

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `C': NEW DELHIA**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND
SHRI K.D. RANJAN, ACCOUNTANT MEMBER**

I.T. A. No.1390/Del/2011
Assessment Year : 2001-02

Global Green Company Limited,
Thapar House, 124, Janpath
New Delhi.
PAN/GIR No.AAACR0635H.

Vs.

Dy. Commissioner of I. Tax,
Circle-12(1), New Delhi.

(Appellant)

(Respondent)

Appellant by : Shri P.C. Yadav, Advocate &
Shri Akhil Mahajan, CA.

Respondent by : Shri Satpal Singh, Sr. DR.

ORDER

PER K.D. RANJAN, ACCOUNTANT MEMBER:

This appeal by the assessee for Assessment Year 2001-02 arises out of the order of the Commissioner of Income-tax (Appeals)-XV, New Delhi.

The grounds of appeal raised by the assessee are reproduced as under:-

“1. That the order of the learned Commissioner of Income Tax (Appeals) is bad in law and on facts.

2. That on the facts and under circumstances of the case, the penalty imposed by the learned Assessing Officer and confirmed by the learned Commissioner of Income-tax (Appeals) is barred by limitation in view of the express provisions of proviso to section 275 sub-sections (1) of the Income-tax Act, 1961.

3. That on the facts and circumstances of the case, the penalty order passed by the learned Assessing Officer as confirmed by the learned Commissioner of Income-tax (Appeals)-XV is not tenable as the requisite satisfaction, as discussed by the Hon'ble Delhi High Court in the case of Madhushri Gupta reported in 317 ITR 107, has not been recorded by the learned Assessing Officer in the body of assessment order.

4. That the learned Commissioner of Income-tax (Appeals) has erred in law and on facts in sustaining the penalty Rs.23,92,060/- levied under section 271(1)(c) of the Act by the learned Assessing Officer on account of disallowance and consequential addition made to the total income in respect of Non-saleable/Damaged Stock written off in the Profit & Loss account during the year under appeal.

5. That on the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) has failed to appreciate that the claim of the appellant vis-à-vis write off of Non-saleable/Damaged Stock in the Profit & Loss account is a bonafide claim inasmuch as the said claim has been approved by the statutory auditors and whereas the similar claim has already been allowed by the revenue in subsequent year.

6. That on the facts and circumstances of the case, the learned Commissioner of Income-tax (Appeals) was wrong in imposing penalty u/s 271(1)(c) of the Act in a case where the Appellant Company has not concealed particulars of Income and/or furnished inaccurate particular of income in respect of Non-saleable/Damaged Stock Rs.59,43,008/- written off in accounts.

7. That without prejudice to Ground No.6, and on the basis of facts and circumstances of the case, the learned Commissioner

of Income-tax (Appeals) has erred in applying Explanation 1 to section 271(1)(c) of the Act on Appellant Company.

8. That the order of the learned Assessing Officer imposing penalty is also not sustainable in view of the fact that the end result of assessment was loss and for the impugned year, the law as it stood at the relevant time, was that no penalty was leviable in loss cases.

8. That the learned Commissioner of Income-tax (Appeals) has failed to appreciate that the Appellant Company did not challenge the order in quantum appeal further as it had huge accumulated losses and it was not likely to gain even the Appellant Company had succeeded in quantum proceedings by spending on litigation.”

2. The only issue for consideration relates to sustaining the penalty of Rs.23,92,060/- under sec. 271(1)(c) of the Act. Brief facts of the case are that the assessee had made a provision of amount of non-saleable goods of Rs.59,43,008/-. The assessee had debited the above provisions made in the profit & loss account. In the assessment order under sec. 143(3) the Assessing officer had observed that the above provision was in respect of liability which was not ascertained. Moreover, no evidence regarding the above amount which was debited in the profit & loss account was filed during the assessment proceedings. In view of the above the AO disallowed the amount of Rs.59,43,008/-.

3. On appeal the learned CIT(A) upheld the addition. The assessee filed an appeal before ITAT. ITAT vide order dated 12-09-2008 after considering the facts and circumstances of the case, upheld the action of the AO.

4. During the course of penalty proceedings the AO invoked the provisions of Explanation 1 to sec. 271(1)(c) of the Act. Since the assessee had tried to suppress its taxable income by claiming the expenditure for which there was no evidence and also since it was not allowable under the provisions of Income-tax Act, penalty u/s 271(1)(c) was imposable. The AO relying on the decision of Hon'ble Supreme Court in the case of Union of India vs. Dharmendra Textiles Processors, 306 ITR 277 imposed the penalty.

5. During the course of appellate proceedings before the CIT(A) it was submitted that the assessee company debited a sum of Rs.59,43,008/- on account of provision for non-saleable/damaged stock. It was submitted that the sum represented the actual write off of non-saleable stock in the ordinary course of business and did not represent any provision. It was also submitted that the assessee was engaged in the business of processing and selling of food products for the purpose of export and the food products processed and packaged by the assessee company were perishable in nature; bearing the date of expiry beyond which they could not be sold; and hence

non-saleable/expired stock needed to be discarded. It was also submitted that in the business of food processing the assessee company has to comply with several legal requirements like Food Products Order (FPO), 1955 – Section 3 of the Essential Commodities Act, 1955 provides for regulation of sanitary and hygienic conditions in manufacture of fruit and vegetable products. Meat Food Products Order (MFPO), 1973 – section 3 of the Essential Commodities Act, 1955 also aims to ensure supply of wholesome meat food products to the consumers. Food Safety and Standards Act, 2006 aims to achieve a high degree of consumer confidence in the quality and safety of produced, processed, sold or exported food. Further since products were mainly exported in USA, the assessee had to comply with the FDA regulations which are one of the most stringent requirements in the world. The assessee has to ensure that the food products which were exported out of India, were fit for human consumption and were not expired or unfit for human consumption. In order to meet the requirements the assessee had to discard the products which were not fit to be consumed. The caps and cartons which were unusable due to change in customer's specifications, change in brand name or difference in quantities also became unusable and had to be written off. Also packing materials were supplied by the suppliers in pre-defined minimum lots and in most of the cases various components

parts were not supplied in matching quantities as they were supplied by different parties. This left the company with unmatched quantities of components which could not be used and have to be written off. It was further submitted that the assessee had disclosed all relevant facts in Schedule 21 of the Audited Accounts the provisions for doubtful debts, claims, advances and provision for non saleable/damaged stocks. The assessee vide submission dated 11th February, 2004 and 19th March, 2007 had submitted the item-wise details in regard to the goods discarded/damaged or non useable.

6. It was further submitted that the Assessing Officer or Appellate Authority had not allowed the above expenditure merely on the pretext that the expenditure was mere provision for decrease in the value of asset and computation of such loss of inventory was not based on expert opinion. The learned AR of the assessee further submitted that there was a complete disclosure of the amount written off on account of the obsolete inventory in the course of assessment and appellate proceedings. The AO made additions in respect of amounts written off on account of difference of opinion as guided by its subjective satisfaction of his on the facts of the case. Since complete disclosure was made, it could not be concluded that the assessee had furnished inaccurate particulars of income. Rather it is a case of

difference of opinion on debatable/arguable issue. It was also submitted that provisions of Explanation 1 to sec.271(1)(c) are not applicable. Neither the assessee has failed to provide an explanation nor was the explanation furnished by the assessee found to be false. Further it is also not a case where explanation offered stands unsubstantiated or found to be lacking bona fide. Since the assessee had offered plausible explanation and his explanation has not been found to be false, nor it is a case of the AO that Clause B of Explanation 1 was to be attracted. Therefore, explanation offered by the assessee is bona fide and no penalty u/s 271(1)(c) is leviable. The assessee has placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd., 322 ITR 158.

7. The learned CIT(A) however, noticed that the assessee has not written off the value of these stocks and the assessee has simply made the provisions on this account. Nothing is mentioned regarding scrap value of these items. The learned CIT(A) rejected the contention of the assessee and confirmed the penalty u/s 271(1)(c) by holding that the explanation offered by the assessee was not bona fide.

8. Before us the learned AR of the assessee submitted that the assessee has written off the amount of non-saleable products. He further submitted that the assessee is eligible for deduction u/s 10B of the Act. Therefore,

there was no incentive for the assessee to write off the non-saleable and damaged goods. The assessee has debited non-saleable and damaged goods in the profit & loss account which have actually been written off. It is not a case of mere provision. However, the AO brushed aside the submissions of the assessee and made two observations i.e. the assessee has debited a provision in respect of liability which was not yet to be ascertained and secondly, the character of this loss was nothing but basically a provision for decrease in the value of assets. The learned AR of the assessee further submitted that the findings of the AO in assessment order are contradictory since on one hand, he says that loss is nothing but decrease in the value of asset and on the other hand, it is alleged that the provision is in respect of unascertained liability. The diminishing in the value of asset can never be termed as liability and if the same is not a liability the question whether the liability is ascertained or unascertained, would not arise.

9. The learned AR of the assessee relying on the decision of Hon'ble Delhi High Court in the case of Madhu Shree Gupta, 317 ITR 107, submitted that the AO while initiating penalty proceedings has not recorded his satisfaction. Therefore, the order passed by the AO is without jurisdiction.

10. The learned AR of the assessee further submitted that during the course of penalty proceedings the assessee has given details of each and every obsolete stock (Pages 44 to 49 of the Paper Book filed by the assessee) gathered from respective units incharge of the factory. Hence, the assessee's claim is bona fide. The AO as well as CIT(A) had not brought on record anything to prove that the details furnished by the assessee in respect of obsolete stock were wrong or bogus. It has further been submitted that the assessee's contention from the very beginning that the food products manufactured by the assessee are highly priced and the same are saleable in the market only after the approval of the Government agencies. The explanation offered by the assessee has been rejected by the AO without proving that the same was false and while doing so the AO has relied on the order of ITAT in the quantum proceedings. He further submitted that penalty proceedings are separate from the assessment proceedings and the findings arrived at in quantum may have persuasive value but the same are not conclusive for levy of penalty. He placed reliance on the decision of Hon'ble Calcutta High Court in the case of CIT vs. Bimal Kumar Damini, 261 ITR 857 and the decision of Hon'ble Delhi High Court in the case of CIT vs. J.K. Synthetics Ltd., 219 ITR 267.

11. The learned AR of the assessee further submitted that entries have been passed in the books of account in a bona fide manner and as per guidelines of the auditors there was no case of penalty. Penalty u/s 271(1)(c) is discretionary and as is evident from the fact that the legislature has used the word “may” and same is not automatically invoked in each and every case particularly in a case where entire income of the assessee is exempt u/s 10B of the Act. He placed reliance on the decision of Hon’ble Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa, 83 ITR 26. He also placed reliance on the following decisions:-

1. ITAT Delhi in the case of Prem Arora in ITA No.4702/Del/2010 dated 08-03-2010;
2. Escort Finance, 188 Taxman 87;
3. Zoom Communication, 327 ITR 510;
4. CIT vs. Reita Biscuits Co. Pvt. Ltd., 309 ITR 154 (P&H);
5. ITAT Mumbai in the case of Sanghvi Swiss Refill in ITA No.3893 of 2007, order dated 7.05.2010.

12. On the other hand, the learned Sr. DR submitted that quantum has been upheld by the Tribunal and therefore, penalty u/s 271(1)(c) is exigible. He accordingly supported the order of the CIT(A).

13. We have heard both the parties and gone through the material available on record. During the course of penalty proceedings the assessee

had filed details of material and stock written off which are placed at Pages 44 to 50 of the Paper Book filed by the assessee. The assessee is engaged in the business of export of food products which are subject to various laws such as Essential Commodities Act, 1955, Fruit Products Order, 1955 & Meat Food Products Order, 1973. The AO has stated that the stock written off as provision is in the nature of unascertained liability. The AO on one hand says that the loss is nothing but decrease in the value of assets and on the other hand, it is alleged that the provision is in respect of unascertained liability. If it is case of decrease in value of assets, the closing stock has to be valued at cost price or market price, whichever is less. The assessee had identified certain stocks summary of which is placed at page 44 of the Paper Book. It is also a fact that in food processing industry the material whose selling life has expired or unfit for human consumption has to be written off. The value of closing stock written off cannot be treated as unascertained liability. In fact the trading assets which have become un-saleable, the value thereof has to be taken at nil. During the course of assessment proceedings the assessee could not file details of closing stock written off. Because of this reason the quantum addition has been upheld upto the level of ITAT. On scrutiny of items written off, the first item is carton stock written off of Rs.3,51,616/-. The details contain certain food products such as sauce,

gherkins, hamburg, tify mango sauce etc. The other items are olive flavour, cans of strawberry, Rasberry, black current, orange marm, chocolate sauce etc. It is a settled law that assessment proceedings and penalty proceedings are separate proceedings and findings arrived at in quantum appeal may have persuasive value but the same are not conclusive for levying penalty. Hon'ble Delhi High Court in the case of CIT vs. J.K. Synthetics Ltd., 219 ITR 267, has held that in quantum appeal there was no finding of the Appellate Tribunal that the claims made by the assessee were not bona fide or that there was any fraud or gross or willful neglect on its part. Moreover, the proceedings for imposition of penalty and assessment proceedings are two separate and independent proceedings and, therefore, separate and distinct provisions have been enacted in the statute for initiation of the same. Therefore, the findings recorded by the Tribunal in the quantum appeal cannot be said to be decisive. In the penalty proceedings the Tribunal had not found that the assessee had concealed the particulars of its income or had furnished inaccurate particulars of its income. There was no error apparent from the record which had to be corrected. Hon'ble Calcutta High Court in the case of CIT vs. Bimal Kumar Damani, 261 ITR 857, has held that the observations made by the Appellate Tribunal in quantum proceedings are not a finding for the purpose of penalty proceedings. The findings of

Tribunal in quantum proceedings are not binding in penalty proceedings. Therefore, the quantum addition sustained by the Tribunal cannot be a conclusive evidence for levy of penalty. Hon'ble Supreme Court in the case of Hindustan Steel Ltd. vs. State of Orissa, 83 ITR 26 has held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

14. In the case of assessee the assessee has written off the un-saleable food products and also some of the packing material which became un-useable because of change of product etc. During the course of penalty

proceedings when the assessee had filed the details of the stock written off, neither the AO nor the CIT(A) had found out any discrepancy or anything suggesting that the claim was not bona fide. The assessee has written off various items because those products could not be sold in the market being hazardous to the health. Moreover, the assessee was exporter of the goods, the profit there from would have been exempt under sec. 10B of the Act. Therefore, no motive can be attached to prove that the assessee by writing off of the stock wanted to reduce the tax liability. The quantum addition has been upheld upto Tribunal but it would not mean that penalty should be imposed automatically. The AO in view of decision of Hon'ble Supreme Court in the case of Hindustan Steel Ltd. (supra) is not bound to levy penalty automatically simply because the quantum addition has been sustained. Further in order to attract penalty, there should be concealment of income or furnishing of inaccurate particulars of such income. Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. (supra) has held as under:-

“A glance at the provisions of section 271(1)(c) of the Income-tax Act, 1961, suggest that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word “particulars” used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee

cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, nor according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”

15. If the facts of the case are decided in the light of the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (supra) we find that the assessee during the course of penalty proceedings has given details of stock written off, the addition was confirmed on the ground that the assessee had not given the details of the stock written off. The un-saleable goods have been written off in the books of account. The entries made in the books of account by the assessee are bona fide and cannot be said to be furnishing of inaccurate particulars of his income. Merely because quantum addition has been sustained, penalty u/s 271(1)(c)

cannot be imposed automatically. Therefore, in our considered opinion it is not a fit case for levy of penalty.

16. The assessee had also challenged that in the assessment order the AO has not recorded finding that there was concealment of income. He has placed reliance on the decision of Hon'ble Delhi High Court in the case of Madhu Shree Gupta while examining the constitutional validity of sub-sec.1B of section 271(1)(c) has held that the presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e., post-amendment. The AO while disallowing the amount of Rs.59,43,008/- in the assessment order, has held that the assessee had debited a provision of Rs.59,43,008/- to the profit & loss account with respect of a liability which was yet to be ascertained. The assessee did not produce any evidence whatsoever of writing off of the said amount in the books of account. The character of this loss was nothing but basically a provision for decrease in the value of assessee's assets. The AO while completing the assessment has not mentioned a word that there was furnishing of inaccurate particulars or concealment of income. The AO had made addition merely on the ground that the assessee was not able to produce any evidence for writing off of the amount in the books of account.

Therefore, the satisfaction that the assessee had concealed income or furnished inaccurate particulars of such income is not discernible from the assessment order. Hence the penalty order suffers from lack of jurisdiction to impose penalty.

17. In view of above discussion, in our considered opinion, penalty u/s 271(1)(c) is not exigible and accordingly the penalty imposed by the assessee is cancelled. The AO is directed to allow the relief to the assessee.

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

18. This decision is pronounced in the Open Court on 13th July, 2012.

Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER

Sd/-
(K.D. RANJAN)
ACCOUNTANT MEMBER

Dated: 13th July, 2012.

Copy of the order forwarded to:-

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

By Order

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Deputy Registrar, ITAT.