

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "G", MUMBAI

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER AND

SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.2935/Mum/2013

(Assessment Year : 2006-2007)

M/s Winsmile Infrastructure Pvt. Ltd., 255, Sharma Estate, S. V. Road, Jogeshwari (West), Mumbai. PAN: AAACW3470D	Vs.	ACIT-8(3), Mumbai.
(Appellant)		(Respondent)

Assessee by : Shri Dr. K.Shivaram & Rahul
Hakani (AR's)

Revenue by : Ms. Mahua Sarkar (DR)

Date of hearing : 29.09.2016

Date of Pronouncement : 19.10.2016

ORDER

PER PAWAN SINGH, JM:

1. This appeal u/s. 253 of Income Tax Act (,Act') is directed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-38, Mumbai dated 21.02.2013 for Assessment Years (AY) 2006-07.
2. The brief facts of the case are that assessee-company filed its return of income for relevant AY on 21.11.2009, declaring total income of Rs.95,530/-. Subsequently, the action u/s 133A of the Act was carried out on 08.03.2010. And the case of assessee was reopened. Notice u/s 148 was issued on 20.10.2010. In response to the notice, the assessee-company filed revised return of income on 12.08.2011 declaring total income of Rs. 62,38,023/-. In the revised return of income, the assessee included Rs. 45 Lakhs which the assessee has write off in its books of account in AY 2006-07, thus the penalty proceeding was initiated against the assessee and the Assessing Officer (AO) levied the penalty of Rs. 20,67,563/- being minimum penalty on

the impugned income sought to be evaded. Aggrieved by the order of AO, assessee filed appeal before the CIT(A). In the appeal, it was contended that AO levied penalty on Rs. 61,42,493/- in place of Rs. 45 Lakhs. Ld. CIT(A) while sustaining the order of penalty, Id. CIT(A) directed the AO to verify the fact and correct the same and re-computed the amount of penalty. Thus, further aggrieved by the order of CIT(A), the assessee filed the present appeal before us.

3. We have heard the Ld. Authorized Representative (AR) of the assessee and the Ld Departmental Representative (DR) for the Revenue and perused the material available on record. Ld AR of the assessee argued that no incriminating material was found during the search proceeding. The assessee has filed revised return of income on receipt of notice u/s 148. The notice u/s 148 was received on 20.10.2010 and revised return of income was filed on 12.08.2011. The assessee-company acted in bonafide manner and immediately revised the return of income. The AO while initiating the penalty has not specified the charge in the notice u/s 274 of the Act, if the penalty is levied for filing of inaccurate particular or for concealment of income. The AO has accepted the return of income without any addition. Ld. AR of the assessee further relied upon the decision of CIT vs. Manjunath Cotton and Ginning Factory 359 ITR 565 (Karnataka) and further in case of CIT vs. S.S.A. Medows (2016) 73 taxman.com 241 (Karnataka) and further argued that the SLP against the order of Hon'ble High Court was dismissed by Hon'ble Apex Court. It was further argued that neither the AO nor the CIT(A) considered the fact that during the course of survey proceeding, it was seen that the assessee has written off of the cost of land amounting to Rs. 45 Lakhs surrendered to Government Authorities in the books of accounts in AY 2006-07. The compensation in respect of the said land from Land Acquisition Officer-7, Mumbai, Mumbai Suburban District was received in AY 2010-11 (FY-2009-10). On the other hand, Id. DR for the Revenue argued that the assessee has not explained the amount of compensation received by the assessee and it was only unearthed during the survey on 08.03.2010. In the

survey, the said income was surrendered by the assessee. Had the survey not been conducted, the assessee could easily conceal the income of compensation. The Id. DR for the Revenue further relied upon the decision of Hon'ble Apex Court in Mak Data Pvt. Ltd. vs. CIT in Civil Appeal No. 9772 of 2013.

4. We have considered the rival contention of the parties and gone through the material available on record. We have seen that during the survey action at the business premises of the assessee on 08.03.2010, the authorized Officer noticed that assessee received an amount of Rs. 1,91,23,813/- during the AY 2010-11 (FY 2009-10) from Special Land Acquisition Officer, Mumbai against the surrender of land purchased by it in the year 2006. On further verification, the authorized Officer noticed that assessee has written off of the cost of land amounting to Rs. 45 Lakhs which was surrendered to the Government Authorities in its books of accounts in AY 2006-07. When these facts were confronted, Shri Abdul Rahim S. Ghasawala accepted the mistake and agreed to file the revised return. The revised return filed by assessee was accepted, no further addition was made. Infact the compensation of land was received in AY 2010-11. The assessee has no occasion to offer the amount which was received in FY 2009-10, the AO treated this amount as concealed income of assessee for the AY 2006-07 and levied the penalty. The AO has even not appreciated the actual difference of amount while levying the penalty.
5. The Hon'ble Delhi High Court in New Holland Tractors (India) Pvt. Ltd. vs. CIT (2014) 49 taxmann.com 573 (Del.) held as under:

"Test of bona fide has to be applied keeping in mind the position as it existed, when the return of income was filed. The Act, i.e. the Income Tax Act, is a complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessee do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of bona fides as long as the legal position so adopted is not per se contrary to the language of the statute or an undebatable legal position not capable of a different connotation and

understanding. When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even

when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. While applying the test of bonafide, we have to also keep in mind that even best of legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts.

32. On the aforesaid aspect, we would like to refer to the following observations of the Supreme Court in the case of Reliance Petroproducts (P.) Ltd., (supra):-

'10. Section 27 1 (1)(c) is as under:

"271. Failure to furnish returns, comply with notices, concealment of income, etc.- (1) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that any person -

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

A glance at this provision would suggest that in order to be covered, 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. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for the Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in Section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars.

11. *The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income". We do not think that such can be the interpretation of the words concerned. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal [(2009) 9 SCC 589] where this Court was considering the same provision, the Court observed that the assessing officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in Union of India v. Dharamendra Textile Processors [(2008) 13 SCC 369] as also the decision in Union of India v. Rajasthan Spg. & Wvg. Mills [(2009) 13 SCC 448] and reiterated in para 13 that: (Atul Mohan Bindal case [(2009) 9 SCC 589] , SCC p. 597, para 13)*

"13. It goes without saying that for applicability of Section 271 (1)(c), conditions stated therein must exist."

12. Therefore, it is obvious that it must be shown that the conditions under Section 271 (1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed 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.

13. In Dilip N. Shroff v. CIT [(2007) 6 SCC 329] this Court explained the terms "concealment of income" and "furnishing inaccurate particulars". The Court went on to hold therein that in order to attract the penalty under Section 271 (1)(c), mens rea was necessary, as according to the Court, the word "inaccurate" signified a deliberate act or omission on behalf of the assessee. It went on to hold that clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term "inaccurate particulars" was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars.

14. It was further held in Dilip N. Shroff [(2007) 6 SCC 329] that the assessee must be found to have failed to prove that his explanation is not only not bona

vide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential

15. *It was only on the point of mens rea that the judgment in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] was upset. In Union of India v. Dharamendra Textile Processors [(2008) 13 SCC 369] after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271 (1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271 (1)(c) read with the Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why the decision in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] was overruled by this Court in Union of India v. Dharamendra Textile Processors[(2008) 13 SCC 369] was that according to this Court the effect and difference between Section 271(l)(c) and Section 276-C of the Act was lost sight of in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] .*

16. *However, it must be pointed out that in Union of India v. Dharamendra Textile Processors [(2008) 13 SCC 369] no fault was found with the reasoning in the decision in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] where the Court explained the meaning of the terms "conceal" and "inaccurate", It was only the ultimate inference in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] to the effect that mens rea was an essential ingredient for the penalty under Section 271 (1)(c) that the decision in Dilip N. Shroff v. CIT [(2007) 6 SCC 329] was overruled.*

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18. *We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(l)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself; will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to inaccurate particulars.*

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20. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271 (1)(c). That is clearly not the intendment of the legislature.'

33. In view of the legal position, when we examine the question of bona fide, we find that the assessee had discharged the said onus for the reasons set out above. We also record that while examining the question of bonafides, we have taken into account the conduct of the appellant assessee in disclosing full and true particulars in return of income as well as before the Assessing Officer at the time of assessment proceedings. In the present case, as noticed above, there is no allegation that full details with regard to the agreement, quantum of receipt, the factum why the payment was made and also the fact that the receipts had been offered for taxation in four separate assessment years, were duly disclosed and stated. We have noted that the appellant assessee had claimed that technical know-how would be used for three years and, therefore, consideration received was relatable to three years. We have rejected the said contention but in case the terms of payment and the agreement had been worded differently, the assessee may well have succeeded. In fact the assessee did not try to draft the agreement in a way, which could have ensured that the amount received was bifurcated/divided as income of four assessment years.”

6. Considering the above legal position, as no addition was made after re-opening of the assessment. Infact the compensation of land was received in AY 2010-11. The assessee has no occasion to offer the amount which was received in FY 2009-10. Though the assessee in the reply of notice for initiation of penalty proceeding clarified that due to mistake in the P&L A/c for the year ending on 31.03.2006, the Accountant has written off the entire land i.e. transfer to work-in-progress, however, the assessee in revised return of

income has shown the income and no further addition was made. Moreover, the AO levied the penalty without considering the actual amount which was written off. As per our considered opinion, there was no concealment of income for claiming deduction when the assessee himself offered the same in revised return of income. The assessee has sufficiently explained the fact in reply of the notice of initiation of penalty. As per our considered opinion, the assessee has sufficiently explained. Thus, the order of penalty is set-aside and by accepting the appeal of the assessee.

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

Order announced in open court on 19th of October 2016.

Sd/-

Sd/-

(R.C.SHARMA)

(PAWAN SINGH)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

Mumbai; Dated 19/10/2016

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

(Asstt.Registrar)
ITAT, Mumbai