

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B", NEW DELHI**

**BEFORE SH. N.K.SAINI, ACCOUNTANT MEMBER
AND
Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No.1576/Del/2018
(Assessment Year: 2011-12)**

Carrefour W & C India Pvt. Ltd. E-22, 2 nd Floor, Hauz Khas, New Delhi Pin- 110016 PAN : AADCC2042A	Vs.	DCIT Circle-5(2) New Delhi
(Appellant)		(Respondent)

Assessee by: Sh. K.Sampath, Adv. & Sh. V.Raja Kumar, Adv.
Revenue by: Sh. Vijay Kr. Jiwani, Sr. DR
Date of hearing : 20.08.2018
Date of pronouncement : 23.08.2018

ORDER

PER SUCHITRA KAMBLE , JUDICIAL MEMBER :

This appeal is filed by the assessee against order dated 04/01/2018 passed by the CIT (A)-13, New Delhi for the Assessment Year 2011-12.

2. The grounds of appeal are as follows:

"1. The Ld. CIT(A) has erred in law and on facts and circumstances of the case in confirming a penalty order of RS.

47,40,699 on the Appellant for the subject assessment year u/s 271(1)(c) of the Act summarily and without appreciating that no concealment of any facts/income was made by the Appellant. Hence, the penalty order passed by Ld. CIT(A) is bad in law and the penalty is liable to be quashed or deleted.

2. The Ld. CIT(A) has erred on facts and in law in levying penalty in the present case since mere acceptance of the disallowance by the Appellant does not tantamount to furnishing of inaccurate particulars of income and more particularly on account of the fact that the Appellant had suo-moto accepted the disallowance and decided not to file any appeal with the ITAT to avoid genuine hardship, mitigate compliance cost and facilitate liquidation process and in view of the substantial past losses which would eventually lapse going forward.

3. Under the facts and in law, the Hon. CIT(A) erred in dismissing the appeal by passing an order u/s 250(6) of the Income Tax Act, 1961 by confirming the penalty of Rs. 47,40,699/- on the appellant for the subject assessment year u/s 271 (1)(c) of the Act summarily and without appreciating that the Appellant company has not made concealment of any facts/income.

4. The Hon. CIT(A) has erred on facts and in law in stating that the Appellant company has not furnished truly and fully all material facts and information called for by the Ld. AO.

5. The Hon. CIT(A) has erred in law and on facts and

circumstances of the case in not accepting that the appellant had voluntarily and in good faith, made full and true disclosures of all material facts in its return of income during the course of assessment proceedings.

The above grounds of appeal are independent and without prejudice to one another.”

3. Carrefour WC&C India Private Limited was incorporated on 19th September 2007 to carry on wholesale trading of all kinds of consumer goods, durables, articles and to carry out any and all such activities as may be necessary or related to or in connection with carrying on such trading activities. During the relevant A.Y, the assessee company e-filed its return of income on 29th November 2012 declaring a total loss of Rs. 55,44,09,599/-. Later, the assessee company revised its return of income on 28th March 2013 declaring a total loss of Rs. 54,14,79,557/-. Subsequently, the return was taken up for scrutiny vide notice issued under section 143(2) of the Income Tax Act, 1961 (“the Act”). For AY 2011-12, since the assessee company entered into international transactions with its associated enterprises, the case was referred to the Additional CIT, TPO 1(1), New Delhi (“TPO”) for determination of

ALP u/s 92CA(1) of the Income Tax Act, 1961 and the TPO vide its order dated 27th January 2015 passed u/s 92CA(1) of the Act directed the DCIT, Circle 5(2) to enhance the income of the assessee company by Rs. 1,39,47,334/-. During the course of assessment proceedings, the Assessing Officer sought various details, explanations and clarifications which were duly furnished by the assessee company from time to time. The draft order u/s 143(3) was passed by DCIT Circle-5(2), New Delhi on 26th February 2015 wherein certain additions were proposed to be made by the Assessing Officer. The assessee company did not preferred any objection/appeal against these proposed additions with the Dispute Resolution Panel ('DRP')/CIT(Appeals). Thereafter, the final assessment order dated 21st April 2015 was passed by the Assessing Officer with the addition on account of Arm's Length Price u/s 92CA(3) of the Act - Rs. 1,39,47,334/-. As per the above addition, the returned loss of Rs. 54,14,79,557/- filed by the assessee company was reduced to Rs. 52,75,32,220/-.

4. Pursuant to this, the Assessing Officer issued a show cause

notice dated 21st April 2015 to the assessee company for levy of penalty under section 271(1)(c) of the Act. The assessee company filed its detailed submissions on 05th May 2015 requesting the Assessing Officer to drop the penalty proceedings. However, the Assessing Officer did not accept the submission made by the Assessee and levied a penalty of Rs.47,40,699/- vide order dated 29th March 2016.

5. Being aggrieved by the Penalty order, the assessee company filed an appeal u/s 246A(1)(a) of the Income Tax Act, 1961 before the CIT(A) on 06th May 2016 to drop the penalty proceedings. However, the CIT(A) dismissed the appeal on 04th January 2018. Therefore, the assessee has preferred the present appeal before us.

6. The Ld. AR submitted that the assessee company had accumulated substantial losses of INR 75.52 Crores as of 1st April 2010 which remained unutilized because of no profits. The Ld. AR further submitted that the disallowances made represent just 1% of the expenses which is highly immaterial with the nature of business and expenses incurred by the company. The assessee company has decided to close down its business operations in India (approved by

the shareholders in the extraordinary general meeting held on 7th July 2014). In pursuance of this, the assessee company already undertook significant steps. The assessee company was supposed to voluntarily liquidated after following the procedures given under the Companies Act, 2013 in the due course. The Ld. AR submitted that the assessee company has been incurring sizeable operating losses since inception, and has consequently filed loss returns declaring tax losses from AY 2008-09 to AY 2015-16. Thus, the assessee company would not have any operational income going forward i.e. from Financial Year ('FY') 2014-15 onwards and shall be voluntarily liquidated, the past losses would eventually lapse and assessee company would not be able to set off these losses in any future years. Further, the Ld. AR submitted that the assessee company is desirous of seeking accelerated closure of its pending tax assessments for the past years(s) to mitigate compliance cost and facilitate liquidation process. In view of the above background and in order to get the closure of assessment proceedings on an accelerated basis, the assessee company suo-moto accepted the disallowances made by DCIT, Circle-5(2), New Delhi. The same was accepted by the assessee company so as to avoid consequent

compliance cost to the assessee company and in view of the substantial past losses which would eventually lapse going forward. Therefore, the assessee company did not prefer to file any appeal with the Tribunal in reference to Assessment Order passed u/s 143(3) of the Income Tax Act, 1961. The Ld. AR further submitted that in earlier Assessment Year 2010-11, the penalty was quashed by the Tribunal in assessee's own case being ITA no. 5504/Del/2016 order dated 04.09.2017. Thus, the Ld. AR submitted that this issue is covered in favour of the assessee.

7. The Ld. DR relied upon the penalty order and the order of the CIT(A), but could not controvert the order of the Tribunal in assessee's own case.

8. We have heard both the parties and perused the relevant material available on record. The Ld. AR submitted that this issue contested, in the present case has already been decided in favour of the assessee by Tribunal's decision in assessee's own case for A.Y. 2010-11. The Tribunal held as under :-

“3.5 Having gone through the orders of the authorities below, material available on record and the decisions relied upon, we

find that penalty under section 271(l)(c) has been levied on two additions. Firstly, on the addition of Rs. 1,21,19,120/- (consisting of disallowance of payment made to ADP India Pvt. Ltd. at Rs.3,01,239/-, others to Rs.20,34,022/- and provision made at Rs.97,83,859/-) and secondly, on the addition of Rs.66,24,284/- in view of order passed under section 92CA(3) of the Act. When we examine the foremost contention of the Id. AR that is the very basis of initiation of penalty and levy of penalty on the above two additions as ambiguous, we fully concur with the submission of the Id. AR that while recording his satisfaction in the assessment order, the Assessing Officer on both the additions i.e. Rs. 1,21,09,120/- and Rs.66,24,284/- has stated as “ I am satisfied that the assessee company has concealed the particulars of income / submitted wrong particulars of its income, therefore, penalty proceedings under section 271(l)(c) of the Income Tax Act, 1961 are initiated on this account” and “..... I am satisfied that assessee company concealed the income / filed inaccurate particulars, hence penalty proceedings under section 271(l)(c) of the I. T. Act have been initiated separately” respectively. Again in the penalty order the Assessing Officer has levied penalty of Rs. 41,19,289/- on both the additions with this finding that assessee has concealed / furnished inaccurate particulars of income with satisfaction recorded as “ Hence, I am satisfied that this is a fit case for imposition of penalty for concealment of income / furnishing inaccurate particulars of excess loss to the tune of Rs. 1,87,33,404/- as per provisions of

section 271(l)(c) of the I.T. Act, 1961.” The Honhle Gujarat High Court in its above cited decisions in the case of CIT Vs. Jyoti Ltd. (supra) and CIT Vs. Whiteford India Ltd. (supra) has been pleased to hold that wdiere no clear finding was recorded by Assessing Officer whether assessee was guilty of concealing income and / or furnishing inaccurate particulars of income, Tribunal was justified in deleting penalty under section 271(l)(c) levied by the Assessing Officer. Respectfully following the ratio of these cited decisions, we hold that in the present case, the authorities below were not justified in imposing and upholding the penalty in question under section 271(l)(c) of the Act. The same is directed to be deleted.

3.6 There is no dispute that assessment proceedings and penalty proceedings are two independent proceedings. Being penal in nature provisions under section 271(l)(c) can be invoked only when there is positive evidence beyond doubt that the assessee has concealed particulars of income or furnished inaccurate particulars thereof towards the addition made in the assessment proceedings. There may be several reasons for non-furnishing of evidence in support, especially when the details of the parties and payment are furnished. Thus, non-furnishing of evidence in support of the claim may be a good reason for disallowance of such claim, but it cannot always lead to the conclusion beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee towards such claim. In the case of CIT

Vs. Udaipur Hotels Ltd. (supra) the Hon'ble High Court of Delhi has been pleased to hold that in a case where expenditure was disallowed due to non-availability of supporting evidence, it could not be held as concealment of income and, therefore, penalty under section 271(1)(c) could not be levied. The Hon'ble Telangana & AP High Court in the case of Pr. CIT Vs. G. K. Properties P. Ltd. (supra) has been pleased to hold that merely because assessee made a claim, which was not acceptable ipso facto, the assessee could not be said to have made a wrong claim by furnishing inaccurate particulars attracting penalty under section 271(l)(c) of the Act. On page No. 1 in para No. 3 of the penalty order, the Assessing Officer has reproduced the names of the parties to whom the payments claimed to have been made by the assessee and by furnishing affidavit, TDS Certificates in support of payment of Rs.20,34,023/-, Tax Audit Report for the year as well as Form No. 3CBE for the year the assessee had explained that 'NIL' TDS demand was there. It is not the case of the Revenue that these informations were false. We are thus of the view that in absence of positive evidence that there was concealment of particulars of income or furnishing inaccurate particulars thereof on the part of the assessee towards the additions in question, the Assessing Officer was not justified in imposing the penalty under section 271 (1)(c) at Rs.41,19,289/-. The same is directed to be deleted. The grounds are accordingly allowed.

4.In result, appeal is allowed.”

In present year as well it is not a case of the Revenue that assessee furnished inaccurate particulars of the income or there is concealment of income on part of the assessee. Thus, the provisions of Section 271(1)(c) of the Act will not be attracted in the present case as well. Thus, the present case is covered in favour of the assessee by the Tribunal's decision in assessee's own case for A.Y. 2010-11. Hence, appeal of the assessee is allowed.

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

Order pronounced in the open court on 23rd August, 2018.

Sd/-

(N.K.SAINI)

ACCOUNTANT MEMBER

Date: 23 .08.2018

Binita

Copy of order to: -

- 1) The Appellant;
 - 2) The Respondent;
 - 3) The CIT;
 - 4) The CIT(A)-, New Delhi;
 - 5) The DR, I.T.A.T., New Delhi;
- True Copy

sd/-

(SUCHITRA KAMBLE)

JUDICIAL MEMBER

By Order

ITAT, New Delhi

Date of dictation	21.08.2018
Date on which the typed draft is placed before the dictating Member	21.08.2018
Date on which the typed draft is placed before the Other Member	21.08.2018
Date on which the approved draft comes to the Sr. PS/PS	23.08.2018
Date on which the fair order is placed before the Dictating Member for pronouncement	23.08.2018
Date on which the fair order comes back to the Sr. PS/PS	23 .08.2018
Date on which the final order is uploaded on the website of ITAT	23 .08.2018
Date on which the file goes to the Bench Clerk	.08.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	