

आयकर अपीलीय अधिकरण, राजकोट न्यायपीठ, राजकोट
**IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT**

(Conducted Through Virtual Court)

**BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

**ITA No.103/RJT/2018
Assessment Year : 2012-13**

Ranjit D. Rathod Prop. Of M/s.Shree Ganesh Marine Nr. Railway Station Main Road Delwada.	Vs	ITO, Ward-1(3) Veraval.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Written Submissions
Revenue by :	Shri B.D. Gupta. Sr.DR

सुनवाई की तारीख/**Date of Hearing** : **01/06/2022**
घोषणा की तारीख/**Date of Pronouncement**: **08/06/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

This is assessee's appeal against the order of Id.CIT(A)-3, Rajkot dated 1.2.2018 relating to the Asst.Year 2011-12.

2. The only issue raised by the assessee is that the learned CIT-A erred in confirming the penalty levied by the AO amounting to Rs. 13,410.00 on account of concealment of particulars of income/furnishing inaccurate particulars of income.

3. The facts in brief are that the assessee in the present case is an individual and engaged in the trading business of fish. The AO during the assessment proceedings found that the assessee has shown sales

of the company namely M/s Bhavani Sea Foods amounting to Rs.45,04,591.00 whereas the impugned company has shown purchases from the assessee at Rs.46,43,759.00 leading to under reporting of sales amounting to Rs.1,30,168.00 which was added to the total income of the assessee in the assessment framed under section 143(3) of the Act vide order dated 20 January 2014. The AO with respect to impugned addition initiated the penalty proceedings by issuing notice under section 274 read with section 271(1)(c) of the Act on account of furnishing inaccurate particulars of income. However there was no response by the assessee in respect of the notice issued to him. Accordingly the AO held that the assessee has furnished inaccurate particulars of income and levied the penalty under *Explanation 1* to section 271(1)(c) of the Act amounting to Rs.13,410.00 being hundred percent of the amount of tax sought to be evaded.

4. Aggrieved assessee preferred an appeal to the learned CIT-(A) who confirmed the order of the AO.

5. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

6. The learned AR before us filed written submissions and contended that the ITAT in the quantum appeal bearing ITA No. 214/RJT/2017 vide order dated 1 October 2019 has reduced the addition to Rs.30,540.00 only. Thus, according to the learned AR, the penalty at the most can be levied on the addition confirmed by the ITAT.

5. Without prejudice to the above the learned counsel for the assessee further submitted that there were certain other parties in

respect of which more amount of sales was shown in the books of accounts viz-a-viz the corresponding purchases shown by the respective parties. Thus, it cannot be said that there was any intention on the part of the assessee to suppress the sales. Thus, the question of penalty under the provisions of section 271(1)(c) of the Act does not arise.

6. On the other hand, the learned DR vehemently supported the order of the authorities below.

7. We have heard the ld. DR and perused the materials available on record. In the present case, it was found out that the assessee has suppressed sales by the amount of Rs.1,30,168.00 only. Accordingly, the addition was made and the penalty on the same was levied under the provisions of section 271(1)(c) of the Act on account of furnishing the inaccurate particulars of income. However, the ITAT in the quantum appeal in the own case of the assessee in ITA No. 214/RJT/2017 vide order dated 1 October 2019 has restricted the addition to Rs.30,540.00 only by observing as under:

“6. We have heard the ld.DR and also written submissions filed by the assessee. We have also gone through the record and orders of Revenue authorities. We find that the mismatches in the cases of four parties viz. Kalpataru Export, Silver Seafoods, Sagar Seafoods and Rameshwar Cold Storage have been accepted by the Revenue and no adverse inference was taken. But in the case of Bhavani Seafoods, as per the books of the assessee total sales was shown at Rs.45,04,591/- whereas as per the books of this party, it was shown at Rs.46,34,759/-, therefore, difference of Rs.1,30,168/- less shown in the books of assessee was treated as out of book sales and added to the total income of the assessee. We find that the Revenue authorities have taken a different yardstick for the same set of transactions. There should be logical conclusion at the end of the Revenue while making such addition. In this nature of business, which is perishable nature there bound to be loss on account of weight loss, spoilage etc. at the time when produce reaches at the destination. The reasons pointed out by the assessee, cannot be simply brushed aside, though there may not

be documentary evidence to prove same. In this kind of business, 100% reconciliation of accounts is not possible. If the real intention of the assessee to book less sales in the account, and to evade tax, then he would not have shown higher figures sales in the cases of four parties cited above. An assessee having a turnover of more than Rs.45 lakhs, cannot be said or believed to be indulging in un-reporting a meager sale figure of Rs.1,30,168/-. Further, if the AO can buy the explanation of the assessee in the case of sales effected to above four parties, why he cannot apply same logic to the sales made to Bhavani Sea food. After all only actual and real income is to be taxed. We are not convinced with logic given by the Revenue in making the impugned addition. Therefore, we are of the view that looking to the nature of the business, excess sales noticed by the AO amounting to Rs.1,60,708/- should be set off against less sales shown of Rs.1,30,168/-. In other words, only an amount of Rs.30,540/- is to be added to the income of the assessee. We restrict the addition to the extent of Rs.30,540/- and allow the ground of appeal partly.”

8. From the above, there remains no ambiguity that the assessee was given the substantial relief by the ITAT and the addition to the tune of ₹ 30,540 was confirmed on ad hoc basis. In other words the ITAT found that there were 4 other parties in respect of which the assessee has shown higher amount of sales than the purchases shown by the respective parties in the books of accounts but the AO has not reduced such amount of sales with respect to such parties. Accordingly, the ITAT found that the assessing officer has taken different stand with respect to different parties. As such the stand which was favouring to the revenue was adopted by the AO and was subsequently confirmed by the learned CIT-A. Thus the basis adopted by the Revenue for making the addition was changed by the ITAT as discussed above. As such the basis adopted by the ITAT for making the addition in part was not based that the assessee has suppressed the sales. As such, the ITAT has found that the assessee in respect of one-party has shown less sales whereas in respect of 4 parties the assessee has shown more sales in the books of accounts than the purchases shown by the respective parties in their respective books of accounts. Thus the ITAT has taken the net effect which is difference of

less sales viz a viz more sales with respect to different parties and confirmed the addition of such difference which to our mind represents the Ad hoc addition. It is the settled law that there cannot be any penalty with respect to addition which were based on ad hoc basis. Accordingly we are of the view that, there cannot be any penalty under the provisions of section 271(1)(c) of the Act on the additions made on ad hoc basis.

9. Without prejudice to the above, likewise, it cannot be alleged that the assessee acted with malice to avoid the tax in view of the fact that the assessee in respect of certain parties have shown higher amount of sales. This fact can be verified from the finding of the AO which is reproduced as under :

“6..... In the cases of remaining parties, the assessee has shown more amounts than the amount shown by sundry debtors i.e. the assessee has shown more sales, hence, no adverse inference is called for in these cases.”

10. Furthermore, it is the settled law that the penalty proceedings are distinct from the assessment proceedings. Therefore the addition made during the assessment proceedings does not authorize the AO ipso facto to levy the penalty under section 271(1)(c) of the Act. As such the AO was under the obligation to carry out the necessary verification before reaching to the conclusion that the assessee has furnished any inaccurate particular of income or concealed the particulars of income. In the instant case, the penalty was initiated on account of the addition made for under reporting of the sales. The AO was aware of the details of debtors but the AO without verifying the debtors during the penalty proceedings has levied the penalty merely on the ground that such income was added to the total income of the assessee during the quantum proceedings. As such the penalty

proceedings being distinct and separate from the assessment proceedings, the AO is under the obligation to carry out the fresh verification as held by the Hon'ble Gujarat High Court in the case of National Textiles Vs. CIT reported 249 ITR 125. The relevant extract of the judgment is extracted below:

“In the instant case, the cash credits were not satisfactorily explained by evidence and documents. The parties who had advanced the alleged temporary loans were neither disclosed with their particulars nor any supporting documents were on record. Only two entries were explained. The accountant who had arranged the loan was not produced stating that he had left the service and relations with him were strained. On this state of accounts and evidence in the quantum proceedings, the department was justified in treating the cash credits as income of the assessee but merely on that basis by recourse to Explanation 1, penalty under section 271(1)(c) could not have been imposed without the department making any other effort to come to a conclusion that the cash credits could in no circumstances had been amounts received as temporary loans from various parties. The assessee in the quantum proceedings failed to produce the accountant but the department also in penalty proceedings made no effort to summon him. Applying the test (ii) discussed above, therefore, it was a case where there was no circumstance to lead to a reasonable and positive inference that the assessee's case, that the cash credits were arranged as temporary loans, was false. The facts and circumstances were equally consistent with the hypothesis that it could have been sundry loans in small amounts obtained from different parties. Therefore, even taking recourse to Explanation 1, the circumstance or state of evidence on which the cash credits were treated as income, could not by themselves justify imposition of penalty without anything more on record produced by the assessee or the department.

It was, accordingly, held that the Tribunal was not justified in law in confirming the penalty levied under section 271(1)(c).”

11. In view of the above, we hold that the AO cannot just levy the penalty merely on the ground that the additions were made during the quantum proceedings. As such the AO has to carry out necessary verification by issuing the notice to the parties before levying the penalty. In view of the above, we are of the opinion that no penalty can

be levied under section 271(1)(c) of the Act for the reasons stated above. Hence the ground of appeal of the assessee is allowed.

12. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 8th June, 2022 at Ahmedabad.

**Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad, dated 8/06/2022
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