

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

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND  
MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

**ITA No.284/Chd/2018**  
Assessment Year: 2013-14

M/s Heritage Marketing  
SCO-64, F.F., Sector-20-C  
Dakshin Marg, Chandigarh

Vs.

The ITO  
Ward-3(2),  
Chandigarh

PAN No. AAAPH6537R

(Appellant)

(Respondent)

Assessee By : Sh. Om Dutt Sharma  
Revenue By : Sh. Manjit Singh  
Date of hearing : 26/06/2018  
Date of Pronouncement : 24/09/2018

**ORDER**

**PER ANNAPURNA GUPTA, A.M.**

The present appeal has been filed by the Assessee against the order of the Ld. Commissioner of Income Tax(Appeals)-1 Chandigarh[in short "CIT(A)] dated 19-12-17, passed u/s 250(6) of the Income Tax Act,1961,(hereinafter referred to as "Act") , confirming the levy of penalty u/s 271(1)(c) Act.

2. Penalty in the present case has been levied on the addition made to the income of the assessee on account of difference in the Tax Deducted at Source(in short "TDS") as reflected in Form No.26AS and that shown in the return of income , being attributed to gross receipts not declared in the return of income filed. While the Form No. 26AS revealed TDS deducted of Rs. 3,25,103/- the assessee, it was noted , had actually claimed TDS of Rs. 3,21,684/- only. When confronted with the same, the assessee submitted that it had claimed lesser credit of TDS of Rs. 3,419/- as there was dispute regarding billing of Rs. 3,13,542/- and accordingly TDS with certain parties. The AO made addition of the said gross receipt of Rs. 3,13,542/- holding that the assessee had failed to explain the said difference. Penalty proceedings under section 271(1)(c) were also initiated and penalty levied on the same amounting to Rs. 96,890/-.

3. The matter was carried in appeal before the Ld. CIT(A) where the assessee contended that the receipts had been duly accounted for in the books of the assessee but the assessee had agreed to the addition only to buy peace and avoid litigation. A party wise description of the gross receipts added was given, pointing out the fact that the said amounts were reflected in the books of the assessee. The Ld. CIT(A) was not convinced with the contentions of the assessee and held that the assessee had failed to give any cogent explanation either during assessment proceedings or penalty proceedings and had in fact agreed to the addition. The CIT(A) held that having once agreed to the addition the assessee was precluded from giving any explanation in appellate proceedings and that the disclosure did not release the assessee from penal proceedings. Reliance was placed on the order of the Hon'ble Apex Court in the case of MAK DATA Pvt. Ltd. vs CIT 358 ITR 593 in this regard. The relevant findings of the CIT(A) at para 7.3 of his order is as under:

*"7.3 Thus, when the assessee has concealed particulars of his income or furnished inaccurate particulars, conditions laid down in Explanation-1 (supra) have to be examined. In the instant case, the addition of Rs. 3,13,542/- was made by the Assessing Officer on the basis of inquiry done by him. It was detected during assessment proceedings that the assessee had not declared the gross receipts to the tune of Rs. 3,13,542/- but the TDS has been claimed on it in the ITR. The assessee was given opportunity to explain this difference but it is categorically mentioned in the assessment order that the assessee failed to do so. Even during the penalty proceedings, the assessee failed to reconcile the difference of Rs. 3,13,542/- and this fact has been recorded by the AO in the penalty order in para 4. In fact, during the assessment proceedings, the assessee had agreed to the said addition and has not filed any appeal against the assessment order. Now at the stage of appellate proceedings against the penalty order, the assessee has attempted to explain the discrepancy as mentioned in para 7.1 above. Once addition has been accepted, the assessee cannot turn around and give another explanation during the appellate proceedings. During the penalty proceedings, the assessee failed to reconcile the difference of Rs. 3,13,542/-. The Assessing Officer has considered the explanation given by the assessee and on sound reasoning has not accepted the same. Assessee has stated that he had surrendered the additional sum with a view to avoid litigation and buy peace. Statute does not recognize those types of defences under the Explanation 1 to section 271(l)(c). It has been settled by the Hon'ble Supreme Court of India in the case of MAK Data Pvt. Ltd vs. CIT (358 ITR 593) that the disclosure does not release the assessee from the mischief of penal proceedings under section 271(l)(c). The law does not provide that when an assessee makes a disclosure of his concealed income, he has to be absolved from penalty. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to declare its true income in the return of income filed by it from year to year. The various case laws quoted by the assessee are different on facts and hence are not applicable to the assessee's case. The explanation filed by the appellant is not bonafide and the case of the appellant is squarely covered by Explanation-1(B) below section 271(1) of the Act. The penalty levied is accordingly confirmed. Ground of appeal taken by the appellant is dismissed."*

4. Aggrieved by the same assessee has come up in appeal before us raising the following grounds:

1. *The Learned Commissioner of Income Tax (Appeals)-I, Chandigarh is not justified in dismissing the appeal of the appellant.*
2. *The appellant craves for leave to alter or amend any ground of appeal at the time of hearing.*

5. During the course of hearing before us the Ld. Counsel for the assessee reiterated the contentions made before the CIT(A). Ld. Counsel for the assessee pointed out that the assessee had furnished explanation of the discrepancy during appellate proceedings, but the CIT(A) had refused to consider the same holding that once the addition had been accepted the assessee could not turn around and give another explanation during the appellate proceeding. Ld. Counsel for the assessee stated that all along the contention of the assessee was that there was no unaccounted receipts on account of the difference in TDS in Form No.26AS and that shown in the return of income. That it was only TDS on disputed billings, which billings were duly accounted for in the books of the assessee, but credit relating to the TDS had not been taken by the assessee on account of the ongoing dispute. Our attention was drawn to the letter filed to the AO during the assessment proceeding under section 143(3), placed at Paper Book page no. 42 to 43 and 47 to 50 in this regard stating so as under:

08.10.15

The Income Tax Officer,  
Ward-3(2), Chandigarh.  
Madam,

Sub.: - M/s. Heritage Marketing  
SCO - 64, Sector - 20C, Chandigarh.  
Assessment Year - 2013-14. PAN - AAFH6537R.

Please refer to your office letter No. ITO/W-3(2)/CHD/2015-16/Qn AY 13-14/895 dated 30.09.2015 in the above said case.

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iv) There is TDS of Rs. 3,25,1037- as per Form No. 26AS whereas the assessee has claimed TDS for Rs. 3,21,6847- as there was dispute regarding billing of Rs. 3,13,5427- and accordingly TDS of Rs. 3,4197- with certain parties. All these receipts have been accounted for by the assessee in its gross receipts. Necessary details are being furnished herewith.

10/08/2015

The Income Tax Officer,  
 Ward-3(2), Chandigarh.  
 Madam,  
 Sub.: - M/s. Heritage Marketing  
 SCO - 64, Sector - 20C, Chandigarh.  
Assessment Year - 2013-14. PAN - AAAPH6537R.

Please refer to your office letter No. ITO/W-3(2)/CHD/2015-16/Qn AY 13-14/361 dated 29/07/2015 in the above said case.

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20. The assessee has claimed T.D.S. on the basis of Form No. 16 received by it but has taken into account all the receipts.

6. Ld. Counsel for the assessee further stated that the assessee had agreed to the surrender only to buy the peace of mind which was so stated to the Assessing Officer also during the penalty proceedings vide letter dt. 04/04/2016 placed at Paper Book page 33 to 35. Ld. Counsel for the assessee further pointed out that necessary explanation of the discrepancy had been furnished before the Ld. CIT(A) which is reproduced in the CIT(A) order also at page no. 4 as under:

*"It is submitted that the Learned Assessing Officer has imposed a penalty under section 271(l)(c) amounting to Rs. 96,890/- on account of an addition of Rs. 3,13,542/-. This addition was made due to the difference between the TDS in 26AS and is claimed by the assessee. The assessee has submitted the T.D.S. reconciliation during the course of assessment and the difference amounted to Rs. 3,419/~ only. The receipts of Rs. 3,13,542/- has been accounted for by the assessee and is included in the gross receipts as is evident from the ledger copies of the concerned parties, The assessee has only agreed to the addition of Rs. 3,13,542/- in order to purchase peace & avoid litigation. That is why the assessee has not JUED an appeal against assessment order and paid the tax accordingly. A brief note on the discrepancy is being given as below:-*

12.10.2012 Rohan Builders (P) Ltd

*Billing was made for Rs. 1,13,809/- including service tax of Rs. 12,519/- on 12.10.2012. A credit note of Rs. 86,517/- including service tax of Rs. 9,517/- was received on 28.02.2013. All these entries are reflected in the books of accounts. Difference comes to Rs. 27,292/- (1,13,809 - 86,517) as against Rs. 28,350/- shown by Rohan Builders.*

07.03.2013 S.S. Contractors Co.

*Billing was made on 07.03.2013 for Rs. 42,697/- including service tax of Rs. 4,697/-. The same Rs. 38,000/- (42,697 - 4,697) is reflected in the books of accounts of the assessee as well as of S.S. Contractions.*

30.03.2013 ALDHA Engineers (P) Ltd.

*Billing was made on 30.03.2013 for Rs. 2,47,192/- including service tax of Rs. 27,192/-. But the TDS was deducted on Rs. 2,47,192/-instead of Rs. 2,20,000/- (2,47,192 - 27,192). But the same has reflected in the books of accounts of assessee as well as of ALDHA Engineers (P) Ltd."*

7. Ld. Counsel for the assessee therefore stated that the findings of the Ld. CIT(A) that no explanation had been furnished was incorrect as also the findings that the assessee had accepted the said addition and therefore assessee had categorically concealed / furnished incorrect particulars of income. Ld. Counsel for the assessee further stated that the Ld. CIT(A) had also erred in rejecting the explanation of the assessee by stating that the assessee cannot give any explanation having once accepted the addition, pointing out that the penalty proceedings are distinct and separate from the quantum proceedings and the assessee is at liberty to furnish explanation which were hitherto not furnished in the quantum proceeding. Ld. Counsel for the assessee therefore stated that the assessee having furnished explanation of the difference in the TDS and having duly shown that there were no unaccounted receipts attributable to the same, the assessee could not be held guilty of having concealed or furnished inaccurate particulars of income and therefore penalty levied under section 271(1)(c) was unjustified.

8. Ld. DR on the other hand relied on the order of the Ld. CIT(A) and emphasized that the fact in the present case were identical to the case of MAK Data (supra) with the assessee having surrendered the amount on being confronted with the same after detection by the AO, and therefore the penalty levied was justified.

9. We have heard Ld. Representatives of both the parties and perused the material placed before us and gone through the document referred to us.

10. We unhesitatingly hold that in the facts and circumstances of the present case, no penalty u/s 271(1)(c) of the Act was leviable on the assessee for concealing/furnishing inaccurate particulars of income. Undisputedly penalty has been levied on the addition made to the income of the assessee of receipts attributable to difference of TDS reflected in Form No.26AS and that of which credit was taken by the assessee in its return of income, holding it to be unaccounted receipts of the assessee. But as rightly pointed out by the

Ld.Counsel for the assessee, the claim of the assessee always, during assessment proceedings, penalty proceedings and even appellate proceedings ,was that the difference was only of TDS and there was no unaccounted receipts relating to the same. The assessee ,we find had also explained the reason for the difference in TDS as being TDS of disputed billings not taken credit of in the return of income. The assessee had also filed all details of the impugned receipts and the TDS relating to the same, pointing out that all the bills had been accounted for in the books of the assessee. The letters filed during assessment proceedings and the submissions made before the CIT(A) duly confirm the aforesaid facts. The Revenue has not controverted the above facts. In such circumstances ,we concur with the Ld.Counsel for the assessee that due explanation had been given by the assessee for the difference in TDS. Therefore merely because the assessee agreed to the said addition does not upturn the facts of the case to make it a case of concealing/furnishing inaccurate particulars of income. For the same reason, that the assessee had a valid uncontroverted explanation for the difference in TDS ,we cannot agree with the Ld.CIT(A) that the assessee had surrendered the income on being detected by the AO. In fact ,we hold, that it is not a case of agreeing to the addition of any concealed income but merely of agreeing to the addition to avoid litigation, as contended by the assessee . The decision relied upon by the Revenue in the case of MAK DATA (supra) therefore does not apply to the facts of the present case ,since there is no surrender of income in the present case after detection as in the case decided by the Hon'ble supreme court in MAK DATA(supra). We are also not in agreement with the contention of the Revenue that the assessee cannot at this juncture furnish any explanation having once agreed to the addition. Firstly ,as noted above by us the assessee has not offered any new explanation but has only furnished details of its explanation in appellate proceedings. The assessee had always maintained that the difference was only of TDS credit and not of receipts attributable to the difference. Further it is settled position of law that quantum proceedings and penalty proceedings are distinct and separate and the assessee can furnish all evidence and explanation hitherto not furnished in the quantum proceeding in the penalty proceedings.

11. Considering the totality of the facts and circumstances of the case we therefore direct that the penalty levied under section 271(1)(c) of Rs be deleted and the order of the Ld. CIT(A) is therefore set aside.

12. In the result appeal of the assessee is allowed.

Order pronounced in the open court.

**Sd/-**  
**(DIVA SINGH)**  
**JUDICIAL MEMBER**  
Dated : 24/09/2018  
AG

**Sd/-**  
**(ANNAPURNA GUPTA)**  
**ACCOUNTANT MEMBER**

Copy to: The Appellant, The Respondent, The CIT, The CIT(A), The DR