

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6690/Del/2015
(Assessment Year: 2011-12)

Hindustan Coca Cola Marketing Company Pvt. Ltd, 13, Abhul Fazar Road, Bangali Market, New Delhi PAN:AABCH1541D	Vs.	ITO, Ward-11(3), CR Building, New Delhi
(Appellant)		(Respondent)

Assessee by :	Shri Aasish Bhatia, Adv
Revenue by:	Shri. Kaushlendra Tiwari, Sr. DR
Date of Hearing	19/09/2017
Date of pronouncement	22/11/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This appeal is preferred by the assessee against the order of the Ld. Commissioner of income tax appeals – 4, New Delhi dated 9/11/2015 for assessment year 2011 – 12, wherein the assessee challenges the confirmation of the penalty under section 271 (1) (C) of the act confirmed by the Ld. CIT (A) of Rs. 222142/-. This is the only issue involved in this appeal.

“The Appellant prefers following grounds in appeal against the order dated November 9, 2015 passed by the Commissioner of Income-tax (Appeals)-IV, New Delhi [hereinafter referred to as “CIT(A)”] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as “Act”].

- 1.0 That the order passed by the Ld. CIT(A) dismissing the appeal filed by the Appellant ignoring the submissions made before the Ld. AO, provision of law and judicial precedents is bad in law and is liable to be quashed;
- 2.0 That on the facts and circumstances of the case, the Ld. CIT(A) erred in confirming penalty @ 100% levied by the Ld. AO in respect of disallowances suo-moto offered by the appellant during the course of assessment proceedings and not detected pursuant to any inquiry / investigation by the Ld. AO;
- 3.0 That on the facts and circumstances of the case, the Ld. CIT(A) failed to appreciate the fact that the Ld. AO’s order levying penalty alleging both furnishing of inaccurate particulars as well as concealment of income, which are mutually exclusive and apply to different set of facts, is bad in law and is liable to be quashed;
- 4.0 Without prejudice to above, on the facts and circumstances of the case, the Ld. CIT(A) failed to adjudicate upon appellant’s submission that penalty cannot be levied in respect of issues material to computation of tax under normal provisions in case

where assessment has been completed under the provisions of Section 115JB at returned income thereby rendering penalty proceedings non-est in law.”

2. Though assessee has raised almost 4 grounds of appeal, however, the main contest remains against the penalty levied by the Ld. assessing officer and confirmed by the Ld. CIT (A).
3. The brief issue involved is that assessee is a company, which is engaged in the business of trading of non-calling beverages. It filed its return of income on 30/9/2011 declaring total loss of Rs. 2665360/-. The assessment under section 143 (3) of the act was passed on 20/3/2014 determining total income of the assessee at Rs. (-) 194 6451/-. The only addition was made with respect to the provision of bad and doubtful debts of Rs. 244783 and Rs. 474126/- on account of liability is no longer required. The assessee agreed to these additions during the course of assessment proceedings itself. Therefore, admittedly, the assessee did not filed any appeal before the higher forum. Therefore, the Ld. assessing officer issued show cause notice for levy of penalty for inaccurate particulars of income furnished by the assessee.
4. The assessee submitted reply dated 19/6/2014. In response to the notice dated 10/6/2014. The assessee submitted that that the assessee has suo Moto offered the above sum which have been claimed as deduction inadvertently in its return of income. The explanation of the assessee was rejected and levied penalty for the reason that assessee company has not make the about disallowance, addition in its computation of total income attached with the return of income. The company has also not any device written. The company is not offered the above income at the time of initial notice. The assessee company has not responded to query raised wide not sheet dated 23/1/2014. After the issue of the notice under section 142 (1) dated 14/2/2014. The assessee filed letter dated 4/3/2014 wherein the assessee company has offered income of Rs. 7 18909/-. Consequent to an end advert and on account of above mean it to be a suo Moto offer for income on the same. Therefore, the Ld. assessing officer as per para No. 12 of his order held that assessee company is in default for furnishing inaccurate particulars of its income and also for concealing its income for the year under consideration in terms of provisions of section 271 (1)(c) read with explanation 1 (B) and for this default penalty was levied of Rs. 222142/-.
5. On appeal before the Ld. CIT (A). The above penalty was confirmed. The Ld. CIT (A) is that the appellant did not offer the disallowance voluntarily particulars only. On being asked twice that assessee came forward with the breakup of the bad and doubtful advances.

Therefore, assessee aggrieved with the order of the Ld. CIT appeal is preferred an appeal before us.

6. The Ld. authorized representative submitted that merely because some disallowances are made in the assessment order, which were assessee voluntarily agreed no penalty can be levied even if the assessee has not filed appeal before the higher forum . He further pointed out that the Ld. assessing officer in the assessment order has initiated penalty on account of furnishing of inaccurate particulars of total income, whereas in the penalty order. He levied penalty for the purposes of furnishing inaccurate particulars of income as well as for concealment of the total income. Therefore, he argued that AO is not at all aware about the specific charge against the assessee, therefore, he submitted that penalty proceedings initiated are erroneous. He further submitted that the order of the Ld. CIT (A) is also not proper in confirming the penalty merely on disallowance of certain expenditure. He therefore submitted that that penalty levied by the Ld. assessing officer may be cancelled.
7. The Ld. departmental representative vehemently supported the order of the Lord assessing officer and Ld. CIT (A). He submitted that assessee has failed to disclosed the about disallowance despite being enquired twice by the assessee. He further stated that unless the assessing officer has proved this issue. It would have not been disclosed by the assessee and therefore the disclosure of surrendering the about disallowance is not voluntarily. He therefore submitted that lower authorities have rightly proceeded on the issue.
8. We have carefully considered the rival contention and also perused the orders of the lower authorities. It is apparent that in the assessment order, while making disallowance/addition, the Ld. assessing officer has initiated penalty proceedings for furnishing of inaccurate particulars of income. The assessee replied to this notice. However, in the assessment order as per para No. 12. The Ld. Assessing Officer has levied the penalty for concealment of income as well as for furnishing of inaccurate particulars of income. Undisputedly, both these charges are generally and in most of the cases mutually exclusive. Therefore, on conjoint readings of the assessment order as well as the penalty order it is apparent that while levying the penalty, Ld. assessing officer is not sure about the offence of the assessee. The Hon'ble Karnataka High Court in 359 ITR 565, has held that:-

“Conclusion

63. In the light of what is stated above, what emerges is as under :

(a) Penalty under section 271(1)(c) is a civil liability.

- (b) Mens rea is not an essential element for imposing penalty for breach of civil obligations or liabilities.
- (c) Willful concealment is not an essential ingredient for attracting civil liability.
- (d) Existence of conditions stipulated in section 271(1)(c) is a sine qua non for initiation of penalty proceedings under section 271.
- (e) The existence of such conditions should be discernible from the assessment order or the order of the appellate authority or the revisional authority.
- (f) Even if there is no specific finding regarding the existence of the conditions mentioned in section 271(1)(c), at least the facts set out in Explanation 1(A) and 1(B) it should be discernible from the said order which would by a legal fiction constitute concealment because of deeming provision.
- (g) Even if these conditions do not exist in the assessment order passed, at least, a direction to initiate proceedings under section 271(1)(c) is a sine qua non for the Assessing Officer to initiate the proceedings because of the deeming provision contained in sub-section (1B).
- (h) The said deeming provisions are not applicable to the orders passed by the Commissioner of Income-tax (Appeals) and the Commissioner.
- (i) The imposition of penalty is not automatic.
- (j) The imposition of penalty even if the tax liability is admitted is not automatic.
- (k) Even if the assessee has not challenged the order of assessment levying tax and interest and has paid tax and interest that by itself would not be sufficient for the authorities either to initiate penalty proceedings or impose penalty, unless it is discernible from the assessment order that, it is on account of such unearthing or enquiry concluded by the authorities it has resulted in payment of such tax or such tax liability came to be admitted and if not it would have escaped from tax net and as opined by the Assessing Officer in the assessment order.
- (l) Only when no explanation is offered or the explanation offered is found to be false or when the assessee fails to prove that the explanation offered is not bona fide, an order imposing penalty could be passed.
- (m) If the explanation offered, even though not substantiated by the assessee, but is found to be bona fide and all facts relating to the same and material to the computation of his total income have been disclosed by him, no penalty could be imposed.
- (n) The direction referred to in Explanation 1(B) to section 271 of the Act should be clear and without any ambiguity.
- (o) If the Assessing Officer has not recorded any satisfaction or has not issued any direction to initiate penalty proceedings, in appeal, if the appellate authority records satisfaction, then the penalty proceedings have to be initiated by the appellate authority and not the assessing authority.

- (p) Notice under section 274 of the Act should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income
- (q) Sending printed form where all the grounds mentioned in section 271 are mentioned would not satisfy the requirement of law.
- (r) The assessee should know the grounds which he has to meet specifically. Otherwise, the principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee.
- (s) Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law.
- (t) The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings.
- (u) The findings recorded in the assessment proceedings insofar as "concealment of income" and "furnishing of incorrect particulars" would not operate as res judicata in the penalty proceedings. It is open to the assessee to contest the said proceedings on the merits. However, the validity of the assessment or reassessment in pursuance of which penalty is levied, cannot be the subject matter of penalty proceedings. The assessment or reassessment cannot be declared as invalid in the penalty proceedings.”

9. On reading of the above decision of the Hon'ble Karnataka High Court it is apparent that if the penalty proceedings have initiated on one limb and if the same are confirmed on another limb it is not proper. In the present case penalty proceedings are initiated for furnishing of inaccurate particulars of income and the penalty would have been levied stating concealment of income as well as furnishing of inaccurate particulars of income, both the charges. Therefore, it is apparent that the penalty levied by the Ld. assessing officer is vague, ambiguous and not specific. In view of this we cancel the penalty levied by the Ld. assessing officer and confirmed by the Ld. CIT (A) of Rs. 222142/- under section 271 (1) (C) of the act. In the result solitary issue raised in the appeal of the assessee is allowed.
10. In the result appeal of the assessee is allowed.
Order pronounced in the open court on 22/11/2017.

-Sd/-

(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:22/11/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi