

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

**ITA No.7205/M/2019
Assessment Year: 2010-11**

M/s. Apco Yarn (India) Pvt. Ltd., Room No.57, Gaiwadi Sadan, 3 rd Floor, 147, Dr. Veigas Street, Kalbadevi Road, Mumbai-400 002 PAN: AADCA1441R	Vs.	Income Tax Officer, Ward 4(1)(3), Aayakar Bhavan, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : None
Revenue by : Shri Manoj Sinha, D.R.

Date of Hearing : 08 . 09 . 2022
Date of Pronouncement : 27 . 09 . 2022

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, M/s. Apco Yarn (India) Pvt. Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 26.09.2019 passed by Commissioner of Income Tax (Appeals)-9, Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2010-11 on the grounds inter alia that :-

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the levy of penalty u/s. 271(l)(c) of the

Income Tax Act, 1961 on addition of Rs.2,40,410/- being 20% disallowance of the Sundry Creditors of Rs. 12,02,051/- without appreciating the facts of the case that the same has been disallowed on adhoc basis.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the levy of penalty u/s. 271(l)(c) of the Income Tax Act, 1961 on addition of Rs.24,78,391/- being unexplained cash credit u/s. 68 of the Act without appreciating the facts of the case.

3. The appellant craves leave to add, alter, amend or modify any or all grounds till the disposal of the appeal.”

2. Briefly stated facts necessary for adjudication of the controversy at hand are : on the basis of assessment framed under section 143(3) of the Income Tax Act, 1961 (for short ‘the Act’) determining the total income at Rs.29,49,627/- by making disallowance of Rs.45,000/-, Rs.2,40,410/-, Rs.24,78,391/- under section 40(a)(ia) of the Act, on account of sundry creditors and unsecured loan/unexplained cash credit respectively, penalty proceedings under section 271(1)(c) of the Act have been initiated. Declining the contentions raised by the assessee that “the entire addition has been made on the basis of guess work/estimation penalty provisions contained under section 271(1)(c) of the Act are not attracted” Assessing Officer (AO) levied the penalty of Rs.8,54,000/- being 100% of the tax sought to be evaded under section 271(1)(c) of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly confirmed the penalty levied by the AO by partly allowing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

4. Despite issuance and service of the notice to the assessee company none appeared on behalf of it, so the Bench proceeded to decide this appeal on the basis of material available on record with the assistance of the Ld. D.R. for the Revenue.

5. We have heard the Ld. Departmental Representative for the Revenue, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and case law relied upon.

6. At the very outset, it is brought to the notice of the Bench that issue raised in this appeal has been dealt with by the co-ordinate Bench of the Tribunal in case of Shri Ajay Loknath Lohia, ITA No. 2998/Mum/2017 for the AY 2009-10 vide order dated 05.10.2018. We have also noticed from the assessment order that the AO has not applied his mind to record a valid satisfaction to initiate the penalty proceedings rather invoked both the limbs of section 271(1)(c) of the Act by recording that “in view of submissions of inaccurate particulars of income and concealment of income penalty proceedings under section 271(1)(c) of the Act are initiated separately”.

7. However, on the other hand, the Ld. D.R. for the Revenue has relied upon the impugned order passed by the Ld. CIT(A).

8. Bare perusal of the satisfaction recorded by the AO in order to initiate the penalty proceedings against the assessee in the assessment order goes to prove that AO has not applied his mind to work out if the assessee has furnished inaccurate particulars of income or concealed its income so as to initiate the penal

provisions. AO is required to record a valid satisfaction if the assessee has concealed its income or has furnished inaccurate particulars of income. Moreover, in the instant case undisputedly entire addition has been made in this case on adhoc basis by the AO as well as the Ld. CIT(A) being the 20% disallowance of sundry creditors and no addition has been made on merits.

9. Identical issue has been decided by the co-ordinate Bench of the Tribunal by holding that levy of penalty under section 271(1)(c) of the Act on the basis of quantum addition made on the basis of estimation and guess work by the AO, penalty levied is not sustainable by returning following findings:

“6. Undisputedly, penalty in this case has been levied by the AO on the basis of alleged bogus purchases to the tune of Rs.10,79,789/- from various entry providers and proceeded to make the addition by estimating the gross profits of the assessee during the year under assessment @ 20.08%. The co-ordinate Bench of the Tribunal in identical facts and circumstances decided the identical issue i.e. to levy the penalty under section 271(1)(c) of the Act on the basis of quantum addition made on the basis of estimation and guess work by the AO in the case cited as Shri Ajay Loknath Lohia, I.T.A. No. 2998/Mum/2017 for the AY 2009-10 vide order dated 05.10.2018, wherein the issue has been decided as under:

“Having heard both sides, we find merit in the arguments of the assessee for the reason that although the AO has estimated 25% gross profit on alleged bogus purchases, never made any observations with regard to the incorrectness in details filed by the assessee to prove such purchases. The AO never disbelieved information filed by the assessee, but the proceeded on the basis of information received from sales-tax department to make additions. The AO has made such addition on ad hoc basis by estimating gross profit on alleged bogus purchases. From these facts, it is very clear that the AO failed to make a case of deliberate attempt by the assessee to furnish inaccurate particulars of income. Therefore, we are of the considered view that mere ITA 2998/Mum/2017 disallowance of purchases on ad hoc basis does not tantamount to wilful furnishing inaccurate particulars of income within the meaning of section 271(1)(c) of the Income Tax Act, 1961. Hence, we are of the considered view that the

AO was erred in levying penalty u/s. 271(1)(c) of the Act. Accordingly we direct the AO to delete penalty levied u/s. 271(1)(c) of the Act.”

10. In view of what has been discussed above, we are of the considered view that when the AO has merely proceeded on estimating the gross profit by way of disallowance of sundry creditors without applying his mind qua the alleged bogus sundry credits provisions contained under section 271(1)(c) of the Act are not attracted. In these circumstances, penalty levied by the AO and partly confirmed by the Ld. CIT(A) is ordered to be deleted. Resultantly, appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on 27.09.2022.

**Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

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

Mumbai, Dated: 27.09.2022.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.