2023:APHC:20168

HIGH COURT OF ANDHRA PRADESH

WEDNESDAY ,THE FOURTEENTH DAY OF JUNE

TWO THOUSAND AND TWENTY THREE

PRSENT

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

THE HONOURABLE SRI JUSTICE T MALLIKARJUNA RAO

WRIT PETITION NO: 11604 OF 2022

Between:

1. DIVINE CHEMTEC LIMITED (A company incorporated and registered under the provisions of Companies Act, 2013) having its registered office at Plot No. H, K, L, Phase -II, Duvvada, Visakhapatnam - 530049, Andhra Pradesh, Rep. by its Authorised Signatory, Moturi Srinivas Prasad.

...PETITIONER(S)

AND:

1. INCOME TAX DEPARTMENT National Faceless Assessment Center Delhi, 4th Floor, Mayur Bhawan, Connaught Circus, New Delhi - 110001
2. Chairman Chairman, Central Board of Direct Taxes,

...RESPONDENTS

Counsel for the Petitioner(s): JAVVAJI SARATH CHANDRA

Counsel for the Respondents: M KIRANMAYEE(SC FOR INCOMETAX)

The Court made the following: ORDER

2023:APHC:20168

HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

W.P.Nos.11604, 11593, 11818, 11596 and 11923 of 2022

Between:
DIVINE CHEMTEC LIMITED
(A company incorporated and
Registered under the provisions
Of Companies Act 2013)
Having its registered office at:-
Plot No.H, K, L, Phase-II, Duvvada,
Visakhapatnam – 530 049, Andhra Pradesh,
Rep. by its Authorized Signatory,
Moturi Srinivas Prasad.

..Petitioner

And

Income Tax Department,
National Faceless Assessment Center Delhi,
4th Floor, Mayur Bhawan,
Connaught Circus, New Delhi – 110 001 and one another

.. Respondents

DATE OF JUDGMENT PRONOUNCED: 14.06.2023

SUBMITTED FOR APPROVAL:

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals? Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

_____
U. DURGA PRASAD RAO, J

_____
T. MALLIKARJUNA RAO, J

***HON'BLE SRI JUSTICE U.DURGA PRASAD RAO**
AND
HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO

+ W.P.Nos.11604, 11593, 11818, 11596 and 11923 of 2022

%14.06.2023

DIVINE CHEMTEC LIMITED
(A company incorporated and
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Plot No.H, K, L, Phase-II, Duvvada,
Visakhapatnam – 530 049, Andhra Pradesh,
Rep. by its Authorized Signatory,
Moturi Srinivas Prasad.

..Petitioner

Vs.

$ Income Tax Department,
National Faceless Assessment Center Delhi,
4th Floor, Mayur Bhawan,
Connaught Circus, New Delhi – 110 001 and one another

.. Respondents

<GIST:

>HEAD NOTE:

! Counsel for the petitioner: Sri B. Adinarayana Rao for Sri Javvaji Sarath Chandra and B. Ravi Kiran Singh learned counsel representing the petitioner.

Counsel for respondents: Smt. M. Kiranmayee, learned Standing Counsel for respondents

? CASES REFERRED:

1. AIR 1999SC 22 = MANU/SC/0664/1998

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

AND

HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO

W.P.Nos. 11604, 11593, 11818, 11596 and 11923 of 2022

COMMON ORDER: *(Per Hon'ble Sri Justice U. Durga Prasad Rao)*

Challenge in the writ petition No.11604 of 2022 is to the order in DIN No. ITBA/PNL/F/271(1)(c)/ 2021-22/ 1041194359(1), dated 21.03.2022 passed by National Faceless Assessment Centre, Delhi of the respondents whereunder it was proposed to impose a penalty of Rs.58,72,241/- U/s 271(1)(c) r/w Section 274(2) of Income Tax Act, 1961 (for short "IT Act").

2. Petitioner's case succinctly is thus:

(a) Petitioner is a company incorporated and registered under the provisions of Companies Act, 2013.

(b) On 20.09.2017 search operations were conducted in the premises of the petitioner U/s 132 of IT Act and notice was

issued on 30.08.2018 U/s 153A of the IT Act calling for its return from income.

(c) During search operation, the Managing Director of petitioner, on verification of Audit and Balance Sheet of the petitioner company noticed an inadvertent error in the books of accounts in the Financial Year ending 31.03.2009 wherein a Foreign Investment was capitalized against Plant and Machinery, though the same did not materialize for various reasons. Since mistake was occurred in the Financial Year ending 31.03.2009, it was continued unnoticed and same was corrected in the Financial Year ending 31.03.2015 for the Assessment Year 2015-16.

(d) Pursuant to the notice U/s 153A, the petitioner on 23.09.2018 filed return declaring therein a loss of Rs.5,50,06,514/- and the same was assessed U/s 143(3) r/w Section 153A of the IT Act by the order dated 30.12.2019 accepting the income in the return filed in the assessment order. The AO through recorded his satisfaction, however initiated penalty proceedings U/s 271(1)(c) r/w explanation 5A for

furnishing inaccurate particulars of income by placing the reliance on original return of income filed U/s 139(1) of the IT Act.

(e) Accordingly, a show cause notice dated 03.01.2020 was issued U/s 274 of IT Act to which the petitioner submitted its reply dated 03.02.2020 denying all the allegations. The petitioner has specifically drawn the attention about the satisfaction of the AO which is a *sine quoa non* for levying the penalty for furnishing inaccurate particulars of income whereas show cause notice was issued for concealment of income thereby rendering the show cause notice baseless.

(f) On 19.02.2020 the petitioner filed additional reply to the show cause notice dated 03.01.2020. However, 1st respondent failed to take cognizance of both the replies.

(g) In terms of the notification dated 12.01.2021, Faceless Penalty Scheme – 2021 was notified by the Central Board of Direct Taxes and accordingly a show cause notice was issued on 24.05.2021 by the National Faceless Assessment Centre to the petitioner. The petitioner submitted reply on 26.05.2021

and also a supplemental reply dated 31.05.2021. Thereafter the petitioner did not receive any communication but a penalty order dated 21.03.2022 was received without granting opportunity of hearing though in the supplemental reply dated 31.05.2021, a specific request was made for personal hearing.

(h) The imposition of penalty is in total violation of Sub Clause-XV of Clause-I of para-5 of the Faceless Assessment Scheme. The petitioner submitted its grievance on the portal maintained by respondent No.2 on 26.03.2022 but same remained unresponded.

Hence the writ petition.

3. It may be noted that with the identical averments the petitioner filed W.P.Nos.11593, 11818, 11596 and 11923 of 2022. The only difference in all the above five writ petitions is the assessment year and loss claimed and penalty levied which are shown in a tabular form as below:

S.No.	W.P No.	Assessment Year	Loss claimed in the return filed under Sec.153A of the Act (Rs.)	Tax Liability Determined in Rs.	Penalty levied under Sec.271(1)c of the Act on the basis of return filed under Sec.139 (Earlier Return) in (Rs)	Depreciation claimed
1.	11593/ 2022	2012-13	Rs.8,89,23,021/-	NIL	Rs.95,80,943/-	Rs.2,95,29,796/-
2.	11818/ 2022	2013-14	Rs.17,25,82,489/-	NIL	Rs.81,03,222/-	Rs.2,49,75,258/-
3.	11596/ 2022	2014-15	Rs.7,78,64,975/-	NIL	Rs.69,23,083/-	Rs.2,13,37,907/-
4.	11604/ 2022	2015-16	Rs.5,50,06,514/-	NIL	Rs.58,72,241/-	Rs.1,80,99,062/-
5.	11923/ 2022	2016-17	Rs.2,19,34,189/-	NIL	Rs.5,213/-	Rs.16,871/-

4. Respondents filed counters and opposed the writ petition *inter alia* contending thus:

(a) As against the impugned order passed under Section 271(1)(c) of the IT Act, the petitioner has got an effective alternative remedy of appeal to the Commissioner of Income Tax (Appeals), hence the writ petition is not maintainable.

(b) During the search operations conducted U/s 132 of the IT Act on 20.09.2017, the Assessee admitted that for Assessment Year 2015-16 while filing return of income they claimed bogus

depreciation of Rs.1,80,99,062/-. In response to the notice U/s 153A of the IT Act, the assessee had withdrawn the excess depreciation and filed revised return of income and the assessment was completed by accepting the income returned. However, since the assessee has furnished inaccurate particulars of income, the AO has initiated penalty proceedings U/s 271(1)(c) of the IT Act vide notice dated 03.01.2020 but in the said notice it was inadvertently mentioned as "for concealment of particulars of income". Having noticed the mistake, the AO has immediately cancelled the notice and issued fresh notice dated 31.01.2020 wherein it has been clearly mentioned that "for furnishing inaccurate particulars of income" and the notice was served on assessee on 31.01.2020. Subsequently, the penalty proceedings were completed basing on the 2nd notice dated 31.01.2020. The petitioner has conveniently omitted to refer to the fresh penalty notice dated 31.01.2020 and is trying to take shelter under the earlier notice dated 03.01.2020. In fact, the penalty proceedings were completed basing on the 2nd notice dated 31.01.2020. The

reply dated 03.02.2020 filed by the petitioner in response to the notice dt: 03.01.2020 is redundant as the said notice was withdrawn.

(c) The contention of the petitioner that the penalty order was passed without following the procedure prescribed in the Faceless Penalty Scheme is incorrect. The order imposing penalty U/s 271(1)(c) was passed by National Faceless Assessment Centre but not National Faceless Penalty Centre.

(d) The contention of the petitioner that the order was passed in violation of principles of natural justice is untenable. The assessee was put on notice before levying penalty vide notices dated 03.01.2021, 31.01.2021 and 24.05.2021 and the assessee availed the said opportunity and submitted a detailed explanation in support of its case. The submission of the assessee was considered by National Faceless Assessment Centre and the penalty was initiated for furnishing inaccurate particulars. There are no faults in the penalty order. The writ petition may be dismissed.

5. Heard arguments of learned Senior Counsel Sri B. Adinarayana Rao for Sri Javvaji Sarath Chandra and B. Ravi Kiran Singh learned counsel representing the petitioner and Smt. M. Kiranmayee, learned Standing Counsel for respondents.

6. Learned Senior Counsel would argue that in spite of the fact that the petitioner, pursuant to the notice issued U/s 153A of the IT Act, filed revised returns and same were approved by the Department by order dated 30.12.2019, the impugned penalty proceedings were taken up contrary to Section 271(1)(c) of the IT Act as there is neither concealment of income nor furnishing of inaccurate particulars of the income. Learned counsel would further argue that imposition of penalty is not a matter of course but the department shall establish that there was a wilful concealment of particulars of the income or wilful furnishing of inaccurate particulars which is not the case in the present instance. Learned counsel would formidably argue that when once the previous mistaken return was permitted to be substituted with revised return and same was accepted, the department cannot impose penalty basing on the earlier return. Learned Senior Counsel would thus reemphasize that when the revised return was filed

pursuant to the notice U/s 153A of the IT Act and the said revised return was accepted, the earlier return filed U/s 139 of the Act pales into insignificance, which cannot be made as a basis to take up penalty proceedings U/s 271(1)(c) of the IT Act. To buttress his argument learned Senior Counsel relied upon Judgment dated 09.02.2017 of a **Division bench of High Court of Delhi in ITA No.463/2016 & CM No.26604/2016 and batch**.

(a) Learned Senior Counsel further argued that in the instant case explanation 5A to Section 271 has no application for the reason that as per Clause 1 of explanation 5A, during the course of a search initiated U/s 132, if any money, bullion, jewellery or other valuable article or things were found to be acquired by the assessee by utilizing his income for any previous year or under Clause-ii, the assessee obtained income based on any entry in any books of accounts or other documents or transactions which the assessee claims that such entry in the books of accounts etc., represents his income for any previous year but the same has not been declared in the return of any of the previous year, Clause 5(A) can be invoked. However, that is not the case in the present instance. In the absence of any incriminating

evidence disclosing the particulars of income or money, bullion, jewellery or other valuable articles, the question of application of explanation 5A does not arise even remotely. What all found was, learned Senior Counsel would emphasize, a mere claim of excess depreciation which was admitted voluntarily and said mistake was permitted to be rectified by filing revised return. Hence explanation 5A had no application was his argument.

(b) The next important argument of learned Senior Counsel is that as against the show cause notice dated 24.05.2021 issued by the National Faceless Assessment Centre directing the petitioner to show cause why penalty should not be imposed, the petitioner submitted a reply dated 26.05.2021 and a supplemental detailed reply dated 31.05.2021 wherein the later reply, the petitioner while exhaustively submitting his case that neither the Section 271(1)(c) nor explanation 5A has any application and requested the authorities for personal hearing but none the less, the impugned order came to be passed ten months thereafter on 21.03.2022 without granting an opportunity of personal hearing and thereby the petitioner was deprived of the

principles of natural justice. Learned counsel thus prayed to set aside the impugned penalty order.

7. Per contra, Smt. M. Kiranmayee, learned Standing Counsel for respondents while opposing the writ petition would predominantly argue that as against the impugned order the petitioner has got an effective and alternative remedy of appeal to the Commissioner of Income Tax (Appeals) and hence the writ petition is not maintainable.

(a) Nextly while supporting the penalty order, learned Standing Counsel would strenuously argue that since the petitioner in the earlier return filed U/s 139 of the IT Act for the Assessment Year 2015-16, wrongly and mischievously claimed high amounts of bogus depreciation against a non existing Plant and Machinery which was admitted only during the search and seizure operations conducted subsequently. In that view, the penalty was rightly imposed and that has nothing to do with the acceptance of the revised returns. Nextly learned Standing Counsel argued that impugned penalty orders were passed only on thorough consideration of the replies dated 26.05.2021 and 31.05.2021 and therefore the petitioner cannot claim that

principles of natural justice were violated. Learned Standing Counsel thus prayed to dismiss the writ petition.

8. The point for consideration is whether there are merits in the writ petition to allow?

9. **POINT**: We deeply cogitated on the respective arguments of both the learned counsel. As can be seen, precisely the contention of the petitioner is that since the revised return was submitted pursuant to the proceedings U/s 153A of the IT Act and the same was accepted, the penalty proceedings U/s 271(1)(c) basing on the previous return filed U/s 139 of the IT Act are not maintainable and the proceedings under explanation 5A of Section 271 are also not maintainable since none of the grounds mentioned therein is attracted in the instant case. That apart, the contention of the petitioner is that in spite of submission of aforesaid contentions in his reply notices dated 26.05.2021 and 31.05.2021 and a personal hearing was sought for, neither the contentions in those notices were considered nor petitioner was given an opportunity of personal hearing and therefore principles of natural justice were violated. Whereas the contention of learned Standing Counsel is that the petitioner has deliberately

concealed the true facts and furnished inaccurate particulars in his earlier return and unduly claimed excess depreciation amounts and later, the same were rectified not by a voluntary confession but only after search proceedings were conducted. Therefore, the respondent authorities have rightly initiated penalty proceedings U/s 271(1)(c) of the IT Act. It is also the contention of learned Standing counsel that the contents in both the reply notices were well considered and rejected and thereafter the impugned penalty order was passed.

10. In the light of above contentions, we perused the record to know whether the petitioner had raised the contentions now raised before us in its reply notices. A perusal of reply notice dated 31.05.2021 would depict that the petitioner has firstly taken up the contention that explanation 5A has no application to their case inasmuch as, the penalty notice can be issued only if "assets or any "entry in any books of account or other documents or transactions" are discovered in the search conducted U/s 132 of the IT Act which were hitherto not disclosed or declared. The petitioner has further contended that a deeper analysis of provisions of explanation 5A would show that the expressions used in Clause-I and II therein such

as discovery of money, bullion, jewellery, or other valuables referred to as tangible assets and similarly income pertaining to the entries also point to concrete evidence arising out of entry in the books, documents and transactions found in the course of search. The petitioner would contend that those expressions were used in unequivocal terms and there is no scope to include voluntary rectification of any mistake which was crept into the records. There is no search or seizure of undisclosed assets, hence explanation 5A has no application.

11. We have also noticed that the petitioner has taken another plea to the effect that the return that was filed U/s 153A of the IT Act was the only relevant return of income for the purpose of assessment U/s 153. As such, since the AO has accepted the revised return filed U/s 153A, there can be no occasion to refer to the previous return filed U/s 139 of the IT Act for any purpose including levying of penalty U/s 271(1)(c) of the IT Act. The petitioner referred to the judgment of High Court of Delhi (supra 1) in this context. Finally, the petitioner submitted as follows:

> "In view of all the above relevant submissions, judicial precedents and pronouncements along with all the facts and merits of the case, we submit that the penalty proceedings be dropped. Should there be an occasion for your good selves for any further information and justification that may be required from our end we would be obliged if a personal hearing is accorded."

12. Thus, we are convinced that indeed the petitioner has taken the two contentious pleas in his reply notice dated 31.05.2021. Then a perusal of counter filed by the respondents in the writ petition would show that they admitted to have received the reply notices dated 26.05.2021 and 31.05.2021. Of course, they contended that one of the pleas taken in the reply notice dated 31.05.2021 to the effect that the petitioner did not receive the notice dated 31.01.2020 was not correct. Except that the respondents did not deny either receiving of the reply notice dated 31.05.2021 or petitioner's taking the two crucial pleas as narrated supra.

13. Then we referred to impugned penalty orders dated 16.03.2022 and 21.03.2022. In Para 3 of four orders, though reference was made about the reply notices dated 03.02.2020 and 26.05.2021, curiously there was no reference about the crucial reply notice dated 31.05.2021. On one order, of course the reply dated 31.05.2021 was

referred. However, we noticed that in the impugned orders the authority of National Faceless Assessment Centre, Delhi, did not mention the two contentions raised by the petitioner and there was no discussion about those pleas. Therefore, there is no occasion for us to know the mind of respondent authorities on the two crucial legal pleas raised by the petitioner. It is true that in the instant case there is no complete deprival of principles of natural justice, inasmuch as, while initiating penalty proceedings, the respondent authorities indeed invited the reply from the petitioner to the show cause notices issued. However, the respondents have not considered the crucial and important pleas and contentions raised by the petitioner before passing the impugned penalty orders. Needless to emphasize that non consideration and discussion of the crucial pleas raised by a party would also amount to negation of principles of natural justice. That apart, though in the reply notice dated 31.05.2021 the petitioner sought for personal hearing, same was not accorded to the petitioner. If such a gracious act was done, we are sure, the petitioner would have been in a position to explain the substance of his contentions before the respondent authorities. Hence the conduct of respondents

would depict there is a partial violation of principles of natural justice.

14. Then the petitioner is concerned, in the reply notice dated 31.05.2021 the petitioner has not requested for personal hearing in clear terms but on the other hand, he only mentioned that if there be an occasion for the respondents seeking for further information and justification from the petitioner, the petitioner would be obliged if a personal hearing is accorded. It would connote as if the personal hearing can be extended by the respondents if they needed further information from the petitioner or justification of his contentions. So petitioner's request is also somewhat obscure without making a clear prayer for according personal hearing.

15. Thus on a conspectus of facts, circumstances, law and conduct of both parties, we, in the interest of justice, are of considered view, the impugned orders can be set aside and the respondents can be directed to accord personal hearing to the petitioner in respect of the contentions raised and pass fresh orders on suitable terms.

16. We also considered the argument of learned Standing Counsel regarding the availability of efficacious alternative remedy in the

form of appeal and non-maintainability of the writ petition on that count. We are unable to countenance the said argument in view of the fact that though alternative remedy of appeal is available, still in the instant case we have noticed partial violation of principles of natural justice by the respondent authorities by depriving the petitioner of personal hearing. It is needless to emphasize, in the cases where the principles of natural justice are on casualty, the constitutional Courts can entertain the writ petitions despite the availability of alternative remedy. There are a slew of legal pronouncements in this regard of which, we can refer to **Whirlpool Corporation v. Registrar of Trade Marks, Mumbai**[1] wherein it is held thus:

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this court not to operate as a bar in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

[1] AIR 1999SC 22 = MANU/SC/0664/1998

17. Accordingly, the writ petitions are allowed setting aside the impugned penalty orders dated 16.03.2022 and 21.03.2022 passed by the 1st respondent and matters are remitted back to the 1st respondent with a direction to consider the reply notices dated 26.05.2021 and 31.05.2021 submitted by the petitioner and after affording an opportunity of personal hearing to the petitioner, pass appropriate orders in accordance with governing law and rules expeditiously on the condition of petitioner depositing 25% of the penalty amount in each case within six (6) weeks from the date of receipt of copy of this order, failing which this order shall stand cancelled. No costs.

As a sequel, interlocutory applications, pending if any shall stand closed.

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U. DURGA PRASAD RAO, J

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T. MALLIKARJUNA RAO, J

14.06.2023
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HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

AND

HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO

W.P.No.11604 of 2022

14th June, 2023

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