

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA No.266/SRT/2017

(निर्धारणवर्ष / Assessment Years: (2011-12)

(Virtual Court Hearing)

Bharatkumar Tulsibhai Patel, 13,B/2, Shanti Niketan Appartment, Sumul Dairy Road, Katargam, Surat.	Vs.	The ITO, Ward-3(3)(1), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: BAFPP1490M		
(Assessee)		(Respondent)

Assessee by : None.

Revenue by : Ms Anupama Singhla, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 27/04/2021

घोषणाकीतारीख/Date of Pronouncement: 19/05/2021

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee pertaining to assessment year (AY) 2011-12, is directed against the order passed by the Learned Commissioner of Income Tax(Appeals)-3 [in short “the Id. CIT(A)”], Surat in Appeal No.CAS-3/260/2015-16 dated 27.09.2017 which in turn arises out of penalty order passed by the Assessing Officer under section 271(1)(c) of the Act (hereinafter referred to as “the Act”). Grievances raised by the assessee are as follows:

- “1. The learned CIT (A) erred in confirming levy of penalty of Rs.6,18,760/- u/s.271(1)(c) of the Act.*
- 2. The appellant reserves right to add, alter and withdraw of any grounds of appeal.”*

2. Brief facts *qua* the issue are that during the assessment year under reference, the assessee had shown gross receipts from civil contract job work at Rs.12 crore and net profit from it at Rs.4,06,433/-. The information received from the DDIT(Inv.), Gurgaon dated 09.09.2013 revealed that M/s. PACL Ltd. (PACL India Ltd.),New Delhi has claimed fictitious land development

expenditure through the so-called contractors and out of which, the assessee is one of them. On the basis of this information, the AO had recorded the statement on oath of the assessee u/s.131 of the Act in which,-the-assessee had admitted that he had not undertaken any contract work for M/s. PACL Ltd., and even no business activity carried out during the year under reference. Further, the assessee had stated that he had earned commission @Rs.0.30 per Rs.100/- on the said fictitious transactions recorded in his books of account and received total amount of commission of Rs.3,50,000/-. During the assessment proceedings, the assessee was requested to furnish the details of labour expenses paid to various parties alongwith their confirmation. However, the assessee did not submit the details like present address of parties, TDS details, confirmation and return of income filed by the said parties for verification of the said labour expenses. Therefore, to verify the genuineness of said labour expenses, AO had issued notice u/s.133(6) of the parties but were received returned. The AO had rejected the claim of the assessee in respect of commission received @ 0.30% and had estimated the commission income @10% which was Rs.1,20,00,000/- being commission earned for providing book entry of Rs.12 crore to M/s. PACL Ltd. and added to the total income of the assessee. For this addition penalty proceedings u/s.271(1)(c) were also initiated. For which, penalty show cause notice u/s.274 r.w.s. 271(1)(c) was issued on 26.03.2014 and was duly served upon the assessee on 29.03.2014 along with assessment order passed u/s. 143(3) of the Act.

3. Aggrieved by the assessment order, the assessee had preferred an appeal before the CIT(A). The CIT(A) has sustained addition of Rs.20,46,592/- as against the addition of Rs.1,20,00,000/- made by the AO on account of commission income and balance amount of commission amounting of Rs.99,53,408/- has been deleted. Since, the CIT(A) has sustained the addition of Rs.20,46,592/- made on account of commission income, therefore Assessing Officer held that penalty required to be levied u/s.271(1)(c) of the Act on said sustained addition. Therefore, the Assessing Officer was of the view that the assessee has concealed his income to the extent of Rs.20,46,592/-, therefore he levied penalty under section 271(1)(c) at Rs.6,18,760/-.

4. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A) who has confirmed the penalty imposed by Assessing Officer under section 271(1)(c) of the Act, observing as follows:

“7. DECISION

7.1 *I have perused the penalty order, CIT (A) order in quantum appeal and the AR rival contentions and verbal arguments .The Ld.CIT(A) has given partial relief in the quantum appeal.*

7.2 *The operative portion of the appellate order of my predecessor in appellant's own case, in quantum appeal decided on 07.05.2015 is reproduced below:-*

"7.2 At the outset, it needs to be mentioned that accommodation entries can be of different types and the quantum of commission will depend on the nature of accommodation entries provided, the benefit derived therefrom and the logistics/ involved. Accommodation entries are provided for bogus profit in the form of fictitious capital gain. Accommodation entries are also provided for bogus share capital, bogus share capital, bogus unsecured loan, non-existent sales, non-existent purchases, and bogus expenses. In the present appeal, it is for bogus expenses. The benefit derived therefrom is tax avoidance of approximately 30% of the amount of accommodation entries. Therefore, the benefit derived from accommodation entries by M/s PACL India Ltd is approximately 30% of Rs.12,00,00,000/-. The estimation of commission @10 % by the assessing officer is 1/3rd of the said benefit, which is excessive and cannot be considered a reasonable estimate.

7.3 On the other hand, the estimate by the appellant at 3% translates to 1% of the benefit derived, which is too low to justify the nature of activities and the risk undertaken by the appellant. Considering the same, the commission in the case of the appellant for giving accommodation entries is estimated at 2% on Rs.1,20,00,000/-. This translate to about 6.7% of the benefit derived by M/s PACL India Ltd and therefore, is a reasonable estimate. As a result, the estimate made by the assessing officer at Rs.1,20,00,000/- is reduced to Rs.24,00,000/- subject to para 8 of this order."

7.3 *From the above, the underreporting or concealment of commission income to the extent of Rs.20,46,592 is confirmed. The Id. CIT(A) has given a clear finding that the rate of commission shown (0.3%) is too low and it does not justify the nature of activities & risk undertaken. I have perused the explanation/submission of assessee reproduced in para 6 above, and I find no merit in the same. The explanation neither establishes that there was no concealment nor does it furnish any reasonable cause. I view of this, the appeal of assessee fails. The penalty is confirmed to the extent leviable on Rs.20,46,952/- which is the concealment in this case.*

8. *In the result, the appeal is dismissed.”*

5. Aggrieved by the order of the Id. CIT(A), the assessee is in appeal before us.

6. We have heard both the parties and carefully gone through the submissions put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the facts of the case including the findings of the Id. CIT(A) and other material brought on record. We note that Assessing Officer has levied the penalty on the estimated addition made by him. From the above order of Id. CIT(A), as mentioned in para no.4 of this order, it is abundantly clear that Id. CIT(A) has also confirmed the penalty levied by Assessing officer under section 271(1)(c) of the Act, based on estimate only. We note that penalty on estimated addition are not sustainable in the eye of law. For that, we rely on the judgment of the Coordinate Bench of Surat in ITA No.293 & 294/AHD/2005 for AY.1988-89 & 1989-90, order dated 13.04.2021 wherein it was held that penalty under section 271(1)(c) cannot be levied on additions made on estimation. The observations of the Coordinate Bench are as follows:

“11. We have noted that the assessee while filing return of income for assessment year 1988-89 on 20.06.1988 declared loss in the form unabsorbed depreciation of Rs.22,48,941/-. The assessment was completed under section 143(3) on 29.05.1992. The assessing officer while passing the assessment order assessed total income of the assessee at Rs. Nil and also allowed carry forward of unabsorbed depreciation. It is an admitted fact that the assessing officer while passing the assessment order rejected the books of accounts and estimated the gross profit @10% turnover by passing the flowing order:

“The assessee failed to produce books of accounts from which the G.P. position can be verified. The assessee does not maintain quantitative tally stock as is evident from the report of the auditors in form No.3CD. Therefore, provisions of section 145(1) are applicable and the G.P. is required to be estimated. I, therefore, worked out at Rs.29,16,850/- as against this G.P. shown was Rs.10,29,291/-. The difference of Rs.18,87,559/- is therefore, added in the total income of the assessee for low G.P.”

12. On second appeal before the Tribunal in ITA No.186/Ahd/1998 dated 08.03.2004 the additions restricted the addition @ 5% of Gross Profit. Considering the fact that addition in the assessment order, on the basis of which the penalty was levied, is purely an estimated addition. It is settled position in law that no penalty under section 271(1)(c) can be levied on additions made on estimation. The similar view was taken by the Hon'ble Jurisdictional High Court in Manish Dhirajlal Mehta Vs. ACIT, Vijay Proteins Ltd., Vs. CIT (supra), in Vijay Proteins Vs CIT (supra) and other case laws relied by Id. AR

for the assessee. No contrary facts or law is brought to our notice. In the result, Ground No.1 of appeal is allowed.

13. In the result, appeal of the assessee is allowed on ground No.1 itself.

ITA No.294/Ahd/2005 for A.Y. 1989-90:

14. As noted by the assessee has raised identical grounds of appeal in 293/Ahd/2005 for A.Y. 1988-89, which we have allowed, therefore, following the principle of consistency, the appeal for A.Y.1989-90 is also allowed with similar observation.

ITA's No.2141/Ahd/2013 & 2142/Ahd/2013 for A.Y. 1988-89 and 1989-90:

15. Considering the fact that while adjudicating the appeal in ITA No. 293 & 294/AHD/2005, deleted the penalty levied by the AO under section 271(1)(c) of the Act, granting full relief to the assessee. Therefore, the appeals in ITA's No.2141/ Ahd/2013 for A.Y. 1988-89 & 2142/Ahd/2013 for A.Y.1989-90 have become infructuous and accordingly dismissed.”

7. None appeared on behalf of the assessee. We have heard ld. Departmental Representative (in short “the ld. DR”) of the Revenue and noted that the issue under consideration is no longer *res integra*, penalty imposed by Assessing Officer on estimated addition is not sustainable in the eye of the law, therefore respectfully following the decision of the Coordinate Bench (supra), we delete the penalty under section 271(1)(c) of the Act.

8. In the result, the appeal filed by the assessee is allowed.

Order is pronounced on 19/05/2021 by placing result on Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

सुरत /Surat
दिनांक/ Date:19/05/2021
SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat