

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
&
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.-239/Del/2015
(Assessment Year: 2011-12)**

Alpex Exports Pvt. Ltd. B-79, Shivalik, Near Malviya Nagar Building New Delhi PAN : AABCA0842N	vs	ACIT Circle-1(1) New Delhi
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Assessee by	Sh. Sudesh Garg, Adv.
Revenue by	Ms. Ashma Neb, Sr. DR

Date of Hearing	28.06.2018
Date of Pronouncement	28.06.2018

ORDER

PER SUDHANSHU SRIVASTAVA, J.M.

This appeal is preferred by the assessee against the order dated 16.10.2014 passed by the Ld. CIT(A)-IV, New Delhi for assessment year 2011-12 wherein, vide the impugned order, the Ld. CIT(A) has confirmed penalty of Rs. 3,44,000/- imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

2. The brief facts of the case are that the assessee had shown income from rent of property at Jasola, New Delhi as income from house property and had claimed depreciation of Rs. 10,10,103/- at

the rate of 10% of the written down value of the house. The assessee had claimed and had been allowed deduction u/s 24 of the Act at the rate of 30% of the annual value. The claim of depreciation was rejected by the assessing officer as the assessee had also claimed deduction at the rate of 30% u/s 24 of the Act in the computation of the income. The assessee accepted the assessment order and did not file any appeal. Thereafter, the AO imposed the penalty of Rs. 3,44,000/- for furnishing inaccurate particulars of income. The AO noted that had the assessee's case not been taken up for scrutiny, there would have been a revenue loss for the government. The assessee's appeal before the Ld. CIT (A) was also rejected. Now the assessee has approached the ITAT and has challenged the confirmation of penalty by raising the following grounds of appeal:-

“1. The Ld. CIT(A)-IV, New Delhi has erred on facts and in law in confirming the penalty under section 271(1)(c) of the Income Tax Act, 1961 of Rs. 3,44,000/-.

2. The Ld. CIT(A) has erred on facts and in law in not considering all the relevant facts of the matter and has further erred by incorrectly interpreting Explanation-1 of Section 271(1)(c) of the Income Tax Act, 1961.”

3. The Ld. Authorised Representative submitted that the assessee had claimed depreciation due to inadvertent error and the *bona fides* of the assessee were not under doubt at all. It was submitted that the

assessee was not liable for penalty because there was no furnishing of inaccurate particulars of income and all the relevant details were disclosed in the computation of income/return of income. Reliance was placed on the judgment of the Hon'ble Apex Court in the case of Price Waterhouse Coopers Pvt. Ltd. reported in 348 ITR 306 (SC).

4. In response, the Ld. Sr. Departmental Representative placed reliance on the concurrent findings of both the lower authorities and submitted that the assessee was trying to gain extra tax advantage by claiming double deduction. Reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Zoom Communication Pvt. Ltd. in ITA no. 07/2010 wherein it was held by the Hon'ble Delhi High Court that in case of failure of the assessee to offer any explanation or where the explanation furnished by him is found false, penalty may be imposed.

5. We have heard the rival submission and have also perused the material on record. The facts of the case are not in dispute. The Hon'ble Supreme Court, in the case of Hindustan Steel Ltd. v. State of Orissa 83 ITR 26 (SC), had laid down the position of law by holding that the Assessing Officer is not bound to levy penalty automatically simply because the quantum addition has been sustained. Also in case of CIT v. Khoday Eswara (83 ITR 369) (SC), incidentally reported in same ITR Volume, it is held that penalty cannot be levied solely on

basis of reasons given in original order of assessment. The Hon'ble Supreme Court has reiterated the law in case of Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519 by holding in Para 62 that finding in assessment proceedings cannot automatically be adopted in penalty proceedings and the authorities have to consider the matter afresh from different angle. The statute requires a satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the Department. While considering whether the assessee has been able to discharge his burden the Assessing Officer should not begin with the presumption that he is guilty. Since the burden of proof in penalty proceedings varies from that in the assessment proceedings, a finding in the assessment proceedings that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceedings constitutes good evidence in the penalty proceedings. In the penalty proceedings the authorities must consider the matter afresh as the question has to be considered from a different angle. It is important to keep in mind the fundamental legal proposition that Assessment proceedings are not conclusive. Assessment proceedings and penalty proceedings are separate and distinct. Findings in Assessment proceedings don't operate as *res judicata* in penalty

proceedings. For this proposition reliance is placed on the decision in CIT vs. Dharamchand L. Shah (1993) 204 ITR 462 (Bom). In Vijay Power Generators Ltd vs. ITO (2008)6 DTR 64 (Del) it was held that “*It is well settled that though they constitute good evidence do not constitute conclusive evidence in penalty proceedings.*” During penalty proceedings, there has to be reappraisal of the very same material on the basis of which the addition was made and if further material is adduced by the assessee in the course of the penalty proceedings, it is all the more necessary that such further material should also be examined in an attempt to ascertain whether the assessee concealed his income or furnished inaccurate particulars. Thus, under penalty proceedings assessee can discharge his burden by relying on the same material on the basis of which assessment is made by contending that all necessary disclosures were made and that on the basis of material disclosed there cannot be a case of concealment of income or furnishing inaccurate particulars of income. Further if there is any material or additional evidence which was not produced during assessment proceedings same can be produced in penalty proceedings as both assessment and penalty proceedings are distinct and separate. In CIT vs. M/s Sidhartha Enterprises (2009) 184 Taxman 460 (P&H)(HC) it was held that the judgment in Dharmendra Textile cannot be read as laying down that in every case where

particulars of income are inaccurate, penalty must follow. Even so, the concept of penalty has not undergone change by virtue of the said judgment. Penalty is imposed only when there is some element of deliberate default.

5.1 Reverting to the facts of the present case, the penalty order is woefully silent on the issue as to how this satisfaction of concealment was arrived at. The quantum addition on which the penalty has been imposed pertains claim of depreciation on building on which 30% deduction had also been u/s 24. The Ld. CIT (A) has also not examined the issue in detail but has simply confirmed the penalty by relying on the findings of the AO. However, there is no finding by the authorities below on the issue as to how the 'furnishing of inaccurate particulars of income' has come to be established so as to warrant imposition of penalty. In the instant case it cannot be said that the assessee withheld any relevant information regarding the claim of depreciation from the AO. The amount of depreciation disallowed was the amount disclosed by the assessee itself. With regard to the provisions of section 271(1)(c) of the Act pertaining to penalty, the Hon'ble Apex court has authoritatively laid down that making of a claim by the assessee which is not sustainable will not tantamount to furnishing inaccurate particulars. In CIT vs. Reliance Petroproducts

Pvt. Ltd. 322 ITR 158 (SC), the Hon'ble Apex Court has held as follows:

1. *“A glance at this provision would suggest that in order to be covered, there has to be concealment of particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a case of concealment of income. That is not the case of the Revenue either. However, the Ld. Counsel for the revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271 (1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income." We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars.”*

5.2 Although, both the lower authorities have held that the assessee has furnished inaccurate particulars, on a consideration on the facts, such a view is not tenable in the present appeal. Therefore,

respectfully following the judgment of the Hon'ble Apex court in the case of Reliance Petroproducts Pvt. Ltd. (Supra) we delete the penalty.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28.06.2018

Sd/-
(G.D. AGRAWAL)
PRESIDENT

Dated: 28.06.2018

BR

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Copy forwarded to:

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

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ASSISTANT REGISTRAR
ITAT, NEW DELHI