

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 3264/MUM/2015
Assessment Year: 2004-05**

M/s Shoe Crafters, 204, Wadala Udhyog Bhavan, Naigon Cross Road, Wadala, Mumbai-400031.	Vs.	Dy. Commissioner of Income Tax 17(2), Piramal Chambers 6 th Floor, Lalbaug, Lower Parel, Mumbai-400012.
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PAN No. AAIFS5140H

Appellant

Respondent

Assessee by : Mr. Mukesh B. Advani, AR
Revenue by : Mr. Satishchandra Rajore, DR

Date of Hearing : 30/10/2018
Date of pronouncement : 31/10/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2004-05. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-32 [in short 'CIT(A)'], Mumbai and arises out of the penalty levied u/s 271(1)(c) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under:

1. The Ld. CIT(A) has erred in confirming the levy of penalty u/s 271(1)(c) of the Income Tax Act 1961 amounting to Rs.4,46,812/-, in spite of the fact that the appellant, has neither concealed any particulars of income

nor were any inaccurate particulars of such income furnished before the Assessing Officer. In light of the above said facts & circumstances of the case, the levy of penalty sustained by the CIT(A) ought to be deleted.

2. Without prejudice to Ground No. 1, the Ld. CIT(A) has erred in not giving any finding on the levy of penalty u/s 271(1)(c) by the Assessing Officer in spite of the fact that the learned A.O. has not recorded his satisfaction to levy penalty u/s 271(1)(c) under the head "Business Promotion Expenses" while passing the Assessment order. In light of the above said facts, the penalty levied u/s 271(1)(c) on the "Business Promotion Expenses" ought to be deleted.

3. Briefly stated, the facts of the case are that the assessee-company filed its return of income for the assessment year (AY) 2004-05 on 27.10.2004 declaring total income of Rs.3,11,57,660/-. The Assessing Officer (AO) completed the assessment u/s 143(3) on 09.11.2006 on total income of Rs.3,24,03,130/-. While assessing the income, the AO made the following additions/disallowances:

Commission paid to Shri Abhir D. Khanna	Rs.3,78,250/-
Business Promotion Expenses	Rs.7,12,281/-
Foreign Travel Expenses	Rs.2,56,708/-
Local Travel Expenses	Rs.1,48,672/-
1/5 th Car Expenses and Depreciation	Rs.2,67,156/-

Thereafter, the AO levied a minimum penalty of Rs.4,46,812/- u/s 271(1)(c) of the Act with the following calculation:

A	Assessed Income	Rs.3,24,03,130/-
	Tax on Assessed Income	Rs.1,16,24,623/-
B	Return Income	Rs.3,11,57,660/-
	Tax on Return Income	Rs.1,11,77,811
C	Tax Concealed Income	Rs.4,46,812/-
	100% of tax of concealed income	Rs.4,46,812/-

Thus the AO calculated penalty u/s 271(1)(c) of the Act on the difference between the tax on assessed income and returned income.

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). During the course of hearing, it was submitted by the assessee that there was no concealment of income as expenses relating to Shri Abhir Khanna was already disclosed in the tax audit report. However, the Ld. CIT(A) was not convinced with the above submission of the assessee for the reason that the Tribunal has confirmed the disallowance only because of the fact that the assessee-company could not prove that the services were actually rendered by Shri Abhir Khanna during the relevant period. Relying on the decision in *UOI v. Dharmendra Textiles Processors & Ors* (2007) 295 ITR 244 (SC), the Ld. CIT(A) held that the assessee had deliberately not disallowed the payment to related parties u/s 40A(2)(b) of the Act. Thus the Ld. CIT(A) dismiss the appeal filed by the assessee.

5. Before us, the Ld. counsel of the assessee submits that the Ld. CIT(A) should not have confirmed the penalty of Rs.4,46,812/- calculated by the AO on the difference between the tax on the assessed income and returned income, because the assessee had neither concealed any particulars of income nor furnished inaccurate particulars of such income because in the tax audit report, which was filed along with return of income, the assessee had disclosed all the payments which were made to the persons covered u/s 40A(2)(b) of the Act. The Ld. counsel relied on the judgment of the Hon'ble Supreme Court in the case of *CIT v. Reliance Petroproducts (P.) Ltd.* [2010] 189 Taxman 322 (SC) in support of his contentions that a mere making of claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of assessee.

6. *Per contra*, the Ld. DR submits that the ITAT 'J' Bench, Mumbai in assessee's own case for the AY 2004-05 (ITA No. 979/Mum/2008) has dismissed the appeal filed by the assessee in quantum addition. Thus it is stated that the assessee had furnished inaccurate particulars of its income and the order passed by the Ld. CIT(A) be confirmed.

7. We have heard the rival submissions and perused the relevant materials on record. As mentioned earlier the AO has levied penalty of Rs.4,46,812/- u/s 271(1)(c) which is the difference between the tax on assessed income and returned income. We have mentioned the disallowances made by the AO in the assessment order at para 3 above. There is no dispute that the appeal filed by the assessee against the assessment order confirmed by the Ld. CIT(A) has been dismissed by

the Tribunal. We need to mention here that findings given in assessment proceedings are certainly relevant and have probative value, but such findings are material alone and may not justify the imposition of penalty in a given case, because the considerations that arise in penalty proceedings are different from those that arise in assessment proceedings as held in *Banaras Textoriun v. CIT* (1988) 169 ITR 782, 790, 791 (All); *CIT v. Govindankutty Menon* (1989) 178 ITR 509, 515 (Ker); *Hotel & Allied Traders (P.) Ltd. v. CIT* (1996) 221 ITR 619, 646 (Ker).

In the instant case, as mentioned above, the penalty has been levied on the disallowances of the claims made by the assessee. In *Reliance Petroproducts (P.) Ltd.* (supra), it is held that merely because assessee had claimed expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not attract penalty u/s 271(1)(c) of the Act.

We find that the ratio laid down in *Reliance Petroproducts (P.) Ltd.* squarely applies to the present case. Respectfully following the same, we delete the penalty of Rs.4,46,812/- levied by the AO.

8. In the result, the appeal is allowed.

Order pronounced in the open Court on 31/10/2018

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;
Dated: 31/10/2018

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai