आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 106/Rjt/2017**
निर्धारण वर्ष/Asstt. Years: 2005-2006

Anup A. Shah, C/o Gujarat Trading Company, "Mangal Bhuwan", Nr. Nirmala Convent, Kalawad Road, Rajkot. **PAN: AFHPS6475H**	Vs.	A.C.I.T, Circle-2, Rajkot.

Assessee by	:	Shri Chetan Agrawal, A.R
Revenue by	:	Shri B.D. Gupta, Sr. D.R

सुनवाई की तारीख**/Date of Hearing : 03/01/2023**
घोषणा की तारीख **/Date of Pronouncement: 31/03/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-2, Rajkot, dated 28/12/2016 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2005-06.

2. At the outset we note that there was delay of 30 days in filling the appeal before the Tribunal. The learned AR for the assessee before us explained the

reason for such delay by stating that the employee of the tax advocate was provided the necessary details to file the appeal but he failed to inform his employer and thus the delay occurred in filing the appeal which needs to be condoned.

3. The learned DR at the time of hearing, considering the length of delay did not oppose on the condonation petition filed by the assesse.

4. We have heard the rival contention of both the parties and perused the materials available on record. Considering the length of delay and the explanation furnished by the learned AR for the assessee and also considering the fact that the learned DR not opposed the same, we hereby condone the delay in filing of appeal for 30 days and proceed to adjudicate the issue on merit.

5. The assessee has raised the following grounds of appeal:

1. The grounds raised in this appeal are without prejudice to one another.

2. The Learned CIT(A)-2 erred in law and on facts in confirming the penalty u/s.271(l)(c) in respect of sustained estimated addition of Rs.686466/-. The same deserves to be deleted.

3. On the facts and circumstances of the case it is contended that as there was no mensrea, penalty on the confirmed addition was not attractable.

4. Without prejudice, it is contended that as the assessee has discharged the burden that lay upon him under explanation-1 to section 271(l)(c), no penalty was leviable.

5. It is contended that, there being no satisfaction of the A.O. in levying the penalty, that the assessee has concealed his income or has furnished inaccurate particulars of income, penalty u/s.271(l)(c) was not attractable.

6. Even otherwise the order under appeal suffers from a many number of defects and infirmities making the same bad in law and without jurisdiction.

7. Your appellant craves leave to add, alter, and / or amend any of the ground stated here above.

6. The only interconnected issue raised by the assessee is that the learned CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act.

7. The necessary facts are that the assessee is an individual and engaged in the business of trading and export. During the assessment proceedings under section 143(3) of the Act the AO made various additions to the total income of the assessee and initiate penalty proceeding under section 271(1)(c) of the Act. Out of the total addition made by the AO, the learned CIT(A) in quantum appeal confirmed following addition only:

Made on a/c of disallowance of interest u/s.40A(20(b)	*Rs.5,51,313/-*
Made on a/c of capital expenditure	*Rs.18,745/-*
Made on a/c of non verified expenses	*Rs.13,100/-*
Made on a/c. of personal expenses	*Rs.18,100/-*
Made on a/c. of excess depreciation	*Rs.10,208/-*
Total confirmed additions	*Rs.21,71,700/-*

8. Accordingly, the AO issued fresh show notice proposing to levy of penalty under section 271(1)(c) of the Act on the addition confirmed by the learned CIT(A) for concealment of income. The assessee in reply only submitted that penalty proceedings were initiated without jurisdiction. Hence, the same is bad in law. However, the AO held that the assessee has concealed his income, hence levied penalty of Rs. 7,30,994/- being 100% of the amount of tax being sought to be evaded.

9. The aggrieved assessee preferred an appeal before the learned CIT(A).

10. The assessee before the learned CIT(A) submitted that against the quantum addition, he filed second appeal before the ITAT in ITA No. 681/RJT/2010 where the Tribunal vide order dated 09-01-2014 set aside the issue to the file of the AO. The AO in set aside proceeding did not make any addition or initiated any penalty proceeding. Thus, the assessee accordingly contended that no penalty should be levied.

10.1 However, the learned CIT(A) found that the Hon'ble ITAT in quantum appeal confirmed the order of the learned CIT(A) except on one issue of addition

representing Low GP for Rs. 15,60,234/- which was set aside to the file of the AO. Accordingly, the learned CIT(A) held that the assessee is liable to levy of penalty on addition of Rs. 6,86,466/- which was also confirmed the by ITAT. Thus. the learned CIT(A) directed the AO to re-compute the amount of penalty on concealment of income for Rs. Rs. 6,86,466/-.

11. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

12. The learned AR before us filed a paper book running from pages 1 to 107 and inter alia contended that the assesse has furnished all the particulars of the claim made in the return of income but some of them were not admitted by the authorities below. However, the claims not admitted by the authorities below at the most can be regarded as wrong claim which cannot be equated with the concealment of the particulars of income.

13. On the other hand, the learned DR vehemently supported the order of the authorities below.

14. We have heard the rival contention of both the parties and perused the material available on record. Admittedly, the AO during the assessment proceeding made several additions amounting to Rs. 94,96,296/- and initiated penalty proceeding for the same. On first quantum appeal by the assessee the learned CIT(A) deleted certain additions in full, confirmed certain additions in part and also confirmed certain addition in full. Thereby, the learned CIT(A) reduced the total addition made by the AO for Rs. 94,96,296/-to the extent of Rs. 21,71,700/- only. On second appeal, the ITAT only confirmed additions aggregating to 6,86,466/- which are detailed as under:

Made on a/c of disallowance of interest u/s.40A(20(b)	*Rs.5,51,313/-*
Made on a/c of capital expenditure	*Rs.18,745/-*

Made on a/c of non verified expenses	*Rs.13,100/-*
Made on a/c. of personal expenses	*Rs.18,100/-*
Made on a/c. of excess depreciation	*Rs.10,208/-*

14.1 The lower authorities held that the assessee has concealed income to the above extent and levied penalty under section 271(1)(c) of the Act. Before going into specific addition/disallowances and levy of penalty on the same, we find that the quantum proceeding and the penalty proceeding are different. Any addition or disallowances made under quantum proceeding do not ipso facto empower the revenue authority to levy penalty under section 271(1)(c) of the Act. In the penalty proceeding it has to be proved by the revenue based on cogent material that the assessee has either concealed income or furnished inaccurate particulars of income. In holding so we draw support and guidance from the judgment of Hon'ble Supreme Court in case Reliance Petroproducts Pvt .Ltd. reported in 322 ITR 158 where it was held as under:

> *If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature.*

14.2 Coming to the case on hand, the first addition/disallowances made during the quantum proceeding is of interest expenses which was considered as excessive by the Revenue authority. Accordingly, the Revenue authority estimated the reasonable interest as per market and made disallowances of interest expenses claimed by the assessee over and above the amount estimated by the AO/Ld. CIT(A). Thus what is transpired that it is not the case that claim of the assessee altogether found incorrect or assessee has not incurred such interest expenses. As such it is a case where revenue authority was of opinion that the assessee was paying interest at excessive rate as compared to market rate. Hence, in our considered opinion, the same does not amount to concealment of income or furnishing incorrect particular of income. In our considered view penalty under section 271(1)(c) of the cannot be levied merely for the reason that certain claim made by the assessee is not allowable or excessive in the opinion of revenue authority. In holding so we draw support and guidance from the judgment of

Hon'ble Supreme Court in case Reliance Petroproducts Pvt .Ltd. (supra) where it was held as under:

> *It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that, by itself, would not attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature.*

14.3 Further the addition made was based on estimation of reasonable rate of interest. As such the assessee paid interest at different rate, the AO estimated different and the learned CIT-A further estimated different rate of interest. It settled position of law by the various High Court that the no penalty under section 271(1)(c) can be sustained in case of estimated addition. At this juncture we feel pertinent to refer the judgment of Hon'ble Allahabad High Court in case of *CIT* v. *Norton Electronics System Pvt. Ltd* [2014] 41 taxamm.com 280 [Allahabad] where the Hon'ble bench observed as under:

> ***6.*** *Needless to mention that the quantum proceedings and penalty proceedings are the independent proceedings as per the ratio laid down in the case of Durga Kamal Rice Mills v. CIT [2004] 265 ITR 25/[2003] 130 Taxman 553 (Cal.). When the addition is made on the estimatebasis, no penalty is sustainable as per the ratio laid down in the following cases:—*
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> 1. *CIT v. Raj Bans Singh [2005] 276 ITR 351 (All.)*
> 2. *CWT v. Sanghi Brothers (India) Ltd. [2008] 301 ITR 129 (M.P).;*
> 3. *CIT v. Adamkhan [1997] 223 ITR 264/95 Taxman 215 (Mad.); and*
> 4. *Harigopal Singh v. CIT [2002] 258 ITR 85/125 Taxman 242 (Punj. & Har.)*
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> *In view of above, by considering the totality of the facts and circumstances of the case, we find no reason to interfere with the impugned order passed by the Tribunal and the same is hereby sustained along with the reasons mentioned therein. No substantial question of law is emerging from the impugned order.*

14.4 Similarly, the Punjab and Haryana High Court in the case of *CIT* vs. *Modi Industrial Corpn.* [2010] 195 Taxman 68 has also held that where the assessment of the assessee was completed on estimated basis penalty under section 271(1)(c) of the Act was not imposable with respect to the additions made on such estimate by the Assessing Officer. Thus in view of the above discussion we are of the opinion that no penalty under section 271(1)(c) of the Act can be levied

on addition/disallowances of interest expenditure of Rs. 5,51,313/- found to excessive as compared to market rate.

14.5 The next addition/disallowances made in the quantum proceeding for Rs. 18,745/- was based on the fact that the assessee purchased computer but claimed 100% deduction by treating the same as revenue expenses under the head repair and maintenance but the AO disallowed the same by treating the same as capital expenditure. Likewise, the assessee while claiming depreciation on weighing machine claimed depreciation at the rate applicable for computer but the AO held that depreciation should be allowed at the rate applicable for plant and machinery thus disallowed excess depreciation of Rs. 10,208/-. Again it is case of difference of opinion where assessee claimed certain deduction in the return of income which was not accepted by the AO. Hence, the question of concealment of income or furnishing inaccurate particular of income does not arise as held by the Hon'ble Supreme Court in case Reliance Petroproducts Pvt .Ltd (supra). Therefore, we are of the opinion that no penalty under section 271(1)(c) of the Act can be levied on addition/disallowances of computer repair maintenance expenses and excess depreciation for Rs. 18,745/- and Rs. 10,208/- respectively.

14.6 The next addition/disallowance made in quantum proceeding is for Rs 18,000/- and 13100/- being credit card expense and computer expenses respectively for the reason that same were either not supported by the documentary evidences or held as personal in nature. But question arise whether any addition/disallowances made in quantum proceeding for want of supporting evidences or any other reason shall amount to concealment of income and liable to levy of penalty. The question has been answered in preceding paragraph of this order that the quantum and penalty proceeding are different and any addition/disallowances made in quantum proceeding do not ipso facto empower the revenue authority to levy penalty under section 271(1)(c) of the Act. As such revenue authority have to prove based on cogent material that the assessee has concealed income willfully with mala fide intension. There is no such finding of the

Revenue authority in the penalty proceeding. Further considering the amount involve we do not agree with contention of the revenue of authority that the assessee concealed his income by claiming deduction of impugned credit card expense and computer expenses.

14.7 Thus in view of the above and considering the facts in totality we hereby set aside the finding of the learned CIT(A) and direct the AO to delete the penalty levied by him. Hence the grounds of appeal of the assessee are hereby allowed.

15. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the Court on 31/03/2023 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 31/03/2023
Manish