

IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 7397/Mum/2018 (Assessment Year 2011-12)

Jefferris India Pvt. Ltd. 42,-43, North Avenue, Maker Maxity, Bandra Kurla Complex, Bandra (East), Mumbai-400051. PAN: AABCJ7850R	Vs.	ACIT-14(2)(1), Room No. 432, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400051.
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Appellant

Respondent

Appellant by : Shri Rajan R. Vora (AR)

Respondent by : Shri Rajiv Gubgotra (DR)

Date of Hearing : 28.03.2019

Date of Pronouncement : 28.03.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-22, (hereinafter referred as Id CIT (A), Mumbai dated 04.12.2017, which in turn arises from the penalty levied by Assessing Officer under section 271(1)(c) of the Act for Assessment Year 2011-12.
2. Brief facts of the case are that the assessee company filed its return of income for Assessment Year 2011-12 declaring income of Rs. 9,78,51,166/-. The return of income was revised on 25.05.2012 declaring income of Rs. 9,58,51,166/-. In the revised return of income, the assessee revised reduction of disallowance under section 40(a)(ia) of Rs.

20,00,000/-, withdrawal of Minimum Alternative Tax (MAT) credit of Rs. 80,77,413/- and deposit of self-assessment tax. The return was selected for scrutiny. The assessment was completed under section 143(3) on 23.12.2015. During the assessment, the Assessing Officer noted that the authorised capital of the assessee was increased from Rs. 36 Crore to Rs. 230 Crore. The assessing officer called rates and taxes. On perusal of the details, the assessing officer noted that stamp duty of Rs. 97,00,000/-, fee of Registrar of Company (ROC) of Rs.38,80,000/- and franking charge of Rs. 22,50,000/- were debited for increase of authorized share capital. The said expenditure was incurred subsequent to the commencement of business and the same was capital in nature incurred for acquiring benefit for enduring nature not allowable under section 35D. The assessee though disallowed the stamp and ROC fees while computing its income, however, the said franking charge was not disallowed. The Assessing Officer disallowed the said franking charge Rs. 22,50,000/-. While passing the assessment order, the Assessing Officer initiated the penalty under section 271(1)(c). The Assessing Officer levied the penalty of 100% of the tax sought to be evaded. The Assessing Officer worked out the penalty of Rs. 7,64,775/-. No appeal in quantum assessment was filed by assessee. However, the assessee unsuccessfully challenged the levy of penalty under section 271(1)(c)

before the Id. CIT(A). Thus, further aggrieved, the assessee has filed the present appeal before us.

3. Perusal of records reveals that the Id. CIT(A) passed the impugned order on 04.12.2017, however, the present appeal was filed on 24.12.2018, thus, there is delay of 280 days in filing of appeal. The assessee has filed an application for condonation of delay and affidavit of Sh. Brijmohan Gopaldass Soni, Director of assessee in support of application for seeking condonation in filing appeal before us.
4. The Id. AR of the assessee submits that the assessee while computing taxable income and filing return of income for relevant Assessment Year placed reliance on Tax Audit Report (TAR) and inadvertently missed to disallow the franking charges amounting to Rs. 22,50,000/-, it was a bonafide mistake on relying on the TAR. During the assessment, the assessee realize its error in not disallowing the franking charges and *suo-moto* admitted that aforesaid charges ought to have been disallowed while arriving the taxable profit and accepted the disallowance. The penalty was levied on the assessee for Rs. 7,64,775/-, though, the assessee contested the appeal before the Id. CIT(A) on the validity of the notice as well as on merit. After dismissal of appeal, the assessee not filed further appeal before the Tribunal to avoid the long drawn litigation particularly looking at the smallness of the amount and chose not to pursue the matter. The assessee also filed a letter dated 12.03.2018 in the

office of Assessing Officer that the assessee in principle, does not agree with the penalty as they have no malafide intention of concealing any income or furnishing inaccurate particular thereof. No further proceeding be initiated and prayed for passing the order giving effect to the order of Id. CIT(A). However, to the surprise of assessee, the revenue has started prosecution of the Director by issuing notice under section 276/277 of Income-tax Act. The Id. AR of the assessee further submits that though the assessee has good case on merit and on the advice of his tax consultant due to smallness of amount, the assessee chose not to file further appeal. The Id. AR of the assessee submits that there was a sufficient ground for condoning the delay as the assessee acted bonafidely for not filing appeal in time. The assessee now compelled to file appeal before the Tribunal as the department has issued show-cause notice for issuing prosecution against all the directors of the assessee. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Supreme Court in Collector, Land Acquisition vs. Mst. Katiji and Others. [1987] 167 ITR 471 (SC), Vedabai alias Vaijayanatabai Baburao Patil [2002] 173 CTR 300 (SC) and the decision of Hon'ble Bombay High Court in Vijay Vishin Meghani vs. DCIT [2017] 398 ITR 250 (Bombay HC). The Id AR would submit that the assessee has good case on merit and is likely to succeed.

5. On the other hand, the Id. DR for the revenue submits that the assessee has not shown good cause for condonation of delay. Once the assessee has taken a conscious decision for not filing appeal, the assessee now cannot take an artificial ground for condoning the delay.
6. We have considered the rival submission of the parties. We have also perused the affidavit filed on behalf of the assessee in support of application for condoning the delay. We have also deliberated on various case law relied upon by Id. AR of the assessee. The Hon'ble Supreme Court in *B. Madhuri Goud v. B. Damodar Reddy* (2012) 12 SCC 693, by referring various earlier decisions of Superior Courts held that the authorities must kept in mind while considering the application for condonation of delay;
 - (i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
 - (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
 - (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
 - (iv) No presumption can be attached to deliberate cause of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
 - (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

- (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
- (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.
- (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.
- (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
- (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such litigation.
- (xi) It is to be borne in mind that no one gets away with fraud, is representation or interpolation by taking recourse to the technicalities of law of limitation.
- (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.
- (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

7. Considering the facts and circumstances of the case and the ratio of law laid down as referred above, we are of the view that the assessee has acted on the advice of his tax advisor. The assessee acted on the advice keeping in view the cost of litigation, which in our view is a reasonable

cause. And the assessee is now compelled to file the present appeal. We have also found that the assessee has got merit in their favour. Therefore, in view of the above discussion the delay in filing the present appeal is condoned. Therefore, assessee and the revenue was also heard on merit.

8. On merit, we have heard the submission of Id. AR of the assessee and Id. DR for the revenue. The Id. AR of the assessee submits that during the assessment, the assessee suo-moto admitted that franking charges ought to have been disallowed while offering taxable profit and accepted the disallowance in the assessment order dated 23.02.2015. However, the Assessing Officer initiated and levied the penalty under section 271(1)(c) vide order dated 28.08.2015 for Rs. 7,64,775/-, without considering the bonafide explanation furnished by assessee. The assessee contested the appeal before the Id. CIT(A) on merit as well as on validity of notice under section 271(1)(c) as relevant limb of section 271(1)(c) which was not applicable in assessee's case, had not been stuck off in the penalty notice. The Id. CIT(A) confirmed the order without considering the bonafide explanation offered by the assessee. The Id. AR of the assessee in support of his submission relied upon the decision of Price Waterhouse P. Ltd. vs. CIT [2012] 348 ITR 306 (SC).
9. The Id. AR of the assessee further submits that notice under section 271(1)(c) is also invalid and bad-in-law as the relevant limbs under

section 271(1)(c) which is inapplicable in case of assessee had not been stuck off. In support of his submission, the Id. AR of the assessee relied upon the decision of CIT vs. SSA's Emerald Meadows [2016] 242 Taxman 180 (SC), CIT vs. Samson Perinchery (ITA No. 1154 of 2014, CIT vs. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565. The Id AR for the assessee submits that the notice under section 274 read with section 271(1)(c) is invalid and thus action initiated on the invalid notice is *void ab initio*.

10. On the other hand, the Id. DR for the Revenue supported the order of lower authorities below. The Id. DR for the revenue submits that assessee while filing return of income wrongly claimed franking charges. The franking charge was not allowable under section 35D. No appeal was filed by assessee against the addition/disallowance made by Assessing Officer. The addition has attained finality. The Id DR further submits that it is a fit case for levy of penalty.
11. We have considered the rival submission of the parties and have gone through the orders of authorities below. There is no dispute that during the assessment, the Assessing Officer disallowed franking charges treating it a capital expenditure. In reply to the show notice under section 274 read with section 271(1)(c), the assessee filed its reply dated 17.08.2015. In the reply, the assessee contended that in course of scrutiny assessment while providing the details in respect of rate and

taxes, the assessee realize its error in not disallowing the franking charges and admitted that the aforesaid charges ought to have been disallowed while arriving at the taxable profit. The contention of assessee was not accepted by Assessing Officer holding that the penalty under section 271(1)(c) is attracted, where the Assessing Officer is satisfied that any person has concealed the particular of income or furnished inaccurate particular of such income. The case of assessee is squarely falls under Explanation (1) to the proviso of section 271(c). The Assessing Officer levied the 100% penalty of tax sought to be evaded on disallowance of franking charges of Rs. 22,50,000/-. The Id. CIT(A) upheld the action of Assessing Officer holding that assessee debited the capital expenditure of franking charges for increase in authorized share capital without adding back the same in its computation of income. It is settled legal position that any expenses incurred for increase of authorized share capital is capital in nature, this fact came to the light only after Assessing Officer called for details of rates and taxes and was not voluntarily disclosed by the assessee. The contention of assessee is that it had inadvertently mistake to disallowing the franking charges incurred on account of increased in the authorized share capital, while stamp duty and filing of fees paid to ROC for the same purpose of Rs. 1.35 Crore was duly disallowed in the computation. The stamp duty and ROC fees were reflected in TAR and franking charges was not reflected

in the TAR by the auditor, which was the bonafide mistake. The assessee acted on the TAR bonafidely. The contention of assessee that there was no willful concealment was also repudiated by Id. CIT(A).

12. We have noted that in the reply to the show-cause notice under section 271(1)(c), the assessee specifically contended that during the scrutiny assessment, the assessee realized its error in not disallowing the franking charge and admitted that the aforesaid charges ought to have been disallowed. The Assessing Officer has not disputed the contention of assessee in the penalty order. The contention of assessee throughout the proceeding are that the franking charges were inadvertently mistake to be disallowed by the assessee as the same was not reported in TAR. The assessee's contention is that the error was unintentional and bonafide mistake. In our view, the assessee has shown reasonable cause by offering the franking charges during the assessment by offering suo-moto disallowance at the cost of repetition, we may ad that the assessee while filing reply to the show-cause notice that assessee realized its error and admitted that aforesaid franking charges ought to have been disallowed. This fact is duly recorded by Assessing Officer in para-2.1 of the penalty order. The Assessing Officer has not countered the bonafide explanation furnished by assessee. The Hon'ble Apex Court in Price Waterhouse P. Ltd. vs. CIT (supra) held that the penalty under section 271(1)(c) could not be levied, where it involves a mistake by assessee on

account of human error. Therefore, considering the decision of Hon'ble Apex Court which is almost on similar fact, we find that the assessee has shown reasonable cause during the assessment as well as during the penalty proceeding and no penalty was leviable on the assessee. Therefore, we direct the Assessing Officer to delete the entire penalty.

13. As we have accepted the primary statement of assessee on merit and deleted the entire penalty, therefore, the discussion on other adjudication and submission and ground no. 3 to 6 raised by assessee have become academic.

14. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 28/03/2019.

Sd/-
SHAMIM YAHYA
ACCOUNTANT MEMBER

Mumbai, Date: 28.03.2019

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Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "F" Bench, ITAT, Mumbai
6. Guard File

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai