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

BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.112/Del/2019
Assessment Year : 2015-16

M/s Gragerious Projects Pvt.Ltd., H.No.3, Street No.4, Old Anarkali, Krishna Nagar, New Delhi – 110 051. PAN : AADCG0192R.	Vs.	Assistant Commissioner of Income Tax, Circle-10(2), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Ajay Wadhwa, Advocate and Ms. Aayushi Gupta, CA.
Respondent by : Shri R.L. Meena, CIT-DR.

Date of hearing : 27.05.2019
Date of pronouncement : 29.05.2019

ORDER

PER G.D.AGRAWAL, VP :

This appeal by the assessee for the assessment year 2015-16 is directed against the order of learned CIT(A)-4, New Delhi dated 1st November, 2018.

2. The only ground raised by the assessee is against the confirmation of penalty of ₹1,54,50,000/- by the Assessing Officer.

3. At the time of hearing before us, Learned CIT-DR sought adjournment on the ground that the Bench has directed for the production of assessment record, specially the penalty notices issued by the Revenue. The same have not been received from the Assessing Officer so far. The learned counsel for the assessee has stated that on

the last date, the Bench wanted to see the original notices issued by the Assessing Officer. At that time, the original notices were not available with him and therefore, the Bench has directed the DR to produce the assessment record, specially the penalty notices issued. He stated that now the original notices received by the assessee are being produced before the Bench and therefore, the matter can be proceeded with. He produced the original notices dated 25th May, 2017 as well as 3rd November, 2017 issued by the Assessing Officer. The notices were shown to the learned DR and he stated that if the Bench deems fit, the matter can be proceeded with because the only purpose for calling of the record was to see the original notices which have now been produced by the assessee. In view of the above, we proceeded to hear both the parties.

4. The learned counsel for the assessee stated that for the year under consideration, the assessee filed the original return declaring loss of ₹476,35,92,302/-. By filing the revised return, the loss was reduced to ₹354,34,84,148/-. That during the course of assessment proceedings, the Assessing Officer asked the assessee to justify the advance written off to TAIDIA Conconation Ltd. amounting to ₹5 crores. It was explained that the advance was given during the course of business activity of the assessee but the deal could not be finalized due to some technical deficiency and the amount was forfeited by the other party and there was no hope for recovery of the same. Hence, the management decided to write off the same from the books of account. It was claimed that it was loss incurred during the course of business and therefore, it should be allowed and it was alternatively claimed that if it is not allowed as a business loss, it should be allowed as a capital loss. The Assessing Officer in paragraph 4 has considered the submission of the assessee and, after rejecting the assessee's contention, held that "Therefore, an amount of Rs.5 Cr. Claimed as business expenditure is hereby disallowed and added back to the

income of the assessee company". That there is no finding by the Assessing Officer of furnishing of any inaccurate particulars or concealment of income by the assessee. He has not recorded any satisfaction for initiation of penalty proceedings either. However, at the end of the assessment order, after computing the income, he recorded the following finding :-

> *"Assessee is eligible to carry forward its long term capital losses of Rs.350,31,73,044/- as per provision of law. Keeping in view the facts of the case, I am satisfied that it warrants the initiation of penalty proceedings u/s 271(1)(c) of the I.T. Act, and the same are hereby initiated by issuing notice u/s 274 of the I.T. Act."*

5. Thus, despite the disallowance of claim of ₹5 crores as a business loss/capital loss, the carry forward of long term capital loss permitted by the Assessing Officer was more than ₹350 crores. That though the Assessing Officer has recorded the satisfaction for initiation of penalty proceedings under Section 271(1)(c), he has not specified whether it is for concealment of income or for furnishing of inaccurate particulars of income. In the first penalty notice dated 23rd May, 2017, the Assessing Officer has mentioned "have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1,2,3,4 and 5". Thus, the notice was totally vague and no specific charge was pointed out. Thereafter, the Assessing Officer issued another notice dated 3rd November, 2017. In this notice, again there is no specific charge but only reference to the earlier notice issued by the Assessing Officer. That the penalty under Section 271(1)(c) has been levied on the ground that the assessee has shown inaccurate particulars of income to the tune of ₹5 crores. However, in the penalty order, the Assessing Officer has not at all specified that which particular furnished by the assessee was inaccurate. In the above factual background, the argument of the learned counsel was twofold – (i) that the penalty under Section 271(1)(c) is invalid because

no satisfaction was recorded by the Assessing Officer in the assessment order and in the penalty notice, there was no specific charge. In support of this contention, he relied upon the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton and Ginning Factory and Others – [2013] 359 ITR 565 (Karn) and the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Virgo Marketing (P) Ltd. – [2008] 172 Taxman 83 (Delhi). He further relied upon the decision of ITAT, Delhi Bench in the following cases :-

a. Dr. Sita Bhagi Vs. ACIT – ITA No.1286/Del/2017, order dated 4th April, 2019.
b. TA Steels Pvt.Ltd. Vs. ITO – ITA No.3108/Del/2015, order dated 6th May, 2019.
c. Sanraj Engineering Pvt.Ltd. Vs. ITO – ITA No.5988/Del/2016, order dated 27th October, 2017.
d. OSE Infrastructure Ltd. Vs. ACIT – ITA No.5891 to 5895/Del/2016, order dated 14th August, 2018.
e. Mindmill Software Limited Vs. ITO – ITA No.242/Del/2016, order dated 10th February, 2017.

(ii) that there was no furnishing of inaccurate particulars by the assessee. Hon'ble Apex Court has considered and explained the phrase "furnishing of inaccurate particulars" in the case of CIT Vs. Reliance Petroproducts Pvt.Ltd. – [2010] 322 ITR 158 (SC). That the above decision would be squarely applicable to the facts of the assessee's case as the Assessing Officer has not specified which particulars furnished by the assessee were inaccurate, false or untrue. The assessee had only made a claim of loss actually suffered by it and the said claim was denied by the Assessing Officer. That does not amount of concealment of income.

6. Learned CIT-DR, on the other hand, relied upon the order of the Assessing Officer as well as CIT(A) and he stated that the claim made by the assessee was not bona fide because the assessee could not establish for which purpose the huge advance of ₹5 crores was given. When during the course of assessment proceedings the assessee was asked to substantiate its claim, the assessee could not furnish any satisfactory explanation. That when the Assessing Officer disallowed the loss of ₹5 crores claimed by the assessee, the assessee accepted the order of the Assessing Officer and did not file any appeal. This clearly proves that the claim of the assessee was not bona fide and on these facts, the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Zoom Communication P.Ltd. – [2010] 327 ITR 510 (Delhi) would be squarely applicable.

7. We have carefully considered the arguments of both the sides and perused the material placed before us. We will first deal with the assessee's contention that the levy of penalty is illegal because in the penalty notices, no specific charge was levied. We find that the first show cause notice issued to the assessee was dated 23rd May, 2017 and the relevant portion of which reads as under :-

> *"Where in the course of proceeding before me for the assessment year 2015-16 it appears to me that you :-*
>
> **have without reasonable cause failed to comply with a notice under section 142(1)/143(2) of the Income Tax Act, 1961 dated*
> **have concealed the particulars of your income or furnished inaccurate particulars of such income in terms of explanation 1,2,3,4 and 5.*
>
> *You are requested to appear before me at 11:30 AM/PM on 23.06.2017"*

8. From the above, it is evident that the notice was absolutely vague. There is no specific charge for initiation of penalty proceedings

which the assessee could explain. The penalty notice mentions the failure of the assessee to comply with the notice under Section 142(1)/143(2). It also mentions about the concealment of particulars of income or furnishing of inaccurate particulars of income in terms of Explanation 1,2,3,4 and 5. The subsequent notice dated 3rd November, 2017 is only a reminder with reference to the first notice. In the assessment order, the Assessing Officer has discussed the addition in paragraph 4 of the order, which reads as under:-

> *"4. The contention of the assessee has been examined. From perusal of the profit and loss account of the assessee company, it was noticed that the assessee company has only dividend income which has been received from the investment made in equity shares and mutual funds. Assessee company did not execute any work/project according to its nature of business. It has no business income, not only in this year but in the preceding year as well. During the year the assessee company has reportedly advanced Rs.5 cr to M/s TAIDIA Conconation Ltd and written off the same in the year under consideration and claimed it in P & L account. The company has failed to file any agreement or supporting evidence in respect of advance given to M/s TAIDIA Conconation Ltd. In view of all these, this alleged advance written off cannot be allowed as expense in P & L account. Therefore, an amount of Rs.5 cr claimed as business expenditure is hereby disallowed and added back to the income of the assessee company."*

9. In the above paragraph, the Assessing Officer has not pointed out any furnishing of inaccurate particulars by the assessee. He simply arrived at the conclusion that the advance written off cannot be allowed as expense in the profit & loss account. Thus, in the whole body of the order, no satisfaction has been recorded for initiating penalty proceedings. Only at the end of the computation of income, the Assessing Officer has recorded "Keeping in view the facts of the case, I am satisfied that it warrants the initiation of penalty proceedings u/s 271(1)(c) of the I.T. Act". Thus, no specific charge is

specified either in the assessment order or in the penalty notices. On these facts, the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory (supra) would be squarely applicable. The above decision has been followed by ITAT, Delhi Benches in the case of Dr. Sita Bhagi (supra), TA Steels Pvt.Ltd. (supra), Sanraj Engineering Pvt.Ltd. (supra), OSE Infrastructure Ltd. (supra) and Mindmill Software Limited (supra).

10. In view of the above, respectfully following the decision of Hon'ble Karnataka High Court in the case of Manjunatha Cotton and Ginning Factory and Others (supra) and the above decisions of ITAT, we hold that the levy of penalty under Section 271(1)(c) of the Act in the case of the assessee was not valid.

11. Even on merits also, the decision of Hon'ble Apex Court in the case of CIT Vs. Reliance Petroproducts Pvt.Ltd. – (2010) 322 ITR 158 (SC) would be squarely applicable, wherein their Lordships held as under :-

> *"Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A 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."*

12. In the case of the assessee, though the Assessing Officer has levied the penalty for furnishing inaccurate particulars of income but he has not specified which particular furnished by the assessee was incorrect, erroneous or false. In fact, in the assessment order, when the Assessing Officer has discussed the addition, there is no mention about furnishing of inaccurate particulars. He simply disallowed the

claim made by the assessee. Hon'ble Apex Court in the above case has clearly mentioned that merely because a claim made in the return of income is not accepted cannot amount to furnishing of inaccurate particulars.

13. Learned DR has relied upon the decision of Hon'ble Jurisdictional High Court in the case of Zoom Communication P.Ltd. (supra), wherein their Lordships held as under :-

> *"In the case of Reliance Petroproducts P.Ltd. [2010] 322 ITR 158 (SC), the addition made by the Assessing Officer in respect of the interest claimed as a deduction under section 36(1)(iii) of the Act was deleted by the Commissioner of Income-tax (Appeals) though it was later restored, by the Tribunal, to the Assessing Officer. The appeal filed by the assessee against the order of the Tribunal was admitted by the High Court. It was, in these circumstances, that the Tribunal came to the conclusion that the assessee had neither concealed the income nor filed inaccurate particulars thereof. In recording this finding, the Tribunal felt that if two views of the claim of the assessee were possible, the explanation offered by it could not be said to be false. This, however, is not the factual position in the case before us. The facts of the present case thus are clearly distinguishable.*
>
> *It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bona fide. If the claim besides being incorrect in law is mala fide, Explanation 1 to section 271(1)(c) would come into play and work to the disadvantage of the assessee. The court cannot overlook the fact that only a small percentage of the income-tax returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it would be difficult to say that he would still not be liable to penalty under section 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be*

liable to imposition of penalty, even if he was not acting bona fide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self-assessment under section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have.

We find that the assessee before us did not explain either to the income-tax authorities or to the Income-tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this case were not added, while computing the income of the assessee-company. We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income, and its accounts are compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee-company and how it could also have escaped the attention of the auditors of the company."

14. Thus, after considering the decision in the case of *Reliance Petroproducts Pvt.Ltd.* (supra), it was stated by the Hon'ble Jurisdictional High Court that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee but if the claim, besides being incorrect in law is *mala fide*, Explanation 1 to Section 271(1)(c) would come into play. If the assessee's claim is bona fide, then he will not be liable for penalty. Therefore, the precise question to be adjudicated by us is whether the assessee's claim was *bona fide* or *mala fide*.

15. On the facts of the assessee's case, we find that the assessee filed the return declaring loss of ₹354.34 crores. Even the Assessing Officer allowed the carry forward of long term capital loss of ₹350.31 crores. The Revenue authorities have not doubted the correctness of the assessee's claim that it suffered the loss of ₹5 crores. Meaning thereby, the genuineness of loss is not in dispute. The only dispute was whether it is an allowable deduction either as a business loss or a capital loss. The assessee's claim is not accepted by the Revenue. However, on these facts, we do not find any justification to arrive at the conclusion that the loss claimed by the assessee was *mala fide*. Therefore, the decision of Hon'ble Delhi High Court in the case of Zoom Communication P.Ltd. (supra) would not be applicable. Reverting to the decision of Hon'ble Apex Court in the case of Reliance Petroproducts Pvt.Ltd. (supra), we find that no particulars furnished by the assessee were found to be erroneous, false or incorrect. Therefore, the above decision of Hon'ble Apex Court would be squarely applicable and penalty is not sustainable even on merits also.

16. In view of the above, we hold that the levy of penalty is not valid. The same is deleted.

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

Decision pronounced in the open Court on 29th May, 2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE)	**(G.D.AGRAWAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Dated : 29.05.2019
VK.

Copy forwarded to: -

1. Appellant : **M/s Gragerious Projects Pvt.Ltd.,**
   H.No.3, Street No.4,
   Old Anarkali, Krishna Nagar, New Delhi – 110 051.

2. Respondent : **Assistant Commissioner of Income Tax,**
   Circle-10(2), New Delhi.
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar