

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD
BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

ITA No.258/Ahd/2020
Assessment Year :2012-13

Gujarat Smelting & Refining Co. Ltd. 2706/2, Mahavir Nagar Naroda Road Ahmedabad 380 060. PAN : AAACG 7566 L		ITO, Ward-2(1)(1) Ahmedabad.
---	--	---------------------------------

(Applicant)		(Responent)
--------------------	--	--------------------

Assessee by :	None
Revenue by :	Shri Ashok Kumar Suthar, Sr.DR

सुनवाई की तारीख/Date of Hearing : 22/08/2023
घोषणा की तारीख /Date of Pronouncement: 29/08/2023

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

The present appeal has been filed by the assessee against the order of Id.Commissioner of Income-tax (Appeals)-2, Ahmedabad [hereinafter referred to as "Id.CIT(A)"] dated 24.1.2020 passed under section 250(6)of the Income Tax Act, 1961 [hereinafter referred to as "the Act" for short] for the assessment year 2012-13 confirming the levy of penalty under section 271(1)(c) of the Act by the AO.

2. None appeared on behalf of the assessee at the time of hearing. From the perusal of the order sheets, it reveals that the appeal of the assessee was listed for hearing on as many as seven occasions i.e. from 21.6.2022 till today i.e. 22.8.2023, but assessee or its authorized representative remained non-present. Therefore, due to continuous absence of the assessee in the hearing before the Tribunal, we proceed to dispose of the case by hearing the Id.DR and considering the material available on record.

3. Brief facts emerging from order of the Revenue authorities are that during assessment proceedings on verification of the details furnished by the assessee, the AO noted that the assessee had shown inflated purchases at Rs.8,03,84,097/-, and some of the purchases allegedly made from Shanti Smelting and Laxmiraj Metal & Alloys P.Ltd., to the tune of Rs.,77,01,535/- and Rs.4,77,18,955/- were found to be bogus. In view of irregularities found in the books of accounts, the AO show caused as to why the books of accounts of the assessee be not rejected, for which the assessee agreed thereto, and accordingly, the AO re-computed the business profit of the assessee at Rs.6,99,941/- as against net business loss returned by the assessee of Rs.(-)2,17,93,121/-. The AO treated the difference of these two amounts, being Rs.2,25,42,873/-, as concealed income and levied penalty under section 271(1)(c) of the Act on the same.

4. Before the Id.CIT(A), the assessee challenged the levy of penalty contending that it was made on estimated addition, and therefore, there was no concealment of income. The Id.CIT(A), however, noted that it was not a simple case of estimation of income; that the AO had specifically arrived at a finding that the assessee had booked bogus purchases to the tune of Rs.8.03 crores and

therefore had rejected the books results of the assessee and estimated its profits. He, therefore, held that the assessee had failed to show true and correct income, and the penalty therefore was rightly levied. His findings in this regard at para 4.4 to 4.8 of the order are as under:

4.4. The appellant merely contended that the penalty is not leviable on estimated addition and there was no concealment and the actual profit on sale of property was not reduced from the assessed income.

The appellant relied on various case laws but after careful

consideration of the same I found that the facts of the cases relied upon by the appellant are different and distinguishable from the case of appellant. So far in the case of appellant bogus purchase was found, books results were rejected and business profit was recomputed for which the appellant agreed also. During the appellate proceeding the AR informed that the appellant had not filed any appeal on this issue before the CIT(A) against the addition made on account of rejection of books of accounts and recomputing the business profit.

4.5. It is noted that the AO has given specific finding after making proper enquiry that the some purchases are bogus and the corresponding creditors also bogus and accordingly after recording proper reasons rejected the books of accounts and recomputed the profit and the appellant also accepted the discrepancies and agreed for addition before the AO. In view of the above factual discussion the contention of the appellant is not tenable as the AO had levied the penalty on business loss only and had not levied any penalty on capital gain.

4.6. It is the statutory duty of the appellant to record all his transaction, investment, expenditure and income in the books of account along with the sources of payments and receipt and to declare its true income in the return of Income filed in every year.

4.7. There are ample judicial pronouncements wherein it has been held that even surrendering of income or filing of revised return does not absolve the assessee from the applicability of penalty proceedings u/s 271(1)(c) of the Act. Some of these are as under :

(a) In this regard, the following observations of Hon'ble Supreme Court in the case of K.P. Madhusudhanan [2001] 118 Taxman 324 (SC) are relevant :---

"The assessee is, therefore, by virtue of the notice under section 271 put to notice that if he does not prove, in the circumstances stated in the Explanation that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No express invocation of the Explanation to section 271 in the notice under section 271 is necessary before the provisions of the Explanation therein are applied. The High Court was, therefore, justified in reversing the Tribunal's order cancelling the penalty under section 271(1)(c)."

(b) The Hon'ble Supreme Court in the case of MAK Data (P.) Ltd. [2013] 38 taxmann.com 448 (SC) has dealt with the concealment penalty and held that --

"The Assessing Officer, shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', 'amicable settlement', etc. to explain away its conduct.

The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between reported and assessed income.

The burden is then on the assessee to show otherwise, by cogent and reliable evidence.

When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the revenue to show that the amount in question constituted the income and not otherwise.

Assessee has only stated that he had surrendered the additional sum with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department.

Statute does not recognize those types of defences under the Explanation 1 to section 271(1)(c). It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings under section 271(1)(c). The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty

The surrender of income on this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the Assessing Officer in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary.

Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year.

The Assessing Officer, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271, read with section 274.

The Assessing Officer has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the Assessing Officer is not required to record his satisfaction in a particular manner or reduce it into writing.

In this case the Apex Court has also reaffirmed the principle laid down in the case of *Dharmendra Textile Processors [2008] 13 SCC 369* and *CIT v. Atul Mohan Bindal [2009] 9 SCC 589*. In the case of *Dharmendra Textile* the Hon'ble Supreme Court has observed that the penalty under the said section is a civil liability. Willful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of prosecution under section 276C. While considering an appeal against an order made under section 271(1)(c) what is required to be examined is the record which the officer imposing the penalty had before him and if that record can sustain the finding there had been concealment, that would be sufficient to sustain the penalty."

4.8. It is undisputed fact that the appellant recorded bogus purchase and thereby inflated the purchase and claimed the bogus loss. Therefore, the appellant miserably failed to show true and correct income in the books of account maintained. It is only after investigation and verification the appellant accepted the bogus purchase. In view of the legal position and facts and circumstances of the case as narrated above, it is held that the appellant has willfully furnished the inaccurate particular and thereby concealed the income therefore the AO is completely justified in levying penalty u/s 271(1)(c) of the Act thus the same is confirmed.

6. Aggrieved by the same, the assessee has come up in appeal before us raising the following grounds:

“The Ld. AO has erred in law by levying penalty u/s 2711 c of Rs. 69,97,590 on estimated net profit without identifying the facts of the case and real nature of transactions involved, that estimation resulted into taxable profit of only Rs 6,99,941 due to set off of loss and tax effect was negligible. The Ld CIT A has erred by confirming the same.”

7. As is evident from the grounds raised before us, the assessee has challenged levy of penalty on merits and on the ground that the addition made by the AO resulted only in taxable profits of Rs.6,99,941/- and tax effect there was negligible.

8. As far as the merits of the case are concerned, we have gone through the order of the Ld.CIT(A) and we do not find any reason to interfere in the same. It is not disputed that the assessee was found to have booked bogus purchases to the tune of Rs.8,03,84,097/- and for this reason his books had been rejected and profits estimated thereon. Therefore, we agree with the finding of the Ld.CIT(A) that the assessee had concealed true particulars of his income, and it is, therefore, a fit case for levy of penalty under section 271(1)(c) of the Act.

9. As regards grounds raised by the assessee regarding quantum of income assessed by the AO at Rs.6,99,941/- penalty if any could have been levied only on the tax evaded vis a vis the income assessed, we find that, facts as noted by the Ld.CIT(A) in para 4.3 of his order is that the assessee had returned net business loss of Rs.(-)2,17,93,121/- which the AO in turn had assessed at a positive income of Rs.6,99,941/-. The resultant difference of amount of

Rs.2,25,42,873/- was accordingly treated as concealment of income on account of furnishing inaccurate particulars and subjected to tax. The facts not being disputed before us, and being substantiated by the assessment order also, the huge loss converted into profits were liable for levy of penalty as per the provisions of law. *Explanation 4* to Section 271(1)(c) of the Act takes care of the situation where the loss returned by the assessee are converted into profits, explaining that the tax sought to be evaded in such a situation, for quantifying the amount of penalty leviable, would include the losses so reduced /converted into profits.

For clarity, the provisions of section 271(1)(c), *Explanation 4* is reproduced as under:

271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—

(a)

(b)

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income

(d)

he may direct that such person shall pay by way of penalty,—

(i).....

(ii).....

(iii) in the cases referred to in clause (c) in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of concealment of particulars of income or the furnishing of inaccurate particulars of income

.....

.

.

.

.

Explanation 4.—For the purposes of clause (iii) of this sub-section,—

(a)

(b) where in any case the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, the amount of tax sought to be evaded shall be determined in accordance with the

8

formula specified in clause (a) with the modification that the amount to be determined for item (A - B) in that formula shall be the amount of tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

10. In view of the above provision of law, requiring levy of penalty even on the loss, which is either reduced on account of assessment or converted into profits, there is no error, we hold, in the order of the Id.CIT(A) confirming the levy of penalty on the portion of the loss converted into profits in the present case amounting to Rs.(-) 2,17,93,121/-.

In view of the above, the grounds raised by the assessee are rejected and the appeal of the assessee is dismissed.

11. In the result, the appeal of the assessee is dismissed.

Order pronounced in the Court on 29th August, 2023 at Ahmedabad.

**Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER**

**Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER**

Ahmedabad, dated 29/08/2023