

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'F': NEW DELHI

BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER, AND  
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No. 2918/Del /2012  
Assessment Year: 2006-07

RDC Concrete (I) Pvt. Ltd  
Sigma, III Floor, Plot No. C/8  
Road No. 22, MIDC, Andheri [East]  
Mumbai

Vs.

The ACIT  
Circle 15(1)  
New Delhi

PAN : AAACU 0108 Q

[Appellant]

[Respondent]

Date of Hearing : 04.05.2016  
Date of Pronouncement : 29.07.2016

Appellant by : Shri Vishal Kalra, Adv  
Shri S.S. Tomar, Adv

Respondent by : Ms. Kesang Y. Sherpa, Sr. DR

**ORDER**

**PER CHANDRA MOHAN GARG, JUDICIAL MEMBER**

This appeal filed by the assessee is directed against the order of the CIT(A)-XVIII, New Delhi, dated 05/03/2012 for A.Y 2006-07 passed in first appeal No. 04/2011-12.

2. Although the assessee has raised as many as four grounds in this appeal, but except the main effective ground No. 1, all the rest are supportive and argumentative to the main ground which reads as

follows:

*“1. On the facts and in the circumstances of the case the CIT(A) has erred in confirming the erroneous observation of the AO that the appellant has claimed a deduction in respect of a sum of Rs. 17,056,951/- as miscellaneous expenses to the extent not written off or adjusted under the head deferred revenue expenditure as against Rs 6,605,954/- actually claimed as deduction.”*

3. We have heard the arguments of both the sides and have carefully perused the relevant material placed on record on the Tribunal inter alia assessment order passed u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act', order of the CIT(A) alongwith the paper book of the assessee spread over 74 pages. The ld. AR took over through the original assessment order passed on 23.12.2008 and submitted that during the relevant ay 2006-07, the assessee debited only Rs. 6605955/- whereas the AO proceeded to levy penalty of an amount of Rs. 1,70,56,950/- as per incorrect addition made in the assessment order. The ld. AR further pointed out that as per the assessee's paper book pages 46 to 48, in Schedule XII, the opening balance of deferred revenue expenditure was Rs. 72,49,150/- and after adjusting expenditure incurred during the year of Rs. 98,07,801/- total amount including opening balance reached Rs. 1,70,56,951/- and after writing off the amount of Rs. 66,05,955/-

during the relevant period, closing balance for the year was Rs. 1,04,50,996/-. The ld. AR drew our attention to Schedule XII and XV of the Statement of Account and also drew our attention towards Note No. 3 to the notes of accounts wherein it has been mentioned that deferred revenue expenditure incurred on or after 1.4.2004 on the site construction and other pre operations has been booked on deferred revenue expenditure basis amortised over three years period or the actual duration of the project, whichever is less after the commencement of commercial production. The ld. AR also pointed out that unfortunately, the appeal of the assessee before the CIT(A) against quantum was dismissed on account of non-prosecution, therefore, the assessee lost his case without adjudication but this cannot be a basis for initiation of penalty against the assessee. The ld. AR also pointed out that the AO picked up wrong figures for making the addition and some incorrect figure was used for imposing penalty and rectification application u/s 154 of the Act is still pending before the AO in this regard which shows that the issue is debatable and the AO imposed penalty on incorrect application of facts and by picking wrong figure of amount which was not actually debited to the profit and loss account. The ld. AR also submitted that for imposition of penalty u/s 271(1)(c) of the Act, the AO is duty bound to bring on record that either the assessee concealed particulars of income or furnished of inaccurate particulars of income with a malafide

intention to evade tax. These allegations have not been substantiated by the AO and thus the impugned penalty is not sustainable.

4. The ld. AR also drew our attention towards assessee's paper book page 55 to demonstrate that right from F.Y. 1999-2000, the assessee is maintaining deferred revenue expenditure account and the amount actually written off during the year has been claimed in the profit and loss account which was Rs. 66,05,955/- for the period under consideration but the AO incorrectly made addition of Rs. 1.70 crore and imposed penalty on the assessee by considering this incorrect and wrong figure which shows clear non-application of mind on the part of the AO. The ld. AR also drew our attention towards assessee's paper book pages 56 and 57 and submitted that similar claim of the assessee was allowed by the AO during the earlier A.Ys and the assessment order dated 25.03.2004 is amply clear where no disallowance or addition has been made in this regard.

5. The ld. AR drew our attention towards profit and loss account for A.Y. 2001-02 Page 60 of Schedule X and submitted that the assessee has written off Rs. 27,59,060/- during the F.Y. 2000-01 pertaining to A.Y. 2001-02 and in the similar set of facts and circumstances of the case, AO, the AO allowed the written off amount without making any disallowance and addition in this regard. Therefore, the issue is quite debatable and infracted. During the year

under consideration, the assessee could not place its case due to inadvertent error of the tax department staff as well as the tax practitioner which led to the dismissal of the appeal before ht CIT(A) for petty cause of non prosecution. Therefore, the penalty imposed by the AO on the basis of incorrect facts and circumstances cannot be held as sustainable and the CIT(A) was quite unjustified and incorrect in upholding the same. To support his contentions, the ld. AR placed reliance on the following judgments of the Tribunal:

- a) DCIT VS. Indiahit Com {P} Ltd  
ITA No. 4374/Del/2004 dated 22.9.2006
- b) Sanghavi Savia Commodity Brokers P. Ltd Vs. ACIT  
ITA No. 1746/Mum/2011 dated 22.12.2015
- c) Elpro International Ltd VS. DCIT  
ITA No. 28 & 29/Mum/2008 dated 23.3.2011
- d) AT & T Communication Vs. DCIT  
ITA No. 2788/Del/2006 dated 19.2.2010

6. Per contra, the ld. DR strongly supported the order of the AO as well as the ld. CIT(A) and submitted that as per penalty order page 4, the AO has drawn correct conclusion that the assessee has furnished inaccurate particulars of income as referred to in section 2(15) of the Act. Therefore, it was liable to penalty u/s 271(1)(c) of the Act. The ld. DR further drew our attention towards last operative para of the impugned order of the CIT(A) and submitted that ht assessee has been unable to justify its claim of filing wrong particulars in its return of

income. Thus it is not a case of bonafide and the assessee has filed incorrect particulars of its income with the intention to evade tax and therefore, the CIT(A) rightly upheld the penalty imposed by the AO.

7. Placing rejoinder to the above submissions of the ld. DR, the ld. AR vehemently contended that neither the AO nor the CIT(A) has brought on record any fact or circumstance against the assessee to show and establish that either the assessee has furnished inaccurate particulars of income or has concealed particulars of its income. Therefore, the penalty cannot be imposed in view of the order of the ITAT, Mumbai in the case of Sanghavi Savia Commodity Brokers P. Ltd. [supra]. The ld. DR placed reliance on the decision of the Hon'ble Delhi High Court in the case of M/s Madhushree Gupta Vs. UOI reported at 317 ITR 107 [Del] and contended that before imposing penalty u/s 271(1)(c) of the Act, the AO should satisfy himself that the assessee has either concealed particulars of his income or furnished inaccurate particulars of income or infringed both these conditions, then only penalty can be levied on the assessee.

8. Before we consider the factual matrix of this case to ascertain as to whether in the eyes of the provisions of the Act as explained by numerous judicial pronouncements, penalty can be levied in this case or not, we would like to discuss in nut shell the relevant legal position regarding levy of penalty u/s 271(1)(c) of the Act and as to how and when such penalty can

be levied under this section. There are no two opinions about the settled position of law that regular assessment proceedings and penalty proceedings are two entirely different subjects which operate in distinct and separate spheres so much so that entirely different parameters are applicable for making quantum addition and for levying penalty under section 271(1)(c). There can be no dispute with regard to the position of law that under section 271(1)(c) of the Act penalty can be levied only if either the act of furnishing of inaccurate particulars of income or concealment of particulars of income, or both, is found to have been committed by the assessee. These are two different omissions or defaults albeit they refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of either suppression or falsity by the assessee. Imposition of penalty is not at all automatic. Meaning thereby, any addition in quantum would not lead to automatic levy of penalty and this is also true in respect of furnishing of inaccurate particulars of income. Not only is the levy of penalty discretionary in nature but the discretion has to be exercised keeping the relevant factors in mind and the approach of the taxman must be fair and objective. This subject has been a matter of great controversy. Finally, after referring to the decisions in the case of Dilip N. Shroff vs JCIT & Another, 291 ITR 519, Union of India vs. Dharmendra Textile Processors [2008] 13 SCC 369, as well as Union of India vs Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448, the Hon'ble Supreme Court

in the case of CIT vs Reliance Petroproducts Pvt. Ltd, 322 ITR 158, has held as under:

*“A glance at the provisions of section 271(1)(c) of the Income-tax Act, 1961, suggests that in order to be covered by it, 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. The meaning of the word "particulars" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, 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. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.*

*Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”*

9. Adverting to the facts of this case, at the very outset, we may point out that the Id. DR has not controverted this fact that the first appeal of the assessee before the CIT(A) has been dismissed on account of non prosecution and on application of the assessee filed u/s 154 of the Act before the AO seeking rectification in the assessment order regarding amount recorded in the quantum assessment order is still pending for adjudication. We may also point out that as per the tabular chart furnished by the assessee, available at page 55 of the assessee's paper book, which was also certified to have been placed on the assessment order during assessment proceedings showing summary of claimed expenses which reveals that the actual amount written off by the assessee on account of deferred revenue expenditure during FY 2005-06 pertaining to AY 2006-07 was 66,05,955/- which was picked up by the AO from quantum assessment order wherein the AO picked up the figure of 1,70,56,950/- which was total of opening balance and deferred revenue expenditure added during the year and actually the assessee has not claimed and written off an amount of Rs. 1,70,56,950/- in the profit and loss account during the year which shows non application of mind on the part of the AO.

10. From the quantum assessment order para 4 page 1, we observe that the AO made disallowance by observing that the assessee had shown a sum of Rs. 1,70,56,950/- as miscellaneous expenses to the extent of not written off or adjusted under the head deferred revenue expenditure. The AO further noted that in the notes of the accounts, it is stated that site construction and other pre operations have been booked on deferred revenue expenditure basis amortised over three years period or the actual duration of the project, whichever is less after the commencement of commercial production. The AO held that as the assessee company was incorporated on 20.4.1993 and actual production of the company commenced since long, therefore, the assessee is not entitled to claim this amount. Therefore, the same is disallowed and added to the income of the assessee. However, it is well accepted proposition that the quantum and penalty proceedings are different but at the same time considering the issue of penalty it is relevant to note that which allowances have been noted by AO while making disallowance and addition and at the time of dismissing the application of ht assessee about its claim for which disallowance and addition has been made. In the present case, in the quantum assessment order, no allocation has been levied against the assessee that the assessee has made a claim which was bogus or the assessee has made a claim by furnishing inaccurate particulars of its income or by concealing particulars of its income. From the penalty order, the

relevant operative para 1, at last page, we may note that the AO in the beginning of the order noted the facts of the case, then the proposition of Hon'ble Rajasthan High Court in the case of Raghuvir Soni Vs. ACIT reported at 258 ITR 239 [Rsj] thereafter reproduced the submissions of the assessee dated 28.3.2011. On the 4<sup>th</sup> page of penalty order, the AO observed that the AO has not been able to show any reasonable cause for its action in claiming deferred revenue expenditure and the assessee has been unable to sustain the explanation offered by him in respect of addition made. But there is no discussion regarding the earlier assessment order wherein similar claims of the assessee has been allowed by the AO. We may further point out that in the latter part of the penalty order, the CIT(A) has reproduced the relevant part of the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Zoom Communications Pvt. Ltd dated 24.5.2010 and thereafter in the last para decided the issue against the assessee by concluding that the assessee has furnished inaccurate particulars of total income as referred to in section 2(45) of the Act and imposed penalty by considering the amount of concealed income as Rs. 1,70,56,950/- which is factually incorrect which shows clear non application of mind on the part of the AO while passing the impugned order. In the similar fashion, the CIT(A) has dismissed the appeal of the assessee wherein in first part of the order reproduced written submissions dated 29.2.2012 thereafter she noted that the

assessee has claimed in its profit and loss account miscellaneous expenses of Rs. 66,05,955/- only and not Rs. 1,70,56,915/- but there is no adjudication by her on this factual discrepancy. In the subsequent part of the impugned order after referring to various judicial pronouncements, the CIT(A) in a brief para mentioned at the end of the order held the assessee has been unable to justify its claim for filing wrong particulars in its return of income and it is not a case of bonafide mistake and the assessee has filed inaccurate particulars of income with the intention to evade tax and mens rea are clearly established which are necessary components in the case of levy of penalty u/s 271(1)(c) of the Act.

11. In this backdrop of the conclusion of the authorities below, we are inclined to hold that the AO imposed penalty by picking wrong facts and figures and by ignoring his own assessment orders in the earlier years wherein on similar set of facts and circumstances the same claim of the assessee has been allowed. As we have already noted that in the penalty order there is no allegation of the AO that in which manner the assessee concealed particulars of its income or furnished inaccurate particulars of income. Unfortunately, during the first appellate proceedings, the CIT(A) observed the discrepancy in the figures picked up by the AO for imposing penalty and contention of the assessee in para 4.1 but did not give any heed of addition to

the facts and circumstances and without adjudicating the vital contention of the assessee which is also pending before the AO as application u/s 154 of the Act for seeking rectification in the assessment order and proceeded to impose penalty by taking into consideration irrelevant allegation of bonafide mistake, mens rea, etc. It is well accepted proposition of law that penalty u/s 271(1)(c) of the Act can only be imposed on the assessee on the basis of allegations as noted by their Lordships in the case of Madhushre Gupta [supra] and the AO is duty bound to satisfy himself that the assessee has either concealed particulars of income or furnished inaccurate particulars of income on both these conditions and he has no explanation to offer or explanation offered by the assessee could not be substantiated or was not acceptable by the AO. On the basis of foregoing discussion, we reach to a final conclusion that the assessee's conduct and explanation offered but it did not show any conscious or intentional act of the to conceal particulars of income or furnish of inaccurate particulars of income. At the same time, we cannot ignore this fact that the assessee's appeal against quantum order was dismissed due to non prosecution and the AO has not decided the rectification application u/s 154 of the Act till date and on specific query from the Bench, the ld. DR could not controvert this fact that e actually made claim by writing off Rs. 66,05,955/- in the profit and loss account during the year under consideration and the

AO has made disallowance and addition by picking wrong figure which was also taken into consideration while imposing penalty on the assessee which shows clear non application of mind by the AO as well as by the CIT(A) wherein the CIT(A) recorded the contention of the assessee but the same remained without adjudication and the CIT(A) confirmed penalty in a mechanical manner without considering the contentions, explanation of the assessee and without providing any heed towards this fact that similar claim of the assessee has been continuously allowed during the earlier A.Ys on similar facts and circumstances. In view of the above, we have no hesitation to hold that the AO as well as the CIT(A) could not establish this allegation against the assessee that the assessee has concealed particulars of income or furnished inaccurate particulars of income regarding claim of deferred revenue expenditure. Therefore, we are unable to agree with the conclusion of the authorities below and thus the main effective ground of the assessee is allowed and consequently, the AO directed to delete the penalty imposed u/s 271(1)(c) of the Act.

12. In the result, the appeal of the assessee stands allowed.

**The order is pronounced in the open court on 29.07.2016.**

**Sd/-  
(S.V. MEHROTRA)  
ACCOUNTANT MEMBER**

**Sd/-  
(C.M. GARG)  
JUDICIAL MEMBER**

Dated: 29<sup>th</sup> July, 2016

VL/

Copy forwarded to:

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

Asst. Registrar,  
ITAT, New Delhi