THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

Before: Shri P.M. Jagtap, Vice President
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 1601/Ahd/2019
Assessment Year 2011-12

M/s. Accura Enterprise Pvt. Ltd. 28, Uganda Society, Nr. Subhash Chowk, Memnagar, Ahmedabad PAN: AAGCA4311D (Appellant)	Vs	Dy. CIT, Circel-1(1)(1), Room No. 309, 3rd Floor, A Wing, Pratyaksh Kar Bhavan, B/h Kamdhenu Complex, Panjrapole, Ahmedabad-380015 (Respondent)

Assessee by: **Shri Parimalsingh B Parmar, A.R. & Shri Tushar Hemani, A.R.**
Revenue by: **Shri R.R. Makwana, Sr. D.R.**

Date of hearing : 26-04-2022
Date of pronouncement : 20-07-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-1, Ahmedabad in Appeal no. CIT(A)-1/10044/DCIT, Cir. 1(1)(1)/2018-19 vide order dated 27/08/2019 passed for the assessment year 2011-12.

2. The assessee has taken the following grounds of appeal:-

"1. The learned CIT(A) has erred in not affording an opportunity of hearing to the appellant and in passing an ex parte order which is in violation of the Principles of Natural Justice.

2. The learned CIT(A) has erred in law and on facts in confirming the action of AO in initiating and levying penalty under section 271(l)(c) of the Act without recording mandatory satisfaction as contemplated under the Act at the time of framing the assessment order.

3. The learned CIT(A) has erred both in law and on the facts of the case in confirming the penalty when show cause notice u/s.274 r.w.s.271(l)(c) of the Act did not specify the exact charge as to whether the penalty is levied for concealment or furnishing of inaccurate particulars of income. Such a defect renders the penalty void ab initio and is also a violation of the principles of natural justice.

4. The learned CIT(A) has erred both in law and on the facts of the case in confirming the penalty of Rs.6,34,716/- levied u/s 271(l)(c) of the Act.

5. In any case, the impugned penalty order is barred by limitation and thus without jurisdiction and illegal.

6. In any case, quantification of the penalty is erroneous and excessive

7. Both the lower authorities have passed the orders without properly appreciating the facts and they further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of the lower authorities is in clear breach of law and Principles of Natural Justice and therefore deserves to be quashed.

8. The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal

Total tax effect 6,34,716/-"

3. The brief facts of the case are that the assessee company is engaged in business of trading and export of different spices and other Agro products. The assessment of the assessee was completed under section 143(3) of the Act determining total income at ₹ 76,65,847/- after making certain additions/disallowances. Against the aforesaid order, assessee filed appeal before Ld. CIT(Appeals), who dismissed the assessee's appeal vide order dated 24-03-2016. Accordingly, penalty proceedings u/s 271(1)(c) of the Act on the below issues:

1. Addition due to sundry creditors: ₹ 19,98,102/-
2. disallowance of expenses claimed under section 35D ₹ 47,345/-
3. addition as per AIR information ₹ 8,650/-

3.1 To give a factual background of issues under consideration, with regard to the issue of addition on account of sundry creditors amounting to ₹ 19,98,102/-, during the course of assessment proceedings despite several opportunities, the assessee was unable to furnish the confirmation from creditors as requisitioned by the Assessing Officer. Hence addition to the tune of ₹ 19,98,102/- was made during assessment proceedings, which were later confirmed by Ld. CIT(Appeals). Regarding disallowance under section 35D of the Act, the AO disallowed an amount of ₹ 47,345/- being expenses incurred for increase in the authorised share capital of the company. The AO held that this amount was not eligible for deduction under section 35D of the Act. The assessee did not press this issue in appeal against before Ld. CIT(Appeals) and accepted the addition. Regarding the third addition, as per AIR information, it was noticed that the assessee had earned brokerage

income of ₹ 45,448/- however it showed income of only ₹ 36,798/- as brokerage income in it's return of income. Accordingly, the AO made addition of ₹ 8,650/- of the differential amount, to the total income of the assessee. The assessee did not press this issue before Ld. CIT(Appeals) in quantum proceedings. Penalty u/s 271(1)(c) of the Act was imposed by the AO in respect of the aforesaid additions, which were later confirmed by Ld. CIT(Appeals). The assessee is in appeal before us against the aforesaid order of Ld. CIT(Appeals).

3.2 Regarding the addition on account of sundry creditors amounting to ₹ 19,98,102/- the counsel for the assessee submitted that this amount has been deleted by the Ahmedabad ITAT in the quantum appeal against the order of Ld. CIT(Appeals) in the assessee's own case in ITA number 1374/Ahd/2016 vide order dated 27-05-2020, and hence since the issue has been decided in favour of the assessee by the ITAT in quantum proceedings, penalty u/s 271(1)(c) of the Act is liable to be set aside. Regarding the addition on account of disallowance under section 35D of the Act, the counsel for assessee submitted that the issue is debatable one and placed reliance on the decision of **DCIT v. M/s Mercury Projects Private Limited (ITA number 450/Hyd/2017)**, wherein the ITAT held that expenses incurred for increase in authorised share capital is eligible for deduction under section 35D of the Act. Accordingly, the counsel for the assessee argued that even though the assessee did not press this issue before Ld. CIT(Appeals) in quantum proceedings, so far as penalty u/s 271(1)(c) of the Act is concerned since the issue is debatable one, penalty is liable to be set aside. Regarding the addition of ₹ 8,650/- on account of lesser amount shown as brokerage

income by the assessee during the impugned assessment year as compared to the amount on which TDS has been deducted by the payer, the counsel for the assessee submitted that the assessee has not received the differential amount alleged to be the income of the assessee on account of brokerage income either during the impugned year nor in any of preceding years till date. Thus, merely if the payer has committed a mistake in filing TDS return and has shown an incorrect figure of brokerage, the assessee cannot be held liable for the same. Accordingly, in the instant facts, no penalty u/s 271(1)(c) of the Act may be levied. The Ld. DR, in response, placed reliance on the order of the Ld. CIT(Appeals).

4. We have heard the rival contentions and perused the material on record. Regarding the addition on account of sundry creditors amounting to ₹ 19,98,102/-, we note that this amount has been deleted by the ITAT in the quantum appeal against the order of Ld. CIT(Appeals) in the assessee's own case in ITA number 1374/Ahd/2016 vide order dated 27-05-2020, a copy of which has been placed before us for our perusal. We would like to reproduce the relevant extracts of the judgement for reference:

> *"6. We have heard both the sides and perused the material on record. During the course of assessment, the assessing officer has made disallowance to the amount of Rs. 19,98,102/- in respect of sundry creditors pertaining to the above referred two parties on the ground that required confirmation was not furnished by the assessee. Subsequently, the assessee has furnished the confirmation before the Id. CIT(A) as additional evidences under rule 46A of the Act. The Id. CIT(A) has admitted the additional evidences and called remand report from the assessing officer. In the remand report, the assessing officer has stated that in respect of sundry creditors namely Westwind Logistics Pvt. Ltd. the necessary books of account and other document were maintained and TDS was deducted*

and necessary bills were verified therefore, stated that the appeal be decided on merit. In respect of other sundry creditors namely M/s. Kankane Oil Mills, the assessing officer has stated that notice issued to it was returned un-served. However, on perusal of the material kept in the paper book, it is noticed that assessee has furnished the copy of sale invoice pertaining to Kankane Oil Mill and copy of contract note, copy of challan, copy of receipt of the agricultural production of marketing committee, copy of form no. 403 of the commercial sales tax department certifying that goods were distributed from Kankane Oil Mill to place of the assessee. Further, the asessee has also placed in the paper book copy of transporter receipt along with payment of transport charges for delivering the goods from the consigner to the assessee, copy of bank account statement showing that payment was made by the assesee to Kankane Oil Mill. In addition to above, we have noticed that the party namely Kankane Oil Mill was based in Uttar Pradesh and for any further verification the assessing officer should have issued commission u/s. 131(i)(d) of the act after keeping into consideration the distance from the place of the assessee and the place of the assessee. The assessing officer has neither given any commission nor disproved a number of evidences furnished by the assessee in supported of its claim of purchasing the goods from the aforesaid parties. The Id. CIT(A) has not disproved the relevant supporting evidences furnished in respect of other party namely Westwind Shipping Logistics Pvt. Ltd. in spite of the fact that assessing officer has clearly mentioned in his remand report that bills were verified and TDS was deducted. Therefore, considering the aforesaid facts and circumstances, we are not inclined with the decision of the Id. CIT(A) for sustaining the additions on assumption basis without disproving the relevant material submitted by the assessee. Therefore, the appeal of the assessee is allowed."

4.1 Since the issues has been decided in favour of the assessee by ITAT in quantum proceedings, penalty u/s 271(1)(c) of the Act is hereby directed to be deleted in respect of the aforesaid amount of ₹ 19,98,102/-.

4.2 With reference to the amount of ₹ 47,345/- being the expenditure incurred for increase in the authorised share capital, we are of the considered view that even if the assessee did not press this issue in quantum proceedings before Ld. CIT(Appeals), since various Tribunals have held that

expenses incurred towards increased in authorised share capital is eligible for deduction under section 35D of the Act, and therefore since the issue is debatable one, hence penalty u/s 271(1)(c) of the Act on this issue is hereby being set aside. We note that apart from the decision of **DCIT v. M/s Mercury Projects Private Limited (ITA number 450/Hyd/2017)** on which reliance has been placed by the counsel for the assessee, the ITAT in the case of **Ocimum Bio Solutions India Ltd. Vs DCIT (ITAT Hyderabad)** in **ITA No. 2178/H/2018** held that expenses incurred by the assessee towards increase in authorised share capital is eligible for deduction under section 35D of the Act. The ITAT made the following observations while passing the order:

> *On perusal of the financial statements submitted by the assessee, we find that there is no doubt that the assessee has increased share capital. On perusal of the provisions of section 35D, we find substance in the written synopsis submitted by the ld. AR of the assessee relying on the judgements quoted supra that section 35D provides amortization of certain expenses, which are in the nature of capital/intangibles/preliminary expenses, which have been incurred by the assessee in the preliminary stage of the company or in the normal course of business and the assessee is entitled to amortize of expenses over a period of time as per section 35D. Therefore, the AO is directed to allow the ROC expenditure incurred towards increase of share capital as per section 35D of the IT Act, 1961.*

4.3 In view of the above, in our considered view, since the issue is debatable one wherein some Tribunals have also decided the same issue in

favour of the assessee, penalty u/s 271(1)(c) of the Act is liable to be set aside.

4.4 Regarding the penalty imposed on account of differential amount of ₹ 8,650/-, the assessee submitted that the addition has been made purely on account of the AIR report and no income has been received by the assessee. In our considered view, looking at the quantum of addition, and in view of the fact that the assessing officer has not been able bring anything on record to substantiate that this amount either accrued to the assessee/or has been received by the assessee, but relied only on the AIR report to hold the assessee has under-reported this income, in the interests of justice, we are hereby deleting the addition u/s 271(1)(c) of the Act.

5. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 20-07-2022

Sd/	**Sd/-**
(P.M. JAGTAP)	**(SIDDHARTHA NAUTIYAL)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Ahmedabad : Dated 20/07/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.