

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA No. 3267/Mum/2013 (A.Y. 1996-97)
ITA No. 404/Mum/2016 (A.Y. 1996-97)

Sabara Impex Ltd.
C/o G.P. Mehta & Co. CAs.,
807, Tulsiani Chambers,
212, Nariman Point, Mumbai-400020

PAN: AAACS6217L

..... Appellant

Vs.

ITO, Ward-2(3)(2),
Aayakar Bhavan, 5th Floor,
M.K. Road, Mumbai-400020.

..... Respondent

Appellant by	:	None
Respondent by	:	Ms. Nilu Jaggi, Sr.DR
Date of hearing	:	05/09/2022
Date of pronouncement	:	17/11/2022

ORDER

PER GAGAN GOYAL, A.M:

These two appeals by the assessee are directed against the orders of Commissioner of Income Tax(Appeals)-6, Mumbai dated 31.01.2013 & 30.10.2015 under section 143(3) r.w.s. 254 & 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 1996-97. In ITA No. 3267/Mum/2013, the assessee has raised the following grounds of appeal:

“01. The orders passed by the learned lower authorities are bad in law and bad in facts

02. The assessment order passed by recourse to section 147 of the IT Act, 1961, is ab initio void, inasmuch as said notice was not served on the appellant in accordance with the provisions of law and also the provision of section 147 of the IT Act, 1961 were not applicable in appellant's case.

03. The assessment order passed is ab initio void, inasmuch as, no speaking order was passed before completion of the impugned assessment on the objections raised against issue of notice u/s 148 of the IT Act, 1961. The action of the learned Assessing Officer is contrary to the dictates of the Hon'ble Supreme Court.

04. The learned Assessing Officer has grossly erred in making an addition of Rs 2,40,75,750/- by recourse to section 68 of the IT Act 1961, and holding it to be the income from other sources. Reasons assigned for the impugned addition are wrong and contrary to the provisions of law

05. The learned lower authorities have grossly erred in restricting deduction u/s 80HHC of the IT Act 1961, atRs 33,41,195/-only, as against the correct amount of deduction allowable at Rs 1,06,98,507/- The shortallowable of deduction is wrong and contrary to the provisions of law read with judicial proposition:

06. The appellant may please be permitted to raise any additional or alternative ground on or before the hearing of appeal.”

2. Brief facts of the case are that the assessee filed its return of income on 01-12-1997 declaring total income at Rs 22,40,430/-. A survey was conducted by DDIT (Inv), Mumbai on 22-04-1999 in the case of M/s Geekay Exim India Ltd. During the course of survey, it was found that various concerns of group were engaged in fictitious trading of pharmaceutical goods without actual delivery. A statement u/s 131 was recorded of Shri Rais Ahmed, director pf M/s Geekay Exim India Ltd. Shri Rais Ahmed is also director in assessee company.

3. During the year under consideration assessee made purchases from following parties:

- Wise Pharma Impex
- R.Y. Chem

- F.F. Pharmaceuticals and
- Pharma Impex.

During the course of assessment proceedings for A.Y. 1998-99 statement of Shri F.H. Rizvi the director of these companies were also recorded and he was asked to produce the books of accounts for F.Y 1995-1996 and 1996-1997 but no details were filed. All the goods purchased by the assessee were sold to one single party M/s Ebers Pharmaceuticals Ltd. These purchases and sales were not supported by any delivery challans or proof of transportation. No payments had been made for these purchases and no confirmation was submitted for sundry creditors in respect of the above-mentioned parties.

4. Based on above mentioned facts the assessment was reopened u/s 148 of the IT ACT and a notice u/s 148 was issued on 21-03-2001. In response to this notice assessee replied vide letter dated 26-03-2001 that the original return filed on 01-12-1997 be treated as return of income filed in compliance to notice u/s 148. The assessment order was passed u/s 143(3) r.w.s. 147 on 26-03-2002 assessing the total income at Rs 2,43,22,330/-

5. Against this order assessee approached the office of Ld. CIT (A). Ld. CIT(A) also confirmed the order of AO against that order assessee further approached ITAT Mumbai. The ITAT vide order dated 13-03-2007 directed the AO to furnish the copy of reasons recorded for reopening of assessment and to give opportunity to file objections to such reasons of reopening (as the assessee raised a ground before the ITAT that reasons recorded for reopening but not supplied to him) and with regard to any legal issue in the connection of the same and to pass a speaking order in accordance with law after deciding this preliminary issue of

reopening. The ITAT further observed that the AO shall frame reassessment if so considered appropriate.

6. We have gone through the order of the AO passed u/s 143(3), 147 r.w.s. 254, and order of the Ld. CIT (A) and submissions of the assessee. Assessee raised total 6 grounds of appeal out of those 5 are substantive grounds and ground no 6 is general in nature. Ground no 1, 2,3 related to reopening of the case and about legality of the order passed by the AO u/s 147. We observed that thew AO provided opportunities (as directed by ITAT) to the assessee to file his objection and dealt with the objections by the speaking order vide letter dated 16-02-2008. As per the direction of the ITAT Mumbai copy of the reasons recorded were supplied to the assessee and assessee filed its objection vide letter dated 08-10-2008. We observed that the AO rightly followed the directions of ITAT by supplying the reasons to the assessee, established valid reasons for reopening and passed a speaking order by bringing all the relevant facts and material on record. In view of the above ground no1,2,3 raised by the assessee is found to be base less hence dismissed. Merits of the reasons supplied we will deal with further in our order while discussing the grounds related to merits of the case.

7. We have thoroughly absorbed the contents in the order of the AO and Ld. CIT (A) with submissions of the assessee. The relevant facts relating to adjudication:

- A statement u/s 131 was recorded of Sri Rais Ahmed director of assessee company wherein he confirmed that he has various concerns of group, engaged in fictitious trading of pharmaceutical goods without actual delivery

- purchases shown by the assessee were never paid off and no confirmation were ever submitted for sundry creditors against those purchases
- Shri Rais Ahmed himself confirmed that all these transactions were only accommodation entries and the goods were never received. Further Mr F.H. Rizvi who was running the vendor concerns never appeared u/s 131 to confirm the transaction claimed by the assessee.
- A statement was recorded of shri F.H Rizvi on 07-12-1998 by DDIT (Inv) Mumbai in connection with search on him u/s 132 of the Act. In his statement Shri F.H. Rizvi admitted that there is no genuine sale purchase transactions in his concerns and he only issues bogus bills without any physical movement of the goods in response to question no 4 of his statement he confirmed that he issues bills to various parties including assessee and get the cheques from them, once the cheque is cleared he withdraw the cash and return the same to the parties.
- **Assessee's own submissions is contradictory in nature, on the one hand he claims the transactions to be genuine on the other hand he himself claim that he entered into deal bogus transaction to enjoy the facility of bill discounting from various banks.**
- It is also observed through from the orders of the authorities below that the assessee on the one hand giving statement of confession on the other hand claiming the transactions to be genuine without retracting from his statements.
- To sum up the facts it can be said that assessee entered into a non genuine transaction of purchase which he fails to substantiate by virtue of facts discussed supra. Further there is no evidence of payment of goods,

movement of goods and confirmation of credit balance in the books of the assessee and vice versa.

- Assessee made all the sales exclusively to one party only M/s Eber Pharmaceuticals Ltd amounting to Rs. 2,40,75,750/-.

8. Through its submission, assessee submitted everything but for essential evidences required to establish genuineness of purchase/sales. In its submissions before the authorities below, assessee emphasized on the technicalities of the matter and never turned up to satisfy the merits of the case. Even before us nothing submitted to substantiate the merits of the case.

9. In view of the above facts, it can be reasonably concluded that assessee entered into fictitious transactions of purchase and sales. We did not find any anomaly in the order of the AO he rightly neutralise the difference amount of profit arisen out of fictitious purchase and sales. We further confirm his action u/s 68 treating the sales receipt amounting to Rs 2,40,75,750/- as cash credit as defined in sec 68. AO rightly observed that in the garb of sales it is assessee's own money which he introduced as sales. We further relied on the following judicial pronouncement as under

- Roshan di Hatti Vs CIT 107 ITR 938 (S.C)
- Kale Khan Mohammed Hanif Vs CIT 50 ITR 1(S.C)
- CIT Vs M.Ganapathi Mudaliar 53 ITR 623 (S.C)
- A.Govindarajulu Mudalair Vs CIT 34 ITR 807 (S.C)

In view of the above addition u/s 68 is rightly made and ground no -4 raised by assessee are dismissed.

10. As far as ground no-5 is concerned that has been dealt in detail by the AO in its original order, order of CIT (A) against the earlier assessment order dated 22-01-2003 (para 5 to 6.1, page 7 and 8). No new material or submission /evidence adduced before us. In view of these facts, we confirm the order of the Ld. CIT(A) and this ground no -5 raised by the assessee is also dismissed.

11. In the result, appeal filed by the assessee is fully dismissed.

12. In ITA No. 404/Mum/2016, the assessee has raised the following grounds of appeal:

01. The penalty orders passed upheld by the learned lower authorities u/s 271 (1) (c) of the IT Act, 1961, is bad in law and bad in facts.

02. The learned lower authorities have grossly erred in levying / confirming the levy of penalty us 271 (1) of the IT Act, 1961, at Rs. 1, 90, 00,000/- purely on the basis of addition made to the returned income during the course of the assessment proceeding, without bringing any material or evidence on record to establish the charge of concealment of particulars of income or for furnishing inaccurate particulars of such income.

03. The learned lower authorities have grossly erred in levying / confirming the levy of penalty under section 271(1) (c) of the IT Act, 1961, at Rs. 1,90,00,000 Reasons assigned for the impugned levy of penalty are wrong and contrary to the judicial prepositions.

04. Having regard to the facts of the case and provisions of law read with judicial interpretations, the impugned levy of penalty is wholly untenable in law, inasmuch as the explanation of the appellant was not proved to be false.

05. The learned lower authorities have grossly erred in levying upholding levy of penalty under section 271 (1) (c) of the I.T. Act 1961, at Rs 1, 90, 00,000/- without giving an adequate and reasonable opportunity of being heard inasmuch as, neither the category of infringement based on which the penalty has been levied was communicated nor a valid notice of hearing was given before levy of impugned penalty

06. The appellant may please be permitted to raise any additional or alternative ground on or before the hearing of appeal."

13. We have thoroughly absorbed the contents in the order of the AO and Ld. CIT (A) with submissions of the assessee. The relevant facts relating to adjudication:

- A statement u/s 131 was recorded of Sri Rais Ahmed director of assessee company wherein he confirmed that he has various concerns of group, engaged in fictitious trading of pharmaceutical goods without actual delivery
- purchases shown by the assessee were never paid off and no confirmation were ever submitted for sundry creditors against those purchases
- Shri Rais Ahmed himself confirmed that all these transactions were only accommodation entries and the goods were never received. Further Mr F.H. Rizvi who was running the vendor concerns never appeared u/s 131 to confirm the transaction claimed by the assessee.
- A statement was recorded of Shri F.H Rizvi on 07-12-1998 by DDIT (Inv) Mumbai in connection with search on him u/s 132 of the Act. In his statement Shri F.H. Rizvi admitted that there is no genuine sale purchase transactions in his concerns and he only issues bogus bills without any physical movement of the goods in response to question no 4 of his statement he confirmed that he issues bills to various parties including assessee and get the cheques from them, once the cheque is cleared he withdraw the cash and return the same to the parties.
- **Assessee's own submissions is contradictory in nature, on the one hand he claims the transactions to be genuine on the other hand he himself claim**

that he entered into deal bogus transaction to enjoy the facility of bill discounting from various banks.

- It is also observed through from the orders of the authorities below that the assessee on the one hand giving statement of confession on the other hand claiming the transactions to be genuine without retracting from his statements.
- To sum up the facts it can be said that assessee entered into a non genuine transaction of purchase which he fails to substantiate by virtue of facts discussed supra. Further there is no evidence of payment of goods, movement of goods and confirmation of credit balance in the books of the assessee and vice versa.
- Assessee made all the sales exclusively to one party only M/s Eber Pharmaceuticals Ltd amounting to Rs. 2,40,75,750/-.

14. Through its submission, assessee submitted everything but for essential evidences required to establish genuineness of purchase/sales. In its submissions before the authorities below, assessee emphasized on the technicalities of the matter and never turned up to satisfy the merits of the case. Even before us nothing submitted to substantiate the merits of the case.

15. Revenue passed two crucial findings; firstly, the assessee had concealed the particulars of his income for the assessment year 1987-88; and second, that he had furnished the inaccurate particulars of such income. It was held that against the net profit of Rs. 11.02 crores, the assessee had declared the net profit of Rs. 1.90 crores in the return of income filed. The Income-tax Officer, who made this assessment, issued the notice to assessee proposing to impose the penalty under

section 271 and initiated the proceedings. The assessee filed the reply denying that he had committed any offence within the meaning of section 271(1)(c) and urging that there was no evidence on record to hold that the assessee had either concealed the particulars of his income for the assessment year 1996-97 or had furnished the inaccurate particulars of such income. The Income-tax Officer held that this was a fit case of levy of penalty under section 271(1) (c) concealing particulars of income by the assessee by furnishing inaccurate particulars of income in the return filed.

16. Penalty order in the case of assessee was outcome of additions made during the assessment proceedings and the same were confirmed by the Ld. CIT (A).

17. There can be no dispute with regard to proposition that the penalty proceedings are different from assessment proceedings and mere addition in quantum proceedings would not *ipso facto* result in imposition of penalty. In the instant case, in quantum proceedings which were taken up to the ITAT, the Tribunal had recorded a fact that assessee booked bogus purchase and sales in the books of accounts in the garb of introducing its own money through sales channel, which is chargeable to tax u/s. 68 of the I.T. Act, 1961. Further, in quantum proceedings authorities below and ITAT have concurrently arrived at a finding of fact that the claim made by the assessee with regard to its purchase and sales are fictitious for subject assessment year. These findings of fact are not shown to be perverse in any manner. The legal claim made that once a transaction is shown in the books of accounts, it must follow that it is *bona fide*, is not understood. The transactions shown in the books are found to be false. The

assessee has to show the reason why he believed at the time he filed his books, it was true. No such attempt was even made.

18. Facts relevant to confirm the order of penalty has already been discussed in detail vide our order (supra), hence, there is no need to elaborate the facts of the case (as discussed in quantum appeal) again. Relying on the outcome of quantum appeal as decided by us, we dismiss all the grounds raised by assessee in penalty appeal.

19. As the assessee had not disclosed all details in the return of income and the claim of the assessee was not sustainable in law amounting to furnishing of inaccurate particulars or concealment of income on the part of the assessee. The various explanations to section 271(1)(c) only explain the ambiguity in the provisions relating to imposition of penalty and merely because the case of the assessee was not covered by any particular explanation, it did not mean that penalty could not be imposed when there is no difficulty in determining the tax sought to be evaded. Under the provisions of section 271(1) of the IT Act, the penalty is prescribed for concealing the particulars of income or for furnishing inaccurate particulars and quantum of penalty based on tax sought to be evaded. If the particulars furnished by the assessee were inaccurate and were not rectified by the assessee despite issue of notice u/s 274 r.w sec. 271(1)(c) of the IT Act, the explanation offered by the assessee was proved to be false, the penalty u/s 271(1)(c) is leviable for furnishing of inaccurate particulars of income.

i) The penalty u/s 271(1) is a civil liability

ii) Mens Rea is not an essential element for imposing penalty for breach of civil obligations or liabilities

- iii) Wilful concealment is not an essential ingredient for attracting civil liability.
- iv) Existence of conditions stipulated in section 271(1)(c) is a sine qua non for initiation of penalty proceedings u/s 271(1)(c)
- v) The existence of such conditions is discernible from the assessment order
- vi) Even if the assessee has not challenged the order of Asstt. Levying tax and interest and has paid tax and interest that by itself is a case for levy of penalty.
- vii) When the explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bonafide, an order imposing penalty can be passed.
- viii) If the explanation offered, and not substantiated by the assessee but is found to be bonafide and material facts relating to the computation of his total income have not been disclosed by assessee, penalty could be imposed.
- ix) The assessee was guided by the well known and reputed Chartered Accountant and it was not expected to make such a mistake while making a claim and such mistake committed by the assessee was a failure to discharge the strict liability to furnish true and correct particulars of income.
- x) An incorrect claim for expenditure would amount to giving inaccurate particulars of such income.

20. Further, had the return not been taken up for scrutiny the assessee would have succeeded in evading payment of taxes on the said sum. Accordingly the provisions of Explanation 1 to section 271(1) (c) would come into play. The assessee has filed inaccurate particulars of income at the time of filing return in order to conceal its income. Thus the provisions of section 271(1)(c) is clearly

attracted in the assessee's case While filing the return of income, the assessee failed to offer the said incomes for taxation with a dishonest intention to conceal its income and thus evaded tax. Also during the course of penalty proceedings the assessee has failed to offer any plausible explanation in this regard thus the assessee has failed to make full and true disclosure of the facts while computing its income and filed return of income with inaccurate particulars and thereby concealing its taxable income.

21. In the light of the facts and the circumstances of the case and the position of law emerging from various courts of law, it is held that the assessee has failed to make out a case for avoiding levy of penalty in its case as the primary onus in the case in terms of Explanations to section 271(1) (c) of the IT Act has not been discharged by assessee. Accordingly, we are satisfied that this is a fit case for imposition of penalty.

22. **In the result, appeal filed by the assessee is fully dismissed.**

Order pronounced in the open court on 17th day of November, 2022.

Sd/-

(VIKAS AWASTHY)

JUDICIAL MEMBER

Mumbai, दिनांक / Dated: 17/11/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई / DR, ITAT, Mumbai

Sd/-

(GAGAN GOYAL)

ACCOUNTANT MEMBER

6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy. /Asstt.Registrar)
ITAT, Mumbai