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

BEFORE SH. RAJENDRA, AM & SH. SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 1528/Mum/2016
(**निर्धारणवर्ष** / Assessment Year: 2010-11)

ITO Ward 3(3)(1), Star House, Urmi Estate 95, Ganpat Rao Kadam Marg, Lower Parel (w), Mumbai-400013	**बनाम**/ Vs.	Regency International Clothing Pvt. Ltd. 77 Nariman Bhavna, 227 Nariman Point, Mumbai-400021.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCN1401A		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Rajesh Kumar Yadav
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Satish R. Mody

सुनवाईकीतारीख/ **Date of Hearing**	:	21.02.18
घोषणाकीतारीख / **Date of Pronouncement**	:	23/02/2018

आदेश / O R D E R

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the revenue is against the order of Ld. CIT (Appeal) – 8, Mumbai dated 28.12.2015 for AY 2010-11on the grounds mentioned herein below:-

1. " On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the penalty of Rs.26,02,272/- levied u/s. 271(1)(c) of IT Act, 1961."

2. " On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating that the assessee has made totally wrong claim of excess depreciation of building of Rs.64,21593/-, which was accepted by the assessee during the course of assessment proceedings. Thus, the assessee has made deliberately wrong claim for reducing its income and therefore it is a clear case of filing inaccurate particulars of income."

3. " On the facts and in the circumstances of the case and in law , the Ld.CIT(A) erred in not considering the fact that the assessee has made a totally wrong claim of Professional /Consultancy fees of Rs.20,000,00/- as business expenses incurred on the property being leased out. Thus, the assessee has made deliberately wrong claim for .educing its income and therefore it is a clear case of filing inaccurate particulars of income."

4. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."

5. "The appellant craves leave to amend or alter any ground or acid a new ground which may be necessary."

2. The brief facts of the case are that assessee is a private limited company incorporated in India. The return of income for AY 2010-11 was filed declaring total income of Rs.Nil. Thereafter, the case was selected for scrutiny and noticed u/s 143(2) was issued and after serving statutory notices, order of assessment u/s 143(3) was completed by the AO determining the total income at Rs. 84,21,590/-. Later on, the application for rectification of mistake u/s 154 was filed by the assessee to reduce the total income to Nil. The AO made two additions /disallowances i.e. i) Depreciation of building at Rs. 64,21,593/- and ii) Professional Fees & Consultancy at Rs. 20 lakhs. Against this order no appeal was filed by the assessee.

During the course of assessment, the AO also initiated penalty proceedings u/s 271(1)(c) of the I.T. Act for furnishing inaccurate particulars. Subsequently, show cause noticed dated 11.07.14 was issued to the assessee for initiating proceeding u/s

271(1)(c) of the I.T. Act, after seeking reply and providing opportunity of hearing, order u/s 271(1)(c) of the I.T Act was passed thereby imposing penalty of Rs. 26,02,272/-.

Aggrieved by the order of imposition of penalty passed by the AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties allowed the appeal of the assessee and set aside the penalty imposed by the AO.

Now before us, the revenue has preferred the present appeal by raising the above grounds.

Ground No. 1& 2.

3. These ground raised by the revenue are inter connected and inter related and relates to challenging the order of Ld. CIT(A) in deleting the penalty of Rs.26,02,272/- levied u/s. 271(1)(c) of IT Act, 1961 and in not appreciating that the assessee has made totally wrong claim of excess depreciation of building of Rs.64,21593/- and Professional /Consultancy fees of Rs.20,000,00/- as business expenses incurred on the property

being leased out, therefore we thought it fit to dispose of the same by this common order.

4. We have heard counsels for both the parties at length, judgment cited by the parties and we have also perused the material placed on record as well as the orders passed by revenue authorities. From the records, we find that assessee has claimed depreciation of Rs. 1,10,08,445/- on the building owned by him during the year under consideration and the AO during the course of assessment, noticed that the said building was on lease to M/s Standlyne Amalgamationas Pvt. Ltd. w.e.f. 01.09.2009 and the assessee has shown 'rental income' from the said building as 'income from house property'. The plea of the assessee with regard to claim of depreciation was found not acceptable by the AO. The assessee admitted and accepted the mistake of claiming wrong deduction and agreed for its disallowance. Thereafter, AO restricted the additions on account of claim of depreciation from 01.04.09 to 31.08.04 and remaining amount of depreciation claimed by the assessee was disallowed.

5. Another addition made by the AO was on account of professional fee and consultancy expenses. In this respect, we noticed that in the P & L account, the assessee had debited Rs. 20 lakhs towards professional and consultancy payment made to M/s Hanu Reddy Realty India Pvt. Ltd and on investigation, the AO found that these expenses were not allowable expenditure u/s 37(1) of the I.T. Act as the assessee has already claimed deduction u/s 24 of the I.T. Act. In response thereto, the assessee vide letter dated 04.03.13 offered the said amount for taxation to buy peace of mind and to avoid further litigation.

6. The AO during the course of assessment initiated penalty proceedings u/s 271(1)(c) of I.T. Act for furnishing inaccurate particulars of income by the assessee. It was found by the AO that the claim of depreciation as well as expenses raised by the assessee during the course of assessment were not at tenable and maintainable under law, therefore the AO after considering the facts of the present case had rightly concluded that this act on the part of the assessee was a clear and undisputed detection of concealment. In case, the claim of the assessee was bonafide or

there was any mistake in raising the claim, then he could have revised its return of income as there was sufficient time, but it was not done so by the assessee.

7. The Ld. AR submitted before us that assessee made a bonafide mistake while raising the claim and later on, the assessee himself agreed for the disallowance. However, this plea raised by Ld. AR is not sustainable in law as this case was selected for scrutiny and had this case not been selected for scrutiny, then the above concealment would have escaped the assessment.

8. Ld. AR also drawn our attention to the order of assessment and pointed out that the AO has not recorded his independent satisfaction while initiating penalty proceedings against the assessee. In this respect, we draw strength from the judgment of Hon'ble Supreme Court in the case of **Mak Data Pvt. Ltd. Vrs. CIT (Civil appeal No. 18389 of 2013)** wherein the Hon'ble Supreme Court has categorically held that *AO is not required to record his satisfaction in a particular manner or reduce it into writing*. *The scope of Section 271(1)(c) has also been elaborately discussed by this court in* ***Union of India vrs. Dharmendra***

Textile Processors (2008) 13 SCC 369 and CIT Vrs. Atul Mohan Bindal (2009) 9 SCC 589.

9. From the above facts and discussion, we are of the considered view that in view of specific provisions of I.T. Act, the claim raised by the assessee for claiming depreciation on his property which was admittedly under tenancy and the expenses for alleged professional fee and consultancy in view of section 24 of the I.T. were not at all sustainable and the same could not have been claimed by the assessee while computing his income. Therefore, the claim raised by the assessee, was not only incorrect in law but was also wholly without any basis.

10. The assessee by not making correct claim had thus filed 'inaccurate particulars' and to interpret the meaning of 'inaccurate', the Hon'ble Supreme Court in the case of **CIT Vrs. Zoom Communication Pvt. Ltd** has categorically held *that the meaning of 'inaccurate' given in Websters Dictionary, the court was of the view that inaccurate particulars would mean the*

details supplied in the return which are not accurate, not exact or correct, not according to truth, or erroneous.

11. The Hon'ble Supreme Court also interpreted the provisions of penalty by holding as under:-

> *19. It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bonafide.. If the claim besides being incorrect in law is malafide, Explanation 1 to Section 271(1) would come into play and work to the disadvantage of the assessee.*
>
> *20. The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under Section 71(1)(C) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition Of*

penalty, even if he was not acting bonafide while making a claim of this nature, that would give a (licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self Assessment under Section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a malafide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have.

21. We find that the assessee before us did not explain either to the Income Tax Authorities or to the Income Tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this case were not added, while computing the income of the assessee company. We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income, and its accounts are

compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee company and how it could also have escaped the attention of the auditors of the company.

22. The explanation offered by the assessee company was not accepted either by the Assessing Officer or by the Commissioner of Income Tax(Appeals). The view of Income Tax Appellate Tribunal regarding admissibility of the deduction on account of written off of certain assets, under Section 32(1)(iii) of the Act is wholly erroneous. The Tribunal has not recorded a finding that the explanation furnished by the assessee in respect of the deduction due to certain assets being written off was a bonafide explanation. The Tribunal has nowhere held that it was .due to oversight that the amount of this deduction could not be added while computing the income of the assessee company.

23. As regards deduction on account of income tax paid by the assessee, the Tribunal felt that since no person would claim the same as deduction, to evade payment of tax, the claim made by the assessee was not malafide. In the absence of the assessee company telling the Assessing Officer asto who committed the

oversight resulting in failure to add this amount while computing the income of the assessee, under what circumstances the oversight occurred and why it was not detected by those who checked the Income Tax Return before it was filed and later by the auditors of the assessee company, we cannot accept the general view taken by the Tribunal. In our view, no such view could have reasonably been taken, on the facts and circumstances prevailing in this case and, therefore, the decision of the Tribunal in this regard suffers from the vice of perversity. We cannot accept the general proposition that no person would ever claim the amount of income tax as a deduction with a view to avoid payment of tax. No hard and fast rule in this regard can be laid down and every case will have to be decided considering the facts and circumstances in which such a deduction is claimed, coupled with as to whether the explanation offered by the assessee for making the claim, is shown to be bonafide or not.

24. For the reasons given in the preceding paragraphs, we answer the question of Lw framed in this case in favour of the revenue and against the assessee. The Income Tax Appellate Tribunal erred in law in deleting the penalty in respect of the amount of Rs. 1 lakh claimed as deduction on account of payment of income tax and the amount of Rs.13,24,539/- debited under the

head equipment written off, in the Profit and Loss Account of the assessee. The appeal stands disposed of accordingly.

12. From the facts of the case, there is no difference of opinion that the disallowance of the claims raised by the assessee and incorrect computation given by the assessee was an act of paying less tax then what was due from it. This fact cannot be ignored that the assessee was a big company, assisted by a team of tax auditors, therefore the question of making bonafide claim by the assessee does not arise, as the claim raised by the assessee were not at all sustainable under the provisions of law. However, the assessee has raised the plea that in order to avoid litigation, the assessee had agreed for disallowance. The Hon'ble Supreme Court in the case of **Mac Data Private Ltd. Vrs. CIT** under these situations had categorically held as under:-

7. The AO, in our view, shall not be carried away by the plea of the assessee like voluntary disclosure, buy peace, avoid litigation, amicable settlement, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment

of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cógéñand reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9 We are of the view that the surrender of income in this case is not voluntary the sense that the offer of surrender was made in view of detection made by the

AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and

is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.

10. The AO has to satisfy whether the penalty proceedings be initiated or not during the course of the assessment proceedings and the AO is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of Section 271(1)(c) has also been elaborately discussed by this Coiiit in Union of India vs. Dharmendra Textile Processors (2008) 13 SCC 369 and CIT vs. Atul Mohan Bindal (2009) 9 SCC 589.

ii. The principle laid down by this Court, in our view, has been correctly followed by the Revenue and we find no illegality in the department initiating penalty proceedings in the instant case. We, therefore, fully agree with the view of the High Court. Hence, the appeal lacks merit and is dismissed. There shall be no order as to costs.

13. The Ld. AR submitted before us that because of mistake, the assessee had raised the claims and the said mistake was a human error which has crept into while making the computation. The Ld. AR also relied upon the orders of the Coordinate Bench

of Hon'ble ITAT in case titled **DCIT vrs M/s Kodak India Pvt. Ltd. ITA No. 1533/Mum/ 14 and M/s B. L. International Vrs. ACIT, ITA No. 1590/Del/14.**

14. We have considered the facts of the above mentioned orders, however the same are not applicable upon the facts of the present case as the factual position contained in the present case is altogether different. On the contrary, the Jurisdictional Hon'ble Bombay High Court in the case of **Samson Maritime Ltd. Vrs. CIT** has held as under:-

> *8 The grievance of the appellant-assessee before us is that it had itself brought its mistake of debiting the loss on account of foreign exchange fluctuation to determine its Non-Tonnage income to the notice of the Assessing Officer. This, according to him, is stated in its Affidavit dated 23rd June, 2010 filed during the penalty proceedings before the Assessing Officer. However, the above affidavit as filed by the appellant during penal proceedings, has been ignored by all the authorities including the Tribunal while passing the impugned order. It is-submitted that the above fact itself would justify dropping of any penal proceedings*

against appellant-assessee. It was also submitted before us that debiting of the foreign exchange loss to arrive its non-tonnage income, was a mistake and no penalty be imposed for the mistake committed. Reliance was placed upon the Apex Courts decision in Price Waterhouse Coopers (P) Ltd., v/s. CIT 348 ITR 306 to contend that mistakes made by an assessee cannot be the basis for imposition of penalty. In the above view, it is submitted that the appeal be admitted.

9 From the record it is clear that the notice under Sections 142(1) and 143(2) of the Act were issued to the appellant on 14th January, 2009. The notice also contains an annexure, seeking details of expenses debited to Profit and Loss Account, along with details of foreign exchange expenses. Even according to the appellant, the alleged mistake on its part was pointed out by a letter dated 23 September, 2009 during assessment proceedings where it stated that it had committed a mistake in debiting foreign exchange loss to its determine non-tonnage income, when in fact, no foreign exchange loss was involved in respect of its non-tonnage business. Thus, it is clear that so-called mistake as claimed by the appellant-assesssee, was only after notices dated 14th January, 2009 were issued under Sections 142 and 143 of the Act. It was only an attempt to pre-empt the Revenue finding out

the appellant had furnished inaccurate particulars. Therefore, it cannot be said that it was voluntary disclosure. In fact, the Apex Court in MAK Data (P) Ltd., (supra) has observed that "The Assess mg Officer, in our view, shall not be carried away by the plea of the Assesseë like "voluntary disclosure", "buy peace", "avoid litigation" "amicable settlement" etc. to explain its conduct." The Apex Court has also further observed that "It is trite law that the voluntary disclosure does not release appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty." In the peculiar fact of the present case, the so-called voluntary disclosure was only after the Assessing Officer initiated proceedings under Section 142 of the Act. Thus, it was not a voluntary disclosure. In fact, the Assessment Order dated 24th December, 2009 under Section 143(3) of the Act also records the fact of verification by the Assessing Officer, leading to a finding that the appell ant- assess ee had debited foreign exchange loss to arrive its non-tonnage income. This order was accepted and no grievance in respect of the same being found by the Assessing Officer, was made by the appellant-assessee. It is only in penalty proceedings that this issue is raised for the

first time. Further, the appellant- ass essee besides stating it is a mistake, has not offered any explanation. Therefore, the explanation under Section 271 (1)(c) of the Act was not found to be satisfactory by the authorities under the Act and penalty imposed and sustained.

10 Reliance placed by the appellant-assessee upon the decision of the Apex Court in Price Waterhouse Coopers (P) Ltd., (supra), is inappropriate in the facts of the present case. In the above case, the Apex Court noted the fact that Tribunal had itself come to a finding that there was a silly mistake on the part of the assesssee in not having added the provision for gratuity to its total income even when the documents accompanying the return of income, did show that provision for gratuity is not allowable as deduction under Section 40(7) of the Act Thus, it was only a computation error in the return of income. In the present facts, none of the authorities including the Tribunal have found tlie debit of foreign exchange loss to its non-tonnage business was made on account of a mistake. Nor can it be classified as an computation error after complete disclosure. Thus, the aforesaid decision does not assist the appellantassessee.

11 We note that all the three authorities have come to a finding of fact, adverse to the appellant, that the so-

called voluntary disclosure was not voluntary, but made only in response to notices under Sections 142 and 143 of the Act. This finding of fact is not shown to be perverse and/or arbitrary, warranting interference. In view of the above, the question as framed does not give rise to any substantial question of law.

15. In view of above facts and circumstances of the present case, it is clear that the assessee by raising the totally unsustainable claims had committed serious laxity, while filing computation of income and thus the mistake committed by it could not be said to be bonafide. Even the surrender of income in this case is not voluntarily, in the sense that the offer of surrender was made in view of detection made by the AO during the scrutiny proceedings. In that situation, it cannot be said that the surrender of income was voluntarily. Consequently, the assessee had no intention to declare its true income and was thus a case of filing "inaccurate particulars of income."

16. Therefore we set aside the order of Ld. CIT(A) and uphold the order of AO of imposing the penalty upon the assessee. Resultantly, these grounds raised by the revenue stands **allowed**.

Ground No. 4 & 5

17. These grounds are general in nature, thus requires no specific adjudication.

18. In the net result, the appeal filed by the revenue stands **allowed.**

Order pronounced in the open court on 23rd Feb, 2018

Sd/- *Sd/-*
(Rajendra) (Sandeep Gosain)
लेखासदस्य / Accountant Member न्यायिकसदस्य / Judicial Member
मुंबई Mumbai;दिनांकDated : 23.02.2018
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**