

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI
BEFORE SHRI B.R.BASKARAN, AM AND SHRI RAVISH SOOD, JM**

ITA No. 4159/Mum/2016
(निर्धारण वर्ष / Assessment Year:2006-07)

Blue Star Limited (Blue Star Infotech Limited now merged with Blue Star Limited) Band Box House, 4 th Floor, 254-D, Dr. Annie Besant Road, Worli, Mumbai Maharashtra 400030	बनाम/ Vs.	The Assistant Commissioner of Income tax Circle 9(2)(1), Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN No.		AAACB6385J
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri S.C. Tiwari & Ms. Rutuja Pawar, A.Rs
प्रत्यर्थी की ओर से / Respondent by	:	Ms. Pooja Swaroop, D.R

सुनवाई की तारीख / Date of Hearing	:	18.01.2018
घोषणा की तारीख / Date of Pronouncement	:	31.01.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal is directed against the order passed by the CIT(A)-12, Mumbai dated 02.03.2016, which in itself arises from the order passed by the A.O under Sec. 271(1)(c) of the Income tax Act,

1961 (for short 'Act'), dated 28.03.2013. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal: -

"The following grounds of appeal are independent of, and without prejudice, to one another.

1 Order bad in law and on facts

- 1.1 *The order dated 28 March 2013 issued by the Deputy Commissioner of Income-tax, Range 6(1), Mumbai ('DCIT') under section 271(1)(c) of the Income-tax Act, 1961 ('the Act') is bad in law and on facts.*
- 1.2 *The order dated 2 March 2016 (received on 21 April 2016) passed by the Commissioner of Income-tax (Appeals) - 12 [the CIT(A)] under section 250 of the Act, upholding the DCIT's order, is bad in law and on facts.*
- 1.3 *The impugned order has been issued in violation of the principles of natural justice and hence is liable to be struck down.*
- 1.4 *The order issued by the CIT(A) ought to be regarded as invalid since it is based on surmise and conjectures.*
- 1.5 *The CIT(A) grossly erred in upholding the penalty of Rs. 63,61,314/- under section 271(1) (c) of the Act levied by the DCIT, in spite of the fact that the Appellant had neither concealed particulars of income nor furnished inaccurate particulars of such income.*
- 1.6 *The CIT(A) failed to appreciate that the Appellant had provided all the necessary documentary evidences to substantiate its claim.*
- 1.7 *The CIT(A) erred in holding that the Appellant failed to offer a bonafide explanation and substantiate the same.*

2 Penalty in relation to reversal of provision for sales tax

- 2.1 *The CIT(A) erred in upholding the order of DCIT levying penalty under section 271(1)(c) of the Act in relation to addition of sales tax of Rs. 18,898,732/- to the income of the Appellant for AY 2006-07, without taking cognizance of the submissions made by the Appellant that it had not concealed any income and had not furnished any inaccurate particulars.*
- 2.2 *The CIT(A) erred in not taking cognizance of the fact that there had been no concealment of income by the Appellant as regards the reversal of provision for sales tax since the Appellant had voluntarily offered sales tax collected from customers to income-tax in the return filed for AY 2007-08.*

The CIT(A) ought to have appreciated that the Appellant's action of voluntarily offering sales tax collected from customers to income-tax in the return filed for AY 2007-08 had been taken much before the DCIT initiated the re-assessment proceedings for AY 2006-07 and the subsequent penalty proceedings.

- 2.3 *Without prejudice to the above, the CIT(A) grossly erred in not taking cognizance of the submissions made by the Appellant that it had*

voluntarily offered provision for sales tax of Rs. 18,898,732/- in its return of income filed for AY 2003-04, AY 2004-05 and AY 2005-06, and that it had erroneously, once again, offered the same to income-tax in its return filed for AY 2007-08.

2.4 *The CIT(A) erred in relying on various judicial decisions for justifying the levy of penalty which are distinguishable on facts.*

The CIT(A) ought to have appreciated that the above decisions have upheld levy of penalty in cases where assessee have accepted the disallowances made in the assessment order, whereas, in the instant case the Appellant had never conceded to, nor accepted, the addition of sales tax of Rs. 18,898,732/- to its income of AY 2006-07 at the time of assessment proceedings before the DCIT or during the course of appellate proceedings before the CIT(A).

Further, the CIT(A) ought to have appreciated the Appellant has also not accepted the CIT(A)-14's conclusion that sales tax of Rs. 18,898,732/- had to be offered to tax in AY 2006-07 and has already filed an appeal before the Income-tax Appellate Tribunal against the order of the CIT(A), which matter is currently pending disposal before the ITAT.

2.5 *Without prejudice to the above, the CIT(A) erred in not taking cognizance of the following judicial decisions which had been relied upon by the Appellant, wherein it has been held that mere non-acceptance of the legal claims made by assessee cannot be a basis for levy of penalty under section 271(1)(c) of the Act:*

- *CIT v. Reliance Petroproducts Pvt. Ltd. [2010-TIOL-21-SC-IT],*
- *CIT v. Indian Metals and Ferro Alloys Limited [1993] 21 ITR 35 (Orissa High Court);*
- *CIT v. H.B. Leasing & Financing Co. Ltd.[2011] 334 ITR 367 (Delhi HC)*
- *CIT v. Amtek Auto Ltd [2013] 352 ITR 394 (P&H)(HC)*
- *CIT v. Harshvardhan Chemicals and Mineral Ltd [2003] 259 ITR 212 (HC Raj)*
- *CIT V. Sivananda Steels Ltd [2002] 256 ITR 683 (HC Madras)*

The Appellant prays that directions be given to grant all such relief arising from the preceding grounds, as also all reliefs consequential thereto.

The Appellant craves leave to add to or alter, by deletion, substitution or otherwise, any or all of the above grounds of appeal at any time before or during the hearing of the appeal.

2. Briefly stated, the facts of the case are that the assessee company which is engaged in the business of software consultancy, designs and development services had filed its return of income for A.Y 2006-07 on 30.11.2006, declaring a loss of Rs.29,08,944/-. Assessment under Sec. 143(3) was framed in the hands of the assessee on 02.12.2009 at an income of Rs.2,46,77,410/-. The case of the assessee was reopened under Sec. 147 of the Act on 31.05.2010.

The A.O in his reassessment order dated 29.12.2010 made an addition of Rs.1,88,98,732/-on account of sales tax collected by the assessee, which was no more required to be paid to the credit of the state government as per the decision of the Assistant Commissioner of Commercial Taxes, Bangalore.

3. The assessee aggrieved with the order passed by the A.O carried the matter in appeal before the CIT(A). The CIT(A) after deliberating on the addition of Rs.1,88,98,732/- made by the A.O on account of sales tax collected but not deposited by the assessee with the Sales tax authorities, upheld the order of the A.O. The assessee assailed the order of the CIT(A) before the Tribunal. The A.O initiated penalty proceedings under Sec. 271(1)(c) and issued a show cause notice under Sec. 274 r.w. Sec. 271, dated 29.12.2010 to the assessee, calling upon it to explain as to why penalty under Sec. 271(1)(c) may not be imposed. The A.O after deliberating on the explanation of the assessee, however, did not find favour with the same and being of view that the assessee had deliberately concealed the particulars of its income within the meaning of Sec. 271(1)(c) of the Act r.w. *Explanation-1* imposed a penalty of Rs.63,61,314/-. Aggrieved, the assessee carried the order of the A.O imposing penalty under Sec.271(1)(c) before the CIT(A). The CIT(A) did not find favour with the contentions raised by the assessee before him and confirmed the penalty imposed by the A.O.

4. The assessee being aggrieved with the order of the CIT(A) upholding the penalty imposed by the A.O under Sec. 271(1)(c), had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that the quantum appeal filed by the assessee assailing the aforesaid addition of Rs.1,88,98,732/- had been allowed by the

Tribunal vide its order dated 26.04.2017 (copy placed on record). It was submitted by the ld. A.R that now when the quantum addition had been deleted, therefore, the penalty imposed on the assessee under Sec. 271(1)(c) on the said issue was liable to be vacated. Per contra, the ld. Departmental Representative (for short 'D.R') did not controvert the aforesaid contention so raised before us.

5. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have perused the order passed by the coordinate bench of the Tribunal, viz. ITAT, Bench "B", Mumbai, dated 26.04.2017 in the case of the assessee, i.e. M/s Blue Star Infotech Pvt. Ltd. Vs. ACIT, Circle-6(1), in ITA No. 7187/Mum/2011, dated 26.04.2017. We find that the Tribunal vide its aforesaid order had deleted the addition of Rs.1,88,98,732/- made by the A.O to the returned income of the assessee by observing as under:-

"We have considered the rival contention of the parties with the help of ld. representatives and gone through the orders of authorities below. We have also perused the various documentary evidences placed on record. We have perused the reasons of re-opening. The careful reading of reasons revealed that from the record, the A.O found that the Performa Credit of Refund of Sale tax due from the (authorities on account of Karnataka Sale Tax collected in earlier not required to be deposited with Sale tax Authorities. In view of the decision of ACIT (Bangalore) dated 19.05.2005. The amount was credited in P&L A/c, though it was required to be brought to tax. From the reasons recorded, it is apparent clear that nothing new material has come in the notice of A.O, subsequently in the course of assessment proceeding. The assessee in the Note of Tax Audit Report has clearly mentioned this fact. Moreover, the assessee in its objection dated 05.10.2010 clearly stated that the Sales tax liability to the extent of Rs. 1,88,98,732/- was offered for taxation for AY 2007-08. The same A.O taxed the Sale tax collected in earlier year in the AY 2007-08. As per our considered opinion the Revenue is not entitled to tax the same amount twice, The Hon'ble Apex Court in CIT vs. Excel Industries Ltd. [358 ITR 295 (SC)] held that when the rate of tax remain the same and the assessee has paid the tax in the subsequent accounting year then the dispute raised by the Revenue is entirely academic and therefore, there is no need for Revenue to continue with the litigation when it is quite clear that not only it was fruitless but also that it meaning have added anything must to the public coffer."

We are of the considered view that now when the quantum addition of Rs.1,88,98,732/- had been deleted by the Tribunal, therefore, there remains no occasion for the penalty imposed on the said count to survive. We thus set aside the order of the CIT(A) and quash the penalty of Rs.63,61,314/- imposed by the A.O under Sec. 271(1)(c).

6. The appeal of the assessee is allowed.

Order pronounced in the open court on 31.01.2018

Sd/-

(B.R. Baskaran)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 31.01.2018

Ps. Rohit Kumar

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT,
Mumbai**

