आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 143/JP/2016
निर्धारण वर्ष/Assessment Year :2007-08

Shri Vikram Singh, 1, Thaltara, Sirsi Road, Khatipura, Jaipur	बनाम Vs.	The Dy.C.I.T., Circle-3, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFPPS 1181 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rajeev Sogani (CA)
राजस्व की ओर से/ Revenue by : Shri Rajendra Jha (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 12/01/2017
उदघोषणा की तारीख/Date of Pronouncement: 16/01/2017

आदेश/ ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Ld. CIT(A) dated 17.12.2015 for A.Y. 2007-08. The sole ground of appeal taken by the assessee is as under:-

"1. *In the facts and circumstances of the case and in law the ld. CIT(A) has erred in confirming the penalty amounting to Rs.2,00,043/- u/s 271(1)(c) of the Income Tax Act, 1961 on estimated trading additions. The action of ld. CIT(A) is illegal, unjustified, arbitrary and against the*

facts of the case. Relief may please be granted by deleting the said additions of Rs.2,00,043/-"

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing and export of all type of artistic handicrafts items mainly made of wood. The return of income was filed by the assessee on 30-10-2007 through E-filing declaring total income of Rs.612,73,640/-. The case of the assessee was selected for scrutiny u/s 143(2) of the Act. On scrutiny of the details/information produced by the assessee the AO observed that the business results shown by the assessee in comparison to immediately last two years are as under:-

Asstt. Year	Turnover (Rs. In lacs)	Gross profit rate
2007-08	302.00	38.45%
2006-07	375.70	40.34%
2005-06	472.20	44.39%

The AO from the trading results observed that the gross profit rate has fallen down from 40.34% to 38.45% and the AO asked for the reasons from the assessee for fall in gross profit rate. The assessee submitted that the fall in gross profit rate was due to not getting the orders from the foreign buyers and the assessee had to introduce new items to sustain in the market which affected the profits margins of the

assessee. Further, the assessee submitted that there was escalation of input costs like raw material, labour etc. Considering the submission of the assessee and documents available on record at the time of assessment proceedings, the AO observed that there are defects in the books of account of the assessee and therefore, he applied the provision of Section 145(3) of the Act and the AO took the mean of last two years of gross profit rate and applied the gross profit rate of 42.36% against the gross profit rate of 38.45% shown by the assessee which resulted in trading addition of Rs.11,79,652/-.

3. Being aggrieved, the assessee carried the matter before the ld. CIT(A) who confirmed the rejection of books of account u/s 145(3) and also estimated the gross profit rate of 40.40% which resulted into trading addition of Rs.5,92,194/-.

4. On further appeal, the Coordinate Bench confirmed the findings of the ld CIT(A) and operative part of its order is as under:

> *"We have heard the rival contentions and perused the material on record. The Ld AR has not pressed the ground relating to rejection of books of account. Therefore, the limited issue for consideration is what should the reasonable basis for estimation of G.P. rate and whether estimation done by the lower authorities*

call for any interference. The A.O. has applied average G.P. rate of last two years @ 42.36%. The ld. CIT(A) by following the G.P. rate of last year has brought the same down and applied G.P. rate of 40.40%. Apparently, both the AO as well as ld. CIT(A) are guided by assessee's past history. At the same time, it is observed from the order of the ld. CIT(A) that he has considered the unusual business conditions prevalent during the subject matter in terms of profit margins getting effected by increase in cost of raw material, introduction of new products in the market and fact that some of the assessee's customers did not place orders during the year resulting in fall in turnover from Rs.375.70 lacs to Rs.302 lacs during the year. In our view, the view of the ld. CIT(A) is fair and reasonable which has factored in the business environment prevalent during the year and at the same guided by assessee's past history, applied gross profit rate of 40.40% as against 42.36% applied by the AO. In light of above, we do not see any infirmity in the order of the ld. CIT(A) which calls for our interference. Thus Ground No.1 of the assessee as well as Ground No.1 of the Revenue are dismissed."

5. On the trading addition sustained in the quantum proceeding by the Coordinate bench, the AO levied penalty u/s 271(1)(c) amounting to Rs.2,00,043/-.

6. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A). The assessee contended that no penalty can be imposed where the trading additions are purely based on an estimation and reliance was placed on the decision of the Hon'ble Rajasthan High Court in case of Shiv Lal Tak (251 ITR 373) & Mahendra Singh Khedla (252 CTR 453), besides other decisions. The ld. CIT(A), however, rejected the contention of the assessee and stated that since specific defects have been established in the books of account, therefore, estimation is not just plain estimation but is supported by positive evidence and accordingly, penalty u/s 271(1)(c) was confirmed.

7. During the course of hearing, the ld. AR submitted that for the so called defects pointed out by the ld. AO, complete explanation was furnished during the course of assessment proceedings. Wood is a natural product and its specific variety/quality determines its net realizable value. Even the rate of teak wood or yellow oak wood vary widely depending on its variety. The explanation offered by the assessee was not found false. The explanation, even though was not

accepted, was not held to be lacking in bona-fides. Needless to mention that all facts were placed before the ld. AO. In view of this provision of Explanation 1 to section 271(1) are not attracted. Otherwise also, additions are not based on any specific defects but are on ad-hoc basis by applying a GP Rate. This estimation has also undergone change in favour of assessee by ld. CIT(A) in quantum appeal. Hon'ble Rajasthan High Court in the case of Mahendra Singh Khedla (supra) has held that "*Fact or allegation based on estimation cannot be said to be correct only, it can be incorrect also.*"

8. Hon'ble Bombay High Court in the case of Upendra V. Mithani ITA (L) No.1860 of 2009, decided on 05.08.2009 observed in the matter of levy of penalty under section 271(1)(c) of the Act, that if the assessee gives an explanation which is unproved but not disproved i.e it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, then no penalty can be imposed in such case. Same ratio was laid down by the Hon'ble Gujarat High Court in the case of National Textiles (2001) 249 ITR 0125 (Guj-HC)

9. Further reliance is placed on the judgment of the Hon'ble Delhi High Court in the case of Vatika Construction (P.) Ltd. [2014] 45

taxman.com 471 (Delhi) (Case Law Page 21), in which it has been held that *"…Head Notes – Section 271(1)(c), read with sections 40A(3) and 44AD of the Income-tax Act, 1961 – Penalty – For concealment of income (Agreed additions) – Assessment year 2004-05 – Assessee carried on construction business – It had issued large number of bearer cheques to small suppliers of building material – In response to notice issued by Assessing Officer seeking to disallow said payments under section 40A(3), assessee offered that its income might be computed by applying net profit rate of 8 per cent of gross receipts – Assessing Officer having accepted assessee's offer, made addition in terms of section 44AD – He also passed a penalty order under section 271(1)(c) – Tribunal, however, set aside said penalty order – Whether since at time to initiating penalty proceedings Assessing Officer did not have any material on record showing that payments made to suppliers were bogus, he could not have merely on basis of assessee's offer to be taxed on estimate basis, concluded that assessee had provided inaccurate particulars in its return – Held, yes – Whether, therefore, Tribunal was justified in setting aside impugned penalty order – Held, yes [Para 14] [In favour of assessee]…"*

10. Ld. CIT(A) misplaced his reliance on various judgments, as set out at Page 14 of his order, as the facts of those cases are totally different from the facts of the case at hand. Below mentioned paras highlight such difference:-

10.i In this case of Swarup Cold Storage & General Mills (*Supra*), the assessee had not even filed its return of income before the due date. The same was filed, in response to the notice under section 142. Further, the assessment was made by the AO ex-parte and assessee at no point of time, during the assessment and appellate proceedings, produced its books of accounts. The appellate authorities even doubted the assertion, of the assessee, that the return of income was filed on the basis of regularly maintained books of accounts.

Whereas, in the present case, the assessee has been regularly maintaining his books of accounts which are duly audited which have nowhere been doubted by the lower authorities. These books of accounts were even produced before the ld. AO for his examination during the assessment proceedings.

10.ii In the case of A.K. Bashu Sahib (*Supra*), assessee himself denied the maintenance of any books of accounts including the trip sheets, or correspondences with the regional transport authority. The assessee himself estimated his income on the basis of assessment of earlier years.

Whereas, in the present case, the assessee has been regularly maintaining his books of accounts which has nowhere been doubted by the lower authorities. The books of accounts were even produced before the ld. AO for his examination during the assessment proceedings. Even the return was filed, by the assessee, based on the books of accounts regularly maintained and not on the basis of any estimation.

10.iii In this case of DR. (MRS) K.D. ARORA (*Supra*) the assessee did not file her return of income, for the relevant assessment year, but the same was filed in response to notice under section 148. During the course of assessment proceedings, it was noted by the AO that the assessee had made certain unexplained investments over the construction of the house. When the assessee was confronted with this aspect, she did not deny that the house was constructed by her in the name of her minor

son. She even explained the investments. AO then estimated the amount of expenditure for the construction of such house. The judicial authorities even questioned the mental attitude of the assessee in not filing the return u/s 139(1).

The facts in the present case are totally different as this is not a case where the assessee tried, even minutely, to conceal the particulars of his income. It is a case where the ld. AO not being satisfied by the percentage of Gross Profit declared by the assessee as compared to the past years estimated a GP rate.

10.iv In the case of MD. WARASAT HUSSAIN (*Supra*) there was a clear finding by the AO that the assessee had concealed his capital gains on sale of land. The assessee calculated Capital Gains, but, however failed to provide the documents for such sale before the AO and even asked the revenue authorities to determine the Capital Gains on estimate basis.

The present case is not related to capital gains. In this case, assessee has provided all the relevant documents/records prepared by him. However, the same, not being made to the

satisfaction of the AO, books were rejected by him and income was estimated.

10.v In the case of BALAKRISHNA TEXTILES & ORS. (*Supra*) there was a raid, on the business premises, of the assessee by the Economic Offences Wing and as a result, the assessee came forward with certain disclosures under section 68. The assessee even admitted to have manipulated his books of accounts at the time of filing the return of income.

Whereas, in the case at hand, it is not the allegation of the departmental authorities that assessee has manipulated the books of accounts at any point of time.

11. Ld. CIT(A) has misplaced his reliance on the judgment of the Hon'ble Supreme Court in the case of Dharmendra Textile Processors & Others [2008] 306 ITR 277 (SC). Ld. CIT(A) has misread the judgment. Hon'ble Apex Court has not at all held that *mens rea* is not essential.

12. It is submitted that the Hon'ble Apex Court in Union of India v. Rajasthan Spg. & Wvg. Mills [2009] 224 CTR 1 (SC) and in CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC) observed that conditions in section 271(1)(c), namely, concealment and furnishing of inaccurate particular, must be proved to levy penalty, demonstrated its

intention that one's *'state of mind'* had to be taken into account to see if that person wanted to contravene law by concealing income. Relevant extracts of the Hon'ble Supreme Court judgments have been set out for the sake of convenience:-

12.i Union of India v. Rajasthan Spg. & Wvg. Mills [2009] 224 CTR 1 (SC)

".....we need to examine the recent decision of this court in Dharmendra Textile Processors' case (supra). In almost every case relating to penalty, the decision is referred to on behalf of the revenue as if it laid down that in every case of non-payment or short payment of duty the penalty clause would automatically get attracted and the authority had no discretion in the matter. One of us (Aftab Alam, J.) was a party to the decision in Dharamendra Textile Processors' case (supra) and we see no reason to understand or read that decision in that manner. In Dharamendra Textile Processors' case (supra) the court framed the issues before it, in paragraph 2 of the decision....."

".....we fail to see how the decision in Dharamendra Textile Processors' case (supra) can be said to hold that section 11AC would apply to every case of non-payment or short payment of duty regardless of the conditions expressly mentioned in the

section for its application. There is another very strong reason for holding that Dharamendra Textile Processors' case (supra) could not have interpreted section 11AC in the manner as suggested because in that case that was not even the stand of the revenue."

12.ii CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158 (SC)

".....We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the asseessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). 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...."

13. The proper analysis of the Dharmendra Textile Judgment has been done by the Hon'ble ITAT Pune Bench in the case of Kanbay Software India (P.) Ltd. Vs. DCIT [2009] 31 SOT 153 (PUNE). The

relevant extracts are reproduced below for proper appreciation of the position:

"..The views expressed by Their Lordships in Daramendra Textile Processors' case (supra) cannot be viewed as an authority for the proposition that a penalty under section 271(1)(c) is an automatic consequence of an addition being made to income of the taxpayer, for the reason that whether it is a civil liability or a criminal liability, penalty under section 271(1)(c) can only come into play when the conditions laid down under that section are to be satisfied. In view of the elaborate discussions in the preceding paragraphs, by no stretch of logic or rationale it could be said that imposition of penalty under section 271(1)(c) has a cause and effect relationship with addition being made to the returned income per se. An addition being made to income does, because of impact of Explanation 1, effectively does raise a presumption against the assessee but that is an entirely rebuttable presumption and the scheme of rebuttal is provided in the Explanation itself…" In the light of the above discussions, and for the detailed reasons set out above, we are of the considered view that even post Dharamendra Textile Processors' judgment (supra) by the Hon'ble Supreme Court, merely because an addition is made to the income declared by the assessee, penalty under section 271(1)(c) cannot be imposed. In our considered view, Hon'ble Supreme Court's judgment in the case of Dharmendra Textile Processors (supra) does not bring about any radical change in the scheme of section 271(1)(c) though it does nullify the

earlier Division Bench judgment on Hon'ble Supreme Court in the case of Dilip N. Shroff judgment (supra) to the extent that it held that the onus was on the tax authorities to establish mens rea before a penalty under section 271(1)(c) can be imposed – a proposition which, in the esteemed views of the larger Bench, did not take into account the correct scheme of things as these were – more particularly of Explanation 1, as it exists now, to section 271(1)(c). Their Lordships have indeed held that a penalty under section 271(1)(c) is a civil liability but that expression is used in contradistinction with criminal liability and, as held by the Hon'ble Supreme Court itself in the case of Om Prakash Shiv Prakash (supra), there is no conflict in a liability being a civil liability and at the same time being penal in character. In effect, therefore, liability under section 271(1)(c) continues to have its basic penal character even as it is held to be a civil liability…"

14. Ld. CIT(A) has not distinguished the jurisdictional High Court decisions. Therefore, ld. ICT(A) has erred in not following the same.

15. It is not the finding of the ld. AO or ld. CIT(A), in the quantum proceedings, that the assessee was indulged in bogus purchases.

16. Hon'ble ITAT Japur Bench has consistently taken a view that no penalty should be levied on estimated additions. Below mentioned are some of the cases in which such view has been followed by the Hon'ble Jaipur Bench.

16.i Indus Jewellery Private Limited, ITA. No.933/JP/13 (Cse Law Page 30)
16.ii Vijay Solvex Ltd., ITA No.641/JP/14 (Case Law Page 34-35)
16.iii Deepshree Buildcon Ltd., ITA 310/JP/12 (Case Law Page 41-42)
16.iv Deepak Dalela, ITA No.1027/JP/2013 (Case Law Page 43–48)

In view of the above, penalty levied by the ld. AO and confirmed by the ld. CIT(A), on trading additions sustained on estimated basis, may please be deleted.

17. The ld. DR has heard who has relied on the order of the CIT(A) and submitted that since specific defects have been pointed out, the levy of penalty was justified and rightly confirmed by the CIT(A).

18. We have heard the rival contention and perused the material available on record. In this case, books of accounts have been rejected and thereafter, the Assessing Officer has estimated a GP rate of 42.36% as against declared GP rate of 38.45% which has finally been sustained by the Coordinate Bench at 40.40%. This GP rate 40.40% has been applied by the CIT(A) following the GP rate of 40.34% in the immediately preceding A.Y. 2006-07. As we have noted above, the coordinate bench while sustaining the GP rate of 40.40% has held that the Ld. CIT(A) has considered the unusual business conditions prevalent during the subject matter in terms of profit margins getting effected by increase in cost of raw material, introduction of new products in the

market and fact that some of the assessee's customers did not place orders during the year resulting in fall of the turnover and the view of the Ld. CIT(A) was held to be fair and reasonable which has factored in the business environment as well as guided by the assessee's past history. In the light of the findings of fact in the quantum proceeding, we do not see any linkage in terms of basis of rejection of the books of accounts and the estimation of GP rate by the Assessing Office at 42.36% which has been finally brought down to 40.40%. The additions have thus been confirmed on a pure estimation basis taken into consideration the prevalent business environment and the past history of the assessee and the same cannot be basis for levy of penalty. Further, the assessee has relied on the decision of Shiv Lal Tak wherein the Hon'ble High Court has held that :

"in making computation of total income where the income returned has been rejected by rejecting the trading results, finding some discrepancy in the books of account and substituting the same by an estimated figure, in the strict sense, can neither be said to be addition of any amount in the returned income nor disallowance of any amount as deductions claimed. The word "amount" of which additions made or deductions disallowed also denotes reference to specific item of amount added or disallowed as deduction in contrast to substitution of altogether a new estimated sum in place of the

income returned. It is a case neither of addition or disallowance but a case of substitution."

18. Further, the assessee has relied on decision of Hon'ble Rajasthan High Court in case of Mahendra Singh Khedla wherein the High Court has confirmed the findings of the Tribunal at Para-8 which are as under:-

"Under these circumstances when in the present case there was no positive evidence beyond doubt regarding estimated trading addition that the amount in difference between the result shown by the assessee and that estimated by the AO was resultant of concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee, penalty under section 271(1)(c) of the Act cannot be levied. The AO had rejected the books of account and estimated the trading addition on the basis that the assessee had not maintained site-wise account, no head-wise details of claimed purchases were furnished, no separate head of expenses was maintained, work in progress was not declared, some wages were shown outstanding without complete details of creditors, stock register was not maintained and misc. expenses on water transportation etc. were not verifiable and purchase vouchers of sand, steel, bajri etc. were self made etc. Assessee explained reasons for the above defects which were not accepted by the AO as not found satisfactory. The AO accordingly made estimate. The circumstances suggest that it may be just and proper case of making

estimated trading addition but an inference therefrom cannot be drawn beyond doubt especially keeping in mind the nature of work in not maintaining those books and details supported with proper vouchers etc. that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee to attract the penal provisions. In view of above discussion and keeping in mind the fact and circumstances of the present case, we are of the view that the ld. CIT(A) was justified in deleting the penalty in absence of positive evidence with the department that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee towards the addition in question. The first appellate order on the issue is thus upheld."

While affirming the above findings of the Tribunal, the High Court further held as under:

"The above finding of the Tribunal makes it clear that additions made by the Assessing Officer were based on estimation only. A fact or allegation based on estimation cannot be said to be correct only, it can be incorrect also. Therefore, in the facts and circumstances of the case, penalty was wrongly levied by the Assessing Officer. The basis for levying penalty in the present case is only estimation, which is purely a question of fact and there is a concurrent finding of fact recorded by first appellate authority as well as the appellate Tribunal both.

19. In light of above factual position and respectfully following the decisions of the Hon'ble Jurisdictional High Court referred supra, we

hereby direct the Assessing Officer to delete the penalty on the estimated addition.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 16/01/2017.

Sd/-	Sd/-
(कुल भारत)	(विक्रम सिंह यादव)
(Kul Bharat)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 16/01/2017.
*Sanjeev.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- Shri Vikram Singh, Khatipura, Jaipur.
2. प्रत्यर्थी/ The Respondent- The D.C.I.T, Circle-3, Jaipur.
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त/ CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File {ITA No. 143/JP/2016}

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar