

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI ASHWANI TANEJA, AM**

**ITA No.4710/Mum/2013
(A.Y:2008-09)**

Income Tax Officer 20(3)(4) Piramal Chambers, Lalbaug, Parel Mumbai-400012	Vs.	Star India Projects 708 Crystal Paradise, Shopping Mall, Off Veera Desai RD, Shah Indl Estate, Mumbai-400058 PAN No.ABOFS8429G
Appellant	..	Respondent
Revenue by	..	Shri. Vishwas Mudhe, DR
Assessee by	..	None
Date of hearing	..	15-12-2016
Date of pronouncement	..	15-12-2016

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of CIT(A) -31, Mumbai in appeal No. CIT(A)-31/IT-106/ITO-20(3)(4)/11-12, dated 28-03-2013. The Assessment was framed by ITO-20(3)(4), Mumbai for the A.Y. 2008-09 vide order dated 27-12-2010 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’). The penalty under dispute was levied by ITO-20(3)(4), Mumbai u/s 271 (1) (C) of the Act vide his order dated 27-06-2011.

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the penalty levied by AO on account of disallowance of expenses under the head advertisement, brokerage and commission etc., deleting the same as expenditure in the nature of capital on levying the penalty for furnishing of inaccurate particulars of income u/s 271(1)(c) of the Act. For this Revenue has raised following two grounds: -

“1. The learned CIT(A) has erred on the facts and circumstances of the case and in law in deleting penalty levied u/s. 271(c) of the of the I.T. Act, 1961 to the tune of Rs. 28,99,442/-.

2. The Ld. CIT(A) has erred in not appreciating the fact that the assessee did not submit the details of the expanses claimed under the head Advertisement, Brokerage and Commission etc. The assessee failed to produce the bills/vouchers of the expanses claimed such as advertisement, and details of Commission and brokerage expanses such as PAN, Confirmation the services undertaken by the assessee and its business exigencies. This way the assessee has furnished inaccurate particulars.”

3. Briefly stated facts are that the assessee is engaged in the business of construction to develop township, marketing the projects etc. During the year under consideration the assessee has claimed loss of Rs.85,30,280/- in the computation of income filed along with the return of income. Subsequently, the assessee during the course of assessment proceedings filed letter dated 18-11-2010 requesting the AO to reduce the loss at Rs.6,54,590/- and the expenses claimed are against work-in-progress and the following are the expense: -

“1.	<i>Advertising expenses</i>	37,56,572
2.	<i>Commission & Brokerage</i>	33,37,779
3.	<i>Site Salary & Wages</i>	3,04,122
4.	<i>Service Charges</i>	3,66,766
5.	<i>Site visit expenses</i>	5,686
6.	<i>Travelling expenses</i>	1,04,767

	<i>Total</i>	78,75,692”

The AO therefore reduced the claim of loss at Rs.6,54,590/- by observing in Para 4.1 as under: -

“4.1 From the assessee’s submission itself is evident that during the year the assessee has no work-in-progress its business activity. The above expenses are claimed against the work-in-progress. Therefore, assessee’s request to reduce the loss to the extent of Rs.6,54,590/- is not acceded to

Further to that, since the assessee has not completed its work during this year, but taken us as work-in-progress and the loss claimed by the assessee at Rs.85,30,280/- is not allowed to be carried forward in the subsequent years.”

4. The assessment was accepted by the assessee and consequently the AO levied the penalty for furnishing of inaccurate particulars of income for the reasons that this loss would not have been reduced by the assessee had no scrutiny assessment proceedings would have taken place. Accordingly, he levied the penalty u/s 271(1)(c) of the Act @ of 100% at Rs.28,99,442/-. Aggrieved, assessee preferred the appeal before CIT(A).

5. The CIT(A) deleted the penalty by observing in para 3.4 & 3.5 as under: -

“3.4 The AO did not accept this request of the appellant and observed that the appellant had no work-in-progress during the year. The loss claimed to be carried forward was disallowed the assessment completed at Nil income. The penalty proceedings are thus based solely on the rejection of the appellant’s claim that the expenses to the tune of Rs.78,75,692/- be taken as capital and not revenue expenses

which is a debatable matter in any light. It is seen that the P & L account filed along with the return of income shows the entire amount of expenses of Rs.85,30,282/ under various heads. Regarding the claim of the appellant that the expenses be capitalised, it is well understood that where expenditure is treated as part of the value of an asset, that expenditure can be capitalised. Such expenditure may be treated as revenue expenses in the normal course of business, but lilt has been expended in relation to an asset and that too during the period prior to bringing the asset in question into a usable condition, these can be treated as part of the value of asset. Whatever the treatment of such expenses, mere rejection of a claim made by the appellant cannot bring the automatic levy of penalty u/s 271(1)(c). The Assessing Officer has not brought any evidence on record to show that the appellant had received income which was not shown in his return of income or that the expenses claimed by the appellant were bogus. He has merely held that since the appellant has no W.I.P during the year, he cannot be allowed to claim capital expenditure. As regards furnishing of inaccurate particulars, the Assessing Officer has not controverted the accuracy of the P&L account and Balance Sheet filed with the return of income. Till sale is completed, whether the expenses incurred are clubbed under revenue or taken as part of WIP, is of little consequence. Thus, this is a situation where at best, it could be said that the appellant had made a claim that was not found allowable by the Assessing Officer. In the case of Sadhana Textile mills (I) Ltd, decided vide Order in ITA No. 7681/M/2011 for A.Y. 2003-04, the 'E' Bench of Hon'ble ITAT, Mumbai held that where claim made by the assessee was supported by documentary evidences, the difference in opinion regarding treatment of the said expenditure would not be valid ground for invocation of provisions u/s 271(1)(c) for filing of inaccurate particulars / concealing the particulars of income. The Hon'ble ITAT observed as under:

"There is a difference between a false claim and a genuine claim. In the first case, the fact of incurring expenditure is missing, whereas in the second situation, incurring of expenditure is never in doubt. The only dispute is how to treat that expenditure - revenue expenditure or capital expenditure. In our opinion, in such cases, penalty cannot be imposed u/s 271(z)(c) of the Act, as stated earlier. In the recent case, delivered by the Hon'ble Supreme court in the case of Reliance Petroproducts (P) Ltd (322 1/P 158), the issue of claims made by the assessee with regard to imposition of penalty u/s 271(1)(c) has been dealt in length."

3.5 In the case of Reliance Petroproducts (SC) reported in 322 If R 158, the Hon'ble Apex Court held that merely making an incorrect claim will not amount to furnishing of inaccurate particulars. Accordingly, I hold that penalty u/s 271(1)(c) is not levied in this case and the Assessing Officer is directed to delete the same. This ground raised by the appellant is therefore allowed,

Aggrieved, now Revenue is in appeal before us.

6. We have heard the learned Sr. DR and gone through the facts and circumstance of the case. We find that AO has not brought the fact of concealment and levy penalty simply

on disallowance of loss that also suo moto by the assessee vide letter dated 11-11-2010 requesting to reduce the loss on account of disallowance of expenses. We find that during assessment proceedings the AO has not doubted the genuineness of expenditure but held it to be capital in nature and disallowed the claim of the assessee. While levying penalty for concealment, the AO has only reasoned that the income was brought to tax due to assessment made in scrutiny otherwise this would not have been detected. But in entirety of facts, we are of the view that the assessee has nowhere tried to conceal the facts rather all the facts were declared in the return of income by making a claim of expenditure even though the same was held as capital in nature. According to us, there is a difference between a false claim and a genuine claim. In the first case, the fact of incurring expenditure is missing, whereas in the second situation, incurring of expenditure is never in doubt. The only dispute is how to treat that expenditure - revenue expenditure or capital expenditure. In our opinion, in such cases, penalty cannot be imposed u/s 271(1)(c) of the Act, in view of the recent case of the Hon'ble Supreme Court in the case of Reliance Petroproducts (P) Ltd (322 ITR 158). Accordingly, we are of the view that the CIT(A) has rightly deleted the penalty and we confirm the same. This issue of Revenue's appeal is dismissed.

7. **In the result, the appeal of the Revenue is dismissed.**

Order pronounced in the open court on 15-12-2016.

Sd/-
(ASHWANI TANEJA)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 15-12-2016

Sudip Sarkar /Sr.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.

//True Copy//

BY ORDER,

Assistant Registrar
ITAT, MUMBAI