# IN THE INCOME TAX APPELLATE TRIBUNAL
# MUMBAI BENCHES "D", MUMBAI

## BEFORE SHRI SAKTIJIT DEY(JUDICIAL MEMBER) AND SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

## ITA No. 6140 & 6141/MUM/2014
## Assessment Year: 2010-11 & 2011-12

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| ITO 14(1)(2)<br>2nd Floor, R.No. 204<br>Earnest House<br>Nariman Point<br>Mumbai- 400021 | Vs. | Diwa Exports<br>205 B Glitz Mall,<br>99 Vithalwadi Zaveri Bazar<br>Mumbai - 400002<br><br>PAN No. AAGFD0180N |
| **(Appellant)** | | **(Respondent)** |

Appellant by : Ms. Amrita Singh
Respondent By : Shri. Ketan L. Vajani
Date of Hearing : 16/08/2016
Date of pronouncement : 30/09/2016

**ORDER**

**PER N.K. PRADHAN, A.M.**

Both the appeals are filed by the Revenue. The relevant assessment years are 2010-11 & 2011-12. The appeals are directed against the order of the Commissioner (Appeals)-25 at Mumbai and arise out of the order passed under section 271(1|)(c) of the Income Tax Act 1961(here-in-after 'the Act') . In this batch of appeals, the controversy raised being similar, they were heard analogously and are disposed of by a common order.

2. The assessee is a manufacturer, importer and exporter of gold and gold jewellery. The assessee exports manufactured gold jewellery on behalf of foreign parties as per their instructions. Gold is received from these parties for manufacturing. The manufacturing unit is located at Noida Special Economic Zone (NSEZ), Noida , Uttar

Pradesh. During the AY 2010-11, the business income from NSEZ was declared by the assessee at Rs. 8,52,74,580/-. After claiming 100% deduction under section 10AA of the Act of Rs. 8,52,74,580/-, the total income was shown as NIL. Similarly for the AY 2011-12, the assessee declared the business income from NSEZ at Rs. 9,87,78,428/-. After claiming 100% deduction under section 10AA of Rs. 9,87,78,428/-, the total income was shown as NIL. The AO, during the course of assessment proceeding for A.Y. 2010-11, sent a show cause notice to the assessee dated 08/03/2013 stating the following-

> "1. From the profit and loss account submitted by you it is observed that you have paid salaries & bonus expenses of Rs. 10,98,121/- to 24 employees during the year for manufacturing more than 500 Kg of jewellery. Further, as per Fixed Assets statement enclosed with your balance sheet it is observed that Plant & Machinery worth Rs. 1,32,263/- is only used for the purpose of manufacturing. This shows that no sophisticated tools have been used by you for the purpose of manufacturing this jewellery. It is impractical to manufacture such a huge quantity of jewellery with such a low cost of labour. The electricity consumption is also low.
>
> 2.Furnish justification regarding claim of deduction u/s 10AA of the Income Tax Act, 1961...'

2.1 In response to the above, the ld. AR of the assessee submitted that the jewellery manufactured was handmade, not requiring sophisticated tools and the assessee had neither suppressed nor given any inaccurate particulars of income. There was no evidence of any expenses incurred or income earned which were not recorded in the books of account. Without prejudice to the above, it was submitted before the AO that it was impossible to quantify as to what would be the expenditure incurred towards salary, electricity and other expenses at the factory at SEZ. This would differ from assessee to assessee and it is a debatable issue. The proposed disallowance of deduction under section 10AA on such grounds would lead to prolonged litigation. It was finally submitted that the assessee with a desire to avoid litigation and to buy peace, *suo motu* and voluntarily, with a condition that there would be no penalty levied and to cooperate

with the Department, filed revised of return income offering additional income Rs. 1,25,00,000/- on *ad hoc* basis for A.Y. 2010-11 and Rs. 1,40,00,000/- for AY 2011-12 to be taxed by treating not having been earned in SEZ and having been spent towards business expenses in SEZ. The assessee filed revised computation of taxable income for the above assessment years and copy of challans evidencing tax payment on the revised return of income. The AO brought to tax the above amount under section 69C in the relevant assessment years. These facts are part of the record.

2.2 The AO, during the course of penalty proceeding under section 271(1)(c) of the Act, came to a finding that the assessee had filed return of income for the above assessment years declaring NIL income. Subsequently, the cases were selected for scrutiny and enquiries were conducted. Then the assessee filed revised return income offering additional income Rs. 1,25,00,000/- on *adhoc* basis for A.Y. 2010-11 and Rs. 1,40,00,000/- for AY 2011-12 to be taxed by treating not having been earned in SEZ and having been spent towards business expenses in SEZ. As per the AO, the revised return of income filed pursuant to notice issued under section 143(2) of the Act and after the enquiry conducted, indicate that the assessee had not furnished full particulars of its true income. Therefore, the AO concluded that the explanation of the assessee being not bonafide and the assessee having furnished inaccurate particulars of income had concealed the income. Therefore, the AO imposed a minimum penalty of Rs. 38,62,500/- for the AY 2010-11 and Rs. 43,26,000/- for the AY 2011-12. Assessee challenged the penalty orders before CIT(A).

2.3 The ld. CIT(A) relied on the judgment in the case of ***Suresh Chandra Mittal* (2000) 241 ITR 124 (MP)**, wherein it has been held that in the case of additional

income offered to buy peace and avoid litigation, no penalty could be levied for concealment. The said judgment was later upheld by the Hon'ble Supreme Court in **251 ITR 9(SC)**. He also relied upon the decision in the case of ***CIT vs. Careers Education and Infotech (Pvt .Ltd.)*** **(2012) 336 ITR 257 (P&H)** wherein it has been held that 'in every case where surrender is made, inference of concealment of income cannot be drawn under section 58 of the evidence Act'. As the AO failed to establish through evidence that the assessee had concealed its income, the ld. CIT(A) deleted the penalty of Rs. 38,62,500/- imposed for the AY 2010-11 and Rs. 43,26,000/- for the AY 2011-12.

3. The Ld. DR relied on the assessment order passed by the AO. She also relied on the decision in the case of ***Prem Pal Gandhi vs. CIT*** **(2011) 335 ITR 23 (P&H)**.

4. The ld. Counsel of the assessee referred to the decision in the case of ***Sudharshan Silk & Sarees vs. CIT*** **(2008) 300 ITR 205 (SC)**; ***Careers Education and Infotech (P) Ltd. ( supra)*** and ***Suresh Chandra Mittal (supra)***. He further stated that the assessee with a desire to avoid litigation and to buy peace voluntarily filed a revised return offering additional income of Rs. 1,25,00,000/- for the AY 2010-11 and Rs. 1,40,00,000/- for the AY 2011-12 on *ad hoc* basis to be taxed by treating not having been earned in SEZ and having been spent towards business expenses in SEZ. In view of the above, the ld. Counsel of the assessee supported the order passed by the ld. CIT(A).

5. We have carefully considered the matter. After considering the rival submissions and perusing the relevant material on record, we find that the assessee in response to the notice issued by the AO, offered additional income of Rs 1,25,00,000/- for the AY 2010-11 and Rs. 1,40,00,000/- for the AY 2011-12 on *ad hoc* basis to be taxed by

treating not having been earned in SEZ and having been spent towards business expenses in SEZ.

5.1 Now let us go through the decision in the case of ***Prem Pal Gandhi (supra)*** relied on by the ld. DR. In this case after assessment was completed, it came to the notice of the AO that the assessee had substantial transactions in Bank which were not disclosed. Proceedings were initiated for re-assessment. The assessee filed revised income and offered the peak credits in the bank account and interest thereon with the condition that no penalty be imposed. After following due procedure, penalty was imposed by the AO. The Hon'ble High Court dismissed the appeal filed by the assessee.

However, we find that the case of the assessee in the present appeal is distinguishable from the decision in the case of ***Prem Pal Gandhi(supra)*** relied on by the ld. DR, as in the instant case the assessment was not completed and the assessee offered during the course of assessment proceedings the additional income on *ad hoc* basis to be taxed.

5.2 We now turn to the decisions relied on by the ld. Counsel of the assessee. In the case of ***Sudharshan Silk and Sarees (supra)*****,** there was a disclosure of additional income in revised return after search and seizure. Revised return filed by the assessee declaring additional income for several years were accepted in toto. The Tribunal upheld the findings of the CIT(A) cancelling the levy of penalty under section 271(1)(c) holding that the assessments were made totally on the basis of estimated income disclosed in the revised return rather than on the basis of incriminating materials found during the search. The Hon'ble Supreme Court held that penalty under section 271(1)(c) was not exigible on the facts and circumstances of the case.

In the case of ***Careers Education & Infotech (supra)***, we find that the Hon'ble High Court observed " not only the survey team but during the course of assessment, the AO has all the materials before him to find out if there are any discrepancies which can be correlated to the amount of surrender made by the assessee. However, the AO has not uttered a single word in the assessment order to say that there was any concealment of income of assessee having noticed by the survey team or by the AO himself." It was held that there was no material to infer concealment of income or furnishing inaccurate particulars by the assessee, therefore, no penalty for concealment be levied under section 271(1)(c) merely because the assessee surrendered additional sum for taxation subsequent to survey operation.

In the case of ***Suresh Chandra Mittal (supra)***, revised return was filed by the assessee showing higher income. Assessee had surrendered the income after persistent queries by AO. However, the revised returns have been regularised by the Revenue. Explanation by the assessee that he has declared additional income to buy peace and to come out of vexed litigation could be treated as bonafide. It was held by the Hon'ble High Court that the Tribunal was justified in cancelling the penalty levied under section 271(1)(c). This decision has been upheld by the Hon'ble Supreme Court in ***CIT vs. Suresh Chandra Mittal(supra)***.

5.3 It has been held by the Hon'ble Supreme Court in ***Jain Bros. vs. Union of India*. (1970) 77 ITR 107, 116 (SC)** that though penalty has been regarded as an additional tax in a certain sense and for certain purposes, it is not possible to hold that penalty proceedings are essentially a continuation of the proceedings relating to assessment

5.4 Let us go back to the beginning. In the instant case, the assessments were made by the AO on the basis of estimated income disclosed in the revised return rather than on the basis of incriminating materials. The AO had no material before him to find out that the *ad hoc* estimated income offered by the assessee could be correlated with any discrepancy.

6. The present factual matrix is to be tested on the anvil of the above enunciation of law. In the light of the decision in the case of ***Sudharshan Silk and Sarees; Careers Education & Infotech; and Suresh Chandra Mittal*** referred here-in-above and the facts being similar, we uphold the order passed by the ld. CIT(A) for the A.Y. 2010-11 and A.Y. 2011-12.

7. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 30/09/2016.

Sd/- Sd/-

(SAKTIJIT DEY) (N.K. PRADHAN)
JUDICIAL MEMBER ACCOUNTANT MEMBER

Mumbai; Dated:30/09/2016

AKV(On Tour)

**Copy of the Order forwarded to :**

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
**ITAT, Mumbai**