

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3313/Del/2015
(Assessment Year: 2007-08)

DCIT, Circle-11(2), New Delhi	Vs.	Hindustan Fertilizer Corporation Ltd, PDIL Bhawan, A-14, Sector-1, Noida PAN: AAACH0907N
(Appellant)		(Respondent)

Revenue by :	Smt Sugandha Sharma, Sr. DR
Assessee by:	Shri Nareen Sethia, CA
Date of Hearing	05/03/2019
Date of pronouncement	13/03/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the DCIT, Circle-11(1), New Delhi for Assessment Year 2007-08 raising the solitary ground of appeal that the ld CIT(A) erred in deleting the penalty of Rs. 2,45,13,669/- levied u/s 271(1)(c) of the Act on account of disallowance of payment made to employees under voluntary separation scheme (VSS).
2. Brief facts of the case shows that the assessee is a company engaged in the business of manufacturing and marketing of fertilizer. It filed its return of income declaring loss of Rs. 33,89,43,167/- on 29.10.2007. The assessee has claimed an expenditure of Rs. 9,94,63,000/- on account of payment made to employees under Voluntary Separation Scheme (VSS). According to the ld AO the above sum should have been deferred over the period of 5 years and 4/5th of the amount should have been added to the total income of the assessee and only 1/5th of such expenditure is allowable under the provisions of section 35DDA(1) of the Act. The assessee furnished details of salary etc. The ld AO for the reasons given for the Assessment Year 2004-05 held that only 1/5th Rs. 9,94,63,000/- amounting to Rs. 1,98,92,600/- is

allowable as expenditure for the year and the balance of Rs. 7,95,70,400/- was disallowed. The Id AO initiated the penalty proceedings u/s 271(1)© of the Act for furnishing inaccurate particulars of its income. Consequently, the assessment u/s 143(3) of the Act was passed on 27.11.2009. The assessee contested the above addition before the Id CIT(A), XV, New Delhi who passed the order dated 10.04.2012 who deleted the above disallowance of 4th of expenditure claimed under voluntary separation scheme. The revenue contested the same before the coordinate bench. The coordinate bench passed order on 11/1/2013 confirming the above disallowance. Consequent to that, the learned assessing officer passed the order u/s 271 (1) (C) of the act on 26/11/2013 and in the penalty order it is stated that as the disallowance has been confirmed by the coordinate bench for 1/5th of INR 9 9463000/- amounting to INR 7 9570400/- , it is being treated as concealed income and is considered for levy of penalty u/s 271 (1) (C) of the act. A fresh cause notice on 12/11/2013 was issued to the assessee on the issue. The assessee submitted its reply on 21/11/2013. The assessee submitted that the coordinate bench has directed to allow the deduction as per section 35DEA and is also directed to allow the deduction in subsequent years in accordance with the provisions of that section. It was further stated that in the statement of facts the entire particulars of the amount paid to the employees was disclosed in the return filed and details furnished at the time of assessment proceedings under section 143 (3) of the act. Therefore it was stated that penalty proceedings are not justified. The learned assessing officer considered the explanation of the assessee and held that explanation 1 of section 271 (1) (C) is clearly applicable in this case. He further held that the claim of the deduction of the hundred percent of voluntary separation scheme expenses of the assessee is not only without any basis and explanation furnished by the assessee company is devoid of any merit. He further added that it is not found to be bona fide. He therefore held that the any amount disallowed in computing the total income of such person as a result thereof is deemed to be representing the income in respect of which particulars have been concealed. He further stated that it is crystal clear that the assessee has indeed furnished inaccurate particulars of income which lead to the concealment of income.

Accordingly he levied the penalty of INR 2 6983337/- being the hundred percent of tax sought to be evaded. The order was passed on 26/11/2013. The assessee aggrieved with the above order preferred an appeal before the learned CIT – A. The assessee submitted that on identical issue in assessment year 2004 – 05 the learned Commissioner of income tax appeal held that it is not a fit case for levy of the penalty. The learned CIT – A noted that coordinate bench while deciding the quantum of appeal in case of the appellant for assessment year 2007 – 08 has held that the provisions of section 35DDA were squarely applicable. He further held that the particulars of various expenses under the head payment made to employees under voluntary separation scheme were duly disclosed by the appellant in its books of account and in the return of income. He therefore held that no concealment of particulars of income was observed by the learned assessing officer in respect of amount in dispute. He therefore held that since the issue was interpreted differently by different authorities based on the same set of facts, penalty u/s 271 (1) (C) cannot be levied as the issue itself is a debatable one on which more than 2 opinions are possible. Therefore he deleted penalty on these additions. The part of the penalty with respect to the prior period expenditure which is not in dispute before us has been confirmed by the learned CIT – A.

3. Aggrieved by the order of the learned CIT – A the revenue is in appeal contesting that the learned CIT – A has erroneously deleted the penalty of INR 2 4513669/- on account of payment made to employees under voluntary separation scheme.
4. The learned departmental representative vehemently supported the order of the learned assessing officer and stated that assessee has furnished inaccurate particulars of income and has made a wrong claim of deduction and therefore the penalty has been rightly levied by the learned assessing officer. She further submitted that merely because the learned CIT – A has allowed the claim of the assessee which has been reversed by the coordinate bench it does not amount to having a 2 opinions on the same set of facts.
5. The learned authorised representative vehemently supported the order of the learned CIT – A and submitted that on the identical facts and circumstances of the case for assessment year 2004 – 05 on identical facts

and circumstances the penalty has been deleted. He referred to the para number 6 of the order of the coordinate bench dated 22/9/2015 wherein the addition itself has been deleted and in para number 7 the penalty is also deleted. He further submitted a detailed chart of the status of voluntary separation scheme expenses with respect to the assessment year 2003 – 04 to 2012 – 13. He also submitted that the complete details have been furnished before the assessing officer in the assessment proceedings itself and therefore there is no question of furnishing of inaccurate particulars of income. He further referred to the penalty order wherein at page number 11 the learned assessing officer has stated that the assessee has furnished inaccurate particulars of its income and concealed its income for the year. He therefore stated that in the penalty order the twin charges levied by the learned assessing officer and therefore the learned assessing officer itself is not sure whether the penalty is levied for furnishing of inaccurate particulars or concealment of income.

6. We have carefully considered the rival contentions and perused the orders of the lower authorities. In this case though in the impugned assessment year the coordinate bench has upheld the addition however for assessment year 2004 – 05 and for assessment year 2006 – 07 , 2007 – 08 and 2008 – 09 the coordinate bench has deleted the identical addition in favour of the assessee. Therefore, it is apparent that there are 2 views on the allowability of the above sum on which penalty has been levied. We also noted that the learned assessing officer is also not sure whether the penalty is levied for furnishing of inaccurate particulars of income or concealment of income. In view of the appreciation of the complete facts, order of the coordinate bench in case of the assessee for earlier years on the quantum proceedings as well as on the penalty proceedings, we are of the opinion that on the above disallowance penalty cannot be levied as there are conceivably 2 opinions on the same set of facts. The learned CIT appeal has deleted the penalty primarily on this reason. Further, on reading the penalty order itself it is found that the learned assessing officer is not sure whether the penalty is levied for concealment of income or furnishing of the inaccurate particulars of income. Therefore, on this ground also the penalty is not sustainable. Accordingly we confirm the order of the learned CIT – A deleting the penalty

of INR 2 4513669/- on account of payment made to employees under voluntary separation scheme. The ground number 1 of the appeal of the assessing officer is dismissed.

7. Accordingly, appeal of the learned assessing officer is dismissed.
Order pronounced in the open court on 13/03/2019.

-Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 13/03/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi