

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 7643/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2010-11)

Balaji Motion Pictures Ltd. C-13, Balaji House, Dalia Industrial Estate , New Link Road , Mumbai-400 053	बनाम/ v.	DCIT 4(3) ,CR-4, Mumbai
स्थायी लेखा सं./PAN : AADCB0840R		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri. Snehal Shah
Revenue by :	Shri. Rajat Mittal

सुनवाई की तारीख /**Date of Hearing** : **21.12.2017**

घोषणा की तारीख /**Date of Pronouncement** : **03.01.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 7643/Mum/2016 for assessment year 2010-11 is directed against the appellate order dated 02.09.2016 passed by learned Commissioner of Income-tax (Appeals)-52, Mumbai (hereinafter called "the CIT(A)") for assessment year 2010-11, appellate proceedings had arisen before learned CIT(A) from the penalty order passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"The appellant objects to the order dated 24/11/2015 issued by the DCIT, Central Circle 4(3),CR-4, Mumbai, passed u/s 271(1)(c) of the Income Tax Act, 1961 on the following amongst the other grounds:

1. *The Learned Assessing Officer has erred in levying penalty of Rs 65,130/- u/s 271(1)(c) of the Income Tax Act 1961 without appreciating the facts of the case in the right perspective.*
2. *The Learned Assessing Officer has erred in not giving the appellant an opportunity to cross examine the third party for verifying the correctness of their admission.*
3. *The ground of appeal is without prejudice to the other.*
4. *The appellant reserve the right to amend, alter or add to the grounds of appeal.”*

3. The brief facts of the case are that the assessee is part of Balaji group and is engaged in the business of production of TV serials and films. The search and seizure action u/s. 132(1) of the 1961 Act was carried out by Revenue against the Balaji Group on 30.04.2013 by DDIT (Inv.) , Mumbai. The assessee was covered under the said search operations conducted by Revenue u/s 132(1) of the 1961 Act. The major allegation against the Balaji Group was that they had inflated their purchases by getting accommodation entries from bogus parties. A statement on oath u/s 132(4) of the 1961 Act was recorded of Smt. Shobha Kapoor , Director of the assessee company w.r.t. alleged bogus purchases wherein she admitted on oath to an additional income in respect of bogus/unproved purchases to the tune of Rs. 10,64,34,202/- in hands of Balaji Telefilms Limited. The assessee filed original return of income on 15.10.2010 declaring a loss of Rs. 9,18,35,203/- . Subsequent to search carried out by Revenue u/s 132(1) on 30-04-2013 , notice u/s 153A of the 1961 Act was issued by Revenue on 27-11-2013 , and the assessee in response thereof filed letter dated 02.04.2014 requesting to consider return of income originally filed on 15.10.2010 declaring total loss of Rs. 9,18,35,203/- as return of income filed u/s 153A in pursuant to search u/s. 132(1) of the Act.

The Revenue made addition of Rs. 2,16,441/- while framing quantum assessment w.r.t. alleged bogus purchases made by the assessee from M/s. Somu Textile Pvt. Ltd. on the grounds that the alleged purchases were bogus purchases and were merely an accommodation entries wherein only bills were issued by the said party without supplying any material physically. The person under whom said Somu Textile Private Limited was under control namely its Director Shri. Jagdish Mundra was also searched by Revenue u/s 132(1) being part of the search on Balaji group and gave statement on oath u/s. 132(4) on 13.05.2013 , wherein in response to question no. 9 , he stated on oath as under:-

“Sir, as stated in response to previous question, all these companies were either incorporated or purchased by Shri Ritesh Burad who then lends these concerns to me. These are basically shell/paper/bogus concerns through which I give accommodation entries pertaining to sale and purchase of textile to various genuine concerns. No genuine business activity is carried out in any of the 17 concerns mentioned in response to question no. 9.”

The said concern Somu Textile Private Limited was registered at the residential address of the said Mr. Jagdish Mundra, Director of Somu Textile Private Limited. As per the AO, the assessee was not able to bring on record any evidence to demonstrate the genuineness of the transaction for the alleged purchases, and hence the A.O brought to tax by making an addition of a sum of Rs. 2,16,441/- as bogus purchases being unexplained expenses / accommodation entries, vide assessment order dated 19.05.2015 passed by the AO u/s. 143(3) r.w.s. 153A of the 1961 Act, wherein the income assessed was loss of Rs.9,16,18,762/- as against returned loss of Rs. 9,18,35,203/- .

The penalty proceedings u/s 271(1)(c) were initiated by the AO for furnishing of inaccurate particulars of income leading to concealment of income. The assessee submitted that additions have been made merely based on the statement of third party whose name appeared in the list of suspected dealers of Maharashtra VAT authorities and who was mainly defaulter with the VAT department having defaulted on the payment of VAT to the Government. It was submitted that the assessee actually purchased the material as is referred to in the bills issued by said dealer namely Somu Textiles Private Limited in the ordinary course of business. It was submitted that the statement of third party is not backed with any incriminating material or any document which could substantiate that the purchases made by the assessee were bogus. The assessee submitted that it has submitted all bills from suppliers, delivery challans, lorry receipts, entries in inward/outward register lying at godown. It was submitted by the assessee that the statement u/s 132(4) was recorded of third party namely Sh Jagdish Mundra Director of Somu Textile Private Limited which was neither backed with cogent incriminating evidences nor there were any incriminating evidences with Revenue which could establish that purchases were not genuine. It was also submitted that the said statement was also not confronted to the assessee nor an opportunity was granted to the assessee to rebut the said statement of Sh. Jagdish Mundra. It was also submitted by the assessee that the cross examination of Sh. Jagdish Mundra,

Director of Somu Textile Private Limited was not allowed to the assessee . It was also submitted that the aforesaid bill of Rs. 2,16,441/- was forming part of the disclosure made in the hands of Balaji Telefilms Ltd. . It was also submitted that the assessee has neither claimed any such expense nor dealt with M/s. Somu Textile Pvt. Ltd. . Thus, the assessee submitted that it has neither submitted any inaccurate particulars of income nor concealed particulars of income and hence the penalty proceedings initiated against the assessee by Revenue u/s 271(1)(c) be dropped . The A.O rejected the contentions of the assessee and held that M/s. Somu Textile Pvt. Ltd. is bogus concern which is indulging in providing accommodation entries. The AO observed that it was admitted by Shri. Jagdish Mundra, Director of Somu Textile Private Limited in an statement recorded on oath u/s 132(4) that no genuine business activity was carried out by this entity. It was observed by the AO that the assessee was found to have availed the benefits of accommodation entry to the tune of Rs. 2,16,441/- and the assessee is not able to bring evidence on record to prove genuineness of the transaction and hence there is a conscious concealment of income by the assessee. The AO levied penalty of Rs. 65,130/- u/s. 271(1)(c) for concealing the particulars of income and furnishing of inaccurate particulars of income vide penalty order dated 23-11-2015 passed by the AO u/s 271(1)(c) .

4. The assessee filed first appeal before the learned CIT-A . The learned CIT(A) invoked explanation (1) r.w. explanation 5A to Section 271(1)(c) of the Act, and confirmed the penalty . However , it is observed by us on being pointed out by learned counsel for the assessee before us that learned CIT-A has confirmed the penalty of Rs. 25,35,260/- as against the penalty of Rs. 65,130/- levied by the A.O , which appears to be a typographical error . The learned CIT-A held that the assessee had made bogus purchases without actual delivery of goods and amount was surrendered by the assessee as well that Sh. Jagdish Mundra, Director Somu Textile Private Limited has also affirmed in statement on oath recorded u/s 132(4) that the said concern was only issuing bogus bills without supplying any material.

5. The assessee has come in an appeal before the tribunal and Ld. Counsel for the assessee has vehemently argued the case before the Bench wherein it was submitted that there was a search and seizure operations conducted by Revenue u/s. 132(1) of the Act in the case of Balaji Group of Companies on 30.04.2013 and the assessee was also searched by Revenue u/s 132(1) on 30-04-2013. It was submitted that there were allegations of bogus purchases to the tune of Rs.

2,16,441/- by the assessee from M/s. Somu Textile Pvt. Ltd. wherein it is alleged that the said concern has only issued bills without supplying any material to the assessee. It was submitted that the penalty of Rs.65,130/- was levied by the AO u/s 271(1)(c) with respect to the said alleged bogus purchases from Somu Textile Private Limited. It was submitted that additions have been made on the basis of statement on oath recorded of Shri. Jagdish Mundra Director of M/s. Somu Textile Pvt. Ltd. u/s. 132(4) on 13.05.2013 wherein he submitted in response to question no. 9 that his concern only issued bogus bills without supplying any material to the assessee , as under:

“Sir, as stated in response to previous question, all these companies were either incorporated or purchased by Shri Ritesh Burad who then lends these concerns to me. These are basically shell/paper/bogus concerns through which I give accommodation entries pertaining to sale and purchase of textile to various genuine concerns. No genuine business activity is carried out in any of the 17 concerns mentioned in response to question no. 9.”

It is submitted by learned counsel for the assessee that the said statement of Sh. Jagdish Mundra was not confronted to the assessee nor said Sh. Jagdish Mundra was made available before the assessee for cross examination despite being asked by the assessee. It was submitted that assessee has not made any disclosure/surrender for the impugned A.Y and he submitted that assessee has made disclosure of Rs. 4 lacs for A.Y 2013-14 and ld. Counsel for the assessee brought to our notice page 4 of the assessment order wherein details of the voluntary disclosure of income made by the assessee was mentioned by the AO. The said assessment order dated 19-05-2015 passed by the AO u/s 143(3) r.w.s. 153A is placed in the file. It was submitted that it was a different company namely Balaji Telefilms Limited which made the voluntarily disclosure of Rs. 10.64 crores from AY 2007-08 to AY 2013-14 with respect to the bogus purchases including purchases made from M/s. Somu Textile Pvt. Ltd. .Our attention was drawn to page 4 of the assessment order wherein details of the surrender/voluntary disclosure of income made by Balaji Telefilms Limited found mentioned. It was submitted that the assessee has duly purchases cloth from Somu Textile Private Limited and duly submitted supporting documents like bill, delivery challans , lorry receipt , entries in inward/ outward register lying at Godown . It was submitted that the assessee did not filed any appeal against the quantum order of the assessment passed by the AO keeping in view smallness of the amount as also because there were huge losses of more than Rs. 9 crores claimed by the assessee

and ultimately losses were reduced by this small addition in quantum and no liability to pay taxes arose due to this small addition of Rs. 2,16,441/-. Our attention was drawn to page no. 11 of paper book wherein statement of Smt. Shobha Ravi Kapoor Director of the assessee recorded on oath u/s. 132(4) on 2.05.2013 is placed , wherein she made voluntarily disclosure of Rs. 10,64,34,202/- towards bogus purchases made from AY 2007-08 to AY 2013-14 in the hands of M/s BTL. It is explained that BTL stands for Balaji Telefilms Limited. Our attention was also drawn to page 21 of the paper book wherein the assessee submitted written letter before the A.O dated 05.05.2015 requesting for the copy of the statement u/s. 132(4) of Shri. Jagdish Mundra and request was also made for allowing for cross examination of said Sh Jagdish Mundra.

Ld. DR on the other hand relied upon the appellate order of the CIT-A .

6. We have considered rival contentions and perused the material on record. We have observed that the assessee is engaged in the production of TV Serials and Films . The assessee is part of the Balaji Group of Companies. The search & seizure operations u/s. 132(1) of the 1961 Act were carried out in the case of Balaji Group on 30.04.2013 by DDIT(Inv.), Mumbai. The assessee was also searched by Revenue u/s 132(1) on 30-04-2013 . The assessee filed its return of income originally on 15-10-2010 u/s 139(1) declaring loss of Rs.9,18,35,203/- , wherein assessed loss was reduced to Rs.9,16,18,762/- due to addition of Rs.2,16,441/- w.r.t. alleged bogus purchases made from M/s. Somu Textile Pvt. Ltd. in an assessment framed by the AO u/s 143(3) r.w.s. 153A vide assessment order dated 19-05-2015. The assessee did not contested the additions made in the aforesaid assessment order as no appeal was filed with learned CIT(A) and it is claimed that due to smallness of the additions being Rs. 2,16,441/- as also that there were huge losses claimed by the assessee to the tune of Rs. 9.18 crores , the assessee has chosen not to contest /litigate w.r.t. quantum assessment framed by Revenue. The assessee has claimed that it made genuine purchases and all the necessary documentations such as invoice, lorry receipt , deliver challans, entries in inward/outward register lying at godown etc were submitted. It is also been shown before us that voluntarily surrender has been made by another group concern namely Balaji Telefilms Ltd. of Rs. 10,64,34,202/- on account of alleged bogus purchases from the period F.Y 2006-07 to 2012-13 through statement recorded on oath of Smt. Shobha Ravi Kapoor u/s 132(4) before Revenue on 02-05-2013.It is also demonstrated that no such voluntary disclosure was made by the assessee

w.r.t. alleged bogus purchases. The Director of M/s Somu Textiles Private Limited Sh Jagdish C. Mundra was also searched on 30-04-2013 as part of the same search conducted by Revenue u/s 132(1). The Director of Somu Textiles Private Limited Sh. Jagdish C Mundra in his statement recorded on oath u/s 132(4) on 13-05-2013 admitted before Revenue that his concerns were engaged in providing accommodation entries of bogus purchases without supplying any material , as under :

“Sir, as stated in response to previous question, all these companies were either incorporated or purchased by Shri Ritesh Burad who then lends these concerns to me. These ore basically shell/paper/bogus concerns through which I give accommodation entries pertaining to sale and purchase of textile to various genuine concerns. No genuine business activity is carried out in any of the 17 concerns mentioned in response to question no. 9.”

The assessee has specifically and consistently asked for the statement of Shri. Jagdish C. Mundra, Director of Somu Textiles Private Limited for rebuttal which was not furnished to the assessee by Revenue . The assessee has also consistently requested for cross examination of said Shri. Jagdish C. Mundra who has given incriminating statement on oath against the assessee u/s 132(4) but the Revenue chose not to produce said Sh. Jagdish Mundra before the assessee for cross examination . The assessee has given an explanation that keeping in view smallness of the amount being addition of Rs. 2,16,441/- and also keeping in view that the assessee had claimed a loss of more than of Rs. 9 crores in the return of income filed with the Revenue and in any case no taxes were payable even after the additions of Rs. 2,16,441/- as were made by Revenue due to huge assessed loss, the assessee submitted that it chose not to file any appeal before appellate forums to avoid further litigation. This is an plausible and bonafide explanation offered by the assessee as no person under normal circumstances would like to enter into dispute/litigation against the might of the State and normal human tendency is to avoid litigation/disputes as it consumes energy, time and also financial costs are involved in the litigations/disputes at higher forums. Now, if we see the entire spectrum of circumstances and events, quantum additions has been made by Revenue merely on the basis of disclosure made by a third party namely Shri. Jagdish Mundra who is a Director of Somu Textiles Private Limited vide statement on oath recorded u/s. 132(4) albeit he was also searched u/s 132(1) on 30-04-2013 as part of searches on Balaji group by Revenue, wherein he admitted that his concerns were engaged in providing bogus accommodation entries without

supplying any material. The copy of said statement on oath of Sh. Jagdish C. Mundra recorded by the Revenue u/s 132(4) on 13-05-2013 as part of searches on Balaji Group has not been furnished to the assessee nor cross examination of said Sh. Jagdish C Mundra has been allowed by the Revenue which in our considered view has clearly infringed upon and breached the principles of natural justice . The decision of Hon'ble Supreme Court in the case of Andaman Timber Industries v. CCE in civil appeal no. 4228 of 2006 vide orders dated 02-09-2015 becomes relevant and applicable . We have also observed that Revenue is under mistaken belief that the assessee has made disclosure w.r.t. bogus purchases , while the fact of the matter is that it is another group company i.e. Balaji Telefilms Ltd. which made disclosures of Rs. 10.64 crores w.r.t. bogus purchases . The Revenue cannot extend the said voluntary disclosure made by another group concern namely Balaji Telefilms Limited w.r.t. bogus purchases for making additions in the hands of the assessee. If Revenue wanted to include the purchases of Rs. 2,16,441/- made by the assessee from Somu Textiles Private Limited being part of the voluntary disclosure u/s 132(4) to make additions in the hands of the assessee, it should have included the same being part of disclosure by the assessee in the statement recorded on oath u/s 132(4) of the said Smt Shobha Ravi Kapoor and in absence thereof the said disclosure as was made by said Smt. Shobha Ravi Kapoor is not sufficient to levy penalty as was done by Revenue in the instant case before us. It is different matter that the assessee accepted quantum additions as were made by Revenue for alleged bogus purchases to the tune of Rs. 2,16,441/- and the assessee did not chose to further litigate the said matter but that does not mean that penalty u/s 271(1)(c) is to be levied automatically. The penalty proceedings are altogether different proceedings and the ingredient for levying penalty are different than making quantum additions. The Revenue has to show by positive material that the assessee has furnished inaccurate particulars of income or concealed the particulars of income. In the instant case, the sole reliance of the Revenue is based on an incriminating statement recorded of a third person namely Sh. Jagdish Mundra recorded on oath u/s 132(4) at the back of the assessee albeit he was also searched simultaneously along with assessee on 30-04-2013, which statement dated 13-05-2013 was never confronted to the assessee nor the said statement had stood the test of cross examination by the assessee . If we eschew the aforesaid statement of said Jagdish Mundra, nothing remains with the Revenue to incriminate the assessee. The assessee has been consistently asking for the statement of said Sh. Jagdish C Mundra as well asking for cross examination of

said Sh. Jagdish C Mundra which is consistently denied by Revenue. There is no such voluntary disclosure made by the assessee company w.r.t. bogus purchases during the course of search u/s 132(1), while the same was made by another Group concern namely Balaji Telefilms Limited. Thus, in our considered view, the penalty as levied by the Revenue u/s 271(1)(c) of the 1961 Act in the instant case cannot be sustained as the explanation offered by the assessee keeping in view peculiar facts of the case as also keeping in view smallness of the amount vis-a-vis returned loss is a bonafide explanation . Thus keeping in view peculiar facts of the case as enumerated above and ratio of decision of Hon'ble Supreme Court in the case of Andaman Timber Industries(supra), we are inclined to accept the explanation offered by the assessee to be bona-fide and we hereby order for the deletion of the penalty as levied by the AO which was later confirmed by learned CIT(A). However, we would like to clarify that we have adjudicated this penalty appeal based on peculiar facts of the case before us and it is also fairly agreed by learned counsel for the assessee before the Bench that this order of the tribunal shall not have a precedential value so far as other appeals of Balaji Group which are pending for adjudication are concerned , as this appeal is adjudicated by us based upon peculiar factual matrix of the case. The assessee succeeds in this appeal . We order accordingly.

7. In the result appeal of the assessee is allowed .

Order pronounced in the open court on 03.01.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 03.01.2018 को की गई ।

Sd/-

Sd/-

(JOGINDER SINGH)
JUDICIAL MEMBER

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 03.01.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, E
6. Master File

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BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**