



**IN THE INCOME TAX APPELLATE TRIBUNAL, PUNE 'B' BENCH, PUNE**



**BEFORE HON'BLE SHRI G. D. PADMAHSHALI, ACCOUNTANT MEMBER**

**AND**

**HON'BLE SHRI VINAY BHAMORE, JUDICIAL MEMBER**

**ITA No. 407 to 408 & 410/PUN/2024**

**Assessment Year : 2013-14 to 2014-15 & 2019-20**

Dy. Commissioner of Income Tax,  
Central Circle-1,  
Ch. Sambhaji Nagar

*..... Appellant*

**V/s**

Shreehari Associates Pvt Ltd.  
Plot No-36, Gut No-41,  
Golwadi, Ch. Sambhaji Nagar.  
PAN: AAHCS7405B

*..... Respondent*

**Appearances**

Assessee by : Mr CH Naniwadekar & Kiran Sanmane ['Ld. AR']

Revenue by : Mr Ajaykumar Kesari & Arvind Desai ['Ld. DR']

Date of conclusive Hearing : 09/10/2024

Date of Pronouncement : 26/11/2024

**ORDER**

**PER G.D. PADMAHSHALI, AM;**

This bunch of three appeals of the Revenue is instituted u/s 253(2) of the Income-tax Act, 1961 [from now 'the Act'] challenging separate orders of Commissioner of Income Tax(Appeals)-12, Pune [from now 'Ld. CIT(A)'] all dt. 08/12/2023 passed u/s 250 of the Act which turndown separate orders of penalty [from now 'PO'] passed u/s 271(1)(c) & 271AAB of the Act by the Dy. Commission of Income Tax, Central Circle-1, Aurangabad [from now 'Ld. AO'] anent to assessment years 2013-14, 2014-15 & 2019-20 [from now 'AYs'] respectively.



2. The issue in extant bunch of appeals relates to solitary dispute over applicability of penal provisions of section 271(1)(c)/271AAB of the Act, where the income is assessed on the basis of material seized in search & seizure action carried out u/s 132 of the Act and further such addition is buoyed by the declaration on oath u/s 131 of the Act.

3. Since the facts and solitary issue dealt in these bunch of appeals are similar, connected and interwoven, on the request of rival parties these appeals for the sake of brevity are heard together for being disposed-off by this common and consolidate order.

4. **Briefly stated common facts born out of case records and common rival submission are that;**

4.1 The respondent assessee is a private limited company incorporated under the Companies Act was engaged in construction of water reservoirs, roads, bridges, dams, thermal power projects, townships, industrial & corporate buildings etc. The assessee is a part of Mulay group of companies, whereon a search action u/s 132 of the Act was carried out on 21/08/2018 covering the assessee as well. During said search action, certain documents/materials were seized which revealed to the Revenue that, the assessee booked/claimed sub-contract expenditure without there being any sub-contracts awarded to certain sub-contractors. When these sub-contracting expenditure/transactions were confronted to the assessee for establishing their veracity & genuineness, the assessee expressed its inability on oath and accepted to surrender/offer 12% of such sub-contracting expenditure as its undisclosed income.



**4.2** For the search year i.e. AY 2019-20 the assessee company filed its return declaring total income of ₹2,22,45,900/- wherein the aforesaid 12% of total unexplained sub-contracting expenditure was surrendered to tax in addition to regular income taxable under the provisions of law. The said return was selected for scrutiny u/s 143(3) of the Act. While assessing the total income for the year under consideration it was observed that, 12% the total amount of unexplained sub-contracting expenditure as worked out by the assessee during the course of search was offered to tax entirely in AY 2019-20 as against the respective years of sub-contract awarded & expenditure incurred. The Revenue following the matching accounting concept/principle, of the total unexplained sub-contracting expenditure of ₹11,61,84,361/- surrendered to tax in the year under consideration, the proportionate unexplained sub-contracting expenditure ₹9,18,06,361/- [pertaining to two years i.e. ₹5,87,79,774/- of AY 2013-14 & ₹3,30,26,587/- of AY 2014-15] were expunged and consequential assessment of AY 2019-20 was culminated retaining the balance amount of unexplained subcontracting expenditure with other additions viz; (i) ₹29,36,047/- disallowance u/s 36(1)(va) of the Act towards delayed remittance of PF/ESI etc., (ii) ₹78,800/- towards disallowance of interest on GST paid (iii) ₹76,02,504/- towards disallowance of interest on TDS/TCS (iv) ₹28,580/- towards disallowance of penalty charges claimed (v) ₹11,00,000/- disallowance of claim of 80G etc. The aforesaid additions and the assessment informed to have not been agitated further in appeal.



**4.3** Insofar as the assessment years 2013-14 & 2014-15 are concerned, in response to notices issued u/s 153A of the Act, the assessee company filed its returns declaring total income of ₹2,06,00,520/- & ₹2,28,99,200/- respectively. These returns of the assessee by service of notice u/s 143(2) of the Act were also subjected to scrutiny wherein a bullet addition of ₹5,87,79,774/- & ₹3,30,26,587/- in respective AY's were made u/s 69C of the Act representing the proportion of unexplained sub-contact expenditure out of the above total unexplained sub-contracting expenditure worked out in the course of search year and consequential assessments by order dt. 21/06/2021 were framed by the Ld. AO u/s 153A r.w.s. 143(3) of the Act whereby taxable income of the assessee company was assessed at variance at ₹7,93,80,294/- & ₹5,59,25,787/- respectively. These aforesaid additions and the assessments also informed to have not been agitated further in appeal by the respondent assessee.

**4.4** Heeding that aforesaid quantum orders remained unchallenged and in absence of any record suggesting further appeals thereagainst by the assessee, Ld. AO concocted the acceptance of quantum and initiated consequential penalty proceedings separately by notice u/s 274 r.w.s. 271(1)(c) of the Act for AY 2013-14 & 2014-2015 in relation to unexplained sub-contract expenditure brought to tax u/s 69C of the Act.

**4.5** On the other hand, for the search year a notice u/s 274 r.w.s. 271AAB of the Act was issued in relation to amount of unexplained sub-contract expenditure of ₹2,43,78,000/- taxed u/s 69C of the Act, alongwith unexplained



sundry creditors of ₹3,57,81,700/- offered to tax by the assessee u/s 41(1) of the Act and other two additions made by the Ld. AO while culminating the regular assessment viz; disallowance u/s 36(1)(va) of the Act and disallowance of interest on TDS/TCS etc.

**4.6** The assessee's submission against proposed penalty proceedings did fail to inspire any confidence to the Ld. AO, in the event the penalty proceedings in relation to AY 2013-14 & 2014-15 were culminated u/s 271(1)(c) of the Act by imposing a penalty equal to 100% of tax on amount of unexplained sub-contract expenditure brought to tax u/s 69C of the Act. The penalty u/s 271AAB of the Act for AY 2019-20 however was restricted to (i) 30% of tax sought to have evaded in relation to addition made towards unexplained sub-contracting expenditure u/s 69C of the Act & undisclosed income taxed u/s 41(1) of the Act and (ii) 60% of tax sought to have evaded in relation to disallowances made towards delayed payment of PF/ESI and Interest of TDS/TCS etc.

**4.7** Aggrieved assessee successfully agitated the imposition of aforesaid penalty in separate appeals before first appellate authority.

5. Aggrieved by the separate orders of first appellate authority, the Revenue came in present appeals challenging the reversal of penalty imposed owing to search action where the income finally assessed over and above the returned income u/s 153A of the Act, on the following substantive grounds;



**ITA No 407 & 408/PUN/2024 [Penalty u/s 271(1)(c) of the Act]**

1. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and in facts by deleting penalty levied u/s 271(1)(c) of the Act of Rs. x,xx,xx,xxx/- for furnishing in accurate particulars.*

2. *Whether on the facts and in the circumstances of the cases, the Ld. CIT(A) has erred in not considering the decision of the Hon'ble Supreme Court in the case of K P Madhusudan Vs CIT (251 ITR 99) wherein the Hon'ble Supreme Court held that the view taken in the case of Shadilal Sugar & General Mills Ltd. Vs CIT can no longer be said to be applicable to section 271(1)(c).*

**ITA No 410/PUN/2024 [Penalty u/s 271AAB of the Act]**

1. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and in facts by deleting penalty levied u/s 271AAB of the Act of Rs. x,xx,xx,xxx/- for undisclosed income of the specified year.*

2. *Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law and in facts by deleting penalty levied u/s 271AAB of the Act by holding that the admission of additional income offered by the appellant was not based on any asset, entry in books of account or transaction found in the course of search proceedings, whereas the provision of 271AAB are applicable on admission of undisclosed income irrespective of whether the same is based on any asset, entry in the books of account or transaction found in the course of search proceedings.*



6. During the course of physical hearing, rival parties Ld. counsels took us through the relevant facts of the case and bullet point of controversies involved herein and conversely claimed that, respective order of imposition of penalty and first appellate orders deleting the penalty deserves to be upheld leaving other jettison.

7. To drive home the Revenue's contention the Ld. DR Mr Desai at the very kickoff challenged the validity of impugned orders passed which solitarily founded its decision by placing reliance on 'Sir Shadilal Sugar & General Mills Ltd. Vs CIT' [1987, 168 ITR 705 (SC)]. In view of the Revenue the ratio therein is inapplicable to the facts and circumstances of present cases. It is the twofold submission of the Ld. DR that; firstly, the addition on account of unexplained sub-contracting expenditure made in the respective years were exclusively based on seized documents/material unearthed during the search. And secondly the case laws relied by the assessee in first appellate proceeding on the basis of which relief given were completely misapplied/misplaced as the reliance placed does not represent the settled position of law. Entrusting culmination of assessment in the light of seized material, the Ld. DR firmly pleaded that the quantum additions u/s 69C of the Act were on the basis of seized materials and only upon treating the sub-contracts & relating expenditure as bogus or sham owing to assessee's failure to prove its genuinity, and same was duly supported by assessee's confirmation statement recorded u/s 131(1) of the Act, which never retracted till date.



8. In bolstering the legality of imposition and survival of penalty the Ld. DR also contended that, these cases are befitting the levy without any express invocation of the explanation to section 271(1)(c) of the Act, and to buttress the said argument reliance was also placed on the decision of Hon'ble Apex Court in the case of '*K P Madhusudhanan Vs CIT*' reported at 251 ITR 99 (SC) and '*UOI Vs Dharmendra Textiles Processor*' reported in 306 ITR 227 (SC). The Ld. DR Mr Desai further pressing into service the decision in the case of '*MAK Data Pvt. Ltd. Vs CIT*' [reported in 358 ITR 598 (SC)] dislodged the entitlement of the respondent assessee for exemption from penalty owing to voluntary surrender of income in search action.

9. *Per contra*, the Ld. AR Mr Naniwadekar submitted that, the addition towards unexplained sub-contracting expenditure though was admitted on oath by one of the directors of the respondent assessee, however it remained an undisputed fact that such additions were arrived at estimated percentage of sub-contracting values and not in absolute terms. These additions to buy-peace-of-mind were not challenged in appeals however this cannot license the Revenue to impose penalty. Since the additions towards unexplained sub-contracting expenditure u/s 69C of the Act were sheerly based on estimation, thus lacked the needed concreteness in establishing either of the limb of concealment or furnishing inaccurate particulars, and therefore was rightly deleted by the Ld. CIT(A) on the basis of ratio laid down in '*Sir Shadilal Sugar & General Mills Ltd.*' (supra).



10. Adverting to the copy of submission made before the Ld. CIT(A) dt. 04/10/2023, the Ld. AR further submitted that, the assessee in addition to the forestated judicial precedents also placed its reliance on the decision of Hon'ble Delhi High Court in the case of '*CIT Vs SAS Pharmaceuticals*' [2011, 244 CTR 51 (Del)] which also iterated similar ratio holding that penalty is impermissible where income is brought to tax on surrender by the assessee. The sum & substance of oral arguments and written submission referred in the course of hearing of respondent assessee is twofold viz; (a) the details of expense & payments relating to all identified sub-contractor/contracts were already available on record and disclosed in the audited financial statements, (b) owing to inability of assessee to produce copies of contracts & confirmation from the respective sub-contracting parties. Thus, the percentage of total sub-contracting value/expenditure surrender was since based on estimation, therefore taxing such unexplained expenditure do not attracting any penal provisions under the Act. To fortify this proposition the assessee spotlighted Ld. co-ordinate benches decisions rendered in '*Mun Gems Vs ACIT*' [2023, 155 taxmann.com 1], '*Rajesh H Shinde Vs DCIT*' [2006, 103 ITD 360(Pune)] and the decision of Hon'ble Gujarat High Court in the case of '*CIT Vs Whitelene Chemicals*' [2014, 360 ITR 385 (Guj)]

11. We have heard the rival contentions of both the parties; and subject to the provisions of rule 18 of Income Tax Appellate Tribunal Rules, 1963 [from now 'ITAT-Rules'] perused the material placed on records and duly considered



the facts of the case in the light of settled legal position which were forewarned to rival parties for necessary rebuttal.

**12. The dispute in these appeals since relating to levy/imposition of penalty on additional income brought to tax owing to search action, we adjudicate this sole & substantive issue commonly hereinunder;**

**12.1** At the outset we note that, the Revenue, though did not dispute the assessee's computation of 12% of total sub-contract value/expenditure as unexplained expenditure to be taxed u/s 69C of the Act however, disapproved the assessee's plea to tax it entirely in the year of search i.e. AY 2019-20. Au contraire the, Revenue having regard to sub-contract award/expenditure adopted matching accounting principles and accordingly made the addition in respective assessment years including the year of search. The aforesaid additions triggered the invocation & imposition of penalty u/s 271(1)(c) of the Act for the AY 2013-14 & 2014-15 and the penalty for the search year was levied u/s 271AAB of the Act.

**12.2** From the material seized in the course of search action carried on the assessee group on 21/08/2018 it revealed that, the assessee had sub-contracted certain projects/contracts to twelve sub-contractors for total sub-contracted price/value of ₹96,82,03,013/- which were spread-over more than one year. The demographical subcontract-wise details and subcontract value were provided in answer to question 27 of the statement of one of the directors/key persons Mr Sacheen Madhukar Mulay recorded on oath in the course of search



operation. In order to verify the veracity & genuineness of such sub-contracts and related expenditure incurred/claimed in the respective assessment years, the respondent assessee was called upon to furnish full details alongwith copies of contract entered & confirmation letters from the respective sub-contractors. In response thereto the respondent assessee baldly stated that, (a) these sub-contracting transactions have been routed through Profit & Loss Account (b) payments to respective sub-contractors were made through banking channel, hence they were genuine in nature. The respondent assessee however expressed its inability to produce full details including copies of sub-contracts and confirmation from the respective sub-contractors which could have effectively testified the veracity & genuineness of sub-contracting & its expenditure. We further found that, in answering question of 27 (supra) the assessee playfully excused from providing key documents on twofold reasons viz; (a) records sought to produce relates to very old period (b) due to paucity of time confirmation from the parties were not possible. Its worthy to note here that, the relevant period of sub-contract expenditure which remained unexplained till date was falling well within the stipulated period for which the respondent assessee was under obligation to maintained its books of accounts and documents under the provision of the Act. Insofar as the paucity of time is concerned, on a specific query by the bench, the respondent submitted in the open court that, neither before culmination of assessment nor first appellate proceedings the sought details/documents were submitted by the assessee to



prove effectively on record that sub-contract/expenditure were indeed do not suffer from genuineness. It is not out of place to state here that, the respondent assessee is also indifferent in the present proceedings. In view thereof, former both the claims/excuses of the respondent in our considered were deceptive.

**12.3** The conjoint reading of records clear suggest that, the Revenue has substantively proved the inaction on the part of respondent assessee to produce the sub-contracting agreement/documents, and other convincing documents which could have proved veracity & genuineness sub-contracts awarded & relating expenditure incurred/claimed by the respondent assessee. Therefore, we see eye-to-eye in treating these transactions as sham and bogus, thus requiring disallowance in its entirety whether in original assessment or otherwise in revision u/s 263 of the Act. We are mindful to state that, the Ld. AO's acceptance of part of total unexplained sub-contract expenditure for the purpose of assessment does neither capable of changing the very characteristic of unexplained expenditure/transactions nor does it shield the transactions from attracting penal provisions of section 271(1)(c)/271AAB of the Act.

**12.4** Coming to impugned orders reversing the imposition of penalty, we are mindful to quote here that, the decision of the Supreme Court in the case of K P Madhusudan Vs CIT (supra) the decision rendered in 'Sir Shadilal Sugar and General Mills' (supra) has been held to be no more applicable after the insertion of Explanations to Section 271(1)(c) of the Act. In the case of K P Madhusudan (supra) has therefore made it express that these cases would have



to be seen with reference to the Explanation to Section 271(1)(c) of the Act. In ‘Sir Shadilal Sugar and General Mills’ the case apparently was penalty therein was levied for furnishing inaccurate particulars owing to disallowance of expenditure, however the Tribunal had given a clear finding that assessee had a good case to argue that claimed expenditure was not bogus. Set of facts in the present cases and findings of the Ld. AO being not indifferent from ‘Sir Shadilal Sugar and General Mills’ (supra) therefore, the impugned adjudication perfunctory based thereupon has no legs to stand, therefore set-side.

**12.5** Admittedly, the inability of the respondent assessee to substantiate the veracity & genuineness of sub-contract & related expenditure incurred continued till date and therefore respondents claim that ‘to buy-peace-of-mind’ it had surrendered the same an ad-hoc basis does not recuse the action from the rigors of penal provision. It is abundantly clear that in view of the Explanation to Section 271(1)(c), the burden of proving that it is a case of ‘surrendered/offered/agreed addition’ on facts coupled with the bonafied was on the assessee. The KP Madhusudan (supra) decision gives an important test for such cases and requires that it would depend how the assessee has discharged burden of proving its bonafides. In the present case, it is therefore not sufficient that the assessee surrendered/agreed addition of unexplained sub-contracting expenditure without any material but it failed to urge, prove or substantiate that the surrender was without material. The assessee stopped after the surrender for addition, therefore risk of applying of the fiction under



Explanation as to deemed concealment would always attract, which in turn empowered the tax authorities for initiating the imposing the penalty set forth u/s 271(1)(c) of the Act. The respondent has only stated that, it has declared the additional sum as its income with a view to avoid litigation and to buy a peace and to make amicable settlement with the income tax department. The surrender or surrender of income in these cases was not voluntary in the sense that the surrender was made when the Ld. AO doubted the veracity & genuineness of sub-contracts & its related expenditure and treated them as sham & bogus. In such a situation, it cannot be said that the declaration or surrender was voluntary by the assessee, all the more the law does not recognize those types of defences under Explanation 1 to section 271(1)(c).

13. It is trite law that the voluntary disclosure or declaration or surrender *per se* does not discharge the assessee from the mischief of penal proceedings u/s 271(1)(c), as the law does not provide that the assessee be pardoned from penalty when it makes a voluntary disclosure of its unexplained income/expenditure. On the other hand, Ld. AO, has recorded a categorical finding in assessment order and was satisfied himself that the assessee had concealed income by furnishing inaccurate particulars of expenditure whereby its exposed to penalty proceedings u/s 271(1)(c)/271AAB of the Act. *Per contra* the facts and circumstance of caselaw relied by the assessee and the Ld. CIT(A) been in variance from the present case, therefore they could hardly rescue the assessee cases from attracting former penal provisions.



14. *Nota bene*, in the similar facts and circumstance, where the income of the assessee is assessed in variation to income returned, the Hon'ble Supreme Court in the case of '*MAK Data Pvt Ltd Vs CIT*' (supra) observed that, the explanation to section 271(1) raises a presumption of concealment when income is finally assessed in variation of returned income, and it was in this factual scenario where the income reported by the assessee in the return filed was lower than the income finally assessed and brought to tax, it is held that the penalty was rightly leviable irrespective of the fact whether such variation was on account of voluntary surrender or surrender of income or otherwise.

15. Glaringly, the sum surrender to pay tax on the sum of sub-contracting expenditure sprung out upon respondents failure to prove veracity & genuineness which came to light solely on account of search action. Therefore, it is not a case wherein a disclosure was voluntarily made; indeed, it was out of search action. Otherwise, bogus expenditure claimed earlier could have continued to hold field of deduction. In any case, so-called voluntary disclosure/surrender of sub-contract expenditure claimed earlier by furnishing inaccurate particulars of income cannot alter the consequences in the light of decision of the Hon'ble Apex Court in the similar facts and circumstances in view of former judicial precedents, irrespective of the fact as to how much of such bogus/sham sub-contact/expenditure has actually been brought to tax in the course of assessment by the Ld. AO, as the same is subject matter of revision under the provisions of law.



16. Given section 274 provides that, no order imposing a penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. The requirement of section 274 of the Act since shown complied and remained undisputed, and the penal provisions being a civil liability calling no act of or ingredient for wilful concealment as laid by Hon'ble Supreme Court vide 25 in the case of 'UOI Vs Dharmendra Textile Processors' reported in 306 ITR 277 (SC), the penalty imposed u/s 271AAB also deserves to be sustained on similar observation. Nothing contrary has been shown to us in the present facts which would warrant diversion from the view fortified by the Hon'ble Supreme Court in 'K P Madhusudan Vs CIT' & 'MAK Data Pvt Ltd Vs CIT' (Supra). Apropos, in view of the aforesaid discussion and former judicial precedents (supra) the impugned orders of Ld. CIT(A) for AY 2013-14 & 2014-15 are set-aside in its entirety and for AY 2019-20 to the extent it relates to penalty on unexplained sub-contracting expenditure brought to tax u/s 69C of the Act. The respective orders of penalty are thus restored accordingly. The grounds thus stands accordingly allowed.

**17. In result, the appeals of the REVENUE are ALLOWED.**

U/r 34 of ITAT Rules, the order pronounced in open court on the date of conclusive hearing mentioned hereinbefore.

-S/d-

**VINAY BHAMORE**  
**JUDICIAL MEMBER**

Pune, Dated : 26<sup>th</sup> day of November, 2024.

-S/d-

**G. D. PADMAHSHALI**  
**ACCOUNTANT MEMBER**

Panaji, dated: 06<sup>th</sup> November, 2024

**Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
4. The CIT-Concerned(MH-India)
5. DR, ITAT, Bench 'B', Pune

3. The Pr.CIT Concerned
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