IN THE INCOME TAX APPELLATE TRIBUNAL), 'D' BENCH MUMBAI

BEFORE SHRI RAJESH KUMAR, AM

&

SHRI PAVAN KUMAR GADALE, JM

ITA No.3958/Mum/2019
(**Assessment Year :2008-09**)

DCIT Central Circle 8(4) Room No.658, 6th Floor Aayakar Bhavan M.K. Road, Mumbai-400020	Vs.	M/s. Ruby Mills Ltd., 11th Floor Ruby House, J.K. Sawant Marg, Dadar (W) Mumbai – 400 028
PAN/GIR No.AAACT0220G		
(Appellant)	..	**(Respondent)**

Revenue by	Shri Sajit V. Nair
Assessee by	Ms. Hema Sharma
Date of Hearing	**18/01/2021**
Date of Pronouncement	**01/02/2021**

आदेश / O R D E R

PER RAJESH KUMAR, ACCOUNTANT MEMBER:

The aforesaid appeal has been filed by the assessee against the impugned order dated 29/03/2019, passed by the CIT(A)- 50, Mumbai, for the assessment year 2008-09.

2. The only issue raised by the revenue is against the deletion of penalty of Rs.1,11,73,740/- as levied by the AO u/s.271(1)(c) of the Act.

3. The facts in brief are that the assessee has filed return of income on 26/09/2008 declaring income of Rs.8,99,90,669/-. The assessment was framed u/s.143(3) of the Act vide order dated 14/12/2010 assessing total income of Rs.14,51,75,209/- making the some additions aggregating to Rs. 5,51,84,540/-. There after another assessment was framed under section 143(3) r.w.s. 153C of the Act making additions to the tune of Rs. 5,21,84,540/-. Finally, the ld. CIT(A) confirmed the following additions:-

a. Disallowance of building on account of building repairs expenses: Rs.9,63,944/-
b. Donation claimed as expenses in the P/L account - Rs.30,00,000/-
c. Mark to market losses of Rs.2,89,00,000/-.

5. Thereafter ,the AO issued notices u/s.271(1)(c) of the Act to show-cause as to why the penalty should be levied in respect of these three items of additions by invoking Explanation to Section 271(1)(c) of the Act. The assessee replied the said notice by submitting that all facts qua these items were fully disclosed by the assessee in the return of income and therefore these disallowances are not liable to any penalty u/s 271(1)© of the Act. However the AO was not convinced with the contentions and submissions of the assessee and ultimately levied penalty of Rs.1,11,73,740/- being 100% of the tax sought to be evaded by the assessee by passing the order dated 28/03/2016 u/s 271(1)© of the Act.

6. In the appellate proceedings, the ld. CIT(A) allowed the appeal of the assessee after taking into consideration the various submissions made by the assessee during the course of proceedings by observing and holding as under:

"9.0 I have considered the contentions of the A.O. in the assessment order, submissions of the Appellant Company and perused the other materials available on record on this issue.

9.1 At the outset, it may be noted that the addition on account of repair on leased premises and on account of donation are not liable for penal action u/s 271(1) (c) of the Act on the facts and circumstances of the present case.

9.2 As regard the issue of repairs to the leased premises is concerned, it is seen from the lease documents that the repair expenses are to be borne by tenant and not by the owner. The Appellant had also stated that the ledger account of repairs includes only repairs pertaining to the factory building. Moreover, the disallowance had been made only due to the supporting documents not being furnished during the assessment proceedings. I have noted that the AO had disallowed the repair expense on an estimate basis by applying a ratio and hence, no penalty u/s 271(1) (c) of the Act is leviable on such an estimated addition."

9.3 In the case of *CJT v. M.M. Rice Mills (2002) 253 ITR 17 (P&H)*, the
Hon'ble Punjab & Haryana High Court had held as under:-

"3. We have heard Shri R.P. Sawhney, senior advocate appearing for the appellant, and have gone through the record.

In our opinion, no question of law, much less a substantial question of law arises for determination in this appeal. A perusal of the order passed by the CIT(A) shows that he had accepted the assessee's plea that there was no concealment of income by making the following observations:
"As regards the plea that no concealment was established and addition was made on estimate basis, after applying the proviso to s. 145(1), the plea is correct, and the AO has not brought on record any document or material to show that assessee was guilty of

concealing the particulars of income. No sale/excess stock of khudiphak was detected outside the books of account. As such the addition made by applying the proviso to s. 145(1) cannot be made the basis for imposition of penalty under s. 271(l)(c). This view has been upheld by the Punjab High Court in the case of CIT vs. Metal Products of India (1985) 45 CTR (P&H) 45 : (1984) 150 ITR 714 (P&H): TC 50R.871. The High Court has observed as under:

'Held, that merely because the addition had been made on estimate under the proviso to s. 145(1) by adopting the view that the gross profit shown in the books of account was took low as there were defects in the method of accounting employed, did not automatically lead to the conclusion that there was failure to return the correct income by means of fraud or gross or wilful neglect. Though the onus to prove that there was no fraud or gross or wilful neglect was on the assessee, yet the quantum of proof to discharge it was that as required in a civil case, i.e., by preponderance of probabilities. This had been discharged by the assessee's producing regular books of account and that was "enough evidence" before the Tribunal to come to the view that the onus had been discharged. This also applied to the discrepancy in the stock statements....."

In view of the foregoing discussion it is held that penalty is not exigible on the facts of this case and penalty imposed is deleted."

The Tribunal expressed its agreement with the view taken by the CIT(A) and dismissed the appeal filed by the Revenue by applying the ratio of the decision of this Court in the case of Metal Products of India (supra).

In our opinion, the concurrent view expressed by the CIT(A) and the Tribunal represents the correct position of law and there is no valid ground to entertain the appeal which we hereby *dismiss.*

9.4 In the case of *CIT vs. Sangrur Vanaspati Mills Ltd ((2008) 216 CTR 0092 : (2008) 4 DTK 0166 : (2008) 303 ITR 0053 : (2008) 171 TAXMAN 0320,*the Hon'ble Punjab and Hayana High Court had held as under:-

"6. We have heard counsel for the appellant and have gone through the impugned order.

The order passed by the Tribunal is based upon two decisions of this Court in CIT vs. Ravail Singh & Co. (2002) 173 CTR (P&H) 429 : (2002) 254 ITR 191 (P&H) and Harigopal Singh vs. CIT (2002) 177 CTR (P&H) 580 : (2002) 258 ITR 85 (P&H). In both these decisions, this Court has held that in order to attract cl. (c) of s. 271(1) of the Act, it is necessary that there must be concealment by the assessee of the particulars of his income or furnishing of inaccurate particulars of such income. The provisions of s. 271(l)(c) of the Act are not attracted to cases where the income of an assessee is assessed on estimate basis and additions are made therein. It was held that when the addition had been made on the basis of estimate and not on account of any concrete evidence of concealment, then the penalty was not leviable. The similar view was also taken by this Court in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H), where the addition was made by the AO by estimating the yield of super phak as well as ofchhilka and also the price of chhilka, that addition was reduced by the. CIT(A). However, the penalty levied by the AO was deleted by the CIT(A). The order of CIT(A) was confirmed by the Tribunal and the appeal filed by the Revenue against the said order of the Tribunal was dismissed by this Court, on the ground that the AO had made the additions on the basis of estimate of the yield of phak and chhilka and an estimate of the price and that the estimate would not ipso facto lead to penalty.

7. In view of the aforesaid factual and legal position, we are of the opinion that no substantial question of law is arising from the order passed by the Tribunal. Dismissed."

9.5 Further, the Hon'ble Supreme Court had in the above mentioned case dismissed the SLP filed by the Revenue on the ground that in case of addition based on estimate, penalty was not leviable.

9.6 The Hon'ble Gujarat High Court in the case of *JumabaiPremchand (HUF) vs. CIT; 243 ITR 812,* wherein there was a finding in the assessment Older that household expenses of the assessee were very low during the relevant assessment years, held that low household withdrawals is not conclusive for imposing penalty u/s 271(l)(c) of the Act.

9.7 It has been held in many judicial pronouncements that in respect of estimated additions, no penalty can be imposed, a few case laws on this issue are enumerated below:-

> CIT vs. Smt. K. MeenakshiKutty 258ITR 494(Mad).

> Harigopal Singh vs. CIT 258 ITR 85(P&H).
> CIT(A) vs. Valimkbhai H. Patel 280 ITR 487(Guj).
> CIT(A) vs. Raj Bans Singh 276 ITR 351 (All).
> CIT vs. Lallubhaijogibhai Patel 261 ITR 216(Guj)
> CIT vs. Shivnarayanjamnalal& Co. 232 ITR 311 (UP).
> Navjivan Oil Mills Vs. CIT [252 ITR 417 (Guj)]
> CIT Vs. Ravail Singh & Co. [254 ITR 191 (P&H)]
> CIT Vs. Dhillon Rice Mills [256 ITR 447 (P&H)]
> CIT vs. K.R. Chinni Krishna Chetty; 246 ITR 121
> CIT Vs. Subhash Trading Co. 221 ITR 110 (Guj.)
> CIT vs. Rahamat Khan Birbal Khan Badruddin& Party (1999) 240 ITR 778 (Raj)
> CIT vs. B.D. Ramchandra (1984) 150 ITR 242 (Bom)
> CIT Vs. Aero Traders Pvt, Ltd. (2010) 322 ITR 316 (Del)

9.8 As regards disallowance of donation is concerned, I am inclined to agree with the appellant that the omission was inadvertent. In case it was deliberate, the Appellant would not have included a claim of 50% of amount of donation as deduction u/s 80G of the Act. There has to be definite finding about the concealment of income before penalty u/s 271(l)(c) can be levied. I have noted that the AO had levied the penalty for concealment only on the ground that the claim of donation was not pressed before the CIT(A).

9.9 The Hon'ble Supreme Court in case of *Sir Shadilal Sugar Mills (168 ITR 705)* has held that there may be a hundred and one reasons for not protesting and agreeing to an addition but that does not follow to the conclusion that the amount agreed to be added was concealed income 9.10 The Hon'ble Karnataka High Court has in the in case of *CIT v. Manjunatha Cotton & Ginning ITA No.l307/Bang/2003 [2013-ITRV-HC-KAR-093]* had held that even if the assessee had not challenged the order of assessment levying tax and interest and has paid the same, 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 which 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 as opined by the Assessing Officer in the assessment order.

9.11 Further, it was held in following cases that agreed addition to income to purchase peace cannot amount to an admission constituting evidence of concealment in penalty proceedings:-

> CIT V. Girish DevchandRajani [2013] 33 taxmann.com 174 (Gujarat)
> CIT v. M.M. *Gujamgadi (2007) 162 Taxmann 211 (KAR.) > CIT vs. Punjab Tyres (1986) 162ITR 517 (MP) > CIT vs. Jaswant Rai (1997) 142 CTR (P&H) 49 > CIT vs. Mecon Builders & Engineers (2001) 248 ITR 159 (Del)*

9.12 I have also noted that the main issue on which penalty had been levied is disallowance of foreign exchange derivative losses amounting to Rs. 2,89,00,000/-. Be that as it may, there can be no doubt that this issue was highly debatable prior to the issue of the CBDT Notification dated 23.03.2010.The Apex Court decision in the case of *Woodward Governor* cited by the appellant supports the view taken by the appellant with regard to allowability of Mark to Market loss in derivatives.

9.13 The Appellant cannot be penalised for adopting an established legal position prevailing at the relevant time. Merely submitting an incorrect claim in law for expenditure would not amount to furnishing of inaccurate particulars : of income. In this regard, reliance is placed on the judgment of *Nayan* t. *Shah* v. *ITO (2016) 386 ITR 304 (Guj HC).*

9.14 In *Price Waierhouse Coopers (P.) Ltd. v. CIT [2012] 25 taxmann.com 400/211 Taxman 40,* the Hon'ble Apex Court held that calibre and expertise of assessee have little to do with inadvertent error. In that case the assessee-firm engaged in providing multi-disciplinary management consultancy services filed its return of income along with tax audit report. A provision towards payment of gratuity was claimed as a deduction which was not allowable, thereby leading to underassessment of income. The Assessing Officer imposed a penalty under section 271(l)(c). The CIT (A) upheld the levy of the penalty; ITAT partially reduced it, taking a view that the assessee had made a mistake which could be described as a silly mistake. The order of the Tribunal was upheld by the Hon'ble High Court. On further appeal, the Hon'ble Apex Court observed as follows:

"The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while

submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The caliber and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income."

9.15 The Hon'ble Bombay High Court in *CIT v. Somany Evergreen Knits Ltd. [2013] 35 taxmann.com 529* held that excess depreciation originally claimed was on account of bona fide and inadvertent mistake on the part of the respondent- assessee. The Tribunal rightly held that mistake should not be visited with penalty. During the assessment proceedings, the mistake was noticed and corrected by the respondent- assessee. On the above facts, the Tribunal concluded the claim for deduction made by the respondent-assessee was on account of a bona fide mistake and in such circumstances the levying of penalty was not justified.

9.16 In my opinion, the instant case is :overe^by the ruling of Hon'ble Supreme Court of India in the case of *C.LT. '^Reliance PetroproductsPvt. Ltd. (2010) 322 ITR 158 (SC),* wherein the Hon'ble Court has held as under:-

"...as the appellant had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion attract u/s. 271(l)(c). If we accept the contention of the Revenue that in case of every return, where the claim made is not accepted by the Assessing Officer for any reason, the appellant will invite penalty u/s. 271(l)(c), That is clearly not the intendment of the legislature."

9.17 It has been held by the Apex Court in case of *Reliance Petro-products Pvt.* Ltd., referred supra that a mere making of a claim which is not sustainable in law by itself, will not tantamount to furnishing inaccurate particulars of income. It has also been held in the same decision that merely because the assessee has claimed expenditure,

which claim was not acceptable to the revenue, that by itself would not attract penalty u/s 271(l)(c).

9.18 The Hon'ble Gujarat High court, in the case of *Sarabhai Chemicals Pvt. Ltd. vs CIT 257 ITR 355* has held that where the assessee is under a bonafide belief that no income has actually accrued, no penalty is leviable. The relevant extract of the order is as under:-

"19.2 The satisfaction in the course of assessment proceedings that any person has concealed the particulars of his income or furnished inaccurate particulars of his income may give rise to a liability to pay penalty as provided by s. 271(l)(c)(iii) of the Act. Accordingly, in addition to any tax payable by him, a sum 'which shall not be less than, but which shall not exceed twice the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income'. Expln. 1 to s. 271(l)(c)(iii) raises a presumption in cases where such person (a) fails to offer an explanation or offers an explanation which is found by the ITO or the AAC or CIT(A) to be false, or (b) offers an explanation which he is not able to substantiate in respect of any facts material to the computation of the total income of such person. This presumption is to the effect that the amount added or disallowed in computing the total income by the ITO, AAC or CIT(A) in the quantum proceedings shall be deemed to represent the income in respect of which particulars have been concealed. By its very nature, the expression 'fails to offer an explanation' or 'offers an explanation which is found by the ITO or AAC or the CIT(A) to be false' occurring in sub-cl. (A) of Expln. 1 to d. (Hi) of s. 271(l)(c) refers to the quantum proceedings. Therefore, the cases where no explanation was given in respect of any facts material to the computation of total income in respect of the amount added or disallowed therein or the explanation given in respect thereof was already found in such assessment proceedings to be false, there would arise a presumption that particulars of such added or disallowed income were concealed. In such cases falling under sub-cl. (A) of Expln. 1, there can arise no question allowing the assessee to urge that he bona fide believe in the explanation which was proved to be false or which never was given, for, one cannot be said to have a reasonable bona fide belief in an explanation which never was given or an explanation proved to be false.

19.3. However, in cases where the explanation offered by such person in the quantum proceedings could not be substantiated by him in those proceedings, as a result of which, the amount was added or disallowed in computing the 10 total income of such person by the ITO, AAC or the CIT(A) before whom the explanation given could not be substantiated as contemplated by sub-cl (B) to Expln. 1. The deeming fiction that the added/disallowed amounts represent the income in respect of which particulars have been concealed contained in Expln. 1 will not apply if the explanation that was given by the assessee in the quantum proceedings which he could not substantiate in those proceedings was (i) bona fide and, (ii) if he had disclosed all the facts relating to the same and material to the computation of his total income.

19.4. Penalty proceedings which are an aftermath of the quantum proceedings are not devised to undo the findings reached in the quantum proceedings. They, are in continuity of the outcome of the quantum proceedings. If the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, which is added or allowed in the quantum proceedings, there still would remain to be considered the question as to the nature and circumstances of concealment and the penalty that may be imposed on him when the requisite satisfaction is reached by the ITO, AAC or CIT(A), and that is why, the show-cause notice for the penalty proceedings comes to be issued under s, 271(1} after reaching the requisite satisfaction. In a large number of cases where the assessee was not able to substantiate the explanation in respect of the income and by rejecting his explanation, the ITO, AAC and/or CIT(A) added or disallowed the amount in computing the total income and it is not a case of 'no explanation' or an explanation already found to be false by the ITO, AAC or the CIT as contemplated by cl (B) of Expln. 1, then there still remains a scope to examine the bona fides of the explanation already given by the assessee in the quantum proceedings. The rationale behind not giving similar consideration to cases falling in subcl (A) of Expln. 1 to a person who 'fails to offer a explanation before the ITO during the proceedings' appears to be the legal assumption underlying the provision that in fact, there existed no explanation which could have been offered and to rule out any possibility of bringing into existence, explanations which in fact were not there. In cases where explanation was offered, but was rejected as it could not be substantiated by the assessee, there would arise no presumption of concealment of the

particulars of income that was added or disallowed and such assessee can show that the said explanation offered by him was a bona fide one and that he had disclosed all facts relating to such explanation and material to the computation of his total income during the quantum proceedings."

9.19 Reliance is also placed on the decision of the Hon'ble Apex Court in the case of *Hindustan Steels Ltd. Vs. State of Orissa (1972) 83 ITR 26(SC)* wherein it was held that:

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, 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 bonafide belief that the offender is not liable to act in the manner prescribed by the statute."

9.20 The AO has relied on certain judicial decisions which are distinguishable on the facts of the present case and the Appellant had in its submissions reproduced above discussed the same in great details.

9.21 In these facts and circumstances and various judicial decisions cited above, it can't be said that the Appellant had furnished any inaccurate particulars of income or concealed its particulars of income. All the relevant facts and figures were duly disclosed in the accounts and hence, penalty u/s 271(l)(c) of the Act is not leviable. Accordingly, the penalty imposed by the AO u/s 271(l)(c) of the Act is deleted and the Grounds of Appeal No. 1 to 3 of the present appeal are allowed.

6. We have heard rival submissions and perused the material available on record. After perusal of the records before us we find that AO levied the penalty by invoking the Explanation 1 to Section 271(1)(c) of the Act while passing the penalty order whereas the penalty was initiated for furnishing inaccurate particulars of income in the assessment order at page 9 in the second last paragraph. We have perused the order of ld. CIT(A) and found that the same has been passed in a very detailed and speaking manner discussing each and every aspect of the issues involved and after taking into the account the decision of CIT Vs Reliance Petroproducts Pvt Ltd.(supra) and various other decisions of the Hon'ble High Courts and Tribunal and came to the conclusion that assessee has not filed inaccurate particulars of income as all the relevant facts and figures were duly disclosed in the accounts and return of income and thus, penalty u/s.271(1)(c) of the Act cannot be levied. We are in the full agreement of the conclusion reached by the ld. CIT(A) on the issue of penalty. We would like to mention that in this case, the penalty has been initiated in the assessment order dated 14/12/2010 at page No.9, second last para for furnishing inaccurate particulars of income whereas after issuing the penalty notice u/s.271(1)(c) of the Act it was finally levied the penalty by invoking Explanation 1 to Section 271(1)(c) of the Act which apparently is applicable in the case of concealment of income as has been held in the case of CIT vs Nepa Ltd 58 taxman.com 137 (Ind). Even the notice has been issued in a standard manner without mentioning the relevant limb on which the penalty was proposed to be levied. Therefore keeping in view all the facts , the penalty as levied has been rightly been deleted by the ld. CIT(A). We are therefore, inclined to upheld the order of ld. CIT(A) by dismissing the appeal of the revenue.

7. In the result, appeal of the revenue is dismissed.

Order pronounced on 01/02/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(RAJESH KUMAR)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 01/02/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai