IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5579/Del/2014
Assessment Year: 2006-07

Hindustan Urban Infrastructure Ltd., (formerly known as Hindustan Vidyut Products Ltd.), C/o M/s RRA Tax India, D-28, South Extension, Part-I, New Delhi.	Vs.	DCIT, Circle-12(1), New Delhi.

PAN: AAACT2345J

(Appellant)		(Respondent)
Assessee by	:	Dr. Rakesh Gupta, Shri Somil Aggarwal & Shri Shubham Sobti, Advocates
Revenue by	:	Shri Amit Katoch, Sr.DR
Date of Hearing	:	16.01.2019
Date of Pronouncement	:	12.01.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 29th August, 2014 of the CIT(A)-15, New Delhi relating to Assessment Year 2006-07.

2. The assessee vide various grounds of appeal has challenged the order of the CIT(A) in confirming the penalty of Rs.35,40,570/- levied by the Assessing Officer u/s 271(1)(c) of the IT Act.

3. The facts of the case, in brief, are that the assessee is a company engaged in manufacturing of all types of insulators. It filed its return of income on 27.11.2006 declaring an income of Rs.27,62,11,677/-. During the course of assessment proceedings, the Assessing Officer observed that the assessee company has claimed an expenditure of Rs.30.36 lakhs on account of liquidated damage. On being asked by the Assessing Officer to justify the claim, it was submitted that the assessee had been granted the purchase order for supply of insulators by M/s Gujarat Electricity Board on 01.01.2004. The assessee was under obligation to supply the material on or before 1st July, 2005. As per clause 18b of the tender document, there was a stipulation of levy of penalty @ 0.5% per week on the prices subject to a maximum of 10% of the total value on account of late delivery. It was accordingly argued that the assessee had provided for liquidated damages of Rs.30.36 lakhs towards this contract. The assessee also relied on a letter dated 16th July, 2005 of Gujarat Energy Transmission Corporation.

4. However, the Assessing Officer did not accept the arguments advanced by the assessee. According to him, the assessee did not supply the material and never intended to supply any material. The purchase order was given on 1st December, 2004 and till the end of the present assessment year, i.e., 31st March, 2006, the assessee

never supplied the material. The other authority i.e., Gujarat Energy Transmission Corpn., also did not enforce any liability clause because of the mere fact that penalty was to be levied in case of late supply and since there was no supply itself, no penalty could have been levied. He referred to the letter issued by Gujarat Energy Transmission Corporation and observed that they were only insisting on supply of material and in case of failure to supply the material the action threatened was of blacklisting the company and cancelling the registration. Relying on the decisions of the Hon'ble Supreme Court in the case of Indian Molasses Company Pvt. Ltd. vs. CIT and in the case of CIT vs. Gemini Cashew Sales Corpn., the Assessing Officer rejected the claim of Rs.30,36 lakhs under the head liquidated damages.

5. The Assessing Officer further observed that the assessee had entered into an agreement under which initially a registered deed for transfer of 37 acres 36 gunta land was made in favour of Army Welfare Housing Organisation vide deed dated 7th October, 2005. However, due to earlier pending notification for the purpose of acquisition of the Bangalore Municipal Corporation later on, a rectification deed was registered and the sale to the extent of 8 acres 10 gunta of land was reversed with sale consideration received being returned back. A detailed note in this regard was submitted by the assessee and according to the same, the assessee company made sales of net 29 acres 26 gunta of land for a consideration of Rs.58.02 crores. However, while computing the capital gain, the assessee deducted the land development charges, land conversion charges and the charges paid to M/s Chandana Developers Pvt. Ltd.

for services rendered were claimed on the entire land. According to the Assessing Officer, the assessee should have apportioned the expenditure proportionately to the area being sold i.e., 29 acres 26 gunta as against 37 acres 26 gunta. He, therefore, restricted the expenditure by Rs.1,12,27,658/- and added the same to the total income of the assessee.

6. In appeal, the ld.CIT(A) upheld the action of the Assessing Officer and on further appeal by the assessee, the Tribunal also dismissed the appeal filed by the assessee. In the mean time, the Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the IT Act. Rejecting various explanations given by the assessee, the Assessing Officer levied penalty of Rs.35,40,570/- being the penalty leviable @ 100% of the tax sought to be evaded on account of the above two additions. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

7. The ld. counsel for the assessee strongly challenged the order of the CIT(A). So far as the first issue on which penalty has been levied i.e., addition on account of liquidated damage is concerned, the ld. counsel drew the attention of the Bench to the copy of the agreement which is placed at pages 127 to 138 of the paper book. Referring to page 2 of the said agreement (page 128 of the paper book), he drew the attention of the Bench clause 8 of the said agreement according to which there is a penalty for late delivery which shall be levied at ½ % per week on the prices subject to maximum 10% reckoned on the value of late delivered supplies. He submitted that on the basis of the said clause, the assessee had made the provision for liquidated

damages due to late delivery of the supplies. Referring to the decision of the Hon'ble Madras High Court in the case of *CIT vs. Durr India Pvt. Ltd. reported in 97 DTR 160 (Mad),* he submitted that under identical circumstances, the Hon'ble High Court has upheld the order of the Tribunal where the Tribunal has held that no penalty u/s 271(1)(c) of the Act was leviable on the assessee who had claimed a deduction of the liquidated damages provided for in the contract even though there was no claim against it for the same. Referring to the decision of the Mumbai Bench of the Tribunal in the case of *M/s Elpro International Ltd. vs. DCIT and vice versa, vide ITA Nos.28 & 29/Mum/2008 and ITA Nos.312 and 313/Mum/2008, order dated 23rd March, 2011*, he submitted that the Tribunal in the said decision, under identical circumstances, has deleted the penalty levied by the Assessing Officer and sustained by the CIT(A) on the ground that the claim of the assessee was *bona fide*. Relying on various other decisions including the decision of Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC),* he submitted that no penalty is leviable merely on account of disallowance of the liquidated damages claimed by the assessee when all the details are available on record.

8. Coming to the second addition on which penalty has been levied is concerned, the ld. counsel for the assessee submitted that the assessee in the computation of capital gain has claimed a sum of Rs.3,42,25,000/- paid to M/s Chandana Developers Pvt. Ltd. and Rs.34,18,000/- and Rs.24,75,433/- towards Land development charges and Conversion charges respectively. He submitted that originally the assessee had 37

acres 36 gunta of land for which agreement was executed with Army Welfare Housing Organisation. However, after the execution of the deed, 8 acres and 10 gunta were acquired by Bangalore Municipal Corporation and, therefore, balance area of land i.e., 29 acres 26 gunta were taken by Army Welfare Housing Organisation. The assessee claimed the entire development and conversion charges while computing capital gains. He submitted that without incurring these expenditures the assessee could not have sold the land. He submitted that all these facts were available with the Assessing Officer at the time of passing of the order and nothing was hidden or suppressed. Further, subsequent to execution of the sale deed, the Bangalore Development Authority, vide Public Notice dated 15th October, 2005, published in Decan Heralad, acquired the land for peripheral ring road. Had the assessee been aware of this Notification, they would not have made agreement with Army Welfare Housing Organisation for transfer of 37 acres 36 gunta. Ld. counsel for the assessee drew the attention of the Bench to the various submissions made before the Assessing Officer and submitted that the claim of the assessee was a *bona fide* claim and merely because the disallowance was sustained the same does not qualify for levy of any penalty. For the above proposition, he relied on the decision of the Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products (P) Ltd.(supra)* and submitted that mere making of a claim which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars of income or concealment of income so as to attract levy of penalty u/s 271(1)(c) of the IT Act.

9. The ld. DR, on the other hand, heavily relied on the order of the Assessing Officer and CIT(A).

10. We have heard the rival submissions and perused the relevant material available on the record. We have also considered the various decisions cited before us. We find penalty u/s 271(1)(c) of the IT Act has been levied in the instant case on account of addition/disallowance of two items i.e., (i) disallowance of liquidated damages of Rs.30.36 lakhs; and (ii) addition on account of capital gain amounting to Rs.1,12,23,941/-. So far as the disallowance of expenditure of Rs.30.36 lakhs on account of liquidated damages is concerned, there is no dispute to the fact that there was a clause in the agreement (clause 8) for levy of penalty @ 0.5% per week subject to a maximum of 10% of the supply of goods. It is the case of the Revenue that the assessee never intended to supply and the other party i.e., Gujarat Energy Transmission Corpn. Ltd. did not enforce any liability clause nor levied any penalty and therefore, the claim of the assessee is not bona fide. We find identical issue had come up before the Hon'ble Madras High Court in the case of *CIT vs. Durr India Pvt. Ltd. (supra).* The Hon'ble High Court in the said decision has upheld the order of the Tribunal holding that no penalty u/s 271(1)(c) was leviable on the assessee who had claimed a deduction of the liquidated damages provided for in the contract even though there was no claim against it for the same. We find the Mumbai Bench of the Tribunal in the case of M/s Elpro International Ltd. has also decided an identical issue and upheld the action of the CIT(A) in deleting the penalty levied. In that case also, it

was a contractual obligation on the assessee as per the terms of the agreement for liquidated damage on account of delay in supply of material. The assessee made a provision for the same which was denied by the Assessing Officer who disallowed the same and subsequently penalty was levied on account of such disallowance. The ld.CIT(A) deleted the penalty and on further appeal filed by the Revenue the Tribunal upheld the order of the CIT(A) and dismissed the appeal filed by the Revenue.

11. Since in the instant case also there was a clause in the agreement for levy of penalty on account of delay in supply which the assessee had provided for in the accounts, therefore, the claim of the assessee cannot be said to be not *bona fide*. Merely because the addition has been sustained by the Revenue authorities, the same does not call for levy of penalty u/s 271(1)(c) of the IT Act. In this view of the matter and in view of the decision of the Hon'ble Madras High Court in the case of *Durr India Pvt. Ltd. (supra*), and the decision of the Mumbai Bench of the Tribunal in *Elpro International Ltd. (supra)* under identical circumstances, we hold that penalty u/s 271(1)(c) of the Act is not leviable on additions on account of liquidated damages. The order of the CIT(A) on this issue is accordingly set aside.

12. Now, coming to the second addition i.e., addition on account of capital gain on which penalty has been levied is concerned, we find the assessee in its computation of capital gain has given the following computation for working out the same:-

Net sales from AWHO for 29 acre 26 guntas of land		580226326
Less: Expenses incurred on the sale of land as under:		
Brokerage paid to M/s Chandna Developers Pvt. Ltd.	29011316	
Charges for various services rendered paid to M/s Chandna Developers Pvt. Ltd.	34225000	
Land Developmetn charges paid to BDA	3418000	
Land conversion charges paid to DC, Bangalore	2475433	
Land conversion charges paid to DC, Bangalore	61257	
Fees paid to M/s Dua Associates for drafting of sale deed	50000	
Fees paid to Sh. B. Mohan, Advocate for opinion	13100	
Fees paid to Mr. R.D. Kolekar	5000	69254906
		510971420
Less: Indexed cost of 29 acres 26 guntas of land		465137
Net capital gain		510506283
Amount invested in REC Bonds u/s 54 EC		NIL

13. We find the land development charges, conversion charges and brokerage paid to M/s Chandana Developers Pvt. Ltd., etc., were claimed on the entire land holding of 41 acres 6 guntas whereas the assessee sold only 29 acres 26 gunta of land and the balance 8 acres and 10 gunta was acquired by the Bangalore Development Authority for expansion of peripheral road. It is the case of the Revenue that the assessee should have claimed proportionate expenditure instead of claiming the entire expenditure while computing the capital gain. It is the submission of the ld. counsel for the assessee that without incurring these expenditure the assessee could not have sold anything and all the details were submitted in the return of income itself and nothing was hidden. We find merit in the argument of the ld. counsel for the assessee that without paying the said charges including the land development and conversion charges, it was not possible to execute the sale deed on 29 acres 26 gunta of land. The ld. counsel also made a submission at the bar that nothing has been received from Bangalore Development Authority till date towards acquisition of the part of the said

land. Since the assessee in the instant case has submitted full details before the Assessing Officer and all the details were filed in the return of income, therefore, mere disallowance of the same, in our opinion, does not call for levy of penalty. The Hon'ble Supreme Court in the case of *Reliance Petro Products (supra),* has held that a mere making of a claim which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. The claim of the assessee in the instant case, in our opinion, cannot be said to be *malafied*. In this view of the matter, we are of the considered opinion that no penalty is leviable on account of addition to the long-term capital gain. The order of the CIT(A) on this issue is accordingly set aside and the Assessing Officer is directed to cancel the penalty levied u/s 271(1)(c) of the Act.

14. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 12.02.2019.

Sd/-	Sd/-
(KULDIP SINGH) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 12th February, 2019.
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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi