

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'C', New Delhi**

**Before : Shri H.S. Sidhu, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 5528/Del./2014
Assessment Year: 2008-09**

D.C.I.T., Circle 11(1), New Delhi. (Appellant)	vs.	Inter Ocean Shipping India Pvt. Ltd. 552, Bank Colony, Devli Village, New Delhi.(PAN- AAACI0143F) (Respondent)
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Appellant by	Shri Arun Kumar Yadav, Sr. DR
Respondent by	Shri Sanjeev Rai Mehra, C.A.

Date of Hearing	11.10.2017
Date of Pronouncement	12.10.2017

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the Revenue against the order of ld. CIT(A)-XV, New Delhi dated 21.07.2014 for the assessment year 2008-09 on the following ground :

“On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty of Rs.20,87,424/- imposed upon the assessee under section 271(1)(c) of the I.T. Act, 1961.”

2. The brief facts of the case are that the assessee filed return of income on 28.08.2008 declaring total income of Rs.13,21,76,480/-. The case was taken up for scrutiny. During the course of scrutiny proceedings, the Assessing Officer observed that the assessee has debited into the profit and loss account

under the head 'renewals and replacement', out of which Rs.20,34,723/- has been disallowed by the Assessing Officer on account of capitalization of repair and maintenance expenses and on further scrutiny of accounts, the Assessing Officer disallowed on account of expenses on payments made on behalf of the foreignship owners of Rs.41,06,565/- on estimated basis of 2% of the total expenses of Rs.20,53,28,258/-. On the above two additions, the ITAT confirmed the additions. Thereafter, the Assessing Officer imposed 100% penalty of Rs.20,87,424/-. The Id. CIT(A), after considering the orders, deleted the penalty. Aggrieved by the deletion of penalty, the Revenue is in appeal before the ITAT.

3. The Id. DR submitted that the ITAT has confirmed the above two conditions, therefore, imposition of penalty is justified. The assessee had wrongly claimed capital expenditures to the profit and loss account which are not allowable as per the law in force. The assessee company internally claimed these expenses to avoid the tax liability. At the time of filing of return, the assessee is required to furnish correct particulars of income. He relied on the order of the Assessing Officer.

4. On the other hand, the Id. AR relied on the order of the Id. CIT(A) and reiterated the submissions made before the CIT(A). It was further submitted

that there is no concealment of income. Regarding the first addition, it was submitted that merely making a claim in the return of income which are not sustainable in law does not amount to attract penalty provisions. In this regard, the assessee has relied on the following case laws :

- (i). CIT vs. Amtek Auto Ltd. 352 ITR 394 (P&H)
- (ii). DCIT vs. Punjab Urban Development Authority 152 ITD 305 (Chand)
- (iii). CIT vs. Aero Trades Pvt. Ltd., 322 ITR 316 (Delhi)
- (iv). Ajay Gupta vs. DCIT, 50 ITR (T) 179 (Delhi-Trib)

5. In respect of adhoc addition of Rs.41,06,565/- on account of expenses on payment made on behalf of foreignship owners, the Assessing Officer in the assessment order did not record any satisfaction that the assessee has concealed the particulars of income or furnishes inaccurate particulars thereof.

6. After hearing the submissions of both the parties and going through the materials available on record, we find that the ld. CIT(A) has properly considered the submissions of the assessee as well as the findings recorded by the Assessing Officer. The findings of the ld. CIT(A) are as under :

“6. I have carefully considered the facts of the case in the light of the submission made by the Appellant and applicable law in this regard. Section 271(1)(c) of the Act provides for imposition of penalty in case the Assessing Officer, in the course of any proceeding under Act, is satisfied that:

- (i) any person had concealed particulars of his income or*
- (ii) had furnished inaccurate particulars of such income.*

Further, after insertion of Explanation 1 to Section 271(l)(c), the onus is on the assessee to show that there was no intention of concealment and not on the revenue. Mens rea was considered to be a necessary ingredient for levy of penalty as laid down by the Supreme Court in CIT Vs Anwar Ali (1970) 76 ITR 696. But after the introduction of Explanation 1 to Section 271(1)(c), the Supreme Court held that the requirement of proof of Mens rea on the part of the Revenue, would no longer be necessary as held in Addl. CIT Vs Jeevan Lal Shah (1994) 205 ITR 244 (SC) and B.A. Balasubramaniam and Bros. Co. Vs CIT (1999) 236 ITR 977 (SC).

The role of the Explanation, it was pointed out, was only to place the burden of proof squarely on the taxpayer. It is however observed that the Explanation has been often overworked by the Assessing officers, so as to justify penalty in each and every case of difference, even where an addition was merely on estimated basis of for bona fide omissions.

6.2 Additions disputed on interpretation of law were also invariably subjected to penalty by relying on the Explanation. The various High Courts in the country understood the effect of the Explanation differently often leading to conflicting decisions. In this context two landmark judgments were given by Apex Court in Dilip N. Shroff Vs Joint CIT (2007) 291 ITR 519 (SC) and T. Ashok Pai Vs CIT (2007) 292 ITR 11 (SC), which spell out mainly the following rules for the purpose of penalty imposable:

(i) Both the expressions "concealment of income" and "furnishing of inaccurate particulars" indicate some deliberation on the part of the assessee, though the word "deliberately" and the word "willfully" are no longer part of the statute.

(ii) Mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

(iii) Primary burden of proof is on the revenue. The statute requires satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or

furnished inaccurate particulars and this onus is to be discharged by the department.

(iv) The Assessing officer while considering levy of penalty should consider whether the assessee has been able to discharge his part of the burden. He should not begin with the presumption that the assessee is guilty.

(iv) Though penalty proceedings under the income-tax law may not be criminal in nature, they are still quasi-criminal requiring the Department to establish that the assessee has concealed his income.

(v) It has to be understood that the Explanation to Section 271(1)(c) is an exception to the general rule raising a legal fiction by which the burden which is ordinarily with the Department is sought to be placed on the assessee. This burden on the assessee is subject to "conditions precedent", which are required to be satisfied before the Explanation could be applied. It was also pointed out as held by Supreme Court in K.C. Builders Vs ACIT (2004) (265 ITR 562) (SC) that "deliberateness" is implied in the concept of concealment.

6.3 However after the decision laid down in Dilip N. Shroff (Supra), T. Ashok Pai (Supra) in a dispute under Central Excise Law the Apex Court in the case of UO1 Vs Dharamendra Textile Processors (2008) (306 ITR 277) (SC) held that "default merited penalty without having to consider any intend of the assessee to evade tax. The Mens rea is essential only for matters of prosecutor & not penalty/" Thus after the decision in the case of Dharamendra Textile Processor (Supra), "Mens rea is not necessary to be proved by revenue for civil penalties/" 6.1.3 However with the recent decision of the Supreme Court in the case of CIT Vs Reliance Petro Products Pvt. Ltd (2010) (322 ITR 158) (SC), it is clear that the Supreme Court by giving the ruling in Dharmendra Textile Processor's Case (Supra) has not overruled their decision in Dilip N. Shroff's case except for its mention of Mens rea therein.

6.4 It is also pertinent to mention here that after the ruling of Dharamendra Textile Processor, the Supreme Court has come out with the ruling in 2 different case of CIT Vs Atul Mohan Bindal (2009) (317 ITR1) and UOI Vs Rajasthan Spinning & Weaving Mills (2010) (1GSTR66) (SC) and have given a finding that "that for applicability of Section 271(1)(c)

the conditions stated therein must exist." Even in the recent, decision in the case of CIT(LTU) Vs. MTNL, ITA No.626/2011 dated 10.10.2011, the jurisdictional Delhi High Court has upheld the same view.

6.5 Thus from this it is very clear that for imposing penalty under Section 271(l)(c), the AO have to be satisfied that:

- (a) assessee has concealed the particulars of income or*
- (b) assessee has furnished inaccurate particulars of such income.*

Thus in view of the above discussion and in view of the Hon'ble Supreme Court in Reliance Petroproducts (supra) it is clear that the legislature did not intend to impose penalty on every assessee whose claim was rejected by the assessing officer. What is sought to be covered under Section 271(l)(c) is concealment of "particulars of income" or furnishing of "inaccurate particulars of income" and not making of an untenable claim.

6.6 From the various judicial precedents it is seen that the facts and circumstances in each case, has to be seen in the context and then penalty provision should be applied to see whether there was the concealment of particulars of income or the appellant has furnished inaccurate particulars so as to call for the penal action under Section 271(1)(c).

6.7 On careful consideration of the facts of the case, I find that evidently, the Ld. AO, in the assessment order dated 23.12.2010, had specifically initiated penalty for the first ground of addition i.e. treatment of repairs expenses as capital in nature, by recording satisfaction in the last sentence of the para 1.1 of the assessment order. However, neither any satisfaction was recorded, nor any penalty initiated in respect of the second ground of addition i.e. disallowance of 2% of 3rd party expenses, in para 1.2 of the assessment order. In the concluding lines also, below the computation, there is no further mention about any satisfaction recorded for the second ground of addition. Therefore, no penalty could be levied on this ground of addition also.

6.8. On merit also, regarding the second ground of addition i.e. disallowance of 3rd party expenses, I find that the appellant is in the business of providing various services to the foreign ships visiting Indian ports. Based on the assessment of the diverse needs of such visiting ships, which is ascertained through various modes of communication, the

appellant raises estimates of the expenses to such ship owners and receives an advance amount in respect thereof. Later, when the ship actually visits Indian port and the appellant provides various services, final adjustment is made and only net balance/outstanding amounts are reflected in the P&L A/c, over and above the actual reimbursements. The Ld. AO however, was not satisfied with this explanation and observed that several payments were not supported by documentary evidence. The AO on one hand, had observed that the appellant's claims have been settled by its clients. Yet, he held that the genuineness of payments was not proved. It is thus, evident that the AO itself did not have any pointed evidence in hand to disallow any specific claim of the appellant in respect of which accusation of inaccurate filing of particulars could be held. The fact that the Ld. AO himself, despite making the above general adverse observation, preferred to make disallowance on estimated basis @2% of expenditure claimed on account of 3rd party, shows that the allegation of inaccurate particulars cannot be proved by the AO. Moreover, in view of the settled law, no penalty could be levied where the additions/disallowance is made on estimate basis, as such errors of estimation itself reflect the absence of any clinching evidence suggesting 'inaccurate filing of particulars'. In view of this, no penalty on this ground could be levied.

6.9 Regarding the first ground of addition relating to the action of the AO on holding certain repairs and maintenance expenses as capital in nature, I find that the Hon'ble ITAT has, in the light of the decision in the case of Modi Spinning and Weaving Mills Vs CIT 160 ITR 656, in which it was held that marbling of floor cannot be said as current repairs, which may give benefit of enduring nature, There is no doubt that the premises on which such repairs were conducted were hired premises and not owned by the appellant company or its Directors. As the Hon'ble ITAT, which is the final fact finding authority has held the repair expenses as capital in nature, no further examination of the issue on facts is necessary. However, so far as levy of penalty under Section 271(1)(c) is concerned, evidently, the decision to hold an expense as capital instead of revenue is based on several factors and there could not be one single yardstick to hold the expenses as capital or revenue. Therefore, there cannot be a uniform finding on holding the expenses as capital in nature. In the light of the decision in the case of Punjab and Haryana High Court in the case of CIT Vs Amtek Auto Ltd. (supra), the allegation of filing of inaccurate particulars cannot be sustained merely on the ground that in the given circumstances, repair expenses were held as capital in nature. In view of

the above, no penalty could be levied on this ground as well. In view of this, the order of penalty is cancelled.”

7. Keeping in view the above findings of the Id. CIT(A), we find no justification to interfere with the impugned order, as there is no material on record on behalf of the Revenue to rebut the conclusions reached by the Id. CIT(A) in the impugned order. After going through the assessment order, the Assessing Officer has made payment to the tune of Rs.20,53,28,258/- and the Assessing Officer has not made any charge on this addition regarding imposition of penalty u/s. 271(1)(c) of the Act in the assessment order and this issue has been discussed elaborately by the Id. CIT(A). In view of the totality of facts and circumstances of the case and the case laws relied by the assessee, we are not inclined to disturb the impugned order of Id. CIT(A). Therefore, it is held that the Id. CIT(A) has rightly deleted the penalty on both the issues. Accordingly, the appeal of the Revenue being devoid of merits deserves to fail.

8. In the result, the appeal is dismissed.

Order pronounced in the open court on 12.10.2017.

Sd/-
(H.S. Sidhu)
Judicial member

Sd/-
(L.P. Sahu)
Accountant Member

Dated: 12.10.2017

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