

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

(Through Virtual Court)

BEFORE SHRI INTURI RAMA RAO, AM  
AND SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No.2004/PUN/2017  
निर्धारण वर्ष / Assessment Year : 2010-11

H. C. Saraswat Tobacco Co. Pvt. Ltd.,  
2204/2205, Gandhi Road,  
Jaysingpore, Dist. Kolhapur.

PAN : AABCH2518N

.....अपीलार्थी / Appellant

बनाम / V/s.

ACIT, Ichalkaranji Circle,  
Ichalkaranji.

.....प्रत्यर्थी / Respondent

Assessee by : None  
Revenue by : Shri Vitthal Bhosale

सुनवाई की तारीख / Date of Hearing : 24.05.2021  
घोषणा की तारीख / Date of Pronouncement : 24.05.2021

**आदेश / ORDER**

**PER INTURI RAMA RAO, AM:**

This is an appeal filed by the assessee directed against the order of the Learned Commissioner of Income Tax (Appeals)- 2, Kolhapur ('CIT(A)' for short) dated 02.06.2017 for the assessment year 2010-11.

2. The appellant raised the following grounds of appeal :-

1. The learned C.I.T. ( A ) erred in confirming the penalty in respect to the addition of commission of Rs. 6,06,720/-.
2. The learned C.I.T. ( A ) erred in ignoring the trade practice of giving commission on purchases since in tobacco business the correct quality of purchase is more important than negotiating the profitable sale transaction.
3. The learned C.I.T. ( A ) erred in working out the rate of commission and comparing the same with the G.P.Ratio and thereby ignoring the working given before him of the effective benefit Rs. 15.03 per K.G. earned by the assessee by reduction in cost of purchase out of which Rs. 6.90 per K.G. were given as purchase.
4. The learned C.I.T. ( A ) erred in ignoring the fact that the commission amount is paid by cheque, TDS has been made and is reflected in his return of income of the person receiving the commission and thereby leaving nothing undisclosed in the matter within the meaning of Sec. 271 ( 1 ) ( c ).
5. The learned C.I.T. ( A ) erred in understanding the reasonability of the commission transaction considering the size of the business, circumstances of

*the business transaction and coming to the conclusion that the transaction is not genuine.*

6. *I pray for your kind permission to add new grounds of appeal or modify the above grounds at any time before the appeal is heard by Honourable Tribunal.”*

3. Brief facts of the case are as under :-

The appellant is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of trading tobacco. The return for the assessment year 2010-11 was filed on 15.10.2010 declaring total income of Rs.18,78,180/-. Against the said return of income, the assessment was completed by the Dy. Commissioner of Income Tax, Ichalkaranji Circle, Ichalkaranji (‘the Assessing Officer’) vide order dated 24.12.2012 passed u/s 143(3) r.w.s. 145(1) of the Income Tax Act, 1961 (‘the Act’) at a total income of Rs.1,53,56,630/- after making the following disallowances :-

1)	<i>Addition on a/c of understatement of stock and suppression of gross profit</i>	76,95,866
2)	<i>Addition on a/c of suppression of purchases &amp; suppression of sales</i>	19,52,000
3)	<i>Addition on a/c of disallowance of bogus commission claimed in the name of Sagar Baldawa</i>	6,06,720
4)	<i>Addition on a/c of disallowance of excessive &amp; Unreasonable salary u/s.40A(2)(b)</i>	30,66,000
5)	<i>Addition on a/c of disallowance of expenses</i>	1,57,860

4. The Assessing Officer also initiated penalty proceedings u/s 271(1)(c) of the Act for furnishing of inaccurate particulars of income.

5. Being aggrieved by the above additions, an appeal was preferred before the Id. CIT(A), who vide order dated 19.03.2014 had partly allowed the appeal. While doing so, the Id. CIT(A) deleted the addition made on account of understatement of stock and suppression of gross profit of Rs.76,95,866/- and also addition on account of unrecorded purchases and sales of Rs.19,52,000/-. The Id. CIT(A), however, confirmed 60% of the disallowances

of salary by holding to be excessive salary, disproportionate to the increase in the business. The Id. CIT(A) also confirmed the 20% of the expenditure incurred shop expenses, telephone expenses, travelling and vehicle expenses on the ground that the possibility of the expenditure being personal cannot be ruled out. Thus, the appeal filed by the assessee came to be partly allowed by the Id. CIT(A).

6. Subsequently, the Assessing Officer issued a show cause notice dated 26.02.2015 calling upon the appellant to file explanation as to why the penalty should not be levied in respect of additions sustained by the Id. CIT(A) i.e. addition on account of disallowance of bogus commission of Rs.6,06,720/- and addition on account of excessive and unreasonable salary of Rs.30,66,000/-. In respect of show cause notice, the assessee had filed an explanation vide his letter dated 20.08.2014 stating that the commission of Rs.6,06,720/- has been made through account payee cheques and compliance with the TDS provisions had been made and the payee had offered the said commission as a taxable income in his hand. As regards to the disallowance of salary, it was submitted that the salary had been disallowed on estimate basis and, therefore, does not entail the levy of penalty. The Assessing Officer after considering the said explanation had levied a penalty of Rs.7,55,913/- vide order dated 27.03.2015 by stating that the assessee had concealed the particulars of income by rejecting the explanation of the assessee.

7. On appeal before the Id. CIT(A), the Id. CIT(A) deleted the penalty levied with reference to the disallowance on account of salary u/s 40A(2)(b) of the Act. However, he confirmed the penalty with reference to the addition on account of alleged bogus commission.

8. Being aggrieved by the above decision of the Id. CIT(A), the assessee is in appeal before us.

9. When the appeal was called on, none appeared on behalf of the assessee despite due service of notice.

10. We heard the Id. Sr. DR who placed reliance on the orders of the lower authorities. From the perusal of the assessment order, it is clear that the Assessing Officer had disallowed the commission of Rs.6,06,720/- paid to Shri Sagar Shivnarayan Baldawa of Jaysingpur in respect of purchases made by the assessee from Shri Narayan Tobacco, Gopalpura, Dist. Anand, Gujarat. The Assessing Officer had primarily made disallowances on three counts : (i) According to Assessing Officer, commission paid on purchases is on higher side, (ii) Normally the commission is only paid on sales not on the purchases and (iii) the party from whom the purchase was made had not confirmed that the goods were supplied through Shri Sagar Baldawa. From perusal of the order of the Id. CIT(A), it appears that the said addition was not contested by the assessee. The Id. CIT(A) confirmed the levy of penalty on the ground that there was no proof of services rendered by the Shri Sagar Baldawa in connection with the purchases made from Shri Narayan Tobacco, Gopalpura, Dist. Anand, Gujarat. Therefore, the question is in the above factual background whether the levy of penalty u/s 271(1)(c) of the Act for concealment of income is justified or not ? From the perusal of the assessment order, it is clear that the addition was made merely because the assessee was unable to substantiate the rendition services by the commission agent in connection with the purchase of Tobacco from Shri Narayan Tobacco, Gopalpura, Dist. Anand, Gujarat. There is no positive evidence on record to say that the commission agent had not rendered any service, there is no the requirement under law that the name of the commission agent

should be mentioned in the purchase bills. Mere inability to substantiate the claim does not entail the levy of penalty. It is settled proposition of law that the penalty cannot be levied for mere inability to substantiate the claim in the absence of any positive evidence to the contrary. Reliance in this regard can be placed on the decision of Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC).

11. In the light of the above discussion, we are of the considered opinion that the impugned order of penalty cannot be sustained in the eyes of law. Accordingly, the orders of the lower authorities are set-aside and we direct the Assessing Officer to delete the penalty levied u/s 271(1)(c) of the Act. Therefore, the grounds raised by the assessee are allowed.

12. In the result, the appeal of the assessee stands allowed.

Order pronounced on this 24<sup>th</sup> day of May, 2021.

**Sd/-**

**(PARTHA SARATHI CHAUDHURY)**  
न्यायिक सदस्य/JUDICIAL MEMBER

**Sd/-**

**(INTURI RAMA RAO)**  
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 24<sup>th</sup> May, 2021.

Sujeet

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Kolhapur.
4. The Pr. CIT-2, Kolhapur.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.