



IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA no. 6219/Mum/2017
(Assessment Year : 2005-06)

M/s United Freight Carriers,
B-11, Archana Juhu,
Versova Link Road,
Andheri (W),
Mumbai - 400061
PAN - AAFU1384K

..... Appellant

v/s

Assistant Commissioner of
Income Tax 20(3),
Room No. 506, 5th Floor,
Piramal Chambers, Parel,
Mumbai - 400012

..... Respondent

Assessee by : Ms. Dinkle Haria (AR)
Revenue by : Ms. Deepika Arora (DR)

Date of Hearing -10.01.2019

Date of Order - 30.01.2019

ORDER

PER SAKTIJIT DEY, J.M.

Assessee has filed this appeal challenging the order dated 21.07.2017 passed by the Ld. Commissioner of Income Tax (Appeals)-37, Mumbai confirming the penalty imposed u/s 271(1)(c) of the Income Tax Act, 1961 (in short, Act) amounting to Rs. 2,97,568/- for the A.Y. 2005-06.

2. Briefly the facts are, the assessee a partnership firm, is engaged in the business of cargo clearing and forwarding sub-agent. For the assessment year under dispute the assessee filed its return of income on 11.10.2005 declaring total income of Rs. 24,50,902/-. Assessment in case of the assessee was completed u/s 143(3) of the Act on 26.12.2007 determining the total income at Rs. 82,48,530/-. The variance between the income returned and income assessed was due to the following additions:-

1. Disallowance u/s 40(a)(ia)	Rs. 36,06,785/-
2. Disallowance of business Promotion expenses	Rs. 49,130/-
3. Disallowance of motor car expenses and depreciation on motor car	Rs. 1,21,377/-
4. Disallowance of commissioner payment	Rs. 18,20,334/-
5. Disallowance of sundry expenses	Rs. 2,00,000/-

3. The additions/disallowances made by the Assessing Officer was challenged by the assessee in appeal preferred before the Id. Commissioner (Appeals) and thereafter before the Tribunal. The Tribunal while deciding assessee's appeal in ITA No. 506/Mum/2011 dated 19.04.2013 deleted the disallowance made of business promotion expenses, motor car expenses and depreciation of motor car and sundry expenses. Whereas, issues relating to disallowance u/s 40(a)(ia) of the

Act and commission payment were restored back to the Assessing Officer for fresh adjudication. While giving effect to the directions of the Tribunal in order dated 10.01.2014, the Assessing Officer, out of the disallowance made u/s 40(a)(ia) of the Act initially, confirmed disallowance of Rs. 5,17,328/-. Further, out of disallowance made of Rs. 18,20,334/- on account of commission payment, the Assessing Officer confirmed disallowance of Rs. 2,95,865/-. On the basis of aforesaid additions/disallowances made in the order giving effect to the order of the Tribunal, the Assessing Officer initiated proceedings for imposition of penalty and ultimately passed an order imposing penalty of Rs. 8,92,704/-, at the maximum rate of 300%, alleging concealing/furnish inaccurate particulars of income. Assessee challenged the imposition of penalty before the Commissioner (Appeals). Ld. Commissioner (Appeals) while deciding the appeal of the assessee, though, confirmed the imposition of penalty under section 271(1)(c) of the Act, however, he reduced the quantum of penalty to 100% of the tax, which worked out to Rs. 2,97,568/-.

4. The Id. Authorised Representative submitted, against the disallowance made u/s 40(a) (ia) of the Act no penalty u/s 271 (1) (c) can be levied as there is neither concealment of income nor furnishing of inaccurate particulars of income by the assessee. She submitted, the disallowance is due to a technical breach as the genuineness of

expenditure claimed is never doubted. In support of such contention Id.

Authorised Representative relied upon the following decisions:-

1. Sharmilla Vaz v/s ITO [ITA No. 5722/M/2013, Order dated 29.08.2016 (Mumbai –Trib)].
2. ITO v/s Western Outdoor Media Tech Pvt. Ltd. [I.T.A. No. 5400/M/2014 Order dated 20.07.2016 (Mumbai-Trib)]
3. Syndicate Labels v/s ACIT [I.T.A. No. 4386/Del/2014, Order dated 21.10.2015 (Delhi-Trib)]
4. Rushi Builder and Developers v/s CIT [I.T.A. No. 6684/M/2012, Order dated 04.03.2015 (Mumbai – Trib)]
5. Tanushree Basu v/s ACIT [I.T.A. No. 2922/M/2012, Order dated 22.05.13 (Mumbai – Trib)]

5. As regards penalty imposed on the addition made on account of disallowance of commission payment, the Id. Authorised Representative submitted, the assessee has paid commission of Rs. 9,48,687/- to Ms. Janet D'souza. She submitted, the payee has also confirmed receipt of the aforesaid amount which was filed before the Assessing Officer. In this context, she drew our attention to copies of the confirmation and bank statement indicating the payment made. She also drew our attention to the affidavit of Ms. Janet D'souza confirming receipt of Rs. 9,48,687/- as commission from the assessee. The Id. Authorised Representative submitted, while making such payment assessee has also deducted tax at source. She submitted, only because due to a

different method of accounting the payee has shown a part of the commission received in the impugned assessment year and other part in the next assessment year, the assessing Officer has accepted a part of the commission amounting to Rs. 7,47,984/- while disallowing the other part amounting to Rs. 2,97,588/-. Thus, she submitted, neither there is concealment of income nor furnishing of inaccurate particulars of income, hence, penalty u/s 271 (1) (c) cannot be imposed. Further, the Ld. AR submitted, in the order giving effect to the ITAT order the Assessing Officer has not specifically initiated proceeding for imposition of penalty u/s 271 (1) (c) of the Act. Therefore, the penalty order passed is invalid. Further, she submitted, in the show cause notice issued u/s 274 read with section 271(1)(c) of the Act, the Assessing Officer has not indicated the exact charge for which he wants to impose penalty u/s 271(1)(c) of the Act, therefore, the penalty order is invalid.

6. The Id. Departmental Representative relied upon of the observations of the Commissioners (Appeals).

7. We have considered rival submissions and perused the material on record. At the outset, we propose to decide the issue relating to the imposition of penalty on merit. As could be seen from the facts on record the Assessing Officer has imposed penalty u/s 271 (1) (c) of the Act on the basis of following two additions:-

1. Disallowance u/s 40(a)(ia) of the Act Rs. 5,17,328/-
2. Disallowance of commission payment Rs. 2,95,865/-

8. As regards disallowance made u/s 40(a)(ia) of the Act, undisputedly the assessee has claimed the aforesaid amount as expenditure in the profit and loss account. The Assessing Officer has neither doubted the genuineness of the expenditure claimed nor the fact that it was for the purpose of business. The only reason for which the Assessing Officer has disallowed the expenditure is, the assessee has not deducted tax at source while making such payment. It is the contention of the Id. Authorised Representative before us that non deduction of tax was on account of the fact that, according to the assessee, the payment made does not come within the purview of the section 194C of the Act. Be that as it may, neither Id. Commissioner (Appeals) nor the Assessing Officer have doubted the genuineness of the payment made or the fact that it was not made for the purpose of business. The disallowance, as could be seen, was made only for the reason that the assessee failed to deduct tax at source while making the payment. That by itself, in our view, does not result in either concealment of income or furnishing inaccurate particulars of income. Therefore, imposition of penalty u/s 271(1)(c) of the Act on account of disallowance made u/s 40(a)(ia) of the Act is not valid. The decisions cited by Id. Authorised Representative clearly support the aforesaid view. Therefore, we delete the penalty imposed on the addition made on account of disallowance u/s 40(a)(ia) of the Act. As regards the disallowance made out of the commission paid, the evidences available on record clearly demonstrate that an amount of Rs.

9,48,687/- was paid to Ms. Janet D'souza in the previous year relevant to the assessment year under dispute. In fact, confirmation from the payee along with an affidavit as well as bank statement indicating the payment made were furnished before the Assessing Officer. The disallowance of Rs. 2,95,865/- out of the aforesaid amount was purely due to a particular method of revenue recognition followed by the payee. However, that does not lead to the conclusion that the assessee has either concealed the income or furnished inaccurate particulars of income. It is further evident, all the material facts relating to the payment made, including the confirmation from the payee, were available before the Assessing Officer and genuineness of the payment made is also established. That being the case, in our considered opinion, imposition of penalty on the part disallowance of commission payment cannot be sustained. Accordingly, we delete the same. In a nutshell, the penalty imposed u/s 271(1)(c) of the Act is deleted. In view of our aforesaid decision, we do not find the need to deliberate further on the other propositions advanced by Id. Authorised Representative challenging the validity of the penalty order.

9. In the result, assessee's appeal is allowed in the terms indicated above.

Order pronounced in the open Court on 30.01.2019.

Sd/-**RAMIT KOCHAR
ACCOUNTANT MEMBER****Sd/-****SAKTIJIT DEY
JUDICIAL MEMBER****MUMBAI, DATED: 30.01.2019**Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Alindra
Private Secretary*

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai