

IN THE INCOME-TAX APPELLATE TRIBUNAL “G” BENCH MUMBAI  
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND  
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER  
ITA No. 4198/Mum/2016 (Assessment Year 2007-08)

DCIT-9(3)(1) Room No. 260A, 2 <sup>nd</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Duron Technologies (India) Pvt. Ltd., Room No. A-11, Trishul, Mahakali Caves Road, Andheri (East), Mumbai-400093. <b>PAN: AACCD1243R</b>
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Appellant

Respondent

Appellant by : Shri Pankaj R. Toprani with  
Shri Krupa P. Toprani (DR)

Respondent by : Shri Satish Chandra Rajore (Sr. AR)

Date of Hearing : 13.03.2019

Date of Pronouncement : 29.03.2019

**ORDER UNDER SECTION 254(1) OF INCOME TAX ACT**

**PER PAWAN SINGH, JUDICIAL MEMBER;**

1. This appeal by revenue under section 253 of the Income-Tax Act (for short “the Act”) is directed against the order of Id. Commissioner of Income-tax (Appeals)-16, [hereinafter referred as Id CIT (A)], Mumbai dated 18.03.2016, which in turn arises from the penalty levied by assessing officer under section 271(1)(c) of the Act for Assessment Year 2007-08.
2. Brief facts of the case are that the assessee-company filed its return of income for Assessment Year 2007-08 on 22.10.2007 declaring total income of Rs. 2,94,00,307/-. The case was selected for scrutiny and assessment was completed under section 143(3) on 23.12.2009 assessing

the total income of the assessee at Rs. 6,04,72,480/- by making additions on account of provision for retention and power cost amounting to Rs. 2,80,72,176/- and provision for liquidated damage amounting to Rs. 30,00,000/-. On appeal before the Id. CIT(A) in quantum assessment the additions were confirmed order dated 18.03.2011. The assessing officer initiated penalty proceeding for furnishing inaccurate particulars of income and concealment of income on both the disallowances. The Assessing Officer passed the penalty order under section 271(1)(c) of the Act on 28.03.2013 levying the penalty of Rs. 1,04,58,890/-. The assessing officer while passing the penalty order recorded that the assessee was given opportunity vide notice dated 07.12.2012. The assessee neither filed any submissions nor attended the proceedings the assessing officer levied penalty @ 100% of tax sought to be evaded on such disallowance. On further appeal before, Id CIT(A) the entire penalty was deleted. Thus, aggrieved by the order of Id. CIT(A) the assessing Officer/ revenue has filed the present appeal before us.

3. The revenue has raised sole ground of appeal that the Id CIT(A) erred in deleting the penalty under section 271(1)(c) of the Act.
4. We have heard the submission of Id. Departmental Representative (DR) for the Revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record. The Id. DR for the revenue supported the order of assessing officer. The Id DR further submits that

the disallowance made in the assessment was upheld by Id CIT(A). And no further appeal was filed by the assessee. The Id CIT(A) deleted the entire penalty holding that assessee was under bonafide belief about the allowability of the provisions made in its account. Had the return of income furnished by the assessee not selected for scrutiny the income would have escaped from the assessment.

5. On the other hand the Id. AR for the assessee supported the order of the Id. CIT (A). The Id AR for the assessee further submits that the penal provisions under section 271(1)(c) would apply when there is concealment of particulars of income or a failure to disclose fully and truly particulars of income and it is only when the appellant fails by not disclosing particulars of income. However, all the necessary facts and figures were disclosed by the assessee in its return of income, which accompanied the profit and loss account for the year, ended 31.03.2007, balance sheet as on 31.03.2007 and relevant schedules. No information given in the income tax return was found to be incorrect or inaccurate, therefore, it could not be said that the provision made by assessee disallowed during the course of assessment proceedings was a result of any suppression of facts or deliberate concealment of income. The assessee had discharged its onus cast on it as per explanation (1) of section 271(1)(c) of the Income Tax Act. It was submitted that there was no justification for imposing penalty when assessee had disclosed all the

facts in the audited statement of accounts for the year under reference. There was no concealment of income at all and it was just a clear cut case of difference of opinion between the assessee and the assessing officer. The assessing officer while imposing penalty has not recorded a conclusive finding that there was an active concealment or deliberate furnishing of inaccurate particulars. These parameters had to be fulfilled before imposing penalty on the assessee. The provision of section 271 (1) (c) of the Income Tax Act, 1961 would require proper application of mind and recording of at least a bare minimum opinion on the part of the assessing officer that a case for initiation of penalty proceeding was made as there was concealment of income or that incorrect particulars had been furnished by the appellant with the intention to avoid payment of taxes.

6. The ld AR for the assessee submits that the assessing officer relied on the decision of Delhi High Court in Zoom Communication (P) Ltd. (2010) 327 ITR 510(Delhi). The decision of Delhi High Court in Zoom Communication (P) Ltd (supra) is distinguishable on the facts of the present case. In Zoom Communication (P) Ltd (supra) the assessee in that case debited the administrative and other expenses under the head “equipment written off” and other sum of Rs. 1.00 lacks was also debited under the head “income tax paid”, thus, clearly inaccurate particular of income was furnished. The ld AR for the assessee relied on the decision

of Delhi High Court in Tristar Intech P Ltd Vs ACIT [2015] 43 ITR( Trib) 279 ( Delhi).

7. In alternative submissions the ld AR submits that he has filed additional paper book and placed on record the copy of notice issued by assessing officer under section 274 read with section 271(1)(c), wherein the assessing officer has not specified the limb of section 271(1)(c) on which the penalty is proposed. The assessing officer has not strike out inappropriate portion of the notice, thus, the notice issued by the assessing officer was invalid. In support of his submissions the ld AR for the assessee relied on the decision of Bombay High Court in CIT Vs Samson Perinchery [2017] 392 ITR 4 (Bombay). The ld. AR for the assessee prayed for dismissal of the appeal.
8. In the rejoinder submissions the ld. DR submits that the assessee has neither filed any Cross Objection, therefore, the assessee is not entitled to argue that the notice issued by assessing officer is invalid. Even otherwise the assessee duly participated in the penalty proceedings and never raised such objection that the assessee is unaware of the charges or limb of section 271(1)(c).
9. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Assessing Officer while passing the assessment order made the addition account of provision for retention and power cost amounting to Rs. 2,80,72,176/- and provision for

liquidated damage amounting to Rs. 30,00,000/-. The appeal filed by the assessee challenging the addition before Id CIT(A) was dismissed vide order dated 18.03.2011. No further appeal was filed before Tribunal. The assessing officer issued notice under section 274 read with section 271(1)(c) dated 07.12.2012. The assessing officer recorded that none appeared on behalf of the assessee nor any submissions was made. The Assessing Officer levied the penalty on both the disallowance @ 100% of the tax sought to be evaded vide his order dated 28.03.2013. There is no dispute that all the necessary facts and figures were disclosed by the assessee in its return of income. The return of income was accompanied the profit and loss account for the year, ended 31.03.2007, balance sheet as on 31.03.2007 and relevant schedules. Similarly, no information given in the return was found to be incorrect or inaccurate, therefore, it could not be said that the provision made by assessee disallowed during the course of assessment proceedings was a result of any suppression of facts or deliberate concealment of income. In our view there was no justification for imposing penalty when assessee had disclosed all the facts in the audited statement of accounts for the year under reference. There was no concealment of income at all. We are of the further view that it was just a clear cut case of difference of opinion between the assessee and the assessing officer.

10. Before the Id. CIT(A), the assessee made the similar submission as made before us. The Id. CIT(A) after considering the assessment order, penalty order passed by Assessing Officer and its submission deleted the penalty while making the following order:

“6. I have carefully perused the assessment order of the AO and the submissions made by the AR in support of his arguments. After taking into consideration, the AO's findings and the appellant's oral and written submissions made during the course of hearing as well as facts of the case, decision on various grounds are adjudicated as under:

6.1 Although appellant has raised 5 grounds of appeal the only effective ground is against levy of penalty of Rs.1,04,58,890/- u/s.271(1)(c) of the Act. The appellant company filed its return of income on 27.10.2007 declaring total income of Rs.2,94,00,307/-. The case was selected for scrutiny and an order u/s.143(3) of the I.T. Act, 1961 was passed by the Ld. A.O. on 23.12.2009 by making an addition/disallowance of Rs.3,10,72,176/-. In para 3 of the assessment order the Ld.AO had mentioned that the appellant company made a provision for retention of 1,30,72,176/- and provision for power cost for an amount of Rs.1.50 crores. In para 4.2 of the assessment order, the Id. A.O. concluded that the provision made by the appellant were in the nature of doubtful debt and not on account of any liquidated damages. The A.O. further concluded that the appellant company had not produced any evidence to show that the appellant is liable to pay any liquidated damage on the contract entered with BHEL. Therefore, the provision made towards liquidated damage of Rs.30,00,000/- towards appellant company was also disallowed. Similarly, in respect of provision of Rs.1.50 crores the Ld. A.O. concluded that if the appellant was liable to pay any liquidated damage it could be collected from the sub contract Utility Energy tech Engineering Ltd. Therefore in view of the A.O., the appellant company was not required to bear the liquidated damages and accordingly the provision of Rs.1,50,00,000/- claimed by the appellant company was not allowed by the A.O. Similarly, provision for retention was also disallowed and penalty u/s.271(1)(c) of the Act were separately initiated.

6.2 In para 5 of the penalty order dated 28.03.2013 the ld. A.O. mentioned that nobody had attended and no written submission was made by the appellant company. Therefore he imposed penalty u/s.271(1)(c) of the Act on the basis of material available on record. According to the A.O. the appellant company could not rebut the additions on account of provision for retention and power cost amounting to Rs.2,80,72,176/- and provision for liquidated damage amounting to Rs.30,00,000/- made in the assessment order which were also confirmed by CIT(A).

6.3 During appellate proceedings, it was submitted that penalty order u/s.271(1)(c) was passed ex-parte without hearing the appellant by the A.O. which was against the principle of natural justice. During appellate proceedings, it was submitted that the penal provisions u/s.271(1)(c) would apply when there is concealment of particulars of income or failure to disclose fully and truly particulars of income. It was claimed that in the case under consideration all necessary facts and figures were disclosed categorically by the appellant in its return of income accompanied by P & L A/c. for the year ending on 31.03.2007 and Balance Sheet as on 31.03.2007. According to the appellant, A.O. did not find any fault in the figures provided by the appellant in its P & L A/c. and Balance Sheet. It was further contended that all the accounts of the appellant company were audited by a reputed firm and professionally qualified C.A. who did not point out any defects in the accounts maintained by the appellant company. In the audit report duly certified and signed by a professional firm, no remarks regarding disallowability of provisions were given by the auditors of the company. It was claimed that after the advice of experts, the appellant company was under a bonafide belief that claim of provisions made in the Balance Sheet were allowable claims. It was argued that there was no justification for imposing penalty when appellant had disclosed all the facts in the audited statement of accounts for the year under reference and no qualification to that effect has been mentioned in the audit report of the appellant by the statutory auditors. In support of its claim a copy of the tax audit report was produced for verification. In support of its claim appellant relied upon judgment of Hon'ble Supreme Court in the case of Reliance Petroproducts P. Ltd. 322 ITR 158 in which the Hon'ble Court had held as under:

*"Mere making of a claim not maintainable in law, will not amount to furnishing of inaccurate particulars. Merely because the assessee claimed of deduction of interest expenditure has not been accepted by the Revenue, penalty under section 271(1)(c) is not attracted. If the contention of the Revenue is accepted, the assessee would be liable to penalty under section 271(1) (c) in every case where the claim made by the assessee is not accepted by the Assessing Officer for any reason. The court held that this cannot be the intention of the legislature."*

Reliance was also placed on the judgment of Mumbai Tribunal in the case of Walter Saldhana 44 SOT 26 wherein it was decided as under:

*"Mere making of a claim which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. The assessee in the present case had made a bona fide claim and hence following the Apex Court's decision in the case of Reliance Petroproducts P. Ltd., it was held that penalty under section 271(1) (c) of the Act was not*

The Hon'ble jurisdictional High Court in the case of Smc Capital Ltd. vs. ITO 13(2) in ITA No.1342/Del./2010 has held that:

*"7. We have heard the rival contentions perused the material on record and gone through the case laws cited by both the parties. Assessee's plea that the mistake was inadvertent has not been controverted, this is an objective issue and inadvertence has to be gathered from the facts and circumstances. Hon'ble Supreme Court in the case of Hindustan Steel Ltd. (supra) has held that the penalty should not be levied merely because it is lawful to do so. The amount of tax involved is only Rs.85,607/-. It has not been claimed that the books of account and statements therefrom filed by the assessee were erroneous, incomplete or particulars were inaccurate or concealed. Assessee made a claim of set off of loss and has right from beginning explaining that the same was due to the inadvertent mistake of tax consultant. Hon'ble Delhi High Court in Escorts Finance Ltd. (supra) also has held that where there is an inadvertent mistake penalty u/s.271(1)(c) should not be imposed. In that case, assessee's explanation*

*that mistake was due to advice of chartered accountant published in prospectus about the allowability of claim was found to be not inadvertent.*

*8. In both the assessment and penalty proceedings, assessee's tax consultant appeared and furnished the above explanation which indicates that the mistake originated from, the side of tax consultant. In the given facts and circumstances, the assessee's claim of inadvertent error cannot be ruled out. Relying on Hon'ble Supreme Court judgement in the case of Hindustan Steel Ltd. and Hon'ble Delhi High Court judgement in the case of Escorts Finance Ltd. we hold that the assessee's claim of inadvertent error on the part of the income tax return consultant cannot be found to be implausible looking at the low amount of tax involved and facts and circumstances of the case. In view of the above, we delete the penalty."*

The Hon'ble Mumbai Tribunal in ITA No.1332 of 2011 in the case of CIT-I vs. Somany Evergreen Knits Ltd. held as under:

*In appeal, the CIT(A) upheld the order of the Assessing Officer. On further appeal, the Tribunal by the impugned order records a finding that in the profit and loss account filed alongwith the return of income. The respondent-assessee has clearly described the loss as the loss on sale of its garments unit assets. This loss was added to the net loss in the computation of the total income. Thus, there was complete disclosure. The Tribunal further records that the above loss was claimed by the respondent-assessee as a revenue expenditure as the Chartered Accountant did not advice them correctly as to the legal position. However, during the assessment proceedings the mistake was noticed and corrected by the respondent-assessee. On the above facts, the tribunal concluded the claim for deduction made by the respondent-assessee was on account of a bonafide mistake and in such circumstances, the levying of penalty was not justified.*

*The grievance of the revenue is that penalty is justified in view of the fact that the respondent-assessee had not filed a revised return of income. However, the Tribunal noted that the time to file revised return had expired. In any event even the revenue does not dispute that it was a bonafide mistake on the part of the respondent-assessee. In the above*

*view, imposition of penalty upon the respondent-assessee is not warranted."*

The Hon'ble Tribunal Pune Bench' A' in ITA No.1121/PN/2011 in the case of Amruta Organics P. Ltd. vs. DCIT Cir-1 concluded that:

*"6. Having considered the rival submissions, we find that the mere mistake in making of a claim in the return of income would not ipso facto reflect concealment or furnishing of inaccurate particulars of income in terms of section 271 (1) (c) of the Act. The wrong claim of depreciation in the present case cannot be said to be made with an intention to evade taxes in as much as even after the disallowance of depreciation, the resultant income of the assessee remains loss. In fact, the assessee had pointed out before the Assessing Officer that it has been incurring losses since the year 2003 due to the market forces. Considering the entirety of the circumstances, in our view, the impugned disallowance on account of depreciation is a mistake and does not invite the provisions of section 271 (1)(c) of the Act.*

*7. In the result, we set aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty imposed u/s.271 (1)(c) amounting to Rs.6,432/-.*

*8. In the result, the appeal of the assessee is allowed."*

6.4 Keeping in view the facts of the case it is found that mere mistake in making of a claim in the return of income would not ipso facto reflect concealment for furnishing of inaccurate particulars of income in terms of income u/s.271(1)(c) of the Act. The present claim of provisions in the present case cannot be said to be made with an intention to evade tax. After receiving audit report from tax consultant without any remarks, appellant was under a bonafide belief about the allowability of provisions made in its account. Therefore, respectfully following the judgments of the Apex Court in the case of Reliance Petroproducts and various case laws of Hon'ble Courts as discussed in foregoing paragraphs penalty u/ s. 271(1)(c) cannot be sustained. Hence, penalty of Rs.1,04,58,890/ - is deleted and appeal of the appellant on this ground is allowed."

11. Considering the details factual and legal discussion made by Id CIT(A), which is supported with decisions of various superior courts, we do not find any legality and infirmity in his order, which we affirm. No contrary facts are brought to our notice to take other view. In the result the ground of appeal raised by the revenue is dismissed.
12. As we have affirmed the finding of the Id CIT(A), therefore, discussions on the alternative submissions of Id AR for the assessee on the validity of notice under section 274 read with section 271(1)(c) has become academic.
13. In the result, the appeal of revenue is dismissed.

Order pronounced in the open court on 29/03/2019.

**Sd/-**  
**N.K. PRADHAN,**  
**ACCOUNTANT MEMBER**

Mumbai, Date: 29.03.2019

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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 "G" Bench, ITAT, Mumbai
6. Guard File

**Sd/-**  
**PAWAN SINGH**  
**JUDICIAL MEMBER**

**BY ORDER,**

**Dy./Asst. Registrar**  
**ITAT, Mumbai**