

IN THE INCOME TAX APPELLATE TRIBUNAL, "SMC" BENCH, SURAT
BEFORE DR. A. L. SAINI, AM

आयकर अपील सं./ITA No.418/SRT/2023

(निर्धारण वर्ष / Assessment Year: (2014-15)

(Physical Court Hearing)

Janakkumar Mukundprasad Patel 57 Omnagar, Tarsadi Kosamba (R.S) Surat-394120	Vs.	Income Tax Officer, Ward 1, Bardoli
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AUZPP 2106 P		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से /Assessee by	Ms. Chaitali Shah, CA
निर्धारिती की ओर से /Respondent by	Shri Vinod Kumar, Sr. DR
सुनवाई की तारीख/Date of Hearing	05/10/2023
घोषणा की तारीख/Date of Pronouncement	30/10/2023

आदेश / ORDER

PER DR. A. L. SAINI, AM:

Captioned appeal filed by the assessee, pertaining to Assessment Year (AY) 2014-15, is directed against the order passed by the National Faceless Appeal Centre, Delhi [in short, "NFAC/Ld. CIT(A)"] dated 18.04.2023, which in turn arises out of a penalty order passed by the Income Tax Officer Ward-1 Bardoli, under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act'), dated 02.06.2017.

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

"1. On the facts and circumstances of the case as well as law on the subject, the learned assessing officer has erred in levying penalty u/s 271(1)(c) when assessing office had not specified in the notice u/s 274 r.w.s. 271(1)(c) whether the penalty was leviable for concealment of particulars income or for furnishing inaccurate particulars thereof.

2. On the facts and circumstances of the case as well as law on the subject, the learned CIT(A) has erred in confirming the action of Assessing Office in levying penalty of Rs.3,09,062/- u/s 271(1)(c) of the I.T. Act, 1961.

3. It is therefore prayed that penalty levied by the assessing office and confirmed by CIT(A) may please be deleted.

4. Appellant craves leave to add, alter or delete any ground(s) either before or in the course of hearing of the appeal.”

3. The facts of the case may be briefly stated. The assessee before us is an individual and engaged in agriculture activities. During the course of assessment proceedings, notice u/s 142(1) of the Act was issued on 05.09.2016, which was duly served upon the assessee. In response to this notice, the assessee submitted requisite details. During the course of assessment proceedings, it was noticed by the assessing officer that the assessee has deposited cash of Rs.51,54,000/- in the saving bank account of State Bank of India during the year under consideration. In this regard the assessee had stated that he was earning agricultural income from last many years and he has deposited the said cash from earning from the agricultural activities. On perusal of bank account and cash-in-hand of the assessee, it was noted by the assessing officer that arguments made by the assessee were not true and arguments of the assessee were not fully acceptable because source of cash deposits in the saving bank account of the assessee was not of agricultural earning from the past years. Therefore, addition of Rs.10,00,000/-, out of Rs. Rs.51,54,000/-, was made by the assessing officer on estimated basis, treating the income as the unexplained sources. Hence penalty proceedings u/s 271(1)(c) r.w.s. 274 of the Act was also initiated on this estimated addition.

4. Later on, the Assessing Officer has also initiated penalty proceedings u/s 271(1)(c) of the Act, on the above addition. Therefore, a show cause notice u/s 274 r.w.s. 271(1)(c) of the Act, was issued on 17.12.2016 and sent along with the assessment order for giving an opportunity of hearing. Further, during the penalty proceedings, the assessing officer noted that the assessee has not preferred appeal against

the above addition. Therefore, before completing the penalty proceedings one more opportunity of being heard was given and hearing was fixed on 27.02.2017 requesting to explain as to why penalty u/s 271(1)(c) of the Act should not be levied. In response to the above show cause, the assessee has not filed submission. For the details reasons as discussed above, Assessing Officer was of the view that the assessee has knowing and deliberately furnished inaccurate particulars of income and concealed particulars of income of Rs.5,45,000/-. Hence, the assessee has defaulted within the meaning of Explanation 1 to Section 271(1)(c) of the Act, therefore Assessing Officer imposed penalty u/s 271(1)(c) of the Act, to the tune of Rs.3,09,062/-.

5. Aggrieved by the order of NFAC/Ld. CIT(A), the assessee is in further appeal before this Tribunal.

6. At the outset, Learned Counsel for the assessee, argued that during assessment proceedings, the Assessing Officer made the addition based on estimation, to the tune of Rs.10 lakh and initiated penalty proceedings on estimated addition of Rs.10 lakh u/s 271(1)(c) of the Act. The Ld. Counsel also submitted that since the penalty was initiated on estimated addition and therefore penalty on estimated addition is bad-in-law and for that Ld. Counsel has invited my attention to the judgment of this co-ordinate Bench of ITAT-Surat, in the case of Gipilon Texturising Pvt. Ltd. Vs. ITO in ITA No.293 & 294/SRT/2013 dated 13.04.202.

7. The Ld. Counsel further submitted that Assessing Officer initiated penalty on account of concealment of income and furnishing inaccurate particulars of income *i.e.*, on both the limbs. During the penalty proceedings, the Assessing Officer has issued notice u/s 271(1)(c) of the

Act, *wherein* both the limbs have been stated, that is, ‘concealment of income’ or ‘furnishing inaccurate particulars of income’. Therefore Ld. Counsel contended that without invoking Explanation-1 of Section 271(1)(c) of the Act, the penalty should not have been levied on both the limbs. For that, Ld. Counsel relied on the judgment of Hon’ble Supreme Court in the case of CIT vs. M/s SSA’S Emerald Meadows in SLP CCNo.11485/2016 dated 05.08.2016 and also relied on the judgment of Hon’ble Bombay High Court in the case of Ganga Iron & Steel Trading Co. vs. CIT [2022] 135 taxmann.com 244 (Bom).

8. On the other hand, Learned Sr.DR for the Revenue supported the penalty order passed by the Assessing Officer and argued that penalty was initiated by the Assessing Officer on two limbs, *viz*: “concealment of income” or “furnishing inaccurate particulars of income”. The penalty notice issued during the penalty proceedings, was also on account of “concealment of income” or “furnishing inaccurate particulars of income”. Therefore, penalty can be imposed on both the limbs, hence there is no any mistake in the initiation of penalty proceedings.

9. The Ld.DR for the Revenue also argued that Assessing Officer has initiated penalty on estimated addition, which is also sustainable in the eyes of law.

10. After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the Ld. Counsel for the assessee, I find that the issue involved in the present appeal is no longer *res integra*. The question as to whether the penalty u/s 271(1)(c) of the Act, on estimated addition is sustainable or not, was considered by various judicial forums across India. I find that Co-ordinate Bench of

ITAT-Surat, in the case of Gipilon Texturising Pvt. Ltd. Vs. ITO in ITA No.293 & 294/SRT/2013, order dated 13.04.2021, held that penalty on estimated addition is not sustainable in the eye of law. The detailed findings of the Coordinate Bench are reproduced below:

“7. At the outset of hearing, the Ld. AR of the assessee submits that though the assessee has raised two separate sets of appeal for both the assessment years i.e. 1988-89 and 1989-90. The Ld. AR for the assessee further submits that in case his points of submissions are accepted in ITA’s No.293 & 294/Ahd/2005, the appeals in ITA’s No.2141/Ahd/2013 & 2142/Ahd/2013 will become infructuous.

8. On merit, the Ld. AR of the assessee submits that the Assessing Officer (AO) while passing the assessment order rejected the books of accounts of assessee and estimated the Gross Profit (GP) @ 10% of turnover. On appeal before the ld. CIT(A), the addition was upheld. However, on further appeal before the Tribunal the addition was restricted to GP @ 5% of Gross Profit for both the assessment years vide order dated 08.03.2004 in ITA(s) No.186 & 187/Ahd/1998. The copy of order of the Tribunal is placed on record. In the aforesaid background, the Ld. AR for the assessee submits that it is settled law that no penalty is leviable on addition made on estimated basis. To buttress of his submission, the Ld. AR of the assessee relied upon the following decisions;

- ❖ Manish Dhirajlal Mehta Vs ACIT in Tax Appeal No.461 & 464 of 2000 and 833 & 836 of 2005 dated 05.02.2014 (Gujarat High Court);*
- ❖ Vijay Proteins Ltd., Vs CIT (Income Tax Reference No.139 of 1996), (Gujarat High Court);*
- ❖ Awadhesh Bansiraj Pandey Vs ITO (ITA No.4784/ Mum/2018) Mumbai Tribunal and*
- ❖ DCIT Vs Anil J Kothari (2048/Ahd/2010), Surat Tribunal.*

9. On the other hand, the Ld. Sr.DR for the Revenue submits that he strongly relied on the order of Assessing Officer (AO) and Ld. CIT(A). In alternative submissions the ld. SR DR for the revenue submits that the assessing officer rejected the books of accounts of the assessee and made fair addition @ 10% of GP, though, it was restricted by Tribunal to 5% of GP, thus, the assessee is liable to saddle with the penalty on such additions and the matter may be restore to the assessing officer for passing order afresh.

10. We have considered the rival submission of both the parties and have gone through the order of Lower Authorities. We have also deliberated on various case laws relied by the ld. AR for the assessee. We have also perused the contents of the order of Tribunal in quantum assessment appeals in ITA No(s). 186 & 187/Ahd/1998 dated 08.03.2004, the order of Tribunal dated 01.04.2005 and the order passed by Hon’ble Apex Court dated 04.09.2012 in Civil Appeal No. 577 of 2007.

11. We have noted that the assessee while filing return of income for assessment year 1988-89 on 20.06.1988 declared loss in the form unabsorbed depreciation

of Rs.22,48,941/-. The assessment was completed under section 143(3) on 29.05.1992. The assessing officer while passing the assessment order assessed total income of the assessee at Rs. Nil and also allowed carry forward of unabsorbed depreciation. It is an admitted fact that the assessing officer while passing the assessment order rejected the books of accounts and estimated the gross profit @10% turnover by passing the following order:

“The assessee failed to produce books of accounts from which the g.p. position can be verified. The assessee does not maintain quantitative tally stock as is evident from the report of the auditors in form No.3CD. Therefore, provisions of section 145(1) are applicable and the g.p. is required to be estimated. I, therefore, worked out at Rs.29,16,850/- as against this g.p. shown was Rs.10,29,291/-. The difference of Rs.18,87,559/- is therefore, added in the total income of the assessee for low g.p.”

12. On second appeal before the Tribunal in ITA No.186/Ahd/1998 dated 08.03.2004 the additions restricted the 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 an estimated addition. 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 Hon'ble Jurisdictional High Court in *Manish Dhirajlal Mehta Vs. ACIT, Vijay Proteins Ltd., Vs. CIT (supra)*, in *Vijay Proteins Vs CIT (supra)* and other case laws 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.

13. In the result, appeal of the assessee is **allowed** on ground No.1 itself.”

11. I note that assessee has deposited cash to the tune of Rs.51.56 lakhs in his Saving Bank account, out of its earning from agricultural source. However, the Assessing Officer has partly accepted, (out of Rs.51.56 lakhs) Rs.10 lakh as addition on estimated basis. The Ld. Counsel also took me through paper book page no. 1 and stated that Assessing Officer made estimated addition of Rs.10 lakh, whereas in the penalty order, Assessing Officer levied the penalty only on Rs.5,45,000/- vide para no.6 of penalty order. Therefore Ld. Counsel argued that the Assessing Officer made addition, on estimated basis, to the tune of Rs.10 lakh, however, in the penalty order dated 02.06.2017, the said amount was further estimated to the tune of Rs.5,45,000/-. Therefore, Assessing Office has further estimated the income of assessee during the penalty proceedings, and hence Ld. Counsel contended that the penalty on estimation should not be

imposed. Hence, it is abundantly clear that penalty u/s 271(1)(c) of the Act, was imposed on estimated addition. Therefore, respectfully following the binding judgment of Co-ordinate Bench of Surat, Tribunal, in the case of Gipilon Texturising Pvt. Ltd. (supra), I delete the penalty imposed by Assessing Officer u/s 271(1)(c) of the Act. Hence, assessee's appeal is allowed.

12. Since, I have deleted the penalty u/s 271(1)(c) of the Act, based on the plea of Id Counsel that penalty on estimated addition is not sustainable. Therefore, other arguments advanced by Id Counsel are rendered academic and infructuous and hence do not require adjudication.

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

Order is pronounced in the open court on 30/10/2023.

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

सूरत / Surat दिनांक/ Date: 30/10/2023

DKP (Sr. PS Outsourcing)

Copy of the Order forwarded to

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

// True Copy //

By Order

Assistant Registrar/Sr. PS/PS
ITAT, Surat