

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.1614/Chd/2017
Assessment Year: 2013-14

Asst. CIT,
Panchkula Circle,
Bays No. 41-43,
Aaykar Bhawan
Sec-2, Panchkula

Vs. M/s Himalayan Expressway Ltd.
Kalka Sadan, Shimla Road
Pinjore

PAN No. AABCH9338L

(Appellant)

(Respondent)

Assessee By : Shri. Ashwani Kumar Garg
Revenue By : Dr. Gulshan Raj

Date of hearing : 11/07/2018
Date of Pronouncement : 16/07/2018

ORDER

PER DR. B.R.R. KUMAR, A.M.:

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A), Panchkula dt. 04/10/2017.

2. In the present appeal Revenue has raised the following grounds:

1. *Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in allowing the appeal of the assessee and cancelled the penalty under section 271(1)(c) which is not correct because the assessee has deliberately furnished the inaccurate particular of its income to evade payment of taxes.*
2. *It is prayed that the order of the Ld. CIT(A) be set aside and that of the A.O. be restored.*

3. Brief facts of the case are that the assessee is in the business of Engineering Design, Construction and maintenance of road.

4. During the assessment proceedings, the Assessing Officer disallowed amounts claimed by the assessee on account of depreciation on the fixed asset being the road, made on BOT basis on which the assessee claimed @10% on the cost of the road. Whereas the Assessing Officer, based on the CBDT Circular No.

9/2004 allowed amortization expenses calculated over the remaining period of 16 years out of the total agreement period of 20 years for the same asset.

5. The Assessing Officer levied penalty on this disallowance of depreciation claimed by the assessee by invoking the judgments of various Courts namely MAK Data Pvt. Ltd. Vs. CIT 358 ITR 593 (Del), CIT Vs. Shri Krishna Trading Co. 253 ITR 645, K.P. Madhusoodan Vs. CIT 251 ITR 1999.

6. The Ld. CIT(A) deleted the addition based on the judicial precedents for depreciation on BOT projects namely CIT v. Noida Toll Bridge Co. Ltd. 213 taxman 333 (All) and DCIT v. Swama Tollway Pvt. Ltd. (ITAT Hyd) etc. Ld. CIT(A) held that there were also precedents for depreciation on such projects to be allowed on intangible asset basis namely in ACIT v. Ashoka Buildcon Ltd. [ITA No.2317/PN/2012 (ITAT Pune)]; Asoka Infrastructure Ltd. v. ACIT [ITANo.II05/PN/2010 (ITAT Pune)]; ACIT v. Ashoka Infraways P. Ltd. [2013] 58 SOT 147 (Pune) etc.

7. Before us, the Ld. AR submitted that due to this lack of clarity on the appropriate basis of depreciation to be followed in BOT projects, the CBDT issued circular No.9/2014 dated 23.04.2014. The Ld. AR stated that the circular itself came much after filing of the return and hence was not followed by the assessee. The Ld. AR further stated that merely making a claim on which there can be reasonably more than one view does not amount to furnishing of inaccurate particulars of income. The company's claim was not frivolous or malafide, it was based on substantial and bonafide grounds. It was argued that the depreciation claimed at the time of filing of the return @10% as there was no dispute on the fact that the buildings includes roads which are eligible for claim of depreciation.

8. On the other hand, Ld. DR, Dr. Gulshan Raj relied on various case laws and filed written submissions as under:

Sub: Written Submission in the above case- reg.

In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to levy of penalty u/s 271(1)(c) of I.T.Act:

1. **Union of India v. Dharamendra Textile Processors I(2007) 295 ITR 2441 AS RELIED UPON BY THE AO IN THE PENALTY ORDER** where Hon'ble Supreme Court held that Penalty under section 271(1)(c) is a civil liability for which willful concealment

is not an essential ingredient for attracting the civil liability as is the case in the matter of proceedings under section 276C.

2. **CIT Vs Moser Baer India Ltd. (184 Taxman 8 (SC)/r20091 315 ITR 460 (SC)/r20091 222 CTR 213** where Hon'ble Supreme Court confirmed Penalty under section 271(1)(c) for wrong adjustment of Unabsorbed Depreciation.

3. **MAK Data P. Ltd vs. CIT W taxmann.com 448 (SC)/r20131 358 ITR 593 (SC)/r20131 263 CTR 1 1 AS RELIED UPON BY THE AO IN THE PENALTY ORDER** Where Hon'ble Supreme Court held that Under Explanation 1 to s. 271(1)(c), voluntary disclosure of concealed income does not absolve assessee of s. 271(1)(c) penalty if the assessee fails to offer an explanation which is bonafide and proves that all the material facts have been disclosed.

'9. We are of the view that the surrender of income in this case is not voluntary in 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.'

In the present case also the assessee has agreed during assessment proceedings that it was eligible for amortization over the concession period of 16 years which resulted in decrease in allowable depreciation by Rs.27.15 crore as proposed by the AO. Had the case is not picked up for scrutiny assessee would not have shown its true income in his return of income.

4. **B.A. Balasubramaniam & Bros. Co Vs CIT [116 Taxman 842, 236 ITR 977, 157 CTR 556]** where Hon'ble Supreme Court held that difference between income assessed and income returned being more than 20 per cent, Explanation to section 271(1)(c) became applicable and assessee having failed to discharge onus being cast on assessee by virtue of said Explanation, Assessing Officer was justified in imposing penalty

5. **Gī vs Gates Foam & Rubber Co F91 ITR 467], CIT vs India Seafood [105 ITR 708]** where Hon'ble Kerala High Court held that **Claiming excessive deduction also amounts to concealment of income.**

6. **CIT Vs R.M.P. Plasto (P.) Ltd M84 Taxman 372 (SC)/[2009] 313 ITR 397 (SC)/[2009] 227 CTR 635]** where Hon'ble Supreme Court held that Confirmed penalty upon assessee for concealment of income under section 271(1)(c) because positive income of assessee was reduced to nil after allowing set-off of carried forward losses of earlier years.

9. We have heard Ld. Representatives of both the parties and perused the facts on records and the arguments taken. The moot point in this case remains

that the Assessing Officer though disallowed the benefit of depreciation to the assessee but allowed deduction as per amortization allowance clarified as per the CBDT Circular.

10. We find that the Circular was issued after the assessee has filed the return. There is no way that the assessee could have forecasted the issue of Circular even before filing of the return. Further, there is only a tangible difference in the method of computation *post facto*. Hence the claim of the assessee can be taken as *bonafide* and this case do not fall under either concealment or furnishing of inaccurate particulars of income so as to attract penalty under section 271(1)(c). The case laws relied by the Ld. DR are on different facts and circumstances of the case hence, cannot be applied to the instant case where the disallowance on depreciation stands converted to amortization and the judgment in the case of Noida Toll Bridge (*supra*) is squarely applicable to this case.

11. Hence, in view of the above facts, we decline to interfere in the order of the Ld. CIT(A).

12. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Dated : 16/07/2018

AG

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR