



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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAVISH SOOD, JM

ITA No.6/Mum/2014
(Assessment Year :2007-08)

ACIT 24(1) C-13 R.NO. 503 Pratyshakar Bhawan Bandra Kurla Complex Bandra (E) Mumbai – 400 050	Vs.	Shri Arun Damji Gada A-103, GOD Gift Adarsha Dugdhalaya Lane, Adarsh Nagar, Adarsh Dhughala Lane, Malad (W) Mumbai – 400 064
PAN/GIR No.		AABPG3923F
Appellant)	..	Respondent)

Assessee by	Shri Rajesh Sanghvi & Subhash Chhajed
Revenue by	Shri Rajesh Kumar Yadav
Date of Hearing	21/12/2017
Date of Pronouncement	19/03/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the revenue against the order of CIT(A)-34, Mumbai dated 28/10/2010 for A.Y.2007-08 in the matter of imposition of penalty u/s.271(1)(c) of the IT Act.

2. In this case, AO has levied penalty with respect to the income determined after giving effect to the order of CIT(A).

3. By the impugned order, CIT(A) deleted the penalty after observing as under:-

2.3. I have carefully considered the impugned penalty order and the submissions made by the appellant, The Hon. ITAT, Mumbai 'C' Bench in the case of Otis Elevator Co.(I) Ltd. reported in ITA No.4509/Mum/2012 has held as under:-

"2,.....The assessee has taken this step before the AO took cognizance of the issue while finalising the assessment for the A.Y. 2007-08, that the act of offering the advances of subsequent assessment years was not dictated by course of assessment proceedings for the AY 2007-08, that it was not fair to levy penalty when dispute between assessee and the AO was only about the taxability of the income and not about deduction of any income which had not been offered for taxation at all. Relying upon the order of Aishwariya Rai (12SOT114), FAA held that facts of that case were applicable in the case under consideration, that Mumbai Tribunal had deleted the penalty levied in that case. He further held that every addition made in course of assessment proceedings should not be treated as the basis for imposing the penalty, that in the case under consideration only adjustment of income was done by the assessee, that adjustment was made prior to the raising of the issue by the AO, that the explanation offered by the assessee was bonafide. Finally he cancelled the penalty levied by the AO. Before us, Departmental Representative supported the order of the AO, where as Authorised Representative upon the order of the FAA. He relied upon the decision of Aishwarya Ray (supra).

...,i) Imposition of penalty is not automatic. Before imposing, penalty it has to be seen that assessee has contravened the provisions of chapter XXI of the Act. Not only the provisions of levy of penalty are discretionary in nature, but the discretion is also required to be exercised judiciously.

ii) Penalties under the Act are imposed for some omissions and commissions of the assessee, but his such omissions/commissions have to specifically spelt out in the show cause notice as well as in the penalty order. AO/FAA has to specifically mention as which of the particulars were false or how he has concealed particulars of his income. So, where there is no finding that any details supplied by the assessee in its return are found to be incorrect/erroneous/ false is no question of imposition of penalty u/s.271(1)(c).

iii) Evidences produced and issues decided during assessment proceedings are not final or binding in penalty proceedings. Provisions for finalising assessment proceedings and for imposing penalty have been incorporated in tax laws for different purposes. During the assessment of appellate proceedings AO or the FAA can draw a conclusion that particular item forms part of income of the assessee. But, such conclusion or finding cannot or should not become sole basis for imposing penalty. In other words confirmation of any disallowance or addition during the assessment or appellate proceedings cannot be basis for invoking that provisions of section 271(1)(c) of the Act.

iv) Claiming or not claiming particular item under a particular head of income is not a valid basis for imposing penalty under concealment provisions.

v) A disputed claim cannot be equated with furnishing of inaccurate particulars by the assessee. In other words penal provisions cannot be invoked because claims, including claims for special deductions, made by the assessee have been rejected by the AO.

vi) If the explanation filed by the assessee about not imposing penalty is not rebutted by the AO, provisions of concealment will not be applicable.

vii) Concealment of income and furnishing inaccurate particulars are different concepts. A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars.

viii) Where estimate made by the assessee is replaced by the estimate of an AO penalty should not be levied for filing inaccurate particulars.

ix) There is a difference between a false claim and a genuine claim. In the first case, the fact of incurring of expenditure is missing, where as in the second situation, incurring of expenditure is never in dispute. The only dispute is how to treat that expenditure revenue expenditure or capital expenditure. In such a case, penalty cannot be imposed u/s. 271(1)(c) of the Act.

x) Penalty also cannot be imposed, if a claim of the assessee for an incurred expenditure is rejected.

xi) Non-deduction of tax as per the provisions of chapter XVII of the Act, should not result in imposition of penalty u/s. 271(1)(c) of the Act. No deduction of tax source can result in other consequences, but imposition of concealment penalty in such cases is impermissible.

xii) Similarly, not getting the Books of Accounts audited cannot be equated with concealing the particulars of income/furnishing inaccurate particulars of income. There are separate penal provisions in the Act for not getting the Books audited as per the provisions of Sec. 44. AD. But, for violation of those provisions, assessee cannot be visited by the provisions of section 271(1)(c) of the Act.

xiii) Penalty cannot be imposed where arguable/controversial/debatable issues are involved.

xiv) Disallowance of claim and imposition of penalty on basis of subsequent Supreme Court decision is not permissible under the provisions of the Act

Applying the above principles, we can safely hold that FAA has rightly deleted the penalty. Assessee had offered the advances for taxation in subsequent Ays., before AO made any inquiry about them. FAA has given a categorical finding about the dates of inquiry initiated by the AO and offering of advances for subsequent years and from his order it is clear that the assessee had on its own paid tax on the amounts-in-question. It is not the case where assessee had concealed the facts of earning of income-rather it is a case where year of taxability of income was in dispute. AO and the assessee had different opinions about the year in which same should be taxed. In our opinion, in such matters penalty j/s. 271 (1)(c) cannot be levied.

Hon.Mumbai ITAT 'H' Bench in the case of Harsha H Javeri reported in 463/Mum/2010 has held as under:-

....5.1. It is not the case of the Assessing Officer that the expenditure claimed by the assessee is bogus or absolutely wrong. The fact of expenditure has not been disputed but the Assessing Officer disallowed the expenditure because of excessive in comparing to the trading activity.

5.2.....When the claim of the assessee is not found bogus or absolutely wrong or illegal and the assessee has also disclosed all the relevant primary facts, then the disallowance of thx same under the provisions of the Act would not ipso facto lead to the conclusion that the assessee has concealed the particulars of income or furnished inaccurate particulars of income leading to levy of penalty u/s,271(1)(c).

6..... .

6.1. The penalty proceedings are separate and distinct from the assessment proceedings. Therefore the explanation furnished by the assessee has to be examined by the Assessing Officer to determine, whether the explanation is bonafide or not.

Though, addition made in the assessment proceedings is a relevant material for the proceedings u/s.271(1)(c) but if the assessee has explained the fact during the penalty proceedings, which are neither found bogus nor false, then the explanation of the assessee has to be considered on the parameters of bonafide.....

7. As regards the contention of the Ld.AR that the Assessing Officer has not recorded the satisfaction for initiation of penalty proceedings. In respect of disallowance of interest expenditure, it is to be noted that the Assessing Officer has specifically recorded the initiation of penalty proceedings u/s.271(1)(c) at the end of the assessment year, which itself sufficient to show that the Assessing Officer has recorded its satisfaction for initiation of penalty for all the disallowances/additions. It is not required on the part of the Assessing Officer to record his satisfaction for each and every disallowance/addition separately once the satisfaction is recorded at the end of the assessment year. The decision relied upon by the Ld. DR is not applicable on the facts of the present case whereas the decision of the Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt.Ltd. (supra) is applicable, and accordingly the penalty is not justified against the disallowances in question. .

8. In view of the above discussion and in the facts and circumstances of the case, when the assessee has disclosed the primary facts and the genuineness of the expenditure is not in dispute, then mere disallowance of claim of expenditure would not lead to attract penalty provisions u/s.271(1)(c) of the Act, Accordingly we delete penalty levied in this case." Since the issue is directly covered by the decision of Hon. Mumbai ITAT in the case of M/s. Otis Elevator Co. (I)Ltd., reported in 4509/Mum/2012 and Harsha H. Javeri reported in ITA No.463/Mum/2010 quoted supra, the Assessing Officer is directed to delete the penalty of Rs.60,76,516/- levied u/s.271(1)(c) of the Income Tax Act.

4. Revenue is in further appeal before us against the order of CIT(A).
5. Learned DR relied on the order of AO for imposing penalty and contended that provision of expenditure made on estimated basis and the same was not crystallised, therefore, AO was justified in levying the penalty.
6. On the other hand, learned AR contended that AO initiated penalty on the addition on the limb of inaccurate particulars of income. See para #

C.17 on Pg : 21 of impugned assessment order. But in impugned penalty order penalty was finally levied on both the limbs of "Concealment" and "furnishing inaccurate particulars of income" as per para # 5 of impugned penalty order and then in para # 9 of impugned penalty order , the AO again levies penalty on Concealment of income as per Expl-1 of Sec. 271(l)(c). Notice u/s 274 dt : 29-12-09 was issued without striking off relevant limbs.

7. Reliance was placed by learned AR on the decision of Karnataka High Court in the case of Manjunath 359 ITR 565, Samson Perincherry (confirmed by Bombay High Court - ITA No. 1154 of 2007 Dt: 5-1-17) & Ashok pai (SC-292 ITR 11). In DCIT vs Nepa Ltd (Indore Tribunal ITA 683/Ind/2013 Dt : 13-10-14) it was held that Expl-1 it relates to Concealment of income and NOT for furnishes inaccurate particulars of income.

8. With regard to the merit of the penalty so deleted by CIT(A), it was contended that books of accounts were not rejected nor any defect in the accounting system was found by the AO. The AO has relied on the Balance-sheet figures drawn from the audited books of accounts and has not challenged them. This is tantamount to acceptance of the book results. Assessee followed Project completion method. This being estimation work, penalty was claimed not to be levied relying on Reliance Petro case (230 CTR 320 - SC) & Otis Elevators case (Mumbai ITAT in ITA 4509/Mum/2012) & Harsha Jhaveri (Mumbai ITA No. 463/Mum/2010). Estimations can constantly change at various levels and hence in

estimation cases no penalty can be levied. Further as per Bombay High court case of Upendra Mithani (ITA 1860 of 2009 Dt: 5-8-09), where the hypothesis that the addition amount does not represent concealed income is equal to the hypothesis that it represents concealed income, and if the assessed gives an explanation that is unproved but not disapproved , penalty cannot be levied. The assessee gave his version why his construction income ought not to be taxable and none of his figures or facts like court litigation were proved wrong or disapproved , but that the AO disagreed on timing issues or it was the AO's version to tax it, the said facts fall in the Upendra Mithani judgement and hence penalty cannot be levied.

9. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that penalty was levied with respect to the provision of expenditure so made which was on estimate basis. This is a case of estimation assessee did not recognise income due to court litigations/demolition orders and non completion of projects. But AO recognised taxable income ignoring court cases or demolition orders. In the alternative the AO refused to recognise the provision of expenditure of 3.80 crs and profits/losses of Gaurav Gagan (demolition Bldg). The CIT(A) recognised the provisioning of expenditure , but not at Rs. 3.80 crs as claimed , but allows Rs. 2.39 crs. The CIT(A) also recognised income (Income term includes losses) of Gaurav Gagan, pegging the loss at Rs. 2.75 crs. Hence estimated addition of Rs. 6.96 crs is reduced by Rs. 5.15 crs and Net addition remains at Rs. 1.81 Crs.,

which was further substantially reduced by the Tribunal vide its order dated 19/01/2018, wherein Tribunal have allowed 80% of these expenditure. In view of the detailed finding so recorded by CIT(A), we do not find any infirmity in his order for deleting the penalty.

10. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 19/03/2018

**Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER**

**Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER**

Mumbai; Dated 19/03/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai