

IN THE INCOME TAX APPELLATE TRIBUNAL  
“H” Bench, Mumbai  
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. Nos.7634 & 7635/Mum/2019  
(Assessment Years 2006-07 & 2007-08)

Hajaram P.Purohit Shop No.8, Building No.33, Ganesh Bhuvan 3 <sup>rd</sup> Khetwadi Lane Mumbai-400 004  PAN : AGUPP6813E (Appellant)	Vs.	ACIT,CC-36 Room No.1902, 19 <sup>th</sup> Floor Air India Building Nariman Point Mumbai-400 021  (Respondent)
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Assessee by	None
Department by	Shri Asif Karmali
Date of Hearing	17.11.2021
Date of Pronouncement	22 .11.2021

O R D E R

Per Bench :-

These appeals by the assessee are directed against respective orders of learned Commissioner of Income Tax (Appeals) wherein following penalty levied under section 271(1)(c) of the Act has been sustained.

A.Y	Amount of penalty
2006-07	Rs. 90,549/-
2007-08	Rs. 4,28,842/-

2. Since facts are similar, we are referring to AY 2006-07 here.

3. The brief facts of the case leading to the levy of penalty are that the AO in these cases made disallowance of 3% on account of sales of the assessee. These were held to be out of bogus purchases. The Ld.CIT(A) had confirmed the addition. Penalty u/s. 271(1)(c) was also levied. Ld.CIT(A) upheld the penalty holding as under:-

“I have considered the submissions of the appellant and perused the materials available on my record including copies of judicial decisions relied upon by him. At the outset, it is proposed to consider the settled legal position on the issue of levy of penalty u/s.271(l)(c) of the Act. In the first place, it deserves to be noted that mens rea is no longer an essential ingredient for the levy of penalty u/s 271(l)(c) as held by the Hon'ble Apex Court in Union of India & ors. v. Dharamendra Textile Processors & ors. 306 ITR 277 (SC). It has been held that the objective behind enactment of Section 271(l)(c) is to provide remedy for loss of revenue and that such a penalty is a civil rather than a quasi-criminal liability and, therefore, wilful or conscious concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution u/s 276C of the Act. Secondly, it has been held in a series of decisions that the evidence gathered at the stage of assessment proceedings is prima facie material in penalty proceedings and that so long as the assessee has not adduced any evidence to disprove or rebut the said prima facie materials at the stage of penalty proceedings, those can be acted upon and a finding of concealment can be based thereon. Likewise, where no fresh material is placed before the A.O. in penalty proceedings, findings recorded in quantum appeal cannot be brushed aside but these are relevant to levy of penalty by relying on findings recorded in assessment/appellate proceedings [Raj Kumar Chaurasia v. CIT 288 ITR 329 (All.) and CIT v. Rattan Singh Grewal 304 ITR 75 (P&H)].

As the appellant in the present case has not led any fresh evidence to disprove the case of the A.O. at the penalty stage, the findings recorded at the time of assessment as well as in quantum appeal would be relevant to the levy of penalty. It deserves to be noted that I have already dismissed the quantum appeal bearing No.CIT(A)-53/DCCC-36/IT-180/I3-14 filed by the appellant for the A.Y. under consideration vide my order of even date. While disposing of the said appeal and sustaining the addition, it has been held that that the A.O. had made addition of undisclosed commission of Rs.3,18,523/- based on the facts of the case and the stand taken by him in A.Y.2009-10. In this connection, it deserves to be noted that similar addition of undisclosed commission made by the A.O. on identical facts in case of the appellant in A.Y.2009-10 has been upheld by the Hon'ble ITAT, Mumbai vide its order dated 13.11.2014 in ITA No.2409/Mum/2013. The relevant extract of the said order is reproduced as under:-

"3.1 ..... There is no dispute to the fact that the assessee made bogus sale/purchases in the form of accommodation entries and earned profit therefrom. .... The assessee also did not provide the correct addresses/PAN numbers of such parties thus their identities could not be verified, resulting into hindrance in conducting enquiries at that stage only and the scam could not be unearthed.

..... The moot question before us pertains to adoption of commission rate and its reasonableness. One fact worth mentioning is that in the absence of search/survey, the assessee would have gone scot free. Even, the extent of this bogus business could not be verified/ascertained as the assessee did not provide the correct addresses of the concerned parties. .... Keeping in view, the totality of facts and the circumstances more specifically when the

assessee itself tendered that he provided/received accommodation entries by way of bogus sale/purchase, therefore, the adoption of rate at 3% that too after obtaining information from the market seems to be justified. At the same time, the assessee has neither produced any evidence nor explained as to how the rate adopted by the Assessing Officer is excessive. Even otherwise law helps those who come with clean hands/authorized business and not as has been done by the assessee for making bogus accommodation entries, therefore, no leniency, if any can be extended to the assessee. We affirm the conclusion/stand taken by the Id. Assessing Officer which was further affirmed by the Id. First Appellate Authority, resulting into dismissal of this ground of the assessee." –

The aforesaid findings of Hon'ble Tribunal will not only be relevant to the penalty proceedings but also clearly show that the appellant had made bogus purchases/sales in the form of accommodation entries extent of which could not be verified as the appellant did not provide correct addresses of the concerned parties. It was also observed that the aforesaid addition was based on the admission made by the appellant in his statement on oath recorded u/s.131 in the course of survey action conducted at his business premises on 28.01.2011 that the appellant was only carrying on the business of giving and taking accommodation entries for earning commission income. It was also found that there was nothing on record to indicate that the appellant had made the statement u/s.131 under any threat, duress or coercion or under any mistake of law or facts. It was a matter of record that the appellant had not repudiated or retracted from the aforesaid admission on any ground whatsoever before the A.O. Thus, no fault could be found with the action of the A.O. in making the aforesaid addition which was accordingly upheld.

And finally, it is now well-settled that an addition made to income raises a presumption against the assessee by virtue of Explanation 1 but such presumption is an entirely rebuttable one and the scheme of rebuttal is provided in the Explanation itself. The question of liability to penalty u/s.271(1)(c) has thus to be determined on the touchstone of Explanation 1 thereto. It is also well-settled that the initial onus lies on the assessee to prove that his case does not fall within the purview of Explanation 1. In the present case, Explanation 1(A) to Section 271(1)(c) is not attracted, because the appellant has offered an explanation in the matter which has not been found to be false. In order to escape penal consequences u/s.271(1)(c) read with clause (B) of Explanation 1, the appellant has to discharge the onus in terms of the following requirements:-

- a) The appellant offers an explanation regarding the additions made by the A.O. and is also able to substantiate the same.
- b) The appellant is able to prove that such explanation is bona fide and that all facts relating to the same and material to the computation of his total income have been disclosed by him.

It is now well-settled that so long as the assessee has not concealed any material fact or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty u/s.271(1)(c) even if

the claim made by him is incorrect or unsustainable in law provided that he substantiates the explanation offered by him and is able to prove that such explanation is bona fide. If the explanation is neither substantiated nor shown to be bona fide, Explanation 1 to Section 271(l)(c) would come into play and the assessee will be liable to the prescribed penalty in respect of the additions or disallowances made at the time of assessment.

Let us now examine the correctness of the A.O.'s action in levying penalty on the appellant in respect of addition of undisclosed commission of Rs.3,18,523/- for providing accommodation entries in light of the above legal position. In this connection, I am unable to accept the appellant's plea that there was no concealment of income or furnishing of inaccurate particulars of income on his part because the appellant had furnished the party-wise details of his purchases and sales and the profit earned had been offered to tax. Merely furnishing the details of parties from whom purchases were made or to whom sales were made is not enough to discharge the onus under Explanation 1. Likewise, the appellant cannot claim immunity from penal action merely because his books of account are duly audited u/s.44AB of the Act. In the background of addition of undisclosed commission income which has been sustained in first appeal in the A.Y. under consideration and even confirmed on identical facts by the Hon'ble ITAT in his own case in A.Y.2009-10 as brought out above, it cannot at all be said that the appellant had reflected his true and correct income in the books of account as well as the return of income. It deserves to be noted that the appellant had in his return attempted to give the colour of genuine trading business to the activity of providing accommodation entries. It is noticed from the record that at the time of assessment, the appellant could not establish the genuineness of purchases made from the two major parties, as stated above. It is a matter of record that both the parties were found to be non-existent at the address provided by the appellant, On verification of TIN database, it was found that TIN of each of his alleged suppliers was either invalid or incorrect or cancelled.

No attempt has been made by the appellant either at the time of quantum appeal or during the present appellate proceedings to prove the genuineness of the purchases and sales. In his statement recorded on oath u/s.131 of the Act during the course of survey on 28.01.2011, the appellant had categorically admitted that he was engaged in the business of taking and giving accommodation entries from/to various parties on which he earned commission income. However, while filing the return of income, it was found that the appellant had not shown any commission income from the activity of providing accommodation entries to various parties. In these circumstances, the appellant's plea that there was no concealment or furnishing of inaccurate particulars of income on his part fails and is accordingly rejected. In view of this, the appellant's reliance on the ratio in case of *Reliance Petro Products Pvt., Ltd.* (supra) will not help to advance his case because the information given in the return had been found to be incorrect or inaccurate. Moreover, the present case does not involve a legal claim but a factual one where commission income from accommodation entries admitted by the appellant in his deposition u/s.131 had not been disclosed in the return of income. Thus, there is no hesitation in holding that

even at the appellate stage, the appellant has failed not only to substantiate his explanation in this regard but also to prove that such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed. Hence, the legal fiction of Explanation 1 to Section 271(l)(c) comes into play and the appellant is deemed to have concealed particulars of his income or furnished inaccurate particulars of such income.

An analysis of judicial decisions relied upon by the appellant reveals that these are all distinguishable on facts and none of these helps to advance his case. For example, in the case of Arjun Prasad Ajit Kumar (supra), the assessee was a country liquor contractor/ vendor. The addition had been made by invoking the proviso to section 145(1), estimating the sales and applying the NP rate which is not so in the present case. Further, penalty u/s.271(l)(c) was deleted in that case because there was nothing on record that the assessee's explanation lacked bona fides. However, as brought out above, the appellant in the present case has not been able to prove the bona fides of his explanation. Similarly, M/s.Rishabh Impex Gulabdas & Co. cited above was also a case of estimation of GP rate based on the past history of the case whereas no such issue is involved in case of the appellant. Thus, the ratio of that decision cannot be mechanically applied in the present case

which is one of estimation of undisclosed (commission) income from providing accommodation entries.

In light of the above discussion, I am of the considered view that the A.O. was justified in holding that the appellant had concealed particulars of his income by way of undisclosed commission income of Rs.3,18,523/- on accommodation entries, thereby attracting the legal fiction contained in Explanation 1 to Section 271(l)(c) of the Act. Under these circumstances, I do not find any error or infirmity in the action of the A.O. in levying penalty of Rs.90,549/- on the appellant u/s.271(l)(c) which is accordingly sustained. Hence, Ground taken up by the appellant is dismissed.”

4. Against the above order assessee is in appeal before us.
5. We have heard the Ld. DR and perused the record. At the outset, we note that reliance by Ld.CIT(A) on Dharmendra Textile Processors & ors. 306 ITR 277(SC) case is not applicable on the fact of this case. As clear from the facts recorded above, the addition has been made on an estimated basis on account of commission on sales in connection with bogus purchases. The Ld.CIT(A) has observed that merely providing the details of parties from whom purchases and sales have been made is not sufficient to discharge the onus cast upon assessee. In our considered opinion,

either the above portion of Ld.CIT(A) 's order is cut and paste from some other assessee's case or it reflects absolute non application of mind by Ld.CIT(A). In our considered opinion, the penalty here is levied with reference to an addition made on estimated basis. In these backgrounds, in our considered opinion assessee cannot be visited with the rigours of penalty u.s 271(1)(c). In this regard, we draw support from the decision of a larger bench of the Hon'ble Supreme Court in the case of the State of Orissa 82 ITR 26, where in it was held that the authority may not levy the penalty, if the conduct of the assessee is not found to be contumacious.

6. In the background of aforesaid discussion and precedent, we set aside the order's of Ld.CIT(A) and delete the levy of penalty.

7. In the result, these assessee's appeals are allowed.

Pronounced in the open court on 22.11.2021.

Sd/-  
(AMARJIT SINGH)  
JUDICIAL MEMBER

Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

Mumbai; Dated : 22/11/2021  
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai