

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL,
 INDORE BENCH, INDORE**

चन्द्रमोहन गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
 AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

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| आ.अ.सं./ I.T.A. No. 757 & 758/Ind/2014 and 236/Ind/2016 |
| निर्धारण वर्ष /Assessment Year: 2003-04 , 2005-06 and 2004-05 |

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| Shri Sanjay Somani, 101, Classic Centre, M G road Indore | v. | DCIT 5(i) Indore |
| अपीलार्थी /Appellant | | प्रत्यर्थी /Respondent |
| स्था.ले.सं./PAN: AQQPS7473P | | |

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| अपीलार्थी की ओर से/Appellant by | Shri S.S. Deshpande, CA |
| प्रत्यर्थी की ओर से/Respondent by | Shri Mohd. Javed, Sr. D.R. |

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| सुनवाई की तारीख/Date of hearing | 02-05-2017 |
| उद्घोषणा की तारीख/Date of pronouncement | 02-05-2017 |

ORDER

PER O.P. MEENA, ACCOUTANT MEMEBR.

These three appeals are filed by the assessee against the separate orders of Id. Commissioner of Income-tax (Appeals)-II, Indore [hereinafter referred to as the CIT(A)] dated 28-08-2014 for assessment year 2003-04 and 2005-06 confirming the penalties of Rs. 15,00,000/- and Rs. 10,00,000/- respectively and confirming penalty of

Rs. 5,25,000/- vide order dtd. 31-12-2015 for the assessment year 2004-05.

Since the facts are common in all these appeals except figures, we dispose of these appeals by this common order.

2. The assessee has taken common grounds of appeal in all the years except the figures of penalty. However, we are reproducing the grounds in I. T. A. No. 757/Ind/2014, for the sake of brevity.

1. *The ld. CIT (A) erred in maintaining the penalty order u/s 271(1) (c).*

2. *The additions have been made on the merely on the ground of estimate of Gross Profit and as such , the penalty confirmed by the ld. CIT (A) on the additions which were made on estimate basis is bad-in-law. The Ld. CIT (A) further erred in not following order of Hon`ble Tribunal in the case of the assessee in subsequent year on similar facts.*

3. *The penalty levied may please be deleted.*

3. We are discussing facts in I. T. A. No. 757/Ind/2014, for the assessment year 2003-04, the decision of which shall be binding on other appeals for the assessment years 2004-05 and 2005-06.

4. Briefly stated, the facts of the case are that a notice under section 148 of the Act was issued on 26-03-2010. In response to which the assessee has submitted vide letter dated 26.04.2010 that return filed u/s.

139(1) declaring total income of Rs. 1,29,054/- may be treated as filed in response to said notice under section 148 of the Act. There was a search u/s 132 of the Act carried out on 30.09.2008 in the case of Shri Bharat Kothari group of cases. During the course of search, a statement u/s 132(4) of the Income-tax Act, 1961, was recorded from the proprietors of M/s. Nikita Steels, M/s. Bharat Enterprises, M/s. Maa Enterprises, M/s. Harsh Enterprises, M/s. Saluja Enterprises, M/s. Sonam Steels and M/s. Pratik Enterprises (called as bill providers). In the statement recorded, they have admitted that they were indulged in the activity of receiving bogus bills, without making actual delivery of iron and steel. They had further confirmed this fact duly in sworn affidavits. They have also admitted that they had received cheques for bills and returned the entire amount to the parties by making cash withdrawals from the Bank by deducting nominal commission ranging from Rs. 10/- to Rs. 40/- per ton iron. During the course of post search enquiries, it was found that the assessee had declared purchase of iron and steel from the above parties. It is found that the assessee had shown purchases from the above entry providers for Rs. 3,14,50,484/-. Accordingly, the case was reopened u/s 147 and income was assessed on 28.12.2010 by considering the above bills as non-verifiable. Accordingly, the AO estimated 6% profit on the sale of Rs.3,14,50,484/-

and, accordingly, made an addition of Rs. 18,87,029/-. The AO further noted that the assessee has made cash purchases for which certainly he made investment from undisclosed sources, which were not recorded in the books of accounts. It was submitted by the assessee that if it is presumed that initial investment is made in cash for purchase of goods, and then there may be number of presumptions, such payments have been made as and when appropriated by Bharat Kothari Group. Thus, in absence of any evidence, presumption of initial investment will not be applied. However, the AO did not satisfy with the explanation of the assessee and observed that the onus is on the assessee to establish that the cash was first issued from Kothari Group of concerns against cheques payment for bogus bills issued and same was utilized for making payment for corresponding unrecorded purchases. Therefore, considering the nature of business of the assessee, the AO noted that it would be unjustifiable to make addition of the entire purchases, as there may be possibility of availability of cash, which has been received against the sale. As number of the peak credit is allowed to the assessee, the assessee has submitted a statement, according to which the peak investment was worked out at Rs.20,00,855/-. The AO also made addition of Rs. 62,90,096/- under section 40A(3) of the Act. Thus, the said amount was treated as

invested in purchases from undisclosed sources. The penalty proceedings u/s 271(1) (c) of the Act were initiated in respect of above addition. In reply to penalty show cause notice, the AO noted that it is not the case of a remission of profit as the assessee has submitted inaccurate particulars showing that the purchases were made from bogus bills providers, while purchases were made with alternative sources. The addition in profit was made considering the savings of the assessee by not paying sales tax and entry tax. While in the present case, no relief regarding addition for profit was allowed by any appellate authority. Thus, it is a clear-cut case of furnishing inaccurate particulars, as such the case laws relied upon by the assessee are also not applicable. Hon'ble I.T.A.T. also confirmed the addition made by the AO. Considering these facts, the AO levied penalty of Rs. 15 lakhs u/s 271(1) (c) of the Income-tax Act, 1961, as against minimum penalty @ 100% at Rs.14,83,456/-. Similarly, penalty of Rs. 5,25,000/- for A.Y. 2004-05 and Rs. 10 Lakh for the assessment year 2005-06 was levied by the AO.

5. The assessee carried the matter before the ld. CIT (A). The ld. CIT(A) noted that the assessee has preferred an appeal before the CIT(A), wherein the assessee has got relief on account of addition u/s 40A(3) amounting to Rs. 62,90,096/- and the addition on account of

investment and purchases amounting to Rs.20,00,855/- and addition of Rs. 18,87,029/- was confirmed. The assessee as well as Department filed an appeal before the Tribunal, wherein the Tribunal applied the decision in the case of M/s. Priya Steels, dated 26.07.2012 , being pari materia and upheld the addition on account of profit on purchases from entry providers amounting to Rs.18,87,029/- and deletion of addition of Rs.62,90, 096/- made u/s 40A(3) of the Act. However, the addition on account of initial investment amounting to Rs. 20,00,855/- was set-aside and the order of the AO was restored. Thus, in nut-shell, the Tribunal has confirmed the addition of Rs.18,87,029/- and Rs. 20,00,855/-. The ld. CIT (A) noted that the Tribunal has observed that it is not the case of the assessee that the entire alternative purchases made by the assessee has been added by the AO. The addition has been made only up to the date of working out peak investment. The ld. CIT (A) has further observed that the Tribunal has concluded the order of the CIT (A) was not correct to the extent of allowing setting off entire 6% profit, which was added in respect of purchases made from the Kothari Group against peak and unexplained investment worked out on a particular date. Therefore, the AO was directed to recompute the addition made on account of purchases made from Kothari Groups up to the date of working out unexplained investment on such purchase.

Further, it was directed that to that extent the set-off should be allowed. Therefore, the ld. CIT (A) observed that the AO should have given effect to the direction of I.T.A.T. before levying and deciding the quantum of penalty amount in view of the above. The ld. CIT(A) directed the AO to recompute the quantum addition with reference to the direction of I.T.A.T. within reasonable time framed and the quantum of penalty shall be considered as modified to that extent of difference worked out after recomputation. Accordingly, the action of the AO was confirmed with these directions.

6. Being, aggrieved the assessee filed this appeal before the Tribunal. The Ld. A.R. reiterated the submissions made before the ld. CIT(A). The Ld. Counsel for the assessee contended that the penalty order u/s 271(i) (c) has been passed in haste based on wrong facts. The AO stated in his order that the reply of the assessee is not acceptable. It is not the case of estimation of profit. Whereas the same AO rejected the books of accounts u/s 145 of the Income-tax Act, 1961. As per, para 5 of the assessment order and further stated before making addition that "As such it is clear that the amount in purchase bills are mentioned as per sweet will of the assessee and the same are not verifiable as such 6% profit rate on sale of Rs. 37,43,849/- is applied and accordingly, an addition of Rs. 2,24,630/- is made to the income of the assessee. In the instant case the addition has been made based on guesswork hence, the same cannot be subject matter of penalty for concealment of income. Penalty being a quasi-criminal proceeding it is the duty of the AO to establish the guilt of the assessee in concealing

the income or furnishing of inaccurate particulars of such income. The Ld. A.R. of the assessee relied upon the decision of I.T.A.T. Indore Bench in the case of M/s. Priya Steels [I.T.A. No. 481/Ind/2014 dtd. 16.05.2016] of the same group and wherein the I.T.A.T. Indore Bench has cancelled the penalty in the case of Priya Steels. The instant appeals are also covered by the decision of I.T.A.T. the Ld. A.R. further relied in the case of Shri Pankaj Kanwar v. ACIT [I.T.A. No. 692 & 693/Ind/2015 for assessment year 2005-06 and 2006-07 dtd. 5.4.2016] of tribunal Indore Bench and Shri Rajesh Gandhi [I.T.A. No. 403 to 406 for A.Y. 2003-04 to 2006-07 dtd. 26-10-2016] . The Ld. A.R. of the assessee conclude that there is neither any concealment of income nor furnishing of inaccurate particulars of income by the assessee. The ld. Authorized Representative of the assessee prayed that the impugned penalty in the instant case for all the years be cancelled.

7. On the other hand, the Ld. Sr. D.R. relied upon the orders of the lower authorities.
8. We have considered the facts and materials available on record. We have gone through the case laws relied upon the Ld. A.R. of the assessee and the decision of I.T.A.T. Indore Bench in the case of M/s. Priya Steels [I.T.A. No. 481/Ind/2014 dtd. 16.05.2016]. We find that the I.T.A.T. Indore Bench held as under :-

“10. We have heard the rival contentions of both the parties. Looking to the facts and circumstances of the case, we find that the assessee is a partnership firm doing the business of trading of steels. The books of accounts are audited u/s 44AB and quantitative details have been maintained by the assessee. A search u/s 132 was conducted at the premises of Bharat Kothari Group and during the course of statement Shri Mayur Kothari that they are issuing the bills without making any delivery of iron and steel. They further stated that they have received the consideration of such share by account payee cheques and after keeping the commission, amounts are returned. On the basis of this statement, the case of the assessee was reopened under Section 147 and

the AO has made the addition of profit on such bogus purchase @ 6%. The Tribunal has upheld the action of AO and the ld. CIT(A) for disallowance of 6% of purchase price in respect of accommodation bills of Kothari Groups. The 6% profit was estimated on estimate basis. The profit for such transactions have already been disclosed by the assessee. The additions have been sustained by the ld. CIT(A) and Tribunal by estimating the gross profit at 6% on these purchases and disallowance of expenditure of 6% on these purchases. The assessee has purchased the goods, which is undisputed fact. The Kothari Group might have arranged the bills but purchase cannot be treated as non-genuine, since the same quantity of goods have been sold by the assessee. We find that in the assessment order, the AO has estimated the profit of the assessee on the ground that during the course of assessment proceedings, the assessee has produced the quantitative tally, which shows that the assessee has sold the goods to other parties and issued the bills and amounts received from them through cheques. As such, it appears that the sales were actually made. As purchases were not made from the bills providers as it is and evident that the purchases were made from the third party. It is well known fact that there was levy of commercial tax @ 4% on billing price, which was one time levy at the time of import from out of M.P. or at the time of first sale after production within the state. The assessee has saved the amount equivalent to commercial tax by purchasing the goods without bills and obtaining the bills from bill providers showing M.A.C.T. paid goods purchases. The same modus operandi was adopted by Shri Piyush Gupta and in that case, it was found that there were some bills, which were not entered in the books, but the bills from the bills provide for the same added and quantities were entered into books and it was found that amount of bills of entry provider was higher than that of bills from which the goods were actually purchased. The purchase amount was mentioned as per sweet will of the assessee and the same are not verifiable and as such, 6% profit rate on sale was applied. From the order of the AO, we found that the AO has estimated the income on the bills issued by the assessee and the AO was of the view that the assessee has saved 4% commercial taxes. The Kothari Groups might have arranged the bills; the assessee has made purchases and same quantitative details have been shown. Therefore, the AO has estimated the income on pure guess work. The similar issue had come before the Hon'ble M.P. High Court in the case of CIT vs. Shivnarayan Jamnalal, (1998) 232 ITR 311 (MP), wherein the Hon'ble High Court has held that the books of accounts maintained by the assessee were not properly maintained and if assessee has not concealed any material and not tried to defraud the authorities, the

penalty cannot be levied, because the income was assessed on estimate basis. We found that similar case has come up before the Hon'ble Punjab and Haryana High Court in the case of Harigopal Singh vs. CIT, 258 ITR 85 (P&H), wherein it is held that it was a difference of opinion as regards the estimate of income of the assessee, it could not be said that the assessee has concealed the income so as to attract the provisions of Section 271(1)(c). In the instant case, the assessee has filed the return of income and which was reopened on the basis of the statement of Shri Mayur Kothari and on the basis of the statement, the assessee's income was estimated on the ground that the assessee has saved the commercial tax @4% and his income was estimated. In order to protect the clause (c) of Section 271(1) of the Act, it is necessary that there must be concealment by the assessee of particulars of his income or if he furnishes the inaccurate particulars of income. The assessee has maintained books of accounts and he has filed the return of income and during the course of search, the AO has estimated 6% profit on the ground that the assessee might have saved 4% of commercial tax by obtaining bogus bills. The assessee might have made purchases without bills. Therefore, the addition was made and income was estimated. Therefore, the addition was made on estimated basis. Therefore, we are of the view that the penalty cannot be levied."

9. We find that the above decision of the I.T.A.T., Indore Bench in the case of M/s. Priya Steels [I.T.A. No. 481/Ind/2014 dtd. 16.05.2016], Shri Pankaj Kanwar v. ACIT [I.T.A. No. 692 & 693/Ind/2015 for A.Y. 2005-06 and 2006-07 dtd. 05.04.2016] of Tribunal, Indore Bench and Shri Rajesh Gandhi [I.T.A. No. 403 to 406 for A.Y. 2003-04 to 2006-07 dtd. 26-10-2016] are squarely applicable to the instant case also. Respectfully following the previously mentioned decisions of I.T.A.T. Indore Bench, we cancel the penalty in all the years.

10. In the result, the appeals of the assessee is allowed for all three-assessment years.

II. The order has been pronounced in open court on 02.05.2017.

Sd/-
(चन्द्रमोहन गर्ग)
(CHANDRA MOHANGARG)
न्यायिक सदस्य
JUDICIAL MEMBER

Dated :02.05.2017

Sd/-
(ओ.पी.मीना)
(O.P.MEENA)
लेखा सदस्य
ACCOUNTANT MEMBER