

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A' NEW DELHI**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 6241/Del/2013  
AY: 2004-05**

**Groz Net Industries,  
C-717, New friends Colony,  
New Delhi.  
(PAN: AAAFG8454E)**

**vs ACIT,  
Circle-22(1),  
New Delhi**

**(Appellant)**

**(Respondent)**

**Appellant by :** Ms Rano Jain CA  
Shri Ashish Goel, CA

**Respondent by :** Shri S.K. Jain, DR

**Date of hearing: 9.3.2017**

**Date of pronouncement: 31.5.2017**

**ORDER**

**PER SUDHANSHU SRIVASTAVA, J.M.**

This appeal is preferred by the assessee against the order of the CIT(A)-XXIII, New Delhi for Assessment Year 2004-05.

2. The facts of the case are that the assessee had filed its return of income declaring income of Rs. 1,51,11,430/-. While completing the assessment, the Assessing Officer made disallowance u/s 43B of the Income Tax Act, 1961 ('the Act') on account of Gratuity expenses which were not paid before the due date of filing the return of income and amounting to Rs. 33,46,304/-. Another addition of Rs. 1,93,407/- was made by the

Assessing Officer on the ground of cessation of liability of sundry creditors. Thereafter, the Assessing Officer held that the assessee had concealed true particulars of income and was, therefore, liable to pay penalty on both the additions. He imposed a penalty of Rs. 7,87,712/- u/s 271(1)(c) of the Act.

2.1 Meanwhile, the assessee had approached the ITAT against the quantum additions and the ITAT vide order dated 25<sup>th</sup> October, 2011 in I.T.A. No. 3608/Del/2008 had set aside the quantum issue of Rs. 33,46,304/- added back u/s 43B of the Act to the file of the Assessing Officer for fresh adjudication. The ITAT also deleted the amount of Rs. 1,93,407/- on account of cessation of liability.

2.2 Against the penalty imposed by the Assessing Officer, the assessee preferred an appeal before the Ld. CIT(A) who deleted the penalty pertaining to cessation of liability of Rs. 1,93,407/- on the ground that the quantum had been deleted by the ITAT but confirmed the penalty on the disallowance of Rs. 33,46,304/- made u/s 43B of the Act.

2.3 Now, the assessee has approached the ITAT and has raised the following grounds:-

- “1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (Appeals) [CIT(A)] is bad both in the eye of law and on facts.*
- 2. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO in levying penalty under section 271(1)(c) amounting to Rs.7,87,712/-.*
- 3. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO in levying penalty under section 271(1)(c) of the Act on account of disallowance made on payment of gratuity expenses and cessation of liability.*
- 4. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty despite the fact that the assessee himself has disclosed all the facts and figures and as such there was no concealment of income on the part of the assessee.*
- 5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in ignoring the fact that the income assessed taken by the AO at Rs.1,76,62,349/- is incorrect in view of the wrong computation of deduction under Section 80HHC post-judgment of the Supreme Court in the case of Topman Exports vs. CIT (2012) 342 ITR 49 (SC).*
- 6. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the penalty under section 271(1)(c) of the Act without giving any finding on the merits regarding concealment of income.*
- 7. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in rejecting the contention of the appellant that the penalty order passed by the AO is barred by limitation. ”*

3. The Ld. SR submitted that the Ld. CIT (Appeals) was legally incorrect in confirming the penalty despite the fact

that the assessee itself had disclosed all the facts and figures and as such there was no concealment of income on the part of the assessee. It was further submitted that the Ld. CIT (Appeals) had confirmed the penalty without giving any finding on the merits regarding the concealment of income. It was further submitted that no penalty under section 271(1)(c) of the Act is imposable in case of disallowance under section 43B of the act As it is not a case where any income has been concealed or inaccurate particulars have been filed. It was submitted that the penalty imposed be deleted.

4. The Ld. Departmental Representative placed reliance on the order of the AO as well as of the Ld. CIT (Appeals) and submitted that the penalty imposed should be confirmed.

5. We have heard the rival submissions and perused the material on record. The Hon'ble Supreme Court, in the case of Hindustan Steel Ltd. v. State of Orissa 83 ITR 26, had laid down the position of law by holding that the Assessing Officer is not bound to levy penalty automatically simply because the quantum addition has been sustained. Also in case of CIT v. Khoday Eswara (83 ITR 369) (SC), incidentally reported in same ITR

Volume, it is held that penalty cannot be levied solely on basis of reasons given in original order of assessment. The Hon'ble Supreme Court has reiterated the law in case of Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519 by holding in Para 62 that finding in assessment proceedings cannot automatically be adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. The statute requires a satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the Department. While considering whether the assessee has been able to discharge his burden the Assessing Officer should not begin with the presumption that he is guilty. Since the burden of proof in penalty proceedings varies from that in the assessment proceedings, a finding in the assessment proceedings that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceedings. In the penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. It is important to keep in mind the

fundamental legal proposition that Assessment proceedings are not conclusive. Assessment proceedings and penalty proceedings are separate and distinct. Findings in Assessment proceedings don't operate as *res judicata* in penalty proceedings. For this proposition reliance is placed on the decision in CIT vs. Dharamchand L. Shah (1993) 204 ITR 462 (Bom). In Vijay Power Generators Ltd vs. ITO (2008)6 DTR 64 (Del) it was held that "*It is well settled that though they constitute good evidence do not constitute conclusive evidence in penalty proceedings.*" During penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to ascertain whether the assessee concealed his income or furnished inaccurate particulars. Thus, under penalty proceedings assessee can discharge his burden by relying on the same material on the basis of which assessment is made by contending that all necessary disclosures were made and that on the basis of material disclosed there cannot be a case of concealment of income or furnishing inaccurate particulars of

income. Further if there is any material or additional evidence which was not produced during assessment proceedings same can be produced in penalty proceedings as both assessment and penalty proceedings are distinct and separate. In CIT vs. M/s Sidhartha Enterprises (2009) 184 Taxman 460 (P & H)(HC) it was held that the judgment in Dharmendra Textile cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default.

5.1 Reverting to the facts of the present case, the penalty order is woefully silent on the issue as to how this satisfaction of concealment was arrived at. The quantum addition on which the penalty has been imposed pertains to disallowance u/s 43B but the Ld. CIT (A) has also not examined the issue in detail but has simply confirmed the penalty by relying on the findings of the AO and stating that the assessee has also accepted that there was a default u/s 43B. However, there is no finding by the authorities below on the issue as to how the 'concealment' has come to be established so as to warrant imposition of penalty. Thus, it is

apparent that the penalty has been imposed as an automatic outcome of the confirmation of the quantum addition. Considering the entirety of the circumstances, in our view the impugned disallowance does not invite the provisions of Section 271(1)(c) of the Act. We set aside the order of the Ld. CIT (A) and direct the AO to delete the entire penalty.

6. In the final result, the appeal of the assessee is allowed.

Order pronounced in the open court on 31.05.2017.

**Sd/-**  
**(N. K. SAINI)**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

DATED: 31st MAY 2017  
'GS'

Copy forwarded to:

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

ASSTT. REGISTRAR

ITAT NEW DELHI

