

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Amarjit Singh , Judicial Member**

ITA Nos. 3448 & 3449/Mum/2011
(Assessment Years: 1996-97 & 1997-98)

M/s. Precision Containeurs Ltd. (formerly <i>Vasparr Fischer Ltd.</i>) 401, Court Chambers, S.V Rd. Borivali (W), Mumbai 400092 PAN – AAACV4766F	Vs.	ACIT, Circle – 9 (3) Aayakar Bhavan M.K. Road, Mumbai 400020
Appellant		Respondent

ITA No. 3445/Mum/2011
(Assessment Year: 1997-98)

ACIT, Circle – 9 (3) Aayakar Bhavan M.K. Road, Mumbai 400020 PAN – AAACV4766F	Vs.	M/s. Precision Containeurs Ltd. (formerly <i>Vasparr Fischer Ltd.</i>) 401, Court Chambers, S.V Rd. Borivali (W), Mumbai 400092
Appellant		Respondent

Assessee by: Shri M. Subramanian
Revenue by: Shri Ranathir Gupta

Date of Hearing: 03.11.2016
Date of Pronouncement: 04.01.2017

ORDER

Per Jason P. Boaz, A.M.

These three appeals consist of; one appeal by the assessee directed against the order of the CIT(A)-20, Mumbai dated 21.02.2011 for A.Y. 1996-97 confirming the levy of penalty of ₹75,00,000/- under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act') and cross appeals by both the assessee and Revenue directed against the order of the CIT(A)-20, Mumbai dated 21.02.2011 on the levy of penalty under section 271(1)(c) of the Act for A.Y. 1997-98. Since similar issues are involved and these appeals were heard together, they are being disposed off by way of this common order.

2. The facts of the case, briefly, are as under: -

2.1 Assessment Year 1996-97

2.1.1 The assessee, engaged in the business of manufacturing drums and containers, filed its return of income on 10.12.1996 declaring Nil income after claiming depreciation of ₹3,68,82,042/-. A revised return was filed on 01.06.1977 declaring loss of ₹26,46,947/- after claiming depreciation of Rs.3,05,93,292/- for the reason that it has withdrawn its claim of depreciation in respect of leased transaction of Bangalore Gases. The case was taken up for scrutiny and the assessment was completed under section 143(3) of the Act vide order dated 24.03.1989, wherein the loss was determined at ₹37,67,906/- in view of, inter alia, disallowance of entire lease rental expenses claimed as bogus and disallowance of notional interest @24% on loans advanced to various parties. On appeal, the learned CIT(A) allowed the assessee partial relief. On further appeal by Revenue, the ITAT, Mumbai vide order dated 17.05.2006 restored the matter back to the file of the Assessing Officer (AO) for fresh adjudication.

2.1.2 Subsequently, the AO completed the assessment under section 143(3) r.w.s. 254 of the Act vide order dated 13.12.2007, wherein the loss was determined at ₹24,33,060/- in view of disallowance of ₹1,59,80,750/- on account of depreciation claimed on bogus lease transactions and disallowance of claim of hire charges and interest relating to the said lease transaction. Penalty proceedings under section 271(1)(c) of the Act was initiated simultaneously. On appeal, the learned CIT(A) vide order dated 18.06.2008 allowed the assessee partial relief.

2.1.3 Penalty proceedings under section 271(1)(c) of the Act were taken up and penalty of ₹75,00,000/- was levied there under on the assessee for furnishing of inaccurate particulars of income in respect of bogus depreciation of ₹1,59,80,750/- claimed; vide order dated 26.03.2010. The assessee's appeal was dismissed by the impugned order of the CIT(A)-20, Mumbai dated 21.02.2011. The assessee is now in appeal before us in respect of the penalty levied under section 271(1)(c) of the Act.

2.2 Assessment Year 1997-98

2.2.1 The assessee filed its return of income for this year on 01.12.1997 declaring Nil income. A revised return was filed on 17.03.1998 again declaring Nil income, wherein the assessee has disallowed unpaid interest to IDBI under section 43B of the Act. The case was selected for scrutiny and the assessment was completed under section 143(3) of the Act vide order dated 30.03.2000, wherein the assessee's income was determined at ₹30,82,450/- in view of, inter alia, disallowance of entire lease rental expenses claimed. On appeal, the learned CIT(A) allowed the assessee partial relief. On further appeal by Revenue, the ITAT vide order dated 17.05.2006 restored the matter back to the file of the AO for fresh adjudication.

2.2.2 Subsequently, the AO completed the assessment under section 143(3) r.w.s. 254 of the Act vide order dated 13.12.2007, wherein the loss was determined at ₹28,69,740/- in view of the assessee claiming bogus depreciation claim on certain bogus lease transactions. Penalty proceedings under section 271(1)(c) of the Act was initiated simultaneously. On appeal the learned CIT(A) vide order dated 18.06.2008 allowed the assessee partial relief.

2.2.3 Penalty proceedings under section 271(1)(c) of the Act was taken up and penalty of ₹20,00,000/- was levied thereunder on the assessee for furnishing of inaccurate particulars of income in respect of hire charges, interest on loans and advances, prior period expenses and disallowance under section 43B of the Act amounting to ₹45,50,866/-. On appeal, the learned CIT(A)-20, Mumbai vide the impugned order dated 21.02.2011 has allowed the assessee partial relief; whereby the penalty levied under section 271(1)(c) of the Act was restricted/confirmed to the claim of hire charges amounting to ₹5,40,851/- to the extent of 100% of tax sought to be evaded thereon and the penalty levied on other items such as interest on loans and advances, prior period expenses and disallowance under section 43B of the Act were deleted. Both Revenue and the assessee are in appeal before us to the extent that the impugned order of the learned CIT(A) is against them.

3. **Assessment Year 1996-97**

3.1 The grounds raised by the assessee in this appeal are as under: -

“On the facts and in the circumstances of the case and in law, the ld. C.I.T. (Appeals) erred in levying the penalty on depreciation, considering that penalty covered by clause (a) of Explanation 4 of section 271(1)(c) instead of clause (c) of the Explanation 4 of section 271(1)(c).

The appellant pray that levy of penalty u/s 271(1)(c) on depreciation of Rs.1,59,80,750/- should be deleted.

The appellant craves leave to amend or alter ground or add new grounds.”

3.1.2 Vide letter dated 12.07.2016, the assessee has filed the following additional grounds: -

Additional grounds of appeal

- “1. On the facts and in the circumstances of the case & in law, the penalty proceedings initiated u/s 271(1)(c) of the Act is invalid and bad in law as show cause notice is ambivalent in so far as it does not mention as to whether the initiation of penalty is for concealing particulars of income or furnishing inaccurate particulars of income.*
- 2. On the facts and in the circumstances of the case & in law, the penalty order dated 26-03-2010 passed u/s 271(1)(c) is invalid and bad in law.*
- 3. On the facts and in the circumstances of the case & in law, the penalty order dated 26-03-2010 passed u/s 271(1)(c) is invalid and bad in law as the impugned order is in order giving effect I.T.A.T's order and no penalty can be initiated without any specific direction.*
- 4. On the facts and in the circumstances of the case & in law, the penalty proceedings initiated is invalid and bad in law as penalty proceedings initiated originally on 24.03.1999 for the very same assessment year and no penalty was levied and therefore, penalty proceedings cannot be re-initiated.*
- 5. On the facts and in the circumstances of the case and in law, learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) although there is no escapement of income as the appellant is eligible for deduction @ 100% u/s 801A of the Act and therefore any addition/disallowance in the business income would also be eligible for deduction u/s 801A of the Act and consequently there would be no amount of tax sought to be evaded.*
- 6. On the facts and in the circumstances of the case and in law, learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) although the leased transaction are genuine and there is nothing on record to show that the transaction are not genuine.*

7. *On the facts and in the circumstances of the case and in law, learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) of Rs.75,00,000 on amount of depreciation disallowed of Rs. 1,59,80,750 which includes Rs. 62,88,750/- being depreciation in respect of Bangalore gases which amount has already been offered and taxed in the block Assessment, that too at 60% and therefore no penalty can be levied on the said sum of Rs. 62,88,750/-.*
8. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) of Rs.75,00,000 on amount of depreciation disallowed of Rs. 1,59,80,750 although penalty proceedings initiated are in respect of lease transaction which consists of 2 parts viz, lease rental offered of Rs. 1,27,91,004/- and depreciation allowance claimed of Rs. 96,92,000/- and therefore, the learned C.I.T.(A) failed to appreciate that only net amount can be considered for penalty and in the instant case, the rental income is more than depreciation allowance and hence no penalty ought to have been levied.”*

4. Assessment Year 1997-98

4.1.1 In its appeal the assessee has raised the following grounds: -

“On the facts and in the circumstances of the case and in law, the ld. C.I.T. (Appeals) erred in levying the penalty on hire charges of Rs.5,40,851/- under section 271(1)(c).

The appellant pray that levy of penalty u/s 271(1)(c) on Rs.5,40,851/- should be deleted.

The appellant craves leave to amend or alter ground or add new ground.”

4.1.2 Vide letter dated 12.07.2016, the assessee has filed the following additional grounds: -

Additional grounds of appeal

1. *On the facts and in the circumstances of the case & in law, the penalty proceedings initiated u/s 271(1)(c) of the Act is invalid and bad in law as show cause notice is ambivalent in so far as it does not mention as to whether the initiation of penalty is for concealing particulars of income or furnishing inaccurate particulars of income.*
2. *On the facts and in the circumstances of the case & in law, the penalty order dated 26-03-2010 passed u/s 271(1)(c) is invalid and bad in law.*
3. *On the facts and in the circumstances of the case & in law, the penalty order dated 26-03-2010 passed u/s 271(1)(c) is invalid and bad in law as the impugned order is in order giving effect I.T.A.T's order and no penalty can be initiated without any specific direction.*

4. *On the facts and in the circumstances of the case & in law, the penalty proceedings initiated is invalid and bad in law as penalty proceedings initiated originally on 30.03.2000 for the very same assessment year and no penalty was levied and therefore, penalty proceedings cannot be re-initiated.*
5. *On the facts and in the circumstances of the case and in law, learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) although there is no escapement of income as the appellant is eligible for deduction @ 100% u/s 801A of the Act and therefore any addition/disallowance in the business income would also be eligible for deduction u/s 801A of the Act and consequently there would be no amount of tax sought to be evaded.*
6. *On the facts and in the circumstances of the case and in law, learned C.I.T.(A) erred in confirming the penalty levied u/s 271(1)(c) although the leased transaction are genuine and there is nothing on record to show that the transaction are not genuine.”*

4.2 Revenue has raised the following grounds in its appeal: -

- “1. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting penalty of imposed u/s. 271(1)(c) of the I.T. Act, 1961 in relation to the additions of ₹24,57,792/- and ₹6,31,682, being prior period expenses and disallowance of interest respectively, overlooking the fact that the assessee had not offered any credible explanation in respect of these additions and the assessee’s case was distinguishable on facts from those of Reliance Petro Products Pvt. Ltd. [322 ITR 158 (SC)] & Atul Mohan Bindal [317 ITR 1 (SC) relied on by the CIT(A).*
2. *The appellant prays that the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.*
3. *The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.”*

4.3 In their application for filing additional grounds of appeal for both assessment years 1996-97 and 1997-98, the assessee has prayed for admission thereof as being legal grounds which go to the root of the matter and which would not require examination of facts and details not already a part of the record. It is submitted that the same were inadvertently omitted to be raised earlier and prayed that the same are admitted for adjudication. In this regard, reliance was placed on the decision of the Hon'ble Apex Court in the case of NTPC Ltd. vs. CIT (299 ITR 383) (SC). We have heard both parties and perused the additional grounds raised by the assessee for both assessment years 1996-97 and 1997-98. We are of the view that the additional grounds raised (supra), are legal grounds which go

to the root of the matter in appeal before us and therefore, following the ratio of the Hon'ble Apex Court's decision in the case of NTPC Ltd. (supra), we admit the additional grounds raised by the assessee for consideration/ adjudication.

5. Additional grounds of appeal 1 and 2 in Assessee's appeal (for both assessment years 1996-97 and 1997-98)

5.1.1. At the outset, the Bench heard both parties on the additional grounds of appeal 1 and 2 in assessee's appeal for assessment years 1996-97 and 1997-98. In these grounds, the assessee contends that the penalty proceedings initiated under section 271(1)(c) of the Act are invalid and bad in law as the show cause notice issued under section 274 r.w.s. 271 of the Act on 13.12.2007 for both assessment years are ambivalent in so far as it does not mention as to whether the initiation of penalty is for concealing particulars of income or for furnishing of inaccurate particulars of income and consequently the penalty orders dated 26.03.2010 levying penalty under section 271(1)(c) of the Act are invalid and bad in law.

5.1.2 In this regard the attention of the Bench was drawn by the learned A.R. of the assessee to the notice issued by the AO, DCIT Circle 9(3), Mumbai, under section 274 r.w.s. 271(1)(c) of the Act (copies placed at pg. 48 & 49 of paper book for A.Y. 1996-97 and at pg. 42 & 43 of paper book for A.Y. 1997-98). It is submitted that the said notices are standard printed cyclostyled notices which do not indicate the required particulars, i.e. as to whether the initiation of penalty is for concealment of particulars of income or furnishing inaccurate particulars of income, since the AO has not deleted therefrom the inappropriate words and paragraphs; thereby evidencing total non application of mind by the AO. The learned A.R. of the assessee contends that the said penalty proceedings have been initiated on all possible grounds. However, in the impugned penalty orders, penalty under section 271(1)(c) of the Act has been levied only for alleged furnishing of inaccurate particulars of income. In support of the proposition that the said notice dated 13.12.2007 issued under section 274 r.w.s. 271 of the Act for initiating penalty proceedings under section 271(1)(c) of the Act were invalid and bad in law, as per the contentions laid

out above, the learned A.R. placed reliance on the following judicial pronouncements:-

- (i) Dilip N. Shroff vs. JCIT (2007) 291 ITR 519(SC),
- (ii) GOI vs. Dharmendra Textile Processors & Others (2008) 322 ITR 158 (SC),
- (iii) CIT vs. Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158 (SC),
- (iv) CIT vs. Manjutha Cotton & Ginning Factory (2013) 359 ITR 565(Kar)

5.2.1 We have heard the rival contentions of both parties on the issues raised in these additional grounds and perused and carefully considered the material on record, including the judicial pronouncements cited. The issue for consideration before us is to examine whether or not penalty under section 271(1)(c) of the Act is exigible in the facts and circumstances of the case on hand as laid out above. In our considered view, proceedings under section 271(1)(c) of the Act can be initiated only if the AO is satisfied in the course of proceedings under the Act that any person has 'concealed particulars of income' or has 'furnished inaccurate particulars of income' and only then can he direct that such person shall pay by way of penalty the sum mentioned in section 271(1)(c)(iii) of the Act.

5.2.2 The expression 'concealed the particulars of income' and 'furnished inaccurate particulars of income', have not been defined, but refer to different acts on the part of the assessee. The Hon'ble Apex Court in the case of Dilip N. Shroff vs. JCIT (291 ITR 519 (SC) on the issue of imposition of penalty under section 271(1)(c) of the Act at paragraphs 95 to 97 thereof has held/observed as under: -

"It is of some significance that in the standard proforma used by the AO in issuing a notice despite the fact that the same postulates that inappropriate words and paras were to be deleted, but the same had not been done. Thus, the AO himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. [See Malabar Industrial Co. Ltd. vs. CIT (2000) 159 CTR (SC) 1 : (2000) 2 SCC 718].

We have, however, noticed hereinbefore that the ITO had merely held that the assessee is guilty of furnishing of inaccurate particulars and not of concealment of income;”

On a perusal of the notices issued under section 274 r.w.s. 271 of the Act for initiation of penalty proceedings under section 271(1)(c) of the Act for both assessment years 1996-97 and 1997-98 in the case on hand, we find that in the standard proforma (ITNS-29) used by the AO for issuing the said notices, the AO himself is not certain as to whether he has to proceed on the basis that the assessee has concealed his income or had furnished inaccurate particulars of his income.

5.2.3 The Hon'ble Apex Court in the case of CIT vs. Reliance Petroproducts P. Ltd. (2010) 322 ITR 158 (SC), while referring to its decisions in the case of Dilip N. Shroff vs. JCIT (2007) 291 ITR 519 and UOI vs. Dharmendra Textile Processors (2008) 306 ITR 277, in para 9 of its order has observed and clarified that the basic reason why the decision in Dilip N. Shroff (supra) was overruled by Dharmendra Textile Processors (supra) was only to the effect that mens rea was not to be considered an essential ingredient for levy of penalty under section 271(1)(c) of the Act. No fault, however, was found with the reasoning in the decision of Dilip Shroff. At para 9 of the order in Reliance Petroproducts P. Ltd. (supra), their Lordships held/clarified the position as under: -

“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. In Dilip N. Shroff Vs. Joint 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)(c) 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. It was further held that the Assessing Officer must be found to have failed to prove that his explanation is not only not bona fide 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. It was only on the point of mens rea that the judgment in Dilip N. Shroff Vs. Joint CIT was upset. In Union of India Vs. Dharamendra Textile Processors, 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 the enactment of section 271(1)(c) read with 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 276C of the Act. The basic reason why decision in Dilip N. Shroff Vs. Joint CIT was overruled by this court in Union of India Vs. Dharamendra Textile Processors, was that according to this court the effect and difference between section 271(1)(c) and section 276C of the Act was lost sight of in the case of Dilip N. Shroff Vs. Joint CIT. However, it must be pointed out that in Union of India Vs. Dharamendra Textile Processors, no fault was found with the reasoning in the decision in Dilip N. Shroff Vs. Joint CIT, where the court explained the meaning of the terms "conceal" and "inaccurate". It was only the ultimate inference in Dilip N. Shroff Vs. Joint CIT 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 Vs. Joint CIT was overruled."

5.2.4 In the above view of the matter, the finding rendered by the Hon'ble Apex Court in the case of Dilip N. Shroff (supra); in respect of holding that 'inappropriate words' and 'paragraphs' in the standard proforma of the notices issued under section 274 r.w.s. 271 of the Act as used by the AO were required to be deleted and the same not having been done, the impugned notices issued on 13.12.2007 for assessment years 1996-97 and 1997-98; then the fact the impugned notices/orders suffer from non-application of mind still holds good and is intact. This legal position has also been reiterated by the Hon'ble Karnataka High Court in the case of CIT vs. Manjunatha Cotton & Ginning Factory (2013) 357 ITR 565 (Kar) and which has also not been interfered with by the Hon'ble Apex Court on

the appeal filed against it by Revenue. Before us, no contrary judgement of the Hon'ble Apex Court has been cited or referred. We, therefore, while taking into consideration the facts and circumstances of the case on hand and applying the ratio and deriving support from the aforesaid decisions of the Hon'ble Apex Court (discussed supra), hold that the notices dated 13.12.2007 issued for initiation of penalty proceedings under section 247 r.w.s. 271 of the Act for levy of penalty under section 271(1)(c) of the Act for assessment years 1996-97 and 1997-98 are defective and issued without application of mind and are therefore invalid and consequently the orders levying penalty under section 271(1)(c) of the Act for both assessment years 1996-97 and 1997-98 are also invalid and liable to be cancelled. In this view of the matter, the additional grounds 1 and 2 raised by the assessee for both assessment years 1996-97 and 1998-99 are allowed.

5.3 Since the levy of penalty under section 271(1)(c) of the Act for both the assessment years has been held to be invalid and the assessee's grievance has been addressed by disposal of additional grounds 1 and 2, the other grounds and additional grounds raised by the assessee against the merits of levy of penalty under section 271(1)(c) of the Act require no adjudication at this stage.

5.4 In view of the levy of penalty under section 271(1)(c) of the Act for both assessment years 1996-97 and 1997-98 being held to be invalid and the impugned orders passed levying the same being cancelled, Revenue's appeal is rendered infructuous and is accordingly dismissed.

6. In the result, the assessee's appeals for assessment years 1996-97 and 1997-98 are allowed and Revenue's appeal for A.Y. 1997-98 is dismissed as indicated above.

Order pronounced in the open court on 4th January, 2017.

Sd/-
(Amarjit Singh)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 4th January, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -20, Mumbai*
4. *The CIT - 9, Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

*Assistant Registrar
ITAT, Mumbai Benches, Mumbai*

n.p.