IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA NOS. 5406/MUM/2011 & 5814/MUM/2013	:	**A.Y : 2007-08**

M/s. K.M. Dastur Reinsurance Brokers Pvt. Ltd., 42, Cambatta Building, M.K. Road, Churchgate, Mumbai 400 020. **PAN : AAACK2826M** (Appellant)	Vs.	ACIT-1(2), Mumbai (Respondent)

Appellant by : Shri Girish Dave
Respondent by : Shri Rajesh Kumar Yadav & Shri R.P. Meena

Date of Hearing : 02/11/2017
Date of Pronouncement : 31/01/2018

O R D E R

PER G.S. PANNU, AM :

The captioned are two appeals by the assessee pertaining to Assessment Year 2007-08 relating to levy of penalty u/s 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act'). Firstly, the challenge is to penalty of Rs.11,95,482/- imposed by the CIT(A) vide order dated 29.06.2011 and the other appeal is arising from the order of Assessing Officer dated 20.07.2011

imposing penalty u/s 271(1)(c) of the Act of Rs.9,02,586/-, which in turn has been affirmed by the CIT(A) vide order dated 22.08.2013. Since both the levies are pertaining to similar addition made to the returned income and relate to the same assessment year, the two appeals have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. In order to appreciate the controversy, we may briefly summarize the background as follows. The appellant before us is engaged in the business of broking for direct insurance and reinsurance businesses. For the Assessment Year 2007-08, it filed a return of income declaring total income of Rs.24,83,92,680/-, which was subject to a scrutiny assessment whereby the total income has been assessed at Rs.26,49,86,430/- in an order passed u/s 143(3) of the Act dated 07.12.2009 which, *inter-alia*, included an addition of Rs.30,08,604/- on account of understatement of brokerage receipts from four insurance companies. Notably, in the course of assessment proceedings, the Assessing Officer carried out a verification exercise u/s 133(6) of the Act with various insurance companies and found that in the case of four such concerns, namely, Bajaj Allianz Insurance Co., Cholamandalam MSG Insurance Co., ICICI Lombard General Insurance Co. and ICICI Prudential Life Insurance, the broking income disclosed by the assessee did not tally with the amounts disclosed in the account books of the said concerns. The relevant difference has been tabulated in the assessment order, which reads as under :-

Sr. No.	*Name of the Insurance company*	*Amount as per Insurance Companies*	*Amount as per assessee's books*	*Un-reconciled amount*	*Remarks*
1	*Bajaj Allianz Insurance Company*	*62,97,424*	*31,30,175*	*3,78,269*	*(1) The amount of Rs.21.02 lakhs was accounted by the assesses in the next F.Y. (2) Service Tax of Rs.6,86,747 was deducted by the Insurance Co.*
2	*Cholamandalam MSG Insurance Co.*	*4,25,782*	*2,24,878*	*1,54,472*	*Service Tax of Rs. 46,432 deducted by Insurance Co.*
3	*ICICI Lombard General Insurance Co.*	*62,28,732*	*30,86,144*	*24,63,332*	*Service tax of Rs.6,79,256 deducted by the Insurance Co.*
4	*ICICI Prudential Life Insurance*	*3,38,669*	*2,89,203*	*12,533*	*Service tax of Rs. 36,933 deducted by the Insurance Co.*
				30,08,604	

3. The Assessing Officer further records that in the absence of any reconciliation, the difference of Rs.30,08,604/- was added to the returned income as understatement of broking receipts. When the matter was carried in appeal before the CIT(A), assessee made detailed factual submissions by pointing out that the differential amount was primarily on account of broking cheques having been received by the assessee in the subsequent period. A complete reconciliation was furnished and we find that the same has also been reproduced by the CIT(A) in his order passed in the quantum assessment proceedings dated 09.12.2010. However, the CIT(A) adopted an entirely different approach as according to him, the amounts disclosed by the four concerns, in fact, showed brokerage accrued

to the assessee which ought to have been shown by the assessee in the instant year itself. According to the CIT(A), the real issue was not one of discrepancy in the receipts shown by the assessee, but it was a case where *qua* the four concerns, assessee had not declared its income on accrual basis. The CIT(A) noted that the said aspect was missed out by the Assessing Officer, and after giving notice to the assessee for enhancement, CIT(A) proceeded to ascertain the differential. The CIT(A) noted that as per the information received from the four concerns, the total income accruing to the assessee was Rs.1,32,90,607/-, whereas what was shown as income by the assessee was Rs.67,30,400/-, and thus the differential of Rs.65,60,243/- was liable to be assessed. Since the Assessing Officer had already added a sum of Rs.30,08,604/-, the balance of Rs.35,51,639/- was further directed to be added to the returned income. On this enhancement of income by a sum of Rs.35,51,639/-, CIT(A) in a subsequent order dated 29.06.2011 has imposed penalty of Rs.11,95,482/-, being 100% of the tax sought to be evaded on the enhanced amount of Rs.35,51,639/- in terms of Sec. 271(1)(c) of the Act. So far as the addition of Rs.30,08,604/- was concerned, the Assessing Officer vide order dated 20.07.2011 has imposed penalty of Rs.9,02,581/-, being 100% of the tax sought to be evaded on such income in terms of Sec. 271(1)(c) of the Act.

4. The aforesaid discussion clearly shows that though the penalties have been imposed by the two authorities, namely, CIT(A) and Assessing Officer, but the reasons for the imposition remain the same, namely, understatement of brokerage receipts.

5. We have heard the rival parties in the above background and also perused the record and accordingly, proceed to adjudicate the controversy as follows. Insofar as the merits of the controversy is concerned, the learned representative pointed out that assessee has large volume of transactions and practically it was not feasible to reconcile every brokerage amount earned, especially the amounts which have not been actually received during the year itself. It has been emphasised that even after considering the stand of the CIT(A) in the quantum proceedings, the sum and substance of the difference between the assessee and the Revenue relates to non-inclusion of only those brokerage receipts which have not indeed been received by the assessee during the year. Our attention has been also invited to the written submissions made to the lower authorities during the assessment proceedings as also in the penalty proceedings to point out that the assessee had furnished complete detail and reconciliation, which showed that the amounts were indeed not received within the year, and that the same were accounted for as and when the cheques were received or if the same have not been paid to the assessee, such income was not accounted for. The learned representative pointed out that even if one is to go by the real income theory, no fault can be found with the income reported by the assessee inasmuch as the differential amount was not received during the year itself. It has been vehemently pointed out that there was no intention to conceal or hide any income/receipt and thus no penalty u/s 271(1)(c) is attracted.

6. On the other hand, the ld. DR pointed out that the addition has been accepted by the assessee in the quantum proceedings which itself shows

that the return of income was wrong inasmuch as the correct broking receipts have been suppressed, which have been unearthed only as a consequence of the assessment.

7. We have carefully considered the rival submissions. The difference between the returned and assessed income in question is on account of broking receipts shown by the assessee from the four insurance companies. Sec. 271(1)(c) of the Act postulates levy of penalty on existence of two conditions, namely, concealment of the particulars of income or furnishing of inaccurate particulars of such income. It is a quite well-settled proposition that penalty u/s 271(1)(c) of the Act is not leviable merely because there is a difference between the assessed and returned income, and that the said difference cannot be conclusive for levy of penalty because the assessment and the penalty proceedings are independent, as laid down by the Hon'ble Supreme Court in the case of *Anantharam Veerasinghaiah & Co. vs CIT, 123 ITR 457 (SC)*. Notably, the findings in the assessment proceedings may be relevant, but the same, by itself, cannot be conclusive for levy of penalty u/s 271(1)(c) of the Act. Thus, in the instant case, the Assessing Officer as well as the CIT(A) were obligated to demonstrate as to how the impugned addition to the returned income constitutes concealment of particulars of income or furnishing of inaccurate particulars of income within the meaning of Sec. 271(1)(c) of the Act. The tone and tenor of the respective orders passed by the Assessing Officer and CIT(A) u/s 271(1)(c) of the Act show that the penalty has been imposed by merely noticing the difference between the returned and the assessed income *qua* the amount of broking receipts. In fact, if one is to consider the explanations furnished

by the assessee, it is quite clear that it is not a case where the income has not been reported by the assessee, but it is a case where the income has been reported in the year of receipt in future; or it is a case, where, in the absence of actual receipt, no income has been accounted for due to uncertainty of recovery. In fact, the detailed explanation by the assessee has been reproduced by CIT(A) in his quantum proceedings order dated 09.12.2010 in para 4. From the nature of explanation, it is quite clear that it is not a case where it could be said that there was any attempt by the assessee to either conceal or furnish inaccurate particulars of income within the meaning of Sec. 271(1)(c) of the Act. Considering the explanation in the background that assessee has voluminous transactions which made it impractical to reconcile every broking receipt on accrual basis, it could not be said that there was any non-*bona fide* considerations on the part of the assessee in not disclosing the impugned income in its return of income. Thus, in our view, it is not a fit case where penalty was imposable u/s 271(1)(c) of the Act. Thus, the impugned orders of the lower authorities imposing penalty are hereby set-aside. The Assessing Officer is directed to delete the penalties imposed in both the orders; one by the Assessing Officer dated 20.07.2011 and other by the CIT(A) dated 29.06.2011.

8. Before parting, we may also mention that the assessee has raised an Additional Ground pointing out that the lower authorities have not specified the limb of Sec. 271(1)(c) of the Act under which the proceedings have been initiated, i.e. whether for concealment of particulars of income or for furnishing inaccurate particulars of income and, therefore, the orders imposing penalty are *void ab initio*. Since assessee has already succeeded on

merits, the aforesaid point of law raised by the assessee is not being adjudicated and is kept open.

9. Resultantly, both the appeals of the assessee are allowed, as above.

Order pronounced in the open court on 31st January, 2018.

Sd/-	Sd/-
(RAM LAL NEGI)	**(G.S. PANNU)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Date : 31st January, 2018

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "A" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai