

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH: BANGALORE**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
and
SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER**

**ITA No.435/Bang/2014
(Assessment year: 1993-94)**

Income-tax Officer,
Ward 6(4),
Bangalore. ... Appellant

Vs.

M/s.Kumar Enterprises,
No.25, 9th Cross, KP West,
Bangalore. ... Respondent

Appellant by: Dr.K.Shankar Prasad, JCIT(DR).
Respondent by: Shri Suresh Muthukrishnan, CA.

Date of hearing : 18-03-2015.
Date of pronouncement: 27-03-2015.

ORDER

Per ABRAHAM P GEORGE, AM:

In this appeal filed by the Revenue, it is aggrieved that Id.CIT(A)-II, Bangalore, through his order dated 23/01/2014 had deleted a penalty of Rs.12,17,441/- levied on the assessee under section 271(1)(c) of the Act.

2. Ld. DR submitted that appeal filed by the assessee before the CIT(A) against the assessment under section 143(3) done on 25/3/1996 for the impugned assessment year though originally dismissed by the Id.CIT(A) as withdrawn by the

assessee, was re-instituted through a Tribunal order dated 27/02/2004 in ITA Nos.397 & 398/Bang/2003. As per the Id. DR, when the re-instituted appeals were disposed off by the Id. CIT(A) by his order dated 17/2/2005, partial relief was given to the assessee, whereby its claim for deduction under section 80HHC was allowed in respect of the business income. However, as per the Id.DR, no relief was given to the assessee on other addition. Again, as per the Id.DR, against the order dated 17/02/2005 of Id.CIT(A), both assessee and Department had moved before this Tribunal, assessee aggrieved on the additions made by the AO under the head 'Income from other sources' sustained by the CIT(A) and Revenue on the relief given to the assessee under section 80HHC. Further as per the Id.DR, this Tribunal in its order dated 30/3/2007 in ITA Nos.635, 636 & 663/Bang/2005, had remitted the issues raised by the assessee back to the file of the AO, while dismissing the appeal of the Revenue. Meanwhile, as per the Id. DR. the AO proceeded to give effect to Id.CIT(A)'s order dated 17/2/2005 and also initiated penalty proceeding under section 271(1)(c) on the assessee for the additions made under the head 'Income from other sources' which was sustained by the Id. CIT(A) and on getting no explanation from the assessee, levied the penalty. As per the Id. DR though the same additions were a subject matter of assessee's appeal against CIT(A)'s order dated 17/2/2005 before this Tribunal, the penalty ought not to have

been cancelled by the Id. CIT(A) considering the penalty order to have merged with the giving effect order.

3. Per contra, Id.AR submitted that the levy of penalty was rightly cancelled by the Id. CIT(A). Reliance was placed on the judgment of the Hon'ble Gujarat High Court in the case of *Ranchhodbhai Haribhai Jadav vs. ACIT* (1999) 238 ITR 949.

4. We have perused the orders and heard the rival contentions. The additions on which penalty was levied were the following:

i) Peak cash deficit found in day book	14,33,843
ii) Cash difference as on 31.3.93	43,478
iii) Excess of assets over liabilities (assets not taken into accounts)	10,91,283
iv) Liabilities overstated	4,75,000

On the business income, assessee's claim for 80HHC was allowed by Id. CIT(A) and Revenue's appeal against this was dismissed by this Tribunal vide its order dated 30/3/2007 in ITA Nos.635 & 636/Bang/2005. However, an assessee's appeal against the additions under the head 'Income from other sources' and its plea that no separate addition was warranted, in view of section 80HHC benefit being granted to it, the directions of this Tribunal in the order mentioned supra read as under:

"2. According to the assessee, it is a 100% export oriented unit and claim u/s 80HHC was made for the first time before the CIT(A). learned CIT(A) admitted the ground and directed the Assessing Officer to allow claim u/s 80HHC with reference to business profit. The submission of the learned counsel is that if it is found that the assessee is a 100% export oriented unit, in that event, other additions may not be warranted. Hence, it is

submitted that the matter may go back to the Assessing Officer for taking proper decision. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. God Granites and others (262 ITR 567).

3. *On the other hand, learned DR supported the action of the Assessing Officer and submitted that no claim u/s 80HHC was made by the assessee before the Assessing Officer. He placed reliance on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd., v. CIT (284 ITR 323).*

4. *After hearing both the sides, we find force in the submission of the assessee. Before the Assessing Officer, the claim u/s 80HHC was not made by the assessee. Therefore, the submission of the assessee that no other additions should be made, was not considered by the Assessing Officer. Deduction u/s 80HHC has been claimed by the assessee before the CIT(A) and that ground that has been rightly admitted by learned CIT(A).*

5. *Before the Tribunal, in assessee's appeal, the assessee has challenged various disallowances and additions made by the Assessing Officer. In view of the aforesaid discussion and since claim of 80HHC was not made before the Assessing Officer earlier, in our opinion, the matter should go back to the Assessing Officer for reconsideration. Accordingly, the impugned order is set aside and the matter is restored to the Assessing Officer for deciding afresh in accordance with law in the light of the discussion made above."*

Order levying penalty on the additions made under the head 'Income from other sources' was passed on 31/3/2006, well prior to the above Tribunal order. Thus on the date when penalty order was passed, the additions on which penalty was levied, stood reverted back to the AO for fresh consideration. Or in other words, the substratum for the levy of the penalty had disappeared. Hon'ble Gujarat High Court in the case of *Ranchchobhai Haribhai Jadav* (supra), no doubt state that when there is no assessment of income in the hands of the assessee or the same has been set aside, penalties too are to be set aside.

However, in our opinion, this does not mean that the AO is precluded from initiating penalty proceedings afresh, if he is satisfied that ingredients required to invoke section 271(1)(c) are there, when completing the proceedings afresh pursuant to the Tribunal order. With this observation, we dismiss the appeal filed by the Revenue.

5. Appeal of the Revenue is dismissed.

Pronounced in the open court on 27th March, 2015.

sd/-
(Rajpal Yadav)
JUDICIAL MEMBER
eksrinivasulu

sd/-
(Abraham P.George)
ACCOUNTANT MEMBER

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore