

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI
BEFORE SHRI G.D. AGARWAL, VICE PRESIDENT
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.2428/Del/2015
Assessment Year: 2004-05**

A.C. Goods Transport P. Ltd., 266, Sector 21A, Faridabad. PAN: AACCA3976E	vs	ACIT, Circle - 2, Faridabad.
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Appellant

Respondent

Assessee by	Shri Rajiv Saxena, Advocate Shri Ajit Kumar Jha, Advocate
Revenue by	Ms Rinku Singh, Sr. DR

Date of Hearing	18.12.2018
Date of Pronouncement	11.01.2019

ORDER

PER K. NARASIMHA CHARY, JM

Challenging the impugned order dated 16.10.2014 in Appeal No.33/12-13 passed by the learned Commissioner of Income Tax (Appeals), Faridabad, {hereinafter referred to as the Id. CIT(A)}, assessee preferred this appeal.

2. Briefly stated relevant facts are that the assessee is a company engaged in the business of transport of goods by hiring trucks and it has its own labour

required for loading and unloading the goods on the trucks. For the assessment year 2004-05 they have filed their return of income on 28/10/2004 declaring an income of Rs.1,38,230/-and the assessment was complete by order dated 18/12/2006 under section 143(3) of the Income Tax Act, 1961 (for short "the Act") at Rs.16,14,460/-by making certain additions including Rs.9,45,185/-on account of trading additions relating to freight charges by enhancing the GP rate from the declared 7.69% to 12%; Rs.2,50,000/-on account of the loans received from director Shri AK Sharma and his wife Smt. Bindu Sharma treating it as Income from undisclosed sources; and Rs.2,02,594/-on account of 'hamali' charges.

3. In the quantum appeal, Ld. CIT(A) while appreciating the contentions raised by the assessee reduced the addition of Rs.9,45,185/-to Rs.2,85,534/-on account of freight charges by adopting a lower GP rate. So also Ld. CIT(A) reduced the addition on account of loans received from director's from Rs.2.5 Lacs to 1 lakh and the addition on account of Hamali charges from Rs.2,02,594/-to Rs. 20,000/-.

4. Aggrieved by the findings of the Ld. CIT(A), both revenue and the assessee filed appeal and cross objections respectively before the Tribunal in ITA No. 1235/Del/2011 and CO No.107/Del/2011 respectively. The Tribunal, however, dismissed appeal of the revenue on account of low tax effect and at the same time taken the cross objections of the assessee as infructuous.

5. Subsequently learned Assessing Officer issued a notice initiating penalty proceedings under section 271(1) (c) of the Act stating that the assessee had concealed the taxable income and furnishing inaccurate particulars thereof and concluded the same by order dated 29/3/2012 with the levy of penalty of

Rs.1,46,206/-under section 271(1)(c) of the Act holding that some additions were sustained by Ld. CIT(A) and to that extent the assessee must be held to have concealed and furnished inaccurate particulars of income to the extent of Rs.4,07,534/-.

6. Aggrieved by this levy of penalty, assessee preferred an unsuccessful appeal before Ld. CIT(A), and the Ld. CIT(A) by following the decision of the Hon'ble Supreme Court in the case of union of India vs. DharamendraTextiles 306 ITR 277, confirmed the penalty. Assessee is, therefore, in this appeal before us stating that the assessee company has neither furnished inaccurate particulars of its income nor had concealed any income so as to attract the penal provisions of Section 271(1)(c) of the Act and the penalty sustained is liable to be cancelled in toto inasmuch as no satisfaction has been recorded in the assessment order while making addition with regard to application of gross profit in the books of accounts. It is further submitted that the assessee company had filed required evidence for taking loan from Smt. Bindu Sharma being the wife of the director of the company. It is further contended that merely because of certain disallowance of expenditure, learned AO is not justified in making an addition without appreciating the fact whether or not there is concealment of income or furnishing of inaccurate particulars thereof.

7. Assessee placed reliance on the decisions reported in CIT vs. Sangrur Vanaspati Mills Ltd (2008) 303 ITR 53 (Punjab and Haryana); CIT verses Kailash crockery house (1999) 235 ITR 554 (Patna); CIT verses metal products of India (1984) 150 ITR 714 (Punjab and Haryana); CIT vs. Whitelene chemicals (2014) 360 ITR 385 (Guj); CIT verses Raj Bans Singh (2005) 276 ITR 351 (Allahabad); CIT verses Aero traders (2010) 322 ITR 316 (Delhi); CIT verses Modi industrial Corporation (2010) 195 Taxman 68 (Punjab and Haryana) and CIT verses Vijay

Kumar Jain (2010) 325 ITR 378. Further reliance is also made on the decisions reported in CIT verses Reliance Petro products (P) Ltd 322 ITR 158 and also CIT verses DCM Ltd Limited(2013) 359 ITR 0101 (Delhi).

8. Ld. DR heavily relied upon the orders of the authorities below.

9. We have gone through the record in the light of the submissions made on either side. There is no dispute on facts in this case. Learned Assessing Officer levied the penalty on the ground of the addition made on estimate basis and to the extent sustained by the Ld. CIT(A). Nevertheless fact remains that the enhancement or reduction of GP rate establishes that the same is merely on estimate basis and further the fact that Ld. Assessing Officer estimated the same at 12% as against the 7.69% declared by the assessee and in spite of the fact that in the previous year it was only 9.14%. In the quantum appeal, the 1st appellate authority observed that considering the increase in sundry creditors liability, learned AO estimated the gross profit by applying the rate of 12% without citing any comparable case in the order in which the GP rate of 12% was declared.

10. On appreciation of the facts including the GP rate declared for the earlier years, Ld. CIT(A) thought it fit to adopt the GP rate of 9% giving some margin for the increase in turnover and on that premise, Ld. CIT(A) deleted the addition to the extent of Rs.6,57,641/-and confirmed the addition to the extent of Rs.2,87,543/-. All this is subjective exercise done by the authorities and as a matter of fact, as rightly observed by the 1st appellate authority in the quantum appeal there is no basis for the learned Assessing Officer to estimate the GP rate at 12%. At the same time Ld. CIT(A) also sustained a portion of the addition by adopting the GP rate at 9% by making reference to the GP rate in

the earlier years, increase in the sundry creditor or liability and also in the turnover. All the circumstances suggest that the addition has no relation either to concealment of income or furnishing of inaccurate particulars thereof. In order to attract the provisions of Section 271(1)(c) of the Act there must be an allegation that there was concealment of income or furnishing of inaccurate particulars thereof, in the absence of which we find it difficult to sustain the penalty on this score. No penalty could be levied on the difference resulted due to adoption of different GP rates made on estimate basis.

11. On a careful perusal of the decisions relied upon by the assessee, we find that we are fortified in our above observation to the effect that in order to attract clause (c) of section 271 (1) of the Act, it is necessary that there must be concealment by the assessee of the particulars of his income or furnishing of inaccurate particulars thereof and the provisions of section 271(1)(c) of the Act are not attracted to cases where the income of an assessee is assessed on estimate basis and additions are made therein by such decisions. It was further held in such decisions that if the addition made on the basis of estimate and not on account of any concrete evidence of concealment, then the penalty is not leviable and cannot be sustained.

12. Next coming to the levy of penalty on account of confirmation of addition of Rs. 1 lakh loan received from Smt. Bindu Sharma who was drawing salary from the assessee company and the wife of the director, is concerned there is no dispute as to the identity of Bindu Sharma and the learned Assessing Officer never doubted the same. Addition was made on the ground that the source of Bindu Sharma was not proved. Insofar as the identity and genuineness of Smt. Bindu Sharma is not in dispute. Merely because an

addition is made by disbelieving her capacity to lend the loan. Such a fact, ipso facto, does not lead to the levy of penalty.

13. In this context we would like to refer to the decision of the jurisdictional High Court in CIT vs. DCM Limited(2013) 359 ITR 0101 (Delhi), wherein the Hon'ble High Court of Delhi held that law does not bar or prohibit an assessee for making a claim, which he believes may be accepted or is plausible; that when such a claim is made during the course of regular or scrutiny assessment, liberal view is required to be taken as necessarily the claim is bound to be carefully scrutinized both on facts and in law; that full probe and appraisal is natural and normal; that threat of penalty cannot become a gag and/or haunt an assessee for making a claim which may be erroneous or wrong, when it is made during the course of the assessment proceedings; that normally, penalty proceedings in such cases should not be initiated unless there are valid or good grounds to show that factual concealment has been made or inaccurate particulars on facts were provided in the computation. Law does not bar or prohibit a person from making a claim, when he knows the matter is going to be examined by the Assessing Officer.

14. So also, in respect of the disallowance of Hamali charges, where learned Assessing Officer made an addition of Rs.2,02,594/-and it was reduced to Rs.20,000/-by the Ld. CIT(A) stating that the learned Assessing Officer had not brought any material on record to prove that part of such expenses were either false or bogus. It is clear that a claim was disallowed without recording a finding that such a claim is false or bogus.

15. In CIT vs. Reliance Petroproducts (P) Ltd.,(2010) 322 ITR 0158 Hon'bleSupreme Court held that a mere making of the claim, which is not

sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee and such claim made in the return cannot amount to the inaccurate particulars.

16. For the reasons recorded in the preceding paragraphs, we find it difficult to sustain the penalty levied in respect of the additions made either on estimate basis, or by disallowing some expense, or on the ground that this source of the capacity of the creditor was not proved. We, therefore, find that the levy of penalty cannot be sustained and the same has to be quashed. We, accordingly, direct the learned Assessing Officer to delete the penalty.

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

Order pronounced in the Open Court on 11th January, 2019.

Sd/-

sd/-

(G.D. AGARWAL)
VICE PRESIDENT

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 11th January, 2019
VJ

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

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