

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री ए.डी. जैन न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI A.D. JAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 171 & 172/JP/2015
निर्धारण वर्ष / Assessment Years : 2004-05 & 2009-10

M/s Zuberi Engineering Company, 2835, Jogiyon Ka Tiba, Phuta Khurra, Jaipur.	बनाम Vs.	D.C.I.T., Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAFZ 2103 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Anil Sharma (CA)
राजस्व की ओर से / Revenue by : Shri R.A. Verma (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 07/09/2016
उद्घोषणा की तारीख / Date of Pronouncement : 09/09/2016

आदेश / ORDER

PER: A.D. JAIN, J.M.

These are the assessee's appeals for A.Y. 2004-05 and 2009-10 filed against the order dated 30/12/2014 passed by the Id. CIT(A)-I, Jaipur contending that the Id. CIT(A) is not justified in confirming the penalty of Rs. 2,50,540/- levied on the assessee U/s 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act'), in respect of trading addition and lump sum disallowance of expenses.

2. **ITA No. 171/JP/2015:** The facts of the case are that, in the case of assessee firm for the year under consideration, vide order dated 15/12/2006 passed U/s 143(3)/144 of the Act, the Id Assessing Officer made the following additions, completing the assessment at a total income of Rs.65,27,030/-.

S. No.	Additions/disallowances	Amount
1	Addition of Unsecured Loans U/s 68	19,00,000/-
2	Addition towards purchases of hydra cranes U/s 69C	19,18,176/-
3.	Trading addition by application of G.P. rate of 14% against that of 11.3% declared by the assessee on total contract receipt of Rs. 70689475/-	19,11,162/-
4	Disallowance of expenses	5,00,000/-
	Total additions made	62,29,338/-

3. The Id. CIT(A) vide order dated 24/3/2008, gave relief to the assessee as follows:-

S. No.	Additions/disallowances	Amount
1	Addition of Unsecured Loans U/s 68	Nil
2	Addition towards purchases of hydra cranes U/s 69C	5,68,176/-
3.	Trade addition by application of G.P. rate of 12% against that of 11.3% declared by the assessee on total contract receipt of Rs. 70689475/-	4,97,361/-
4	Disallowance of expenses	Nil
	Total additions sustained	10,65,537/-

4. Against the relief granted by the Id. CIT(A), the department approached the ITAT by way of an appeal. During the pendency of that

appeal, vide order dated 30/03/2009, the Id Assessing Officer levied a penalty of Rs. 3,82,261/- U/s 271(1)(c) of the Act, in respect of the additions of Rs. 10,65,537/-, as confirmed by the Id. CIT(A). In the penalty appeal, the Id. CIT(A), by virtue of order dated 4/12/2009, sustained the penalty in respect of addition of Rs. 5,68,176/-, whereas the penalty in respect of trading addition of Rs. 4,97,361/- was deleted.

5. On 23/7/2014, the Id Assessing Officer passed an order U/s 154 of the Act, observing therein, inter alia, as follows:-

"Now, the assessee, through his A/R has moved an application u/s 154 on 15.07.2014 stating there in that the penalty u/s 271(1) (c) has been imposed twice on additions Rs. 5,68,176/- made u/s 69C on account of purchase of Hydro Crane in order u/s 271(1) (c) of the Act dated 31.03.2009 and also in order dated 01.10.2010. As the mistakes are apparent from record, assessee had requested that penalty imposed on addition of Rs. 5,68,176/- u/s 69C in order dated 01.10.2010 may be reduced to that extent.

On going through the record and as per the application, assessee's contention are found to be true. As discussed supra it is noticed that the penalty

was imposed twice on account of addition u/s 69C of Rs. 5,68,176/- in both the penalty orders. As the mistake is apparent from record and falls under purview of section 154, the same is hereby rectified u/s 154 of the Income Tax Act by reducing the penalty imposed twice and penalty of the assessee is recomputed as under:

Total Concealed income as determined by the A.O.

In order u/s 271(1)(c) of the Act, 1961: Rs. 12,65,549/-

Less: Addition u/s 69C considered twice as

Discussed above : Rs. 5,67,176/-

Total revised concealed Income : Rs. 6,98,373/-

Tax on concealed income : Rs.2,50,540/-"

6. Meanwhile, vide order dated 28/08/2009, the Tribunal restored the quantum matter to the file of the Id Assessing Officer, directing the Assessing Officer to verify the correctness of the documents filed by the assessee before the Id CIT(A) and to decide the issues raised in the grounds of appeal afresh.

7. The Id. Assessing Officer passed order dated 01/10/2010, giving effect to the aforesaid ITAT order dated 28/8/2009. The Assessing

Officer assessed the total income of the assessee at Rs. 15,63,250/-, making the following additions:

S. No.	Additions/disallowances	Amount
1	Additions towards purchases of hydra cranes U/s 69C	5,68,176/-
2	Trading addition by application of G.P. rate of 12% against that of 11.3% declared by the assessee on total contract receipt of Rs. 7,06,89,475/-	4,97,361/-
4	Disallowance of expenses	2,00,000/-
	Total addition made	12,65,549/-

The assessee did not prefer any appeal against the assessment order dated 01/10/2010.

8. Pursuant to the above additions, the Id Assessing Officer levied a penalty of Rs. 4,54,015/- vide order dated 29/4/2011.

9. However, as observed hereinabove, vide order dated 23/07/2014 passed U/s 154 of the Act, the penalty in respect of the addition towards purchases of Hydra Cranes U/s 69C, amounting to Rs. 5,68,176/-, was deleted. The penalty with regard to addition by application of G.P. rate of 12% as against that of 11.3% declared by the assessee on the total contract receipts of Rs. 7,06,89,475/-, amounting to Rs. 4,97,373/-, and

qua the disallowance of expenses amounting to Rs. 2.00 lacs was sustained.

10. The order dated 23/7/2014, passed U/s 154 of the Act was appealed against before the Id. CIT(A) by the assessee and the CIT(A), by virtue of the impugned order dated 30/12/2014, dismissed the same.

11. Aggrieved, the assessee is in further appeal.

12. The only grievance raised by the assessee through the Id. Counsel for the assessee and as also stated in the sole ground raised is that the penalty was illegally imposed in respect of a trading addition and lump sum disallowance of expenses, which was illegally sustained by the Id. CIT(A).

13. The Id. Sr.DR on the other hand, has placed strong reliance on the impugned order.

14. Having heard the rival submissions in the light of the chequered history of the case and the material placed on record, it is seen that it remains undisputed and patent on record that the penalty in question has been levied with regard to a trading addition of Rs. 4,97,393/- by application of G.P. rate of 12%, as against that of 11.3%, as declared by

the assessee on total contract receipts of Rs. 7,06,89,475/-. The penalty has also been levied on lump sum disallowance of expenses amounting to Rs. 2.00 lacs. The question is as to whether the levy of penalty on both these counts is sustainable in law.

15. In the case of 'CIT Vs. Mahendra Singh Khedla', (2013) 33 taxmann.com 666 (Raj), it has been held that the additions based on estimation only cannot attract levy of concealment penalty, observing that a fact or allegation based on estimation cannot be said to be correct only, it can be incorrect also.

16. In the case of 'CIT Vs Krishi Tyre Retreading & Rubber Industries', (2014) 44 taxmann.com 9 (Raj), it has been held that where the addition has been sustained purely on estimate basis and no positive fact or finding has been found so as to even make the said addition, no penalty is leviable U/s 271(1)(c) of the Act.

17. No decision to the contrary has been cited before us. Therefore, respectfully following the decisions in the case of 'CIT Vs. Mahendra Singh Khedla' and 'CIT Vs Krishi Tyre Retreading & Rubber Industries', (supra), the penalty imposed with regard to the addition of Rs. 4,97,373/-, made by application of G.P. rate of 12% as against that of

11.3% declared by the assessee on total contract receipts of Rs. 7,06,89,475/-, is deleted.

18. So far as regards the levy of concealment penalty on the disallowance of expenses amounting to Rs. 2.00 lacs, it has been contended on behalf of the assessee that there is no positive evidence or finding on record to show that the assessee has claimed bogus and false expenses, or that the assessee has overstated the expenses; that it is the mere inability of the assessee to support its claim by complete vouchers, which, undeniably, are impossible to maintain, considering the nature of the expenses, like staff and labour welfare, vehicle repair and maintenance, conveyance, entertainment and office expenses, etc., which has attracted the penalty, though the same is not leviable for this very reason, no concealment at the hands of the assessee having been proved.

19. Per contra, the Id. Sr.DR has contended that the expenses claimed were duly test checked on a random basis and it was found that the assessee had miserably failed to get the same verified; and that, therefore, the penalty was rightly levied on the lump-sum addition made by disallowing the expenses to the tune of Rs. 2.00 lacs.

20. In this regard, it cannot be disputed that it is well nigh impossible to maintain the vouchers for each and every item of expenditure incurred, particularly when the expenditure is in the nature of the expenses claimed by the assessee, i.e., entertainment, conveyance, office, etc. It is only a case where the claim of expenditure was not accepted by the revenue. In such a case, in the case of 'Reliance Petro Products Pvt. Ltd.' 189 taxman 322 (SC), it has been held that concealment penalty is not leviable.

21. The decision in the case of 'Reliance Petro Products Pvt. Ltd.', (supra) has also not been successfully rebutted by the department before us. The same is squarely applicable to the facts of the present case. Therefore, respectfully following the decision in the case of 'Reliance Petro Products Pvt. Ltd.', (supra), the penalty levied on the addition of the lump-sum addition of Rs. 2.00 lacs representing disallowance of expenses, is also deleted.

22. In the result, the appeal of the assessee is allowed.

23. **ITA No. 172/JP/2015**: This is the assessee's appeal for A.Y. 2009-10 contending that the Id. CIT(A) is not justified in confirming

the penalty of Rs. 1.00 lac levied U/s 271B of the Act, for not getting the books of account audited, as required U/s 44AB of the Act.

24. The Id. Counsel for the assessee has stated at the bar that he does not wish to press this appeal. Therefore, this appeal is dismissed as not pressed.

25. In the result, ITA No. 171/JP/2015 is allowed, whereas ITA No. 172/JP/2015 is dismissed as withdrawn.

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

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

Sd/-
(ए.डी जैन)
(A.D. Jain)
न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 09th September, 2016
*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Zuberi Engineering Company, Jaipur.
2. प्रत्यर्थी / The Respondent- The D.C.I.T., Circle-2, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 171 & 172/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar