

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

**BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER  
AND  
T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

**ITA No.469/RJT/2015  
Assessment Year : 2000-01**

M/s.Bhagwati Infrastructure Ltd. 16, Vijay Plot, Rajkot. PAN : AACCS 5989 C	Vs	ACIT, Cir.5 Rajkot.
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(Applicant)	(Responent)
Assessee by :	Written submissions
Revenue by :	Shri B.D. Gupta, Sr.DR

सुनवाई की तारीख/Date of Hearing : 22/06/2022  
घोषणा की तारीख /Date of Pronouncement: 31/08/2022

**आदेश/O R D E R**

**PER T.R. SENTHIL KUMAR, JUDICIAL MEMBER**

This appeal is filed by the Assessee against order dated 18.8.2015 passed by the Commissioner of Income-tax (Appeals)-3, Ahmedabad confirming penalty levied under section 271(1)(c) of the Income Tax Act, 1961 ("the Act" for short) relating to the Asst.Year 2000-01.

2. Brief facts of the case is that the assessee company is engaged in the business of manufacturing and sale of bright Bars. For the Asst.Year 2000-01 the assessee filed its return of income on 27.1.2000 declaring a loss of Rs.1,16,30,000/-. The return was processed under section 143(1) of the Act and thereafter taken up for scrutiny assessment. There was a survey action under section 133A of the Act in the business premises of the assessee on

7.3.2000. During the course of survey, few discrepancies viz. excess stock valued at Rs.20 lakhs were found; cash book was found negative; the peak of such amount comes to Rs.14,06,133/-. The AO completed assessment under section 143(3) on 17.2.2003 making the above disallowance and determined net loss at (-)Rs.65,52,807/-. Subsequently, 148-notice was also issued upon the assessee. During the course of survey, from cash book maintained in the computer of the assessee found negative cash balance of Rs.2,65,668/-, which was treated by the AO as unexplained expenditure under section 69C of the Act. Accordingly, the ld.AO initiated penalty proceedings by issuance of notice dated 17.11.2003 under section 274 read with section 271(1)(c) of the Act for concealing particulars of income. In the meanwhile, quantum appeal travelled upto the ITAT and the assessee's appeal was dismissed by confirming addition of Rs.2,65,668/- under section 69C of the Act vide order dated 21.9.2012 in ITA No.386/RJT/2012. Pursuant to this order, the AO issued another show cause notice dated 14.3.2013 giving fresh opportunity to the assessee for levy penalty under section 271(1)(c) of the Act. Vide para-5 of the penalty order, the AO imposed the penalty by holding as follows:

*"5. On receipt of the order of the Hon. ITAT, a fresh show cause notice u/s.271(1)(c) of the Act was given to the assessee vide show cause notice dated 14/03/2013 giving him fresh opportunity of being heard in the matter. But till date no body has attended nor given any written submission in reply of the above show case notice. Therefore, it is presumed that the assessee has noting to say in respect of show notice issued by the AO for levying penalty u/s 271(1)(c) of the. IT Act. Penalty u/s 271(1)(c) is leviable on the additions confirmed by the Hon'ble ITAT of Rs.2,65.,68/-*

*The assessee has not contested the aforesaid order of the Hon.ITAT, Rajkot Bench, Rajkot and thus the order of the Assessing Officer has achieved its finality.*

*In the light of given facts, it can very well be held that the assessee had willfully furnished the inaccurate particulars of income with an intention to evade tax. Accordingly, the assessee is liable to penalty u/s. 271(1) (c) of the I.T. Act, 1961.*

3. Aggrieved against the assessee, the assessee filed appeal before the ld.CIT(A). It can be seen from page no.5 of the CIT(A)'s order, assessee's reply letter dated 21.3.2013, which reads as follows:

*"Please refer to your letter no. ACIT/ Circle - 5/ Penalty/ BIL/ 2012-13 dated 14-03-2013 in the above matter.*

1. *During the course of survey and as mentioned in assessment order, total additions in income is made as under:*

*(A) Unexplained expenditure U/S 69(1) Rs. 2,65,668/-*

*This was negative balance in cash book due to some credit entries was pending for accounting. No any opportunity was given for up grade the same, at time of survey. This is not cover under concealment U/S 271(1) (c).*

*(B) The AGIT has wrongly intuited penalty proceedings U/S.271(1)(c)."*

4. But the ld.AO in his penalty order stated that nobody has attended in response to the penalty notice nor given any written submissions and thereby confirmed levy of penalty. The ld.CIT(A) also held that written reply by the assessee was nothing but same fact which have been considered and adjudicated by the appellate authorities viz. Commissioner of Income Tax (Appeals) and Income Tax Appellate Tribunal, Rajkot Bench while deciding the quantum appeal. Thus, the CIT(A) confirmed levy of penalty and dismissed the assessee's appeal. Aggrieved against the same, the assessee is before the Tribunal.

5. During the course of hearing none appeared on behalf of the assessee. However, written submissions dated NIL was filed before us stating that the issue is fully covered matter both on merits as

well as on technical grounds. The assessee relied upon judgment of Hon'ble jurisdictional High Court in the case of CIT Vs. Scientific Chemicals, 278 ITR 199 wherein Hon'ble High Court held as follows:

*“Where explanation tendered before ITO in response to show cause notice levying penalty under s. 271(1)(a) has been ignored by ITO stating that no explanation has been tendered, order levying penalty suffers from violation of principles of natural justice and vice of non-application of mind and cannot be allowed to stand.”*

*“10. As held by the apex court in the case of Tin Box Co, once the Tribunal found that the Income-tax Officer had not given to the assessee proper opportunity of being heard, whether the assessee could have placed the evidence before the appellate authority or before the Tribunal, was really of no consequence for it was the assessment order that counted : that order had to be made after the assessee had been given a reasonable opportunity of being heard. Principles of natural justice take within their sweep not only the right of reasonable opportunity, but also the right of being heard. The right of being heard would encompass the factum of the explanation tendered being considered before the assessing authority decides to pass an order. Section 271(1)(a) of the Act grants discretion to the Income-tax Officer to levy or not to levy penalty. This is clear from the phrase, "he may direct that such person shall pay by way of penalty" namely, the Income-tax Officer may direct or may not direct levy of penalty considering the fact that he is required to be satisfied whether any person has committed the stipulated default without reasonable cause. Such a satisfaction can be recorded only if proper and adequate opportunity is accorded to the assessee. Therefore, before the authority can exercise discretion vested in it, it is imperative for the authority to grant reasonable opportunity and this would take within its fold the right of being heard and the explanation tendered as to the existence of reasonable cause being taken into consideration before the order to levy penalty is made. The legal position in this regard is well settled and bears no repetition. The authority vested with discretion by a statutory provision is under a mandate to exercise such discretion in a judicial manner and not arbitrarily. When the explanation tendered by the assessee is ignored or omitted from the zone of consideration before the order is made, it would definitely violate the principles of natural justice. The order would be vitiated by exercise of arbitrariness*

*in the decision-making process and the discretion cannot be stated to have been exercised judicially.*

*11. There is one more aspect of the matter. When an authority is vested with discretionary powers and omits to take into consideration the explanation tendered, which has admittedly been filed in response to the show-cause notice, the order would suffer from the vice of non-application of mind when the order records that no explanation is tendered. In the present case, admittedly, it has been found by the Tribunal that though the explanation was tendered, the Income-tax Officer proceeded on the footing that no explanation was tendered and thus, it is established that the order stands vitiated for non-application of mind. If a statute invests a public officer with the authority to do an act in a specified set of circumstances, it is imperative upon him to exercise the authority in a manner appropriate to the facts and circumstances of the case when a party interested and having a right takes appropriate steps in that regard and circumstances for exercise of authority with the discretion are shown to exist. The exercise of discretion has to be in a judicial manner, namely, fairly and reasonably.*

*12. Applying the aforesaid principles to the facts of the case, it is apparent that the assessee had tendered an explanation before the Income-tax Officer in response to the show-cause notice issued by him, such explanation has been ignored by the Income-tax Officer in entirety by stating that no explanation has been tendered and in the circumstances, the order levying penalty suffers from violation of the principles of natural justice and vice of non-application of mind and cannot be allowed to stand. The Tribunal was, therefore, justified in holding that the order levying the penalty was bad in law and could not be sustained.”*

6. After hearing the Id.DR and considering material available on record, we find that by applying the above ratio of the judgment of the Hon'ble Gujarat High Court in the present facts of the case, the AO by levying penalty order has categorically held that nobody has attended during the hearing or given any written submissions in reply to show cause notice issued under section 271(1)(c) of the Act. Whereas the CIT(A) has extracted the reply dated 21.3.2013 given by the assessee in his impugned order. Thus, the order levying penalty

suffers from violation of principle of natural justice and non-application of mind by the AO and the same cannot be allowed to stand. The AO has not exercised his power to levy penalty in a fair, reasonable and judicial manner. Therefore, respectfully following the jurisdictional High Court's judgment, penalty levied by the AO without considering the assessee's explanation is bad in law and hereby quashed. Thus, the ground raised by the assessee is allowed.

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

**Order pronounced in the Court on 31<sup>st</sup> August, 2022 at Ahmedabad.**

**Sd/-  
(ANNAPURNA GUPTA)  
ACCOUNTANT MEMBER True Copy**

**Sd/-  
(T.R. SENTHIL KUMAR)  
JUDICIAL MEMBER**

Ahmedabad, dated 31/08/2022

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण / DR, ITAT,
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad