

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

Before Shri Joginder Singh(JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.5397/Mum/2015
(Assessment year: 2011-12)

ACIT-19(2), Mumbai	vs	M/s Kalpavruksha Developers 821, Parekh Market Mama Parmanand Marg Opera House, Mumbai-4 PAN :ABGPM7171B
APPELLANT		RESPONDENT

Appellant by	Shri Ram Tiwari
Respondent by	None

Date of hearing	06-06-2018
Date of pronouncement	13-06-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the revenue is directed against the order of the CIT(A)-30, Mumbai dated 31-08-2015 and it pertains to AY 2011-12. The revenue has raised the following grounds of appeal:-

1. *Whether, on the facts and in the circumstance of the case and in law, the Ld.CIT(A) was justified in deleting the penalty levied u/s. 271(l)(c) of Rs.12,00,000/- for furnishing inaccurate particulars of income.*
2. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the Penalty taking cognizance of the case law in Reliance Petro Products Ltd, (supra), in the light of the decision taken by the Hon'ble Delhi H.C. in the case of Zoom Communication (P.) Ltd., wherein while referring to the judgment in the case Reliance Petro Products Ltd. (supra), it was*

held that "It is true that mere submitting of claim, which is incorrect in law would not amount to giving incorrect particulars of the income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bona fide. If the claim besides being incorrect in law is mala fide. Explanation 1 to section 271(1) would come in play and work to the disadvantage of the assessee?"

2. The brief facts of the case are that in this case, the assessment has been completed u/s 143(3) wherein the AO has made addition towards disallowance of brokerage expenses on the ground that no specific details of services rendered for which brokerage was paid for claiming deduction as business expenditure or services provided by any of the brokers. Thereafter, the AO initiated penalty proceedings u/s 271(1)(c) and after considering relevant submissions of the assessee, levied penalty u/s 271(1)(c) by observing as under:-

6. The submissions made by the assessee have been considered but not acceptable due to the following reasons:

a) The assessee has not provided any fresh evidences to substantiate his claim. Merely stating that the disallowance was just an opinion of the A.O. would not suffice. The A.O. disallowed the claim after conducting detailed investigation. There was no clause for alternate accommodation in the contract. The information u/s 133(6) were called from the parties and no specific details of services rendered for which brokerage was paid for claiming deduction as business expenditure were provided by any of the brokers. The assessee also failed to substantiate how is it relatable to business. The tenants also denied to have been provided with an alternate accommodation.

b) The case laws provided by the assessee are also not applicable in light of the facts of the present case. From the various judicial precedents it is seen that the facts and circumstances in each case has to be seen in -the context and then penalty provisions should be applied to see whether there was the concealment of particulars of income or the appellant has furnished inaccurate particulars so as to call for the penal action under Section 271(1)(c). Thus the assessee fails on this account to prove it otherwise

7. In Webster's Dictionary, "inaccurate" has been defined as not accurate, not exact or correct ; not according to truth; erroneous ; as an inaccurate statement copy or transcript ."

The penalty u/s 271(l)(c) of the Act is leviable if the AO is satisfied in the course of any proceedings under this Act that any person has concealed the particulars of his income or furnished inaccurate particulars of such income.

Explanation 1 to section 271(l)(c) of the Act mentions that where in respect of any facts material to the computation of the total income of any person under the Act , such person fails to offer an explanation or offers an explanation which is found by the AO or the CIT (Appeals) or the Commissioner to be false, or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall for the purpose of clause (c) of section 271(1), be deemed to represent the income in respect of which particulars have been concealed.

The necessary ingredients for attracting Explanation 1 to section 271(1)(c) are that

- (i) the person fails to offer the explanation, or
- (ii) he offers the explanation which is found by the AO or the CIT (Appeals) or the Commissioner to be false, or
- (iii) the person offers explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same have been disclosed by him.

If the present case the assessee falls under the (ii) & (iii) categories, thus the deeming provision provided in Explanation 1 to section 271(1)(c) comes into play, and the amount added or disallowed in computing the total income shall be considered as the income in respect of which particulars have been concealed, for the purposes of clause (c) of section 271(1).

8..Reliance is also placed on the Hon'ble Supreme court judgment in the case of MAK Data (P.) Ltd. V/S Commissioner of income tax -II, (2013) 38 taxmann.com 448(SC). The relevant extracts of which are reproduced below:

The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income.

The burden is then on the assessee to show otherwise, by cogent and reliable evidence". .

9. Keeping in view, the facts of the case discussed above, it can be seen that the assessee had made false claim of expenses of Rs. 40,00,000/-and concealed income and filed inaccurate particulars of income. Thus the penalty provisions u/s. 271 (l)(c) of the Income tax Act, 1961 are clearly attracted in this case.

Hereafter, the undersigned propose to impose penalty under section 271(l)(c) of the Act in this case.”

3. Aggrieved by the penalty order, assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has filed elaborate written submissions and also relied upon certain judicial precedents including the decision of Hon'ble Supreme Court in the case of CIT vs Reliance Petroproducts Pvt Ltd 322 ITR 158 (SC). The relevant submissions of the assessee are extracted at para 4 on pages 4 to 9 of CIT(A)'s order. The sum and substance of the arguments of the assessee before the Ld.CIT(A) are that there is no concealment of particulars of income nor furnishing of any inaccurate particulars of income in respect of disallowance of commission paid to brokers as the assessee has filed necessary evidence to justify commission payment. However, the AO has disallowed only on the ground that the assessee has failed to prove nexus between commission payment and rendering of services of such brokers. The assessee further contended that the 9 parties to whom brokerage was paid duly confirmed the services rendered, payments were made through account payee cheques and all are income-tax assesses and have PAN as well. The evidences clearly establish that the expenditure incurred by the assessee by way of brokerage was for the services rendered by those parties in locating the alternative

accommodation which the assessee had to incur to ensure the prompt.

4. The Ld.CIT(A), after considering relevant submissions of the assessee and relying upon various judicial precedents, including the decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt Ltd vs CIT(supra) observed that having regard to the provisions of clause (b) of Explanation 1 to section 271(1)(c) of the Act, there is no concealment of particulars of income as the assessee has successfully proved that the Explanation is bona fide and that all the facts relating to the same and material to the computation of its total income have been disclosed. The relevant portion of the order of the CIT(A) is extracted below:-

5.15 During the course of appellant proceedings, the appellant had again furnished the details in connection to evidences relating to services rendered by the persons to whom brokerage had been paid by the appellant during the year under consideration. The nine parties to whom brokerage was paid had duly confirmed the services rendered, payments were made through account payee cheques and all are income assesseees quoted with their PAN number as well. The evidences clearly established that expenditure incurred by the appellant by way of brokerage was for the services rendered by these parties in locating the alternate accommodation which the appellant had to incur to ensure the prompt and timely vacation of the entire premises to the buyer trust.

5.16 The appellant had to arrange for alternate accommodation themselves from the compensation received by them, and whereby they had to individually ensure payment of rent towards their respective alternate accommodation to the respective tenants. It was the prerogative of the appellant to take all steps as are necessary to ensure that all tenants should handover timely vacant possession. It also .logical fact that in case of any contract, time is the essential factor. Hence, the appellant had to ensure that all the tenants were paid compensation and also further ensure that all of them would handover

vacant possession within the desired time frame. The appellant who was required to ensure that all the tenants should vacate and hand over possession within the specified time period had to therefore engage to assist and help in smoothening and hastening the process of handing over vacant possession.

5.17 The Assessing Officer has ignored that fact that the penalty proceedings are separate from assessment proceedings. In the event of additions/disallowances made in assessment proceedings, the Assessing Officer has to revisit the facts and merits of the case. The AO is obliged to set out reasons for arriving at a conclusion that penalty should be leviable in any case. The appellant had incurred expenses in the course of its business. The nature and extent of the project to be handled was huge. It was not possible for the appellant to on their own complete the process of vacating the premises of each tenant. The expenditure incurred on brokerage included to assist in finalizing alternate accommodation which the appellant had to incur to ensure prompt and timely vacating of the full premises to the buyer Trust. It is clear that appellant had incurred the expense to ensure specific delivery (vacant possession) to the buyer within the time limit specified.

5.18 It is trite law that assessment and penalty proceedings are two distinct proceedings and merely because disallowance was made this would not give rise to imposition of penalty de hors and the explanation furnished during the course of the penalty proceedings is also a material factor. In this regard, it is also observed that the Ld. A.O. has not doubted the genuineness of the payment of brokerage. In this light, it has been stated by the Ld. AR that the explanation offered by the appellant was bonafide. From the facts emanating in the case, I find that the appellant is able to offer a bonafide explanation as per Clause (B) of explanation 1 to section 271(l)(c) of the I.T. Act.

5.19 It is now well-settled that an addition made to income raises a presumption against the assessee by virtue of Explanation 1 but such is an entirety rebuttable one and the scheme of rebuttal is provided in the Explanation itself. It is also well-settled that the initial onus lies on the assessee to prove that his case does not fall within the purview of Explanation 1.

5.20 The appellant had discharged its primary onus lies on him in terms of the following requirements:-

(a) The appellant offered an explanation regarding the additions made by the A.O. and is also able to substantiate the same.

(b) The appellant has successfully proved that such explanation is bona fide and that all facts relating to the same and material to the computation of his total income have been disclosed by him.

5.21 Having considered all the facts of the case and the explanations furnished by Ld. AR, I find that even the provisions of clause (B) of Explanation 1 to section 271(I)(c) of the Act would not be attracted in this case as the appellant has successfully proved that the explanation is bonafide and that all the facts relating to the same and material to the computation of his total income, have been disclosed.

5.22 In view of the above discussion and explanation offered by the appellant thereof and particularly taking cognizance of the following case laws, penalty of Rs. 12,00,000/- is cancelled:-

i) **Reliance Petro Products Ltd, (supra)** - It was held that a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars.

ii) **CIT vs. Shiv Lal Desai and Sons 114 ITR 377 (Bom)** - It was held that merely because the disallowance was made in the assessment proceedings, it would not necessarily lead to imposition of penalty.

iii) **Shri Ishar Alloys & Steel Ltd vs ACIT 68 ITD 117 (Mum)** – It was held that action under section 271(I)(c) was not valid as the assessee had made a bonafide but unsuccessful claim for depreciation.”

5. None appeared for the assessee. We have heard the Ld.DR and perused materials available on record. The Ld.DR submitted that the Ld.CIT(A) was erred in deleting the penalty levied u/s 271(1)(c) of Ras.12 lakhs without appreciating the fact that the Hon'ble Delhi High Court in the case of Zoom Communication Pvt Ltd, after considering the judgement in the case of Reliance Petroproducts Pvt Ltd vs CIT(supra) held that it is true that mere submitting of claim which is incorrect in law would not amount to giving incorrect particulars of income of the assessee. But, it cannot be disputed that the claim made by the assessee needs to be bona fide. In this case, the AO has brought out clear facts to the effect that although assessee claims to have paid brokerage to arrange the alternative accommodation, but failed to

substantiate its claim. Therefore, there is no bona fideness in the claim of the assessee and hence, the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt Ltd vs CIT(supra) cannot be applied.

6. We have considered the submissions made by the Ld.DR and perused the material available on record. The AO levied penalty u/s 271(1)(c) towards addition made on account of disallowance of brokerage paid on the ground that the assessee failed to prove nexus between brokerage payment and rendering of any service by such brokers. But, it is a matter of fact that the CIT(A) has brought out clear facts that the assessee has filed necessary evidence to prove nexus between brokerage payment and rendering of services by such brokers to make alternative accommodation for smooth delivery of entire premises to the buyer trust. The Ld. CIT(A) noted that a mere making of a claim which is not substantiated in law, by itself, will not amount to furnishing of inaccurate particulars of income so as to levy penalty in the light of ratio of judgement of Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt Ltd vs CIT(supra). The revenue failed to bring on record any contrary decision against the ratio laid down by the Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt Ltd vs CIT(supra). Therefore, we are of the considered view that the Ld.CIT(A)