

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA.No. 1592 & 1593/MUM/2016
(A.Ys: 2002-03 & 2003-04)**

Asst. Commissioner of
Income Tax – 14(2)(1), Room
No. 432, 4th Floor, Aayakar
Bhavan, M.K. Road, Mumbai-
400 020

v.

M/s. Idea Cellular Ltd,
(Successor to Spice Communications
Ltd.), Windsor, 5th Floor, Off. CST
Road, Kalina, Near Vidyanagri,
Santacruz (E), Mumbai – 400 098

PAN No: AAACB 2100 P

(Appellant)

(Respondent)

**Assessee by : Ms. Krupa R. Gandhi &
Ms. Manshi Padhiar**

Revenue by : Shri M.V. Rajguru

Date of Hearing : 08.03.2018

Date of Pronouncement : 31.05.2018

ORDER

PER C.N. PRASAD (JM)

1. These two appeals are filed by the Revenue against different orders of the Ld. Commissioner of Income-tax (Appeals)-8, Mumbai dated 29.12.2015 and 31.12.2015 in sustaining the penalty levied u/s. 271(1)(c) of the Act for the Assessment Years 2002-03 and 2003-04.

2. At the outset, Learned Counsel for the assessee submitted that for the Assessment Year 2002-03 penalty was levied on the disallowance partly sustained by the Ld.CIT(A) towards management service charges claimed by the assessee. It is submitted that, the Ld.CIT(A) in quantum proceedings allowed 75% of the management service charges as Revenue expenditure and 25% as capital expenditure. Learned Counsel for the assessee submitted that similar disallowance was made in the Assessment Year 2007-08 and the penalty was also levied with reference to such disallowance made with respect the management service charges and the Hon'ble Tribunal in ITA.No. 3372/Mum/2015 dated 06.02.2017 deleted the penalty as there is no concealment of income or furnishing of inaccurate particulars of income. Copy of the order is placed on record.

3. Ld. DR vehemently supported the orders of the Assessing Officer.

4. We have heard the rival submissions, perused the orders of the authorities below and the Coordinate Bench decision. On perusal of the Coordinate Bench decision for the Assessment Year 2007-08 we find that on identical circumstances penalty was deleted observing as under: -

"6. We have heard the rival contentions of both the parties. The issue is regarding the payment of Rs.3,26,25,000/-under the head 'management service charges to shareholders'. The Assessing Officer in assessment has treated it as capital expenditure. The matter went to CIT(A) and CIT(A) has confirmed 25% of the expenditure as capital expenditure and remaining expenditure was treated as revenue expenditure. Moreover, when the assessee has filed the return of income, assessee has disclosed all the facts in his return of income. As per the decision of Reliance Petroproducts (P) Ltd. (supra) we find that for penalty for concealment of income if the assessee has made a claim of expenditure which was not accepted

or was not acceptable to revenue by disallow not attract the penalty u/s 271(1)(c) of the Act for imposing the penalty there has to be concealment of particulars of income of the assessee secondly assessee must for furnish inaccurate particulars of this income. It is admitted fact that no information given in the return of assessee was found to be incorrect or inaccurate. The statement given by the assessee was not found to be factually incorrect hence prima facie assessee could not be held guilty for furnishing inaccurate particulars. Therefore, in this case the claim of the assessee was partly allowed by the CIT(A) and Tribunal has submitted the finding of CIT(A). Therefore, we are of the view that CIT(A) has rightly justified in following the decision of Hon'ble Supreme Court. We also find that the Bombay High Court in case of Sesa Resource Ltd. Vs Assistant Commissioner of Income Tax where in the Hon'ble High Court has relying upon the decision of Reliance Petroproducts (P) Ltd. (supra) has deleted the penalty manner we also find in the case of Director of Income Tax Vs. Administrator of the Estate of Late Mr. E.F. Dinshaw (218 Taxman 125) (Bom) similar view has been taken by the jurisdictional High Court. We also find that in the case of Commissioner of Income Tax Vs. Yahoo India (P.) Ltd. 33 taxmann.com 322 Bombay wherein the Hon'ble High Court has held that whenever there is a debatable issue the penalty cannot be levied. Therefore, we respectfully following the same we are of the view that CIT(A) is justified in deleting the penalty in the result the appeal of the Department is dismissed."

5. Respectfully following the same, we delete the penalty levied for the Assessment Year 2002-03 also since there is neither concealment of income nor furnishing of inaccurate particulars of income.

ITA.No. 1596/MUM/2016 (A.Y.2003-04).

6. Coming to appeal for the Assessment Year 2003-04, at the outset, Learned Counsel for the assessee submitted that initiation of the penalty proceedings itself is bad in law as it was not specified as to which limb of the penalty notice was invoked i.e. either for concealment of income or furnishing of inaccurate particulars of such income. It is submitted that the charge for which the penalty was invoked is not specified. Referring to copy of notice placed at Page No. 45 of the Paper Book counsel submitted that the irrelevant portion of the charge was not stricken off and therefore the initiation of penalty proceedings is bad in law. It is submitted

that there is no application of mind by the Assessing Officer and the penalty was initiated without application of the mind in mechanical manner.

7. Coming to the merits of the issue, it is submitted that the penalty was levied with reference to the disallowance of the prior period expenses which was disclosed in the Books of Accounts and there is no failure on the part of the assessee to disclose these expenses. Ld. Counsel for the assessee referring to Page No. 11 of the Paper Book submitted that, in the schedules to Profit and Loss Account it was clearly mentioned that legal and professional charges includes prior period expenses. All the expenses are disclosed in the Tax Audit Report. It was also further submitted that the computation of income filed by the assessee in point No.8 it was specifically mentioned that the prior period expenses have been debited during the current year under legal and professional charges and these have been booked in this year as the bills have been received in the year under consideration though they relate to earlier years. Therefore, it is submitted that there is no failure to disclose the expenses relating the prior period. It is also submitted that the genuineness of the expenditure is not doubted and it is also submitted that assessee has incurred losses in both the Assessment Years i.e. 2002-03 & 2003-04 and there is no avoidance of tax.

8. Ld. DR vehemently supported the orders of the Assessing Officer.
9. We have heard the rival submissions, perused the orders of the authorities below. On the technical issue we find that the Assessing Officer has not made the charge clear to the assessee i.e. the penalty is initiated either for concealment of income or for furnishing inaccurate particulars of income by striking off the irrelevant portion of the charge in the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act. We also find from the Assessment Order that the Assessing Officer except stating that penalty proceedings u/s. 271(1)(c) is being initiated, he has not mentioned as to on what charge the penalty proceedings are initiated i.e. either for concealment of income or for furnishing inaccurate particulars of income. In the case of *Orbit Enterprises v. Income Tax Officer* [60 ITR (Trib.) 252] the Mumbai Bench of the Tribunal considered identical situation. The Tribunal considering the decision of the Hon'ble Jurisdictional High Court in the case of *CIT v. Samson Perinchery* [392 ITR 4] held that, if the Assessing Officer failed to specify the charge for which the penalty proceedings are initiated the proceedings are bad in law. Respectfully following the said decision, we hold that the notice issued u/s. 274 r.w.s. 271(1)(c) of the Act suffers from infirmity as it was issued on non-application of mind by the Assessing Officer and thereby the proceedings

itself are vitiated. Therefore, the penalty is deserved to be deleted on this ground itself.

10. Even on merits, we find that the penalty was levied for disallowing the expenses claimed by the assessee relating to prior period, the claim was based on the bills received by the assessee during the current Assessment Year. There is complete disclose of the expenses by the assessee in its Books of Accounts and therefore there is neither concealment of income nor furnishing of inaccurate particulars of income. Mere disallowance of expenses cannot attract levy of penalty u/s. 271(1)(c) of the Act, thus even on merits the assessee should succeed. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of the CIT v. Reliance Petroproducts (P) Ltd., [322 ITR 158]. In view of the above we direct the Assessing Officer to delete the penalty.

11. In the result, both the appeals of the Revenue are dismissed.

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

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Mumbai / Dated 31/05/2017
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

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.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum