

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI****BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER****ITA No.4735 /DEL/2013
Asstt.Yr: 2009-10**

M/s Associated Machinery Corporation, Vs Income-tax Officer,
F-64, Site-I, B.S. Road, Ward-1(1), Ghaziabad.
Industrial Area, Ghaziabad.

PAN- AACCA7476M

APPELLANT**RESPONDENT****Appellant by****None****Respondent by****Sh. Sanjay Kumar, Sr. DR****Date of hearing****05.05.2022****Date of pronouncement****25.05.2022****ORDER****PER N.K. CHOUDHRY, JM:**

The Assessee has preferred the instant appeal against the order dated 13.06.2013 impugned herein passed by the learned Commissioner of Income tax(Appeals), Ghaziabad (in short "Commissioner") for the assessment year 2009-10 u/s 271(1)(c) of the Income Tax Act, 1961 (in short "the Act").

2. Grounds of appeal are as under:

"1. Appellant is manufacturing company engaged in the manufacture of wire drawing Machines.

2. The assessment of appellant was completed u/s 143(3) by ITO Ward 1(1) Ghaziabad for the A. Y.2009-10.

3. During assessment proceedings certain additions were made by A.O. and in order to purchase the peace and avoid further litigation appellant surrendered Rs. One crore with the understanding the no further penalty will be levied on additions but A.O. has levied penalty u/s 271(1)(c) which was subsequently upheld by CIT (appeals) which is wrong and bad in law .

4. The order of CIT [appeals] was wrong illegal and contrary to the facts of the Case.

5. Ld. CIT [appeals] has not considered facts of the case for levy of penalty of Rs.4208060 /- and rejected the appeal of appellant.

6. A.O. has levied penalty @ 100% of tax sought to be evaded amounting to Rs.5472620 which was reduced to Rs 4208060 U/s 154.

7. As regards the said unexplained expenses of Rs.50000/=, we would like to submit that the details were duly furnished with at the time of assessment proceedings .So this cannot be treated as concealment of income.

8. Regarding advance of Rs. 512200/= from M/s Broadways Machines (P) Ltd we are to submit that advance was taken for supply of machines. Moreover it was duly reflected during the assessment proceedings .So this cannot be treated as concealment of income.

9. Regarding late payment of ESI & PF of Rs. 430065/= we are to submit that the dues could not be deposited due to lack of funds and as soon as funds were available the dues were paid before due date of filing of ITR . Hence this cannot be treated as concealment of income.

10. Regarding addition in sundry creditors the assessee has himself surrendered creditors of Rs. 1 Crore in order to purchase peace and avoid further litigation .So this should not be cannot be considered as concealment of income.

11. It has also been ruled by Honble Supreme Court in Hindustan Steels ltd Vs State of Orissa [1972] 83 ITR 26 that penalty cannot be imposed

until & unless there is conscious breach of law .

It has been held in so many cases that mere enhancement of income cannot attract the penalty u/s 271(1) c. There should be some willful concealment of facts. In present case all the facts and income were disclosed before A.O and CIT [appeals].

It has also been held by Honble Supreme Court in Hindustan Steels Ltd vs. State of Orissa [1972]83 ITR 26 that penalty cannot be levied Until & unless there is conscious breach of law.

Under the facts and circumstances of the case and some other points which may be urged at the time of hearing , your honour is requested to delete the order of penalty u/s section 271(1)."

3. In this case, return of income declaring income of Rs. 3,97,998/- was e-filed on 29.9.2009 by the Assessee, which was selected for scrutiny through CASS and the assessment was finalized u/s 143(3) of the Act by determining the income at Rs. 1,22,89,340/- as against the returned income of Rs. 3,97,998/-, by making following additions:

i)	On account of unverifiable selling expenses	
	50000	
ii)	Disallowance of EPF & ESIC after due date	430065/-
	added u/s 2(24)(x) read with section 36(1)(va)	
iii)	Deemed dividend u/s 2(22)(e)	5,12,200/-
iv)	Bogus creditors	12,97,079/-
v)	Surrender on account of unverifiable creditors	100,00,000/-

4. On the aforesaid additions, penalty proceedings u/s 271(1)(c) of the Act have also been initiated by the Assessing Office and vide penalty order dated 29.06.2012 u/s 271(1)(c) of the Act imposed the penalty to the tune of Rs. 54,72,620/- @ 100 of the tax sought to be evaded.

5. The Assessee being aggrieved against the levy of penalty, preferred first appeal before the learned Commissioner, who vide impugned order dated 13.06.2013 confirmed the levy of penalty by concluding as under:

“5.3 Present Case

In this particular case, the material facts regarding various additions, which have been made as bogus for levy' of penalty in this case, are discussed issue wise as here-under:-

The adhoc, estimated disallowance of Rs. 50,000/- does not attract penalty, since it is a purely estimated disallowance on the ground of non-availability of petty vouchers.

Disallowance on account of late payment of ESI and PF is purely a legal disallowance, emerging out of full facts disclosed by the assessee itself; so this also does not attract concealment penalty.

Regarding advance from M/s Broadway Machines (P) Ltd., the addition is indeed a legal addition u/s 2(22)(e), but I find sufficient force in A.O's argument that assessee was conscious of the facts regarding this transaction, and hence, should have applied provisions of section 2(22)(e) itself. It is also apparent that assessee had taken a chance to hide this taxable deemed income by not showing in the return, and possible escapement from scrutiny of its case, but when A.O. enquired and obtained relevant facts, assessee gave in and agreed for addition by not filing any appeal. Thus, it does tantamount to conscious concealment of true income.

Regarding 'surrender' of two other items of addition- income of Rs. 12,97,074/- and of Rs. 1,00,00,000/- (Rs. 1 Crore) ; it is obvious on record that on enquiry and imminent detection, the assessee had decided to 'surrender' these bogus creditor's balances. The explanation that "we are ready to surrender since we are not able to furnish confirmations " , is nothing but direct admission of the bogus nature of credits introduced in its accounts. The assessee has not furnished any evidence to show that transactions did take place and these parties did exist, although, for some reason, confirmations could not be obtained. Rather, the assessee has meekly surrendered as it had become obvious to assessee that falsity has been detected, and further enquiries and verifications would establish the bogus nature of these credit balances, even more strongly, and, thus,

assessee chose to make a conditional surrender' with a view to take a chance of lenient view in penalty.

5.4 Conditional agreement/offer during assessment or admission/agreed addition/admitted concealment: Legal Views:

There is no principle of universal application that whenever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed. The department can levy penalty u/s 271 (1)(c) in respect of additional -p le offered by assessee if the explanation offered by assessee for not including such amount in the return is not found acceptable. *Commissioner of Income tax v. D.K.B. & Co.* [20021 (Ker)-243/618.

The assessee agreed to certain additions proposed to be made by the AO towards bogus hundi credits.

It was held that the levy of penalty was justified specially when there was nothing on record to show that the assessee had made it a condition that no penalty should be levied, before agreeing to such additions.

Rahman & Co. v. Inspecting Assistant Commissioner [1979] (Mad)

The assessee failed to produce relevant records and whereabouts of party through whom purchases were allegedly made. The assessee also failed to produce the purchase and sale registers and the stock register. Even the addresses of brokers through whom the alleged purchases were made were not furnished. The assessee, impliedly, conceded the fact of concealment. The assessing officer levied penalty. Assessee's appeals was dismissed by Commissioner (Appeals) and Tribunal. It was held that there was material for finding that there was concealment of income and penalty levied by the Assessing officer was justified. *Beena metals v. Commissioner of Incometax* [1998] (Ker)

The fact that after the AO detected concealment, the assessee admitted the same, would not absolve him from penalty u/s 271(1)(c) of the Act. *Ayyasami Nadar & Bros. v. Commissioner of Income tax* [2056] (Mad). The original as well as revised return filed by the assessee did not disclose correct income. The assessee also agreed to huge additions. Imposition of penalty was justified. *Commissioner of Income tax v. Balakrishna Textiles* [1990] (Mad). During the course of assessment, the assessee himself admitted that he had derived income from the sale of imported cycle parts and the income from the same was not recorded in his books of accounts. The amount was not shown in the return of income. The assessee agreed to the inclusion of this amount in his total income. As the assessee admitted that such amount represented his income, no further evidence

was necessary to show that it was the amount which represented his income and concealed income. Commissioner of Income tax v. Dr. R.C. Gupta & Co. [1980] (Raj).

The assessee willingly agreed to have cash credits treated as his undisclosed income. There was no further duty on the part of the Department to show in penalty proceedings that the sum was concealed income of the assessee. Commissioner of income tax v. O.B.Shah& Co. (P) Ltd.[1976] (Cal).

The books of the assessee showed certain borrowings and repayments from certain bankers. The assessee produced the discharged hundis before the AO who, however held that bankers had merely lent their names in what was known as bogus hawala transactions. The assessee thereupon, agreed to the addition of the peak credit to his income . In the penalty proceedings, the assessee's submission that no penalty was exigible was rejected by the Tribunal. On a reference to the High Court: Held, that n a case where the assessee himself has admitted that the amounts represented his own income, no further evidence would be necessary to show that it was the amount which represented his income and it represented his concealed income. The assessee in the instant case having readily agreed to the inclusion of the amount as his income, the levy of penalty was justified.

Western Automobiles (India) v. Commissioner of Income tax [1976] (Bom)

The assessee had agreed to treat voluntary contributions made by him to a stock exchange fund, as capital expenditure before the Assessing officer and the revisional authority. There was no evidence to show that he was coerced to agree. The assessee cannot be permitted to go back on his own stand.

Mahesh B. Shah v. Assistant Commissioner of Income tax [1998] (Ker)

Where there was a claim that the assessment was made on the basis of compromise arrived at between the assessee and the department and there was an understanding that no penalty action would be taken against the assessee. There was nothing on record which could lead to the conclusion that any understanding was given to the respondent that no penal action could be taken. There is no provision in the Act, whereby a compromise assessment could have been arrived at between the assessee and the Commissioner.

Union of India v. Banwari Lal Agarwal [1998] (SC) 238/461.

The Chartered Accountant had given the commitment on behalf of the assessee agreeing for assessment of interest income at 27 per cent for both the assessment years 1997-98 & 1998-99 specifically on condition that no penalty proceedings would be initiated u/s 271(1)(c). Hence it was not open to the assessee to appeal against the assessment orders.

CIT v. Vamadevan Bhanu [2011] 330 ITR 559 (Ker)

The assessee had agreed to addition to income. Penalty for concealment can be levied if assessee offers no satisfactory explanation regarding such. Income.

Commissioner of Income tax v. Jugalkishore Hargopal Das [2000] (Ker)

Assessee filed return showing loss, although there was substantial turnover. The books of accounts suffered from various defects and on scrutiny the AO found a number of cash credits. The AO proposed substantial addition and sent draft assessment order u/s 144B. The assessee sent in a letter saying that he was agreeable to the proposed addition as the assessee was not in a position to substantiate the objections against the draft assessment order. However, it was also submitted that the "penalty may not be levied". The court held that there was no understanding that the penalty will not be levied. Further, even at the threshold of proceedings there was no attempt to offer any explanation worth the name in any sense of the term. On fact, levy of penalty was held justified.

Anand Liquors v. Commissioner of Income tax [1996J (Ker)

The accounts maintained by the assessee, were unreliable on the ground that the assessee had declared a huge loss of Rs. 12 Lakhs and that there was fluctuation in the sale price of arrack and made additions. A penalty of Rs. 15 Lakhs was levied by him u/s 271(1)(c) of the income tax act, 1961.

The CIT (Appeals) modified the order directing the levy of minimum penalty. The Tribunal was justified in sustaining the penalty levied on the ground that only a minimum amount was levied as penalty. K. Sreedharan & Co. v. Assistant Commissioner of Income tax, Circle 2(1) [2009] (Ker)

5.4.1 Addition based on estimate- concealment penalty can be levied: Case Laws:

Addl. CIT vs. Chandrakantha and another (MP) 205 ITR 607.

Addl. CIT vs. Lakshmi Industries and cold storage Co. Ltd. (All) 146

ITR 492.

Sushil Kumar Sharad Kumar vs. CIT (All) 232 ITR 588

CIT vs. Md. Warasat Hussain (Patna) 171 ITR 405

A.M. Shah & Co. vs. CIT (Guj) 238 ITR 415

CIT vs. Krishnaswamy and Sons (Mad) 219 ITR 157

CIT vs. Svarup Cold Storage & General Mills (All) 136 ITR 435.

CIT vs. Chandra Vilas Hotel (Guj) 291 ITR 202

If the assessment order became final, it was binding on both parties and neither party could seek to reopen it in a penalty proceedings Bharat Rice Mill Vs. CIT (All) 278 ITR 599

S.S. Ratanchand Bholanath Vs. CIT (MP) 210 ITR 682

CIT Vs. Ram Niwas Agarwal (All) 125 ITR 432

Mere offering explanation, is not sufficient – Explanation to be substantiated by cogent and reliable evidence.

CIT Vs. Lalchand Tirath Ram (P&H) 225 ITR 675

5.4.2 Apart from the above cases, I would also like to place reliance on two recent case laws:-

The Delhi High Court said: in the case of Morgan Finvest Pvt. Ltd.

“... The judgment of the Supreme Court in Reliance Petroproducts (Supra) cited on behalf of the assessee has been explained and distinguished by the Division Bench of this Court in CIT vs. Zoom Communications P. Ltd. (2010) 327 iTR 510 (Del). This is not a case where all the correct particulars relating to the claim were furnished and a claim for relief or allowance was made on that basis, which was not accepted by the assessing officer who did not question the particulars relating to the claim, but merely took a different view on the very same particulars. This is a case where questionable details and particulars relating to the claim were furnished by the assessee and such details were so fundamental to the genuineness and bonafide of the claim that the mere furnishing of those particulars made the claim vulnerable. The Tribunal failed to appreciate the claim of the assessee for what it is. It completely missed the fact that there was no evidence to show that the property was used for the purpose of the assessee’s business during the relevant previous year. We find considerable justification for the criticism leveled by the learned Standing Counsel against the decision of the Tribunal to cancel the penalty without meeting any of the findings recorded by the income tax authorities. In the result we answer the substantial question of law in the affirmative, in favour of the revenue and against the assessee”

(ii) The Bombay High Court said: In the case of M/s Sanghvi Swiss Refills Pvt. Ltd.

“..... .The authorities under the Act have reached a finding of fact that the particulars of the expenditure of Rs. 10.81 lacs paid to M/s Primco Pvt. Ltd. Were inaccurate, in as much as no such amounts were paid. This finding of the Tribunal in its order dated 4th May, 2006 has also been filed. The aforesaid finding clearly establishes that inaccurate particulars had been furnished by the appellant so as to arrive at a lower income to reduce the incidence of tax.

So far as the reliance upon the decision of the Apex Court in the matter of Reliance Petroproducts Pvt. Ltd.(Supra) is concerned, we find that the same is distinguishable. In that case, there was no finding recorded by the Tribunal that the details supplied by the assessee therein were inaccurate or false and therefore, the Apex Court held that no penalty under section 271 (1)(c) of the Act could be visited upon the assessee in that case. As against that in the present case the Tribunal has reached a finding of fact that the appellant had filed inaccurate particulars regarding its income by showing false/exaggerated expenses. Therefore in the present case the provisions of section 271(1)(c) of the Act stand attracted. Making of a claim on admitted/disclosed facts is different from filing false/inaccurate particulars. In the present case, the details furnished by the appellant were found to be inaccurate leading to a concealment of income on the part of the appellant. In view of the above, we find no fault with the order of the Tribunal dated 14th May, 2010 upholding penalty under section 271 (1)(c) of the Act upon the appellant ”

5.5 It is also to be noticed that assessee has not offered any worthwhile explanation, for rebutting the presumption of concealment. Its explanation furnished during penalty proceedings and also now curing appeal, are cursory , lacking any depth and substance. As mentioned earlier, no worthwhile new facts and evidence have been brought on record, so as to, show that transactions, even if not ‘confirmed’ by these parties were genuine/real.

Thus, it is a case where virtually no explanation has been offered in penalty proceedings.

5.6 In the following important cases of agreed addition; it was held that Explanation I to Section 271(1)(c) was applicable and hence penalty was rightly levied:-

(i) In *CIT v. KedarNath Ram Nath* (1977) 106 ITR172(All), penalty was levied under the Explanation where addition to income was made by rejection of book profit for want of proper verification. The penalty was cancelled by the Tribunal on the ground that no case has been made out for holding that there was any fraud or gross or willful neglect. The High Court held that the Tribunal had misconceived the real position and that the burden lay on the assessee to prove that there was no gross or willful neglect or fraud on his part.

(ii) (a) *CIT v. Tikaram & Sons (P) Ltd.* 103 Taxation 21 (All): (1992) 193 ITR 120(AI1).

(b) The Supreme Court in *CIT v. Tikaram & Sons (P) Ltd.* (1991) 191 ITR (St.) 306(SC) dismissed an SLP against the above judgment.

(iii) It has been held in *CIT v. UnidaramTulsidas Panjabi* (1993) 204 ITR 675, 683 (Bom) that where the Explanation to section 271(1)(c) applied, the presumption raised by the Explanation can be rebutted only by cogent, reliable and relevant materials. As in this case the explanation submitted by assessee was found by the IAC, Commissioner as well as the Tribunal to be false, the Tribunal was not justified in cancelling the penalty holding that the IAC had failed to produce further substantive material to prove the concealment. "Such an interpretation will frustrate the very purpose of the Explanation".

5.7 Conclusion

In view of the above detailed discussion I hold that penalty has been rightly levied u/s 271(1)(c), by the AO in the present case."

6. Against the impugned order of the learned Commissioner, though the Assessee has preferred the instant appeal, however before us could not substantiate its appeal, due to non-service of notices upon him, whereas the learned DR vehemently supported the orders passed by the authorities below and specifically claimed that the impugned order is a reasoned, logical and reasonable order based on the facts and circumstances of the case and, therefore, does not require any interference, as the same is not suffered from any impropriety, perversity or illegality.

7. We have heard the learned DR and perused the orders passed by the authorities below, specifically the impugned order wherein the Ld. Commissioner has observed *that the Assessee has not offered any explanation for rebutting the presumption of concealment and even also failed to mention any worthwhile new facts and evidence in order to show the transactions, even if not confirmed by the parties with whom the Assessee has dealt with, were genuine/real. Therefore, virtually in this case no explanation has been offered in the penalty proceedings. Hence, the penalty has been rightly levied u/s 271(1)(c) of the Act.*

Before us as well, the Assessee has failed to place on record any material to contradict the findings of the Id. Commissioner. Even otherwise we do not find any reason or material to controvert the findings given by the Id. Commissioner in upholding the levy of penalty imposed by the Assessing officer and therefore in the absence of any cogent reason and/or material, we are constrained to dismiss the appeal of the Assessee and to uphold the impugned order.

8. In the result, the appeal of the Assessee is dismissed.

Order pronounced in open court on 25.05.2022.

Sd/-

**(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER**

Sd/-

**(N.K. CHOUDHRY)
JUDICIAL MEMBER**

MP