 I have considered the rival contentions. I find from the order of the CIT(A) that the sum of Rs. 5,09,650/- in respect of which the penalty was imposed based on estimate. The said sum was estimated @ 12.5% of the purchases treated as bogus. I find that the A.O failed to bring any concrete evidence to prove that the sum of Rs. 5,09,650/- actually represented income in respect of which inaccurate particulars had been furnished by the appellant. I find that the facts in the case cited by the appellant is similar to the facts of the appellant case. In that case, the question of law before the Hon'ble Court was whether penalty is attracted under section 271(1)(c) of the Act where income is assessed purely on estimate basis and additions are made in the declared income on that basis. In that case, the Hon'ble High Court of Punjab & Haryana held as under:

“4. In order to attract Clause (c) of [Section 271\(1\)](#) of the Act, it is necessary that there must be concealment by the assessee of the particulars of his income or if he furnishes inaccurate particulars of such income. What is to be seen is whether the assessee in the present case had concealed his income as held by the Assessing Officer and the Tribunal. He had not maintained any accounts and he filed his return of income on estimate basis. The Assessing Officer did not agree with the estimate of the assessee and brought his income to tax by increasing it to Rs. 2,07,500. This, too, was on estimate basis. The Tribunal agreed that the income of the assessee had to be assessed on an estimate of the turnover but was of the view that the estimate as made by the Assessing Officer was highly excessive and it fixed the total income of the assessee at Rs. 1,50,000 for the year under appeal. It is, thus, clear that there was a difference of opinion as regards the estimate of the income of the assessee. Since the Assessing Officer and

the Tribunal adopted different estimates in assessing the income of the assessee, it cannot be said that the assessee had "concealed the particulars of his income" so as to attract Clause (c) of [Section 271\(1\)](#) of the Act. There is not even an iota of evidence on the record to show that the income of the assessee during the year under appeal was more than the income returned by him. Additions in his income were made, as already observed, on estimate basis and that by itself does not lead to the conclusion that the assessee either concealed the particulars of his income or furnished inaccurate particulars of such income. There has to be a positive act of concealment on his part and the onus to prove this is on the Department. We are also of the considered view that the Tribunal grossly erred in law in relying on Explanation 1(B) to [Section 271\(1\)\(c\)](#) of the Act to raise a presumption against the assessee. The assessee had justified his estimate of income on the basis of household expenditure and other investments made during the relevant period. It is not the case of the Revenue that he had, in fact, incurred expenditure in excess of what he had stated. In this view of the matter, it cannot be said that the explanation furnished by the assessee had not been substantiated or that he had failed to prove that such explanation was not bona fide".

5.2 In view of decision of above, the penalty imposed is not sustainable. The A.O's reliance on the decision of the Hon'ble Apex Court in the case of MAK data Pvt Ltd., Vs. CIT (supra) is misplaced because in this case the disallowance / addition was not based on any concrete evidence. Accordingly, I direct the A.O to delete the penalty of Rs. 1,69,293/-. In the result, ground of appeal No. 1 is allowed.

5. We considering the observations of the Ld.CIT(A) find that, the penalty u/s 271(1)(c) of the Act cannot be sustained when the income has been estimated. We support our view relying on the decision of CIT Vs. Manjunatha Cotton & Ginning Factory, [2013] 359 ITR 0565 (Kar).

*“In the case of **CIT Vs. Manjunatha Cotton and Ginning Factory, Karnataka High Court** has laid down the following Principles for levy of penalty Under section 271(1)(c) of the Income Tax Act, 1961 :-*

(a) Penalty under Section 271(l)(c) is a civil liability.

(b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.

(c) Wilful concealment is not an essential ingredient for attracting civil liability.

(d) Existence of conditions stipulated in Section 271(l)(c) is a sine qua non for initiation of penalty proceedings under Section 271.

(e) The existence of such conditions should be discernible from the Assessment Order or order of the Appellate Authority or Revisional Authority.

(f) Even if there is no specific finding regarding the existence of the conditions mentioned in Section 271(l)(c), at least the facts set out in Explanation 1(A) & (B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.

(g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under Section 271(l)(c) is a sine qua non for the Assessment Officer to initiate the proceedings because of the deeming provision contained in Section 1(B).

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(h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Appeals and the Commissioner.

(i) The imposition of penalty is not automatic.

(j) Imposition of penalty even if the tax liability is admitted is not automatic.

(k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.

(l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty could be passed.

(m) If the explanation offered, even though not substantiated by the assessee, but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.

(n) The direction referred to in Explanation IB to Section 271 of the Act should be clear and without any ambiguity.

(o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the Assessing Authority.

(p) Notice under Section 274 of the Act should specifically state the grounds mentioned in Section 271(l)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income

(q) Sending printed form where all the ground mentioned in Section 271 are mentioned would not satisfy requirement of law.

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(r) The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.

(s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.

(t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.

(u) The findings recorded in the assessment proceedings insofar as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.

6. We are of the substantive opinion that, the penalty u/s 271(1)(c) cannot be levied when the income has been estimated. The Ld. DR could not controvert the observations of the Ld.CIT(A) with any cogent evidence except relying on the A.O's order. Accordingly, we are not inclined to interfere with the order of the Ld.CIT(A) who relied on the judicial decisions and passed a reasoned order in directing the assessing officer to delete the penalty. Hence, The grounds of appeal raised by the revenue are dismissed.

7. In the result the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 30.12.2020

Sd/-

(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 30/12/2020

KRK, PS

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