

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

Before Sh. N. K. Saini, AM and Sh. Kuldip Singh, JM

ITA No. 3849/Del/2015 : Asstt. Year : 2007-08

ITA No. 3850/Del/2015 : Asstt. Year : 2008-09

ITA No. 3851/Del/2015 : Asstt. Year : 2009-10

ITA No. 3852/Del/2015 : Asstt. Year : 2010-11

Hans Ispat Ltd., Mehta Lodha & Co., Chartered Accountants, 105, Sakar-1, Nr. Gandhigram Railway Station, Ashram Road, Ahmadabad	Vs	Asstt. Commissioner of Income Tax, Central Circle-25, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCH2447Q		

Assessee by : Sh. Prakash D. Shah, CA

Revenue by : Sh. S. R. Senapati, Sr. DR

Date of Hearing : 11.06.2018	Date of Pronouncement : 13.06.2018
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ORDER

Per Bench:

These four appeals by the assessee are directed against the separate orders each dated 27.04.2015 of the ld. CIT(A)-23, New Delhi.

2. Since, the appeals pertained to the same assessee and were heard together, so, these are being disposed off by this common order for the sake of convenience and brevity.

3. Common issue involved in all these appeals relates to the confirmation of penalty levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

4. At the first instance, we will deal with the appeal for the assessment year 2007-08 in ITA No. 3849/Del/2015. Following grounds have been raised in this appeal:

“1. That the learned CIT(A) has erred in law and facts by confirming the penalty of Rs.3,02,187/- levied under section 271(1)(c) of the Act by the learned AO and therefore the learned AO should be directed to delete the penalty.

2. That the appellant craves liberty to add, amend, alter and delete any grounds of appeal before the final hearing.”

5. Facts of the case in brief are that a search and seizure operation was conducted in Jaksons Group of cases on 10.02.2010 and the assessment proceedings were initiated by issuing the notice u/s 153C of the Act on 02.06.2011. However, no return was filed in response to the notice u/s 153C of the Act. Therefore, the assessment was completed u/s 144 r.w.s. 153C of the Act on 22.12.2011 at an income of Rs.3,40,38,250/- and book profit u/s 115JB of the Act at Rs.1,00,53,935/-. Addition of Rs.1,06,72,728/- on account of unsecured loans and Rs.1,33,12,904/- on account of disallowance of expenses were made to the total income of the assessee company. However, in the first appeal, the ld. CIT(A) deleted the addition of Rs.1,06,72,728/- made by the AO on account of unsecured loans and also allowed relief of Rs.96,44,708/- out of disallowance of expenses amounting to Rs.1,33,22,580/- (wrongly mentioned as Rs.1,33,12,904/-). Thereafter, the AO initiated the penalty proceedings u/s 271(1)(c) of the Act on account of addition sustained by the ld. CIT(A) out of expenses amounting to

Rs.33,68,196/-, the AO levied the penalty of Rs.11,33,740/- u/s 271(1)(c) of the Act.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) and submitted as under:

“(i) That the appellant has not furnished any inaccurate particulars of income and the disallowance of expenses is on account of non-business purpose or personal use.

(ii) That the appellant's income is subjected to Book Profit U/S.115JB of the Act and disallowance has been made in the computation of income under normal provisions of the Act. In such a case where income of an assessee company is finally assessed at book profits by deeming the same to be total income of the assessee, penalty imposable under Section 271(1)(c) of the Act could only be levied in respect of any adjustment / addition / disallowance made while computing such book profits. Our income has been assessed u/s 115JB of the Income Tax Act and therefore any addition/disallowance into normal income is not liable for penalty u/s 271(1)(c). Therefore, since in this case the income is assessed at book profits, penalty under section 271(1)(c) of the Income Tax Act cannot be levied with reference to disallowance made while computing normal income and therefore the learned AO should be directed to delete the penalty. In this regard, reliance is placed on the decision of the Delhi High Court in M/S NALWA SONS INVESTMENT LTD. [2010 327 ITR 543 (Delhi)], order dated 26/08/2010 in ITA No. 1420/2009. Copy of the said judgment is annexed herewith as Annexure 13. Petition for Special Leave to Appeal (Civil) No(s). 18564/2011 filed against the said judgment has also been dismissed by the Hon'ble Supreme Court. Copy of the said judgment is annexed herewith as Annexure 14. Further reliance is also place on the judgment of the Hon'ble ITAT - Delhi Bench "E" in the case of Asstt Commission of Income Tax Vs Nitrex Chemicls India (P) Limited ITA No 5761/Del/2012 of Asstt Year 2005-06 dated 31st May 2013 (copy of the said judgement is annexed herewith as Annexure 15).

(iii) That in the instant case, there was no finding that any details supplied by the assessee in its return were found to be incorrect or

erroneous or false. Assessee just made a claim of expenditure in support of which he was unable to furnish the requisite bills. A mere making of the claim, which is not sustainable in law by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to inaccurate particulars. In this regard, reliance is placed on the judgment of Supreme Court in Reliance Petroproducts (P.) Ltd. [(2010) 322 ITR 158 (SC)].

(iv) That the Books of accounts are audited under Companies Act and Income Tax Act under section 44AB and which have been relied for filing of the return of income and therefore it cannot be treated that we have filed inaccurate particulars of income and accordingly, the return of income has been filed on the bonafide belief and opinion of the tax consultant and for which no penalty u/s. 271(1)(c) of the Act can be levied. In this regard reliance is placed on the following judgments;-

- 1. Hon'ble Gujarat High Court in the case of BTX Chemical (P) Ltd. vs. CIT (288 ITR 196)(Guj), wherein it was held that, "assessee having claimed of loss on account of destruction of capital assets on account of fire under bona fide belief that the loss was revenue loss in view of contusing legal position prevailing at the relevant time, no case of concealment is made out and penalty u/s.271(1)(c) is not leviable.*
- 2. Judgment of Hon'ble High Court of Punjab and Haryana in the case of CIT Vs Deep Tools 274 ITR 603 (P&H).*

(v) Since the expenditure has been disallowed on estimate basis, there cannot be any penalty under section 271(1)(c) of the Act. In this regard reliance is placed on the judgment of the Honble Punjab and Haryana High Court in the case of CIT Vs Sangrur Vanspati Mills Limited (303 ITR 53)(2008).

(vi) The Ld. A.O. has not properly considered our written submission dated 18th November 2013. That further, proper opportunity of hearing has not been given for the levy of the penalty; though the same has been specifically asked vide the said letter. And therefore the

order passed by the learned AO is against the principle of natural justice.

(vii) That In order that a penalty under section 271(l)(c) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of income K.C. Builders V.CIT [(2004) 265 ITR 562 (SC)] and CIT V Susai Kalyanamandapam Pvt. Ltd. [(2004) 271 ITR 138 (Mad.).In this case, in the profit and loss account, the. said expense has been clearly stated and full details have been furnished during the course of assessment proceedings, and it has not been found bogus or non-genuine loss. Further, in cases of levy of penalty, there should always be mens rea. "Mens rea" is evil intention or knowledge of the wrongfulness of the act that a person commits. Only when such mental attitude is present in an act, the person who commits it is said to have acted deliberately in defiance of law or is guilty of dishonest conduct. Since in this case, "mens rea" is absent penalty u/s 271(1)(c) is not imposable.

(viii) In view of the above facts and legal position, the penalty levied by the learned AO is bad and therefore the learned AO should be directed to delete the penalty levied.

Your good office is requested to consider the above submission while passing the order and oblige."

7. The Id. CIT(A) after considering the submissions of the assessee sustained the penalty of Rs.3,02,187/- by observing in paras 4.1 to 4.3 of the impugned order as under:

"4.1 I have considered the facts of the case and the submissions made. Ld. AR has raised the argument concealment penalty is not imposable as there was no intention to evade tax. This argument is not acceptable as the law laid down in Dilip N Shroff case [291 ITR 519 (SC)], wherein it was held that mens rea was an essential requirement for imposing concealment penalty u/s 271(1)(c), was overruled in Dharmendra Textile Processors case [306 ITR 277 (SC)]. Ld. AR has also raised the argument that as the income was assessed u/s 115JB, concealment penalty was not imposable in the case. This argument also cannot be accepted as it is a case where the

returned income under the normal provisions has been altered in assessment / appeal, and although tax has been levied on the book profit computed u/s 115JB, that cannot be a reason to claim that inaccurate particulars have not been filed or that concealment penalty cannot be imposed for this reason. If this argument were to be accepted, all companies / corporate taxpayers liable to pay tax under the MAT provisions would be inclined or incentivized to manipulate their income / loss under the normal provisions of the Act. Therefore, the facts of the case need a closer examination.

4.2 I find that the disallowances sustained in appeal are of two types. The AO had made disallowance of certain expenses on an estimate basis to the extent of 10%. These expenses were examined in appeal, and only with regard to some of these expenses the disallowance made was sustained at the same estimated rate of 10%. Ld. AR has pointed out that a claim disallowed on estimate does not invite concealment penalty. I am of the view that this argument can be accepted as the factum of the expense is not in dispute and therefore it cannot be concluded that appellant concealed any particulars of income / expense. Ld. AR has also pointed out that a claim, disallowed in law does not invite concealment penalty placing reliance on the judgment in Reliance Petroproducts (P) Ltd [(2010) 322 ITR 158 (SC)]. Following the said judgment, legal disallowance of the expenses claimed will not attract penalty to the extent that the factum of these expenses are not in dispute. However, two expenses claimed by the appellant have been disallowed in full. These are donation amounting to Rs.61,800/- and service tax amounting to Rs. 10,07,290/-. Of these two expenses, donation was claimed on actual payment basis but appellant is not in a position to substantiate the same at this late stage. In these facts of the matter, it cannot be said that appellant has made a wrong claim with regard to the donations. However, with regard to service tax amounting to Rs.10,07,290/-, the said expense was claimed on accrual basis but it appears that the said amount was not paid during the previous year or even up to the due date of filing the IT return. If the appellant had not paid the service tax up to the date of filing of IT return, it was incumbent on the appellant to disallow the said expense in the computation of income filed with the said IT return. To the extent the appellant failed to add back the said amount of unpaid service tax it has to be held that appellant filed inaccurate particulars of its income, as the

fact of not having paid the said amount was well within the knowledge of the appellant at the time when the IT return was verified and tiled. I hold accordingly.

4.3 In view of the above, penalty is sustained @ 100% on the unpaid service tax amounting to Rs.10,07,290/-. On all other disallowances, the penalty imposed is canceled. Accordingly, penalty is sustained to the extent of Rs.3,02,187/- and appellant gets relief of Rs.8,31,553/-.”

8. Now the assessee is in appeal. The Id. Counsel for the assessee submitted that the income of the assessee was subjected to book profit u/s 115JB of the Act and the income has been assessed at book profits by deeming the same to the total income of the assessee. Therefore, the penalty imposable u/s 271(1)(c) of the Act could only be levied in respect of any adjustment/addition/disallowance made while computing such book profits. The reliance was placed on the judgment of the Hon~~o~~ble Delhi High Court in the case of CIT Vs M/s Nalwa Sons Investment Ltd. (2010) 327 ITR 543. The reference was also made to the Circular No. 25/2015 dated 31.12.2015 issued by the CBDT, copy of which was furnished during the course of hearing which is placed on the record. It was also stated that the appeal of the assessee on quantum has been decided by the ITAT Delhi Bench -Cø New Delhi in ITA Nos. 3642 to 3645/Del/2014 for the assessment years 2007-08 to 2010-11 respectively vide order dated 25.08.2017 (copy of the said order was furnished which is placed on record).

9. In his rival submissions, the Id. Sr. DR strongly supported the orders of the authorities below.

10. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the penalty u/s 271(1)(c) of the Act has been levied by the AO and sustained by the Id. CIT(A)

on the basis of the addition made on account of disallowances out of expenses. The said addition was a subject matter of the assessee's appeal in ITA No. 3642/Del/2014 for the assessment year under consideration wherein vide para 11 of the order dated 25.08.2017, this issue has been set aside to the file of the Id. CIT(A) to be decided afresh by providing an opportunity of being heard to the assessee. The relevant findings given in the said order read as under:

“11. Bare perusal of the highlighted expenses disallowed by the AO and sustained by the Id. CIT (A) goes to prove that apparently, the same cannot be treated as business expenses without perusing the exact nature and detail of the expenses. Id. CIT (A) has merely sustained the addition on the basis of estimation without calling upon the detail as to the nature thereof and without providing an opportunity of being heard to the AO. So, in these circumstances, the question framed is answered in favour of the assessee and this issue is remanded to the file of the Id. CIT (A) to decide afresh by providing an opportunity of being heard to the assessee. Grounds No.1 & 2 of all the appeals are determined in favour of the assessee for statistical purposes.”

11. Since, the penalty sustained u/s 271(1)(c) of the Act is directly related to the addition sustained by the Id. CIT(A) out of the expenses, the said issue has been set aside to the file of the Id. CIT(A). Therefore, the present issue relating to the levy of penalty u/s 271(1)(c) of the Act is also restored to the file of the Id. CIT(A) to be adjudicated after considering the outcome of the appeals on quantum. We also direct the Id. CIT(A) to consider the judgment of the Honøble Delhi High Court and the Circular No. 25/2015 dated 31.12.2015 issued by the CBDT while deciding the issue under consideration.

12. The facts in ITA Nos. 3850 to 3852/Del/2015 for the assessment years 2008-09 to 2010-11 are identical to the facts involved for the assessment year 2007-08 in ITA No. 3849/Del/2015 which we have already adjudicated in the former part of this order, therefore, the findings given therein shall apply *mutatis mutandis*.

13. In the result, the appeals of the assessee are allowed for statistical purposes.
(Order Pronounced in the Court on 13/06/2018)

Sd/-
(Kuldip Singh)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 13/06/2018

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR