



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER, AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.5507/Mum./2019
(Assessment Year : 2009-10)

ITA no.5508/Mum./2019
(Assessment Year : 2011-12)

Asstt. Commissioner of Income Tax
Circle-9(3)(2), Mumbai

..... Appellant

v/s

Golkunda Diamonds & Jewellery Ltd.
G-30, Gems & Jewellery Complex-III
SEEPZ, Andheri (E), Mumbai 400 096
PAN - AAACG2736L

..... Respondent

Revenue by : Shri T.S. Khalsa
Assessee by : Ms. Aarti Sathe

Date of Hearing - 02.06.2021

Date of Order - 27.07.2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The present appeal preferred by the Revenue challenging the impugned order dated 30th May 2019, passed by the learned CIT(A)-16, Mumbai, deleting the penalty ₹ 55,000, for the A.Y. 2009-10, and ₹ 1,56,000, for the A.Y. 2011-12, imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") by the Assessing Officer.

2. Since both these appeals pertain to the same assessee involving common issue, except variation in figures, which arose out of identical set of facts and circumstances, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. However, in order to understand the implication, it would be necessary to take note of the facts of one appeal. We are, accordingly, narrating the facts, as they appear in the appeal being ITA no.5507/Mum./2019, for assessment year 2009-10, the conclusive result of which will be applicable equally to the other appeal being ITA no.5508/Mum./2019, for the A.Y. 2011-12.

3. Facts in brief:- In the present case, the assessee is a Public Limited Company engaged in the business of manufacturing of gold studded jewellery. The assessee company filed its return of income for the assessment year 2009-10 on 27th September 2009, declaring total income at ₹ 2,58,62,409. Subsequently, on the basis of information received from the Sales Tax Authorities, the case was re-opened under section 147 of the Act. During the assessment proceedings, the assessee was asked to justify the genuineness of purchases of ₹ 4,82,762 made from M/s. Pooja Trading Company and was also requested to furnish, inter-alia, evidences of transport and delivery of goods purchased from the above party. The assessee, however, failed to provide such details and evidences of physical transport of delivery

of goods. The Assessing Officer concluded the assessment and passed order on 26th March 2015, determining total income at ₹ 2,64,45,170 after making addition of ₹ 4,82,762, on account of bogus purchase and ₹ 1,00,000 on account of capitalization of interest. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Act and levied penalty of ₹ 55,000. The assessee being aggrieved by the order so passed by the Assessing Officer, for contesting the issue of levying of penalty under section 271(1)(c) of the Act filed appeal before the first appellate authority.

4. The learned CIT(A) deleted the penalty so imposed by the Assessing Officer under section 271(1)(c) of the Act by observing as under:—

"6.1.1. Vide this ground, the appellant has agitated against levying penalty of Rs.55,000/- u/s. 271(1)(c) of the IT Act, 1961. The Ld. AO has initiated the penalty on addition made on account of bogus purchases in the assessment order.

6.1.2 During the appellate proceedings, the appellant has pleaded that there is neither concealment of income as all the documentary evidencing the genuineness of the transactions were submitted to the Ld. AO nor the appellant company has furnished inaccurate particulars of income as the appellant company has truly disclose the purchase transaction before the Revenue authorities. Considering these facts I tend to agree with the appellant's contention.

6,1.3 In support of my view, I would like to place reliance on decision of Hon'ble jurisdictional ITAT in the case of Dcit 24(2), Mumbai vs Unisynth Chemicals 5967/MUM/2014, held that:-

"From a perusal of the finding of the CIT(A) in the impugned order it is seen that the addition of Rs.47,04,9601-, on the basis of which penalty under section 271 (1)(c) of the Act was levied by

the Assessing Officer, was on account of undisclosed income on account of bogus purchases and sales. On an appreciation of the material on record we are inclined to concur with the view of the CIT(A) that the explanation put-forth by the appellant in the penalty proceedings was a plausible one, inasmuch as, the circumstances on which the additional income was offered was because the disputed parties with whom these transactions were made were non-cooperative and the appellant having no control over those parties was, therefore, not able to substantiate its claim with necessary material evidence. Therefore, the appellant was constrained in order to avoid lengthy litigation to offer the additional income, which was accepted as such the Assessing Officer. The Hon'ble Apex Court in the case of Mak Data P. Ltd. (2013) 358 ITR 593(SC) while considering the provisions of Explanation 1 to section 271(1)(c) of the Act observed that the general principles of law in respect of penalty for concealment of income, does not grant the appellant automatic immunity from penalty on account of surrender or M/s. Unisynth Chemicals voluntary disclosure of income. As per the provisions of Explanation-1 to section 271(1)(c) of the Act, the question is whether the appellant has offered any explanation for concealment of income or furnishing of inaccurate particulars of income. In the case own hand we find that the requirement laid down by the Hon'ble Court has been met by the appellant inasmuch as, as observed by the CIT(A), the appellant's explanation (supra) which appears plausible and which explanation, though brushed aside by the Assessing Officer as an afterthought, has not been brought out or found to be false in respect offurnishing of particulars. We, therefore, uphold this view of the CIT('A) and consequently uphold her order directing the Assessing Officer to delete the penalty levied in the case on hand for assessment year 2009-10"

6.1.4 Also, Reliance is placed on decision of the ITAT in AY 2009-10 in Ajay Loknath Lohia, Mumbai vs ITO ITA 2998/MUM/2017, Mumbai wherein it was held that The AO never disbelieved information filed by the appellant, but he proceeded on the basis of information received from sales-tax department to make additions. The AO has made such addition on adhoc basis by estimating gross profit on alleged bogus purchases. Therefore, disallowance of purchases on adhoc basis does not tantamount to willful furnishing inaccurate particulars of income within the meaning of section 271(1)(c) of the Income-tax Act, 1961.

6.1.5 Hon'ble Supreme Court in a case cited as CIT vs. Reliance Petro Products Pvt. Ltd. - 322 ITR 158 (SC) decided the identical issue in favour of the appellant. Operative part of which is reproduced for ready reference as under :-

"A glance at the provisions of section 271(1)(c) of the I.T. Act, 1961 suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the appellant. Secondly, the appellant must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the detail of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the appellant cannot be held guilty of furnishing inaccurate particulars. In order to expose the appellant to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the appellant, because that is the only document where the appellant can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous. Where there is no finding that any details supplied by the appellant in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the appellant. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

6.1.6 The Hon'ble ITAT in the case of Ws Ruchi Developers Vs Income Tax Officer (ITAT Ahmedabad) I.T.A. No. 3348/Ahd/2011, held that

"Coming to the penalty appeal, the Tribunal found that the assessee has placed on record the letters addressed to ITO with account of the alleged bogus party. PAN is also written in case of LJmiya Traders and in case of Maruti Traders. The assessee has also placed on record the confirmations by the concerned parties. The AO made addition on the basis that the assessee failed to produce the parties. However, other details in the nature of PANs and confirmations of concerned parties were furnished. Since the AO has not made further enquiry to verify the correctness of confirmations, the arguments of the Revenue was not accepted under these facts. In the instant case, the addition has been confirmed in the quantum proceedings on the basis that the parties from whom purchases were made, was reported to be left by the postal authorities. This reason may be sufficient to sustain the addition, but this basis was not sufficient in the light of the decision of the Coordinate Bench in the case of ACIT vs. Manish Organics India Ltd. wherein the Hon'ble Coordinate Bench has held "This is a case where explanation of the assessee has not

been accepted by the Department.. The levy of penalty is merely on disallowance of expenditure and not finding of concealment of any particulars or mala fide intention to reduce the taxable income." The Hon'ble Gujarat High Court in the case of National Textiles v/s CIT has held that "section 68 permits the A.O. to treat unexplained cash credits as income for making certain additions if there is failure by the assessee to give an explanation. However, the addition made on this count automatically cannot justify the penalty levied under section 271(1)(c)". In the light of above, Tribunal was of considered view that the Id.CIT(A) was not justified to confirm the penalty. Therefore, order of Id. CIT(A) was set aside."

6.1.7 The Hon'ble Jurisdictional ITAT in the case of Deepak Gogri, Mumbai vs ITO 25(3)(2) 1396/MUM/2017

"In so far as the penalty levied on estimation of profit element on purchases is concerned, we are of the view that Assessing Officer had made only adhoc estimation of profit on certain purchases treated as unexplained expenditure. Assessing Officer did not doubt the sales made by the assessee from out of such purchases. Assessing Officer based on the decision of the Hon ble Gujarat High Court in the case of CIT v. Simit P. Seth (356 ITR 4511 estimated the profit element in such purchases at 12.5% and by reducing the Gross Profit already declared by the assessee. In the circumstances, we hold that there is no concealment of income or furnishing of inaccurate particulars as the profit element was determined by way of adhoc estimation. Coming to the interest, the assessee furnished complete details in the return of income and made a claim and simply because the claim is denied and cannot lead to furnishing of inaccurate particulars or concealment of income. No allegation by Assessing Officer that the assessee failed to disclose the ITA.No.1396/MUIVJ/2017 (A.Y: 2011-12) Shri Deepak Gogri particulars relating to its claim in the return of income. Thus we hold that there is no concealment of income or furnishing of inaccurate particulars of income. Thus we direct the Assessing Officer to delete the penalty levied u/s. 271(1)(c) of the Act."

6.1.8 I further reply on following decisions for my view that penalty cannot be levied on addition made on agreed basis.

- a) CIT v/s Suresh Chandra Mittals (2001) 251 ITR 9 (SC).*
- b) CIT v/s Manjunatha Cotton and Ginning Factory (Ker. HC)*

6.1.9 With the consideration of all the above judgements, it is clear that where appellant has failed to produce creditor parties in respect of alleged Bogus Purchases while he submitted all other details and evidences and additions been made, It was held that

where explanation of the appellant has not been accepted by the Department, The levy of penalty is merely on disallowance of expenditure and not finding of concealment of any particulars or mala fide intention to reduce the taxable income. The addition made on this count automatically cannot justify the penalty levied u/s 271(1)(c).

6.1.10 In support of my view, further, I would like to placed reliance on decision of Hon'ble jurisdictional ITAT in the case of DOT vs Unisynth Chemicals 5967/ MUM/ 2014, held that:-

"The Supreme Court in the case of Sir Shadilal Sugar and General Mills Ltd. v. CIT [1987] 168 ITR 705, has pointed out that not every case of nondisclosure warrants imposition of penalty as the appellant may forgo a deduction or offer higher sums for taxation for a hundred and one different reasons and all of them cannot be regarded as reasons which are unworthy of acceptance. The Supreme Court in that case held that the Tribunal which had held that penalty was not imposable having regard to the circumstances in the case had held so rightly.

The Supreme Court observed that from the appellant agreeing to additions to his income, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission. The reasons offered in the case has rightly been held by the Tribunal to be relevant reasons.

The question referred to us is therefore, answered in favour of the appellant and against the Revenue."

6.1.11 In view of what has been discussed above, I am of the view that A.O. has erred in levying the penalty of Rs.55,000, which is not sustainable in the eyes of law, hence ordered to be deleted. Consequently, the appeal filed by the appellant is hereby allowed."

5. The Revenue being aggrieved with the aforesaid order of the learned CIT(A) for deleting the penalty, filed appeal before the Tribunal.

6. Considered the rival submissions and perused the material on record. As it appears, the Assessing Officer imposed penalty under section 271(1)(c) of the Act on ad-hoc basis without adducing any

evidence on record for concealment of income. Penalty under section 271(1)(c) of the Act is liable to be imposed only where the assessee has concealed its particulars of income or furnished inaccurate particulars. Action of making addition on ad-hoc basis does not result into imposition of penalty u/s 271(1)(c) of the Act and hence cannot be termed as either concealment or furnishing of inaccurate particulars of income. We find support from the series of decisions by different High Courts as well the decision of the Co-ordinate Benches of the Tribunal, wherein it was held that when addition is made on estimate basis, penalty is not sustainable in the eyes of law. In support of this contention, following case laws are relied upon:-

- i) *CIT v/s Norton Electronics Systems (P) Ltd. [2014] 41 taxmann.com 280 (Allahabad HC);*
- ii) *ACIT v/s Vision Research Management (P) Ltd., [2015] 63 taxmann.com 8 (Lucknow) (Trib.);*
- iii) *Prem Chand v/s ACIT, [2014] 52 taxmann.com 95 (Chandigarh) (Trib.);*
- iv) *CIT v/s PHI Seeds India Ltd., [2008] 301 ITR 0013 (Del); and*
- v) *Dilip N. Shroff v/s JCIT [2007] 291 ITR 519 (SC).*

7. The learned Departmental Authorities has not brought any cogent material to prove otherwise warranting interference at the instance of the Revenue. In this view of the matter, we are of the considered view that the learned CIT(A) was indeed justified in deleting the penalty, as there was no concealment of income on the

part of the assessee have been proved by the Revenue and additions made on estimation by the Assessing Officer do not call for initiation of penalty. Consequently, we uphold the order passed by the learned CIT(A) by dismissing the grounds of appeal raised by the Revenue.

8. In the result, Revenue's appeal is dismissed.

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9. In the present appeal which relates to A.Y. 2011-12, the related facts and circumstances of the issue raised by the Revenue are materially identical to the issue decided by us vide ground of appeal raised by the Revenue in its appeal being ITA no.5507/Mum./2019, vide Para-06 and 07 above, wherein we have upheld the order of the learned Commissioner (Appeals) deleting the penalty under section 271(1)(c) of the Act imposed by the Assessing Officer for the assessment year 2009-10. Consistent with the view taken therein, we decline to interfere with the order passed by the first appellate authority and dismiss the grounds raised by the Revenue for this assessment year also.

10. In the result, appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 27.07.2021

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

Sd/-
S. RIFAUR RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 27.07.2021

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai