

**आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत**  
IN THE INCOME TAX APPELLATE TRIBUNAL  
SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, Hon'ble JUDICIAL MEMBER  
AND Dr. ARJUN LAL SAINI, Hon'ble ACCOUNTANT MEMBER

(Virtual Hearing)

**आ.अ.सं./I.T.A No's.293 & 294/AHD/2005**

**निर्धारण वर्ष/Assessment Years: 1988-89 and 1989-90**

Gipilon Texturising Pvt. Ltd, 10-C, Brijkutir brijwasi Estate, Nr.Nidhi Complex, Parle Point, Op.Umrigar School, Surat – 395 007. <b>[PAN: ABEPP 6880 C]</b>	Vs	The Income Tax Officer, Ward-1(2), Surat.
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

**आ.अ.सं./I.T.A No's.2141 & 2142/AHD/2013**

**निर्धारण वर्ष/Assessment Years: 1988-89 and 1989-90**

Gipilon Texturising Pvt. Ltd, 10-C, Brijkutir brijwasi Estate, Nr.Nidhi Complex, Parle Point, Op.Umrigar School, Surat – 395 007. <b>[PAN: ABEPP 6880 C]</b>	Vs	The Income Tax Officer, Ward-1(2), Surat.
अपीलार्थी / Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओर से /Assessee by	Shri Manish Shah – Advocate
राजस्वकीओर से /Revenue by	Smt. Usha Shrote – Sr. DR

सुनवाई की तारीख/ Date of hearing:	13.04.2021
उद्घोषणा की तारीख/Pronouncement on:	13.04.2021

**आदेश / O R D E R**

**PER PAWAN SINGH, JUDICIAL MEMEBER:**

1. These four appeals by assessee, out of which first two appeals (ITA (s) No. 294 & 294/AHD/2005 are directed against the common order of ld. Commissioner of Income Tax (Appeals)-1, Surat hereinafter referred as “ld. CIT(A)” dated 08.12.2004, which in turn arise against the penalty levied by assessing officer under section 271(1)(c) for A.Y. 1988-89 and 1989-90. Other

remaining two appeals in ITA(s) No, 2141 & 2142 are directed against the order of ld. CIT(A)-1, Surat dated 12.06.2013 and 27.05.2013 for similar assessment years.

2. Brief back ground history of the cases is that initially, the assessee challenged the common order of ld. CIT(A) dated 08.12.2004 for AY 1988-89 & 1989-90, in appeal in ITA's No.293 & 294/AHD/2005. The assessee assailed the order of ld. CIT(A) by raising two substantial grounds of appeal; (i) that ld CIT(A) erred in confirming penalty of Rs. 2,47,900/-, when there was no concealment of income and (ii) in alternative and without prejudice that penalty is not leviable in view of decision of Special Bench of Ahmedabad Tribunal in ITA No.284/Ahd/2004 (in ACIT Vs. Apsara Processors Pvt. Ltd.). The appeals came up hearing before Tribunal and after hearing the submissions of the parties, both the appeal were adjudicated vide order dated 01.04.2005. The Tribunal while adjudication the appeals of the allowed both the appeal of the assessee on ground No.2 by following the decision of special bench in ACIT Vs Apsara Processor Pvt Ltd (supra), wherein the Special Bench held that when the loss declared in the return of income is reduced or converted into income, before the amendment by Finance Act, 2002, it cannot be held that the penalty under section 271(1)(c) can be levied where the assessed income is loss. Since, the

assessee was granted full relief for directing to delete the penalty; therefore ground No.1 was rendered academic. The revenue challenged the order of Tribunal in appeal before the Hon'ble Gujarat High Court, where the order of the Tribunal dated 01.04.2005 was upheld. However, on further appeal by the Revenue before the Hon'ble Supreme Court, the order of the Tribunal was reversed vide order dated 04.09.2012 in Civil Appeal No. 577 of 2007 & others. On receipt of the order of Hon'ble Apex Court the assessing officer while giving effect to the order of Apex Court restored/ revived the order of penalty dated 21.09.2004, vide his order dated 05.12.2012. The assessee challenged the order dated 05.12.2012 before Id. CIT(A), which was dismissed vide order dated 12.06.2012( AY 1988-89). Similar appeal for AY 1989-90 was dismissed by Id CIT(A) in order dated 27.05.2013. The assessee has challenged the order dated 12.06.2013 and 27.05.2013 in ITA No. 2141 & 2142/AHD/ respectively.

3. Thereafter, the assessee filed Miscellaneous Applications (M.A.) No.231 & 232/ AHD/2012 for fixing the appeals in ITA No. 293 & 294/AHD/2005 for adjudication of ground No.1. The M.A. No.231/Ahd/2012 and 232/Ahd/2012 were allowed vide detailed order dated 08.01.2021 and accordingly both the

appeals were fixed for hearing for adjudication of appeal of Ground No.1.

4. While passing the order of M.A.(s) on 08.01.2021, this Bench noted that original files of ITA's No.293 & 294/Ahd/2005 were not available and, therefore, directed the registry to reconstitute the file after seeking appropriate order from Hon'ble Vice-President, ITAT Ahmedabad Zone. The registry made proposal/request to Hon'ble Vice-President, ITAT Ahmedabad Zone for necessary permission for reconstitution of file. The Hon'ble Vice-President, ITAT Ahmedabad Zone was pleased to approve the proposal of reconstitution of duplicated file vide order dated 24.03.2021.
5. On receipt of order of Hon'ble Vice-President, ITAT Ahmedabad Zone, for reconstitution of file, the Ld. Authorised Representative (AR) of the assessee was directed to file copies of assessment orders of A.Y. 1988-89 and 1989-90, penalty orders for both the years and the order passed by the ld.CIT(A). The ld. AR for the assessee furnished the copy of all these desired orders. The ld. DR for the revenue was also directed to cross check the copies of those orders with the copies of official orders and to place on record the certified copies of all those orders i.e. assessment order for A.Y. 1988-89 and penalty order and order passed by the ld.CIT(A) dated 08.12.2004. On the direction of Bench, the

Ld. Sr. DR for the revenue furnished the attested copies of all desired order along with grounds of appeal raised by the assessee in ITA(s) No. 293 & 294/AHD/2005. In view of the aforesaid back ground, the duplicate file was reconstituted and the cases were fixed for hearing afresh on ground No.1 for both the assessment years.

6. We have noted that facts for both the years, leading to levy of penalty are identical, except for variations of figure of amount of penalty levied under section 271(1)(c), the ld CIT(A) while passed common order for both assessment years, therefore , with the consent of parties the appeal in ITA No.293/AHD/2005 for A.Y. 1988-89 is treated as lead case.

**ITA No.293/Ahd/2005 for A.Y. 1988-89:**

7. At the outset of hearing, the Ld. AR of the assessee submits that though the assessee has raised two separate sets of appeal for both the assessment years i.e. 1988-89 and 1989-90. The Ld. AR for the assessee further submits that in case his points of submissions are accepted in ITA's No.293 & 294/Ahd/2005, the appeals in ITA's No.2141/Ahd/2013 & 2142/Ahd/2013 will become infructuous.
8. On merit, the Ld.AR of the assessee submits that the Assessing Officer (AO) while passing the assessment order rejected the books of accounts of assessee and estimated the Gross Profit

(GP) @ 10% of turnover. On appeal before the ld. CIT(A), the addition was upheld. However, on further appeal before the Tribunal the addition was restricted to GP @ 5% of Gross Profit for both the assessment years vide order dated 08.03.2004 in ITA(s) No.186 & 187/Ahd/1998. The copy of order of the Tribunal is placed on record. In the aforesaid background, the Ld. AR for the assessee submits that it is settled law that no penalty is leviable on addition made on estimated basis. To buttress of his submission, the Ld.AR of the assessee relied upon the following decisions;

- ❖ Manish Dhirajlal Mehta Vs ACIT in Tax Appeal No.461 & 464 of 2000 and 833 & 836 of 2005 dated 05.02.2014 (Gujarat High Court);
- ❖ Vijay Proteins Ltd., Vs CIT (Income Tax Reference No.139 of 1996), (Gujarat High Court);
- ❖ Awadhesh Bansiraj Pandey Vs ITO (ITA No.4784/ Mum/2018) Mumbai Tribunal and
- ❖ DCIT Vs Anil J Kothari ( 2048/Ahd/2010), Surat Tribunal.

9. On the other hand, the Ld. Sr.DR for the Revenue submits that he strongly relied on the order of Assessing Officer (AO) and Ld. CIT(A). In alternative submissions the ld. SR DR for the revenue submits that the assessing officer rejected the books of accounts of the assessee and made fair addition @ 10% of GP, though, it was restricted by Tribunal to 5% of GP, thus, the assessee is liable to saddle with the penalty on such additions and the matter may be restore to the assessing officer for passing order afresh.

10. We have considered the rival submission of both the parties and have gone through the order of Lower Authorities. We have also deliberated on various case laws relied by the Id. AR for the assessee. We have also perused the contents of the order of Tribunal in quantum assessment appeals in ITA No(s). 186 & 187/Ahd/1998 dated 08.03.2004, the order of Tribunal dated 01.04.2005 and the order passed by Hon'ble Apex Court dated 04.09.2012 in Civil Appeal No. 577 of 2007.
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 following 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 ld. 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 infractious and accordingly dismissed.

16. In the result ITA(s) No. 293 & 294/AHD/2005 are allowed and ITA (s) No. 2141 & 2142/Ahd/2013 are dismissed.

Order pronounced on 13<sup>th</sup> April 2021 at the time of hearing of appeal.

**Sd/-**

(Dr. ARJUN LAL SAINI)

(लेखा सदस्य/ACCOUNTANT MEMBER)

**Sd/-**

(PAWAN SINGH)

(न्यायिक सदस्य/JUDICIAL MEMBER)

सुरत/ Surat, दिनांक Dated: 13<sup>th</sup> April 2021 / #SGR

Copy of order sent to-

Assessee /AO/Pr. CIT/CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat