

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ "बी" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A.2930/Mum/2012

(निर्धारण वर्ष / Assessment Year: 2007-08)

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| N Jamnadas and Co., 16, Bank street, Fort, Mumbai-400001 | बनाम/ Vs. | The Dy.Commissioner of Income Tax, Central Circle-39, Room No.32, Aayakar Bhavan, M K Road, Mumbai-400020 |
| (अपीलार्थी /Applicant) | : | (प्रत्यर्थी / Respondent) |

स्थायी लेखा सं./जीआइआर सं./PAN : AACFN8427G

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|-----------------------------------|---|-----------------|
| अपीलार्थी की ओर से / Applicant by | : | Shri Harsh Shah |
| प्रत्यर्थी की ओर से/Respondent by | : | Shri N P Singh |

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|--|---|-----------|
| सुनवाई की तारीख /Date of Hearing | : | 23.1.2017 |
| घोषणा की तारीख /Date of Pronouncement | : | 27.1.2017 |

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This is an appeal filed by the assessee challenging the order dated 28.3.2012 passed by the Commissioner of Income Tax, Mumbai for the assessment year 2007-08.

2. The issue raised in all the grounds of appeal is against the exercising the revisionary powers under section 263 of the Income Tax Act, 1961 by the CIT on the ground that the AO has failed to initiate penalty proceedings u/s 271(1)(c) of the Act in the re-assessment order.

3. Brief facts of the case are that the assessment was completed by the AO under section 143(3) of the Act on 31.7.2009 by assessing the total income of Rs.62,06,64,040/- by making disallowances to the tune of Rs.32,14,838/- on account of gift expenses, Chandla expenses and sundry expenses. The disallowances of gift expenses amounting to Rs.1,70,503/- and sundry expenses of Rs.30,37,680/- on account of expenses on behalf of the clients for making various payments were made by the AO by following the earlier assessments. In the year 1997-98 similar expenses were disallowed and on appeal, before the Tribunal, the disallowance of sundry expenses to the extent of 25% of the total expenses were sustained in the assessee's own case.

4. The Commissioner observed that the assessee was knowing that 25% of the total expenses were not allowable still it claimed all these expenses and AO failed to initiate penalty proceedings under section 271(1)(c) of the Act after making additions. Now, the CIT issued show cause notice u/s 263 of the Act in exercise of revisionary powers under the Act on 7.3.2012 to explain why the assessment order passed under section 143(3) of the Act on 31.3.2009 should not be held erroneous and prejudicial to the interest of revenue for the reasons that the penalty proceedings u/s 271(1)(c) of the Act were not initiated in the assessment order. The assessee vide letter dated 21.3.2012 submitted that the expenses were incurred on behalf of the clients/principals on whose behalf it acted as agents. The reply of the assessee is reproduced below:

"5 Assessee filed written submission on 21/03/2012. It was stated that these expenses were incurred for and on behalf of clients/principals on whose behalf it acted as Agents. The assessee further submitted that though the assessing officer has been disallowing all expenses, however, ITAT restricted the disallowance to 25% of these expenses on the basis of its decision in the case of the assessee for the assessment years 1997-98 & 1998-99. The assessee further submitted that the ITAT upheld the disallowance on the basis of assumption that expenditure to the extent of 25% was paid to Government employees and hence, not allowable as the same is covered by Explanation to section 37(1) of the Income Tax Act. On these facts, assessee submitted that expenditure was disallowed on estimated basis and therefore, there is no question of levy of penalty. The assessee has also relied on the decision of Supreme Court in the-case of CIT vs Reliance Petro Products(P)Ltd reported in 332 ITR 158. The assessee submitted that the order of the assessing officer is not erroneous and also not prejudicial to the interest of revenue and hence provision of section 263 is not applicable".

5. The CIT, after considering the contentions and submissions of the assessee and rejecting the same, came to the conclusion that the order passed by the AO was erroneous in so far as it is prejudicial to the interest of revenue by relying on the decision of the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd reported in 243 ITR 83(SC). The CIT further held that the order passed by the AO was not in accordance with law and incorrect appreciation of the facts or incorrect application of law would amount to assessment order being erroneous and prejudicial to the interest of revenue as has been held in the above decision. Finally, the Commissioner set aside the assessment order framed by the AO on the ground of non-initiation of penalty proceedings under section 271(1)(c) of

the Act and accordingly directed the AO to examine whether the disallowance of 25% of sundry expenses should be treated as furnishing inaccurate particulars of income and concealment of income and decide the matter afresh.

6. The Id.AR vehemently submitted before us that the initiation of penalty proceedings, under section 271(1)(c) of the Act is a prerogative of and within the domain of the AO who decides the issue of initiation or non initiation of penalty proceedings on the basis of addition made whether the addition made by the AO could be considered as concealment or furnishing inaccurate particulars of income on the part of the assessee. But in the present case, the AO has not initiated penalty proceedings in the assessment order framed under section 143(3) of the Act dated 31.7.2005 meaning thereby that after examining the nature of addition, the AO did not feel the case of the assessee to be worth and fit for initiation of penalty proceedings under section 271(1)(c) of the Act. The Id. Counsel, heavily relied upon the order of the Hon'ble Supreme Court in the case of *CIT vs. Reliance Petroproducts Pvt Ltd. (2010) 322 ITR 158 (SC)*.

7. The Id. DR argued that there is no whisper of penalty proceedings in the assessment order and therefore the Assessing Officer overlooked the provisions of section 271(1)(c) of the Act and the CIT rightly directed the AO to initiate penalty proceedings against the assessee and therefore the order passed by the AO was erroneous and prejudicial to the interest of revenue.

8. We have carefully considered the rival contentions, perused the material placed before us during the course of hearing including the decision of authorities below and also the decisions relied upon by the parties. We find that the AO has not initiated penalty proceedings in the assessment order. The expenses disallowed were by the AO on the basis of the order of the Tribunal for the assessment year 1997-98 in which 25% of the total expenses were sustained by the Tribunal, whereas the assessee claimed whole expenses in the return of income filed by it. In our considered view, it is a trite law that initiation of penalty is a sole prerogative and within the jurisdiction of the AO who makes the addition whether to initiate penalty or not to initiate penalty proceedings. It is true that there is no whisper in the assessment order to initiate penalty proceedings u/s 271(1)(c) but that does not mean that the AO has not gone into the matter. The rationale behind the CIT exercising revisionary powers u/s 263 of the Act seems quite absurd and meaningless for the reason that to initiate the penalty proceedings in the assessment order and then drop in the same order when the AO is satisfied. In our opinion, the question of levy of penalty is a debatable issue which is to be decided by the AO on the basis of nature of addition made in the assessment order depending on the facts whether the same amounted concealment of income and furnishing inaccurate particulars of income and there is no tailor made formula to levy penalty under section 271(1)(c) of the Act. Moreover the assessee counsel submitted before the Id CIT that the

penalty proceedings were not attracted in view of the apex court decisions in the case of CIT V/s Reliance Petroproduct Pvt.Ltd -322 ITR 158 (SC), wherein it has been held by the Hon'ble Supreme Court that the "*claim which may be wrong or not accepted or was not acceptable to revenue, that by itself would not attract penalty under section 271(1)(c) of the Act.*". In view of these legal aspects, we are of the considered opinion that non-initiation of penalty is neither erroneous nor prejudicial to the interest of revenue as has been opined by the CIT and the exercise of revisionary power under section 263 of the Act by the CIT was wrong and against the provisions of the Act. We are not convinced with the conclusion drawn by the CIT on this issue. We have also perused the ratio laid down by the Hon'ble Apex Court in the case of Malabar Hills (supra) wherein it has been held that the reopening and revisionary can only powers could be exercised under section 263 of the Act only in the case of where the order passed by the AO is erroneous and prejudicial to the interest of revenue. But in the present case, the order of the AO is neither erroneous nor prejudicial to the interest of revenue and therefore the ratio has wrongly been applied by the CIT. Accordingly, we set aside the proceedings u/s 263 of the Act and the consequent order of the Id.CIT.

9. In the result the appeal of the assessee is allowed,

Order pronounced in the open court on 27.1.2017.

Sd
(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

sd
(Rajesh Kumar)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 27.1.2017

SRL,Sr.PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai