

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**

**BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.180/SRT/2021**

**(निर्धारणवर्ष / Assessment Year: (2012-13)**

**(Virtual Court Hearing)**

Sanjay D Domadiya Plot No.C-10/11, Sachin Udhyog Nagar, Sachin- Palsana Road, Sachin, Surat- 394230	<b>Vs.</b>	Income Tax Officer, Ward-2(3)(4), Aaykar Bhavan, Majura Gate, Surat-395002
<b>स्थापीलेखासं./जीआइआरसं./PAN/GIR No.: AFTPD 6992 G</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Kishore R Gheewala, C.A

Respondent by : Shri Vinod Kumar, Sr-DR

सुनवाईकीतारीख/ **Date of Hearing** : 06/07/2022

घोषणाकीतारीख/**Date of Pronouncement**: 25/08/2022

**आदेश / ORDER**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by the assessee pertaining to the assessment year 2012-13, is directed against the order passed by the Learned National Faceless Appeal Centre (NFAC)/ Ld.CIT(A) dated 16.08.2021, which in turn arises out of a penalty order passed by the Assessing Officer ('AO' for short) u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide order dated 14.11.2018.

2. Grounds of appeal raised by the assessee are as follows:

*"1. The order dated 14/11/2018 imposing penalty u/s 271(1)(c), simultaneously with issuance of the SCN dated 14/11/2018 fixing the date of hearing at 29/11/2018 is bad in law liable to be quashed.*

*2. The order imposing penalty of Rs.154,601/- u/s 271(1)(c) on estimated addition for alleged low G.P. is unwarranted, unjustified & illegal."*

3. At the outset, Ld. Counsel for the assessee begins by pointing out that Assessing Officer rejected the books of account and estimated @8% gross profit on the turnover. The Assessing Officer having rejected books of account also made addition on brokerage expense to the tune of Rs.3,17,881/-.

4. On appeal, Ld. NFAC/Ld. CIT(A) deleted the addition on account of brokerage expense and further restricted estimated disallowance to the extent of Rs.5 lakh only. Therefore instead of estimated disallowance to the tune of Rs.50,08,257/- the Ld. NFAC /CIT(A) has further estimated the disallowance and restricted the estimated addition to the tune of Rs.5 lakh only. Therefore, Ld. Counsel for the assessee contended that penalty on estimated addition should not be imposed on assessee, hence, penalty imposed on should be quashed.

5. On the other hand, Ld. Sr-DR for the Revenue relied on the penalty order passed by Assessing Officer.

6. We have heard both the parties and perused the materials available on record. We note that Ld. CIT(A) reduced the estimation from Rs.50,08,257/- to Rs.5,00,000/-. The findings of Ld. CIT(A) is reproduced below:

*“10.2 Now the most significant question which arises here is to estimation of profit. This is true that there was fall in G.P. Rate during the year @ 4.26% as against 6.87% shown in immediate preceding year. Ld. AO has also referred to two other comparative cases where GP rate was much better @ 8.83% & 8.19% in the case of M/s Chinco Textiles & M/s Chinco Polysizers coupled with better yield ratio of 109.92% & 107.25% respectively as against 104% shown by the assessee. Eventually, Ld. AO applied GP rate of 8% as against 4.26% shown by the assessee and made addition of Rs.50,08,257/- in this regard. During appellate proceedings, Ld.AR of the assessee has been provided the copies of final accounts of “comparable cases” to defend his case. In this regard, Ld. AR of the assessee has made detailed analysis of facts and figures of both the comparable cases and pointed out their non-comparability on various counts/parameters viz. Amount of capital deployed. Huge amount of secured/unsecured loans. Incomplete data about chemical consumption, Difference in nature of type of Raw Material and those parties being very old in business etc. In nutshell, Ld.AR could successfully pointed out that both cases used by Ld. AO as perfect comparable cases were actually not comparable at all. I have verified the data and considered the reply submitted by Ld. AR of the assessee. Simply on the basis of turnover itself, these cases are not found comparable at all. The turnover during the year shown by assessee was Rs.13.96 crores whereas M/s Chinco Textiles has shown turnover at Rs.65.92 Crores & M/s Chinco Polysizers has shown Rs.43.49 Crores. Thus, there was huge/vast difference in the scale of business which bound to have variation in its profitability. Apart from this, M/s Chinco Textiles has shown yield of 107.25% but shown GP of 8.83% whereas M/s Chinco Polysizers having shown higher yield of 109.92% whereas M/s Chinco Polysizers having shown higher yield of 109.92% have shown lower GP of 8.19% only. Thus, there was huge difference & variation between the two “ideals” used as comparables by Ld. AO.*”

*As per Ld. AR, the higher yield of 107.25% & 109.92% shown by two comparable cases should not be taken as gospel truth because said concerns have not shown quantity of their chemical consumption. As per rule of conventional wisdom, more chemical consumption would result into more yield like adding water to milk. On basis of above discussion, I find enough persuasive force in the arguments of Ld.AR that both the comparable cases picked up by Ld. AO for making GP comparison we not ideal or perfect to draw any adverse conclusion against the assessee and AO should not straight way apply GP rate @ 8% on basis of these so-called comparable cases. Comparability of profit results depends on various factors such quality of Raw Material used, scale of production & use of technology, market place & share, turnover, capital employed etc. Ld. AR has demonstrated that on so many counts the so-called comparable cases have failed in test of comparability. So, I hereby rejected GP addition based on two comparable cases picked up by Ld. AO which I find not comparable in various aspects. Therefore, applying GP Rate @ 8% is not at all justified in this case.*

*It is trite law that past history of the assessee himself is the best to compare with. In the case of **Kansara Bearings Pvt. Ltd. Vs. ACIT 270 ITR 235 (Raj) & Ajay Goyal Vs. ITO (99 TTJ 164)** – it was held that past years profit declared by the assessee is the best guide for application of GP/NP Rate. During the assessment proceedings, Ld.AR of the assessee provided the comparative figures of GP/NP for various years as under:-*

YEAR	2012-13	2013-14	2014-15	2015-16
T/O	1396428230	108715544	184809160	119486807
GP	6214784.61	5311374	8608318	6712664
GP RATIO	4.45048601	4.885569997	4.657949855	5.617912277
NP	1855608.94	1771190	354064	2022604
NP RATIO	1.32882507	1.629196649	1.915837938	1.69274253

*A glance to Gross Profit history shows that GP Ratio was in the limits of 4.5% to 5.6% except in A.Y 2011-12 when GP Rate was 6.87%. This is an established proposition that department cannot force a businessman to earn profit year after year and that too on a consistent rate. At the same time, because the assessee has failed to maintain day to day stock register in relation to quality & quantity, book results are not reliable to cannot be accepted as it is.in view of these facts & circumstances, I find it fair & appropriate to sustain a lumpsum addition of **Rs.5,00,000/-** on estimate basis to meet the both ends of justice. Hence, the addition is sustained to the extent of Rs.5,00,000/- and assessee will get a relief of Rs.45,08,257/- (Rs.50,08,257 -Rs.5,00,000). Ground of appeal is **partly allowed.**”*

7.We note that Assessing Officer has rejected the books of account of assessee u/s 145(3) and then made estimation addition. The Assessing Officer also made line by line addition on account of brokerage to the tune of Rs.3,17,881/-. However, on appeal addition on account of brokerage to the tune of Rs.3,17,881/-has been deleted by Ld. CIT(A) and Ld. CIT(A) further re-estimated assessee's gross profit from Rs.50,08,257/- to Rs.5,00,000/-. Therefore, we note that the penalty was

levied on the assessee on estimated addition and it is settled principle of law that no penalty u/s 271(1)(c) can be levied on addition made on estimation. For that we rely on the order of Co-ordinate Bench of this Tribunal in the case of *Gopilon Texturising Pvt. Ltd. vs. Income Tax Officer Ward-1(2), Surat* in ITA No.293-294/AHD/2005 for A.Ys. 1988-89 & 1989-90 order dated 13.04.2021, wherein the Tribunal held as follows:-

*“12. On second appeal before Tribunal in ITA No.186/AHD/1998 dated 08.03.2004, the additions restricted to addition 5% of gross profit. Considering the fact that addition in the assessment order, on the basis of which the penalty was levied is purely on estimated basis. It is settled position in law that no penalty under section 271(1)(c) can be levied on additions made on estimation. The similar view was taken by the Jurisdictional High Court in Manish Dhirailal Mehta Vs. ACIT, Vijay Proteins Ltd. Vs. CIT (supra), in Vijay Proteins vs. CIT (supra) and other case law relied by Ld. AR for the assessee. No contrary facts or law is brought to our notice. In the result, Ground No.1 of appeal is **allowed**.”*

8. Therefore, respectfully following the binding precedent of Co-ordinate Bench of this Tribunal in the case of *Gopilon Texturing Pvt. Ltd. (supra)*, we delete the penalty imposed by Assessing Officer u/s 271(1)(c) of the Act.

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

Order pronounced on 25/08/2022 by placing the result on the notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

सूरत / Surat दिनांक/ Date: 25/08/2022

Dkp Outsourcing Sr.P.S.

**Copy of the Order forwarded to**

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat