

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'D', NEW DELHI**

Before Sh. Bhavnesh Saini, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 388/Del/2009 : Asstt. Year : 2001-02

ITA No. 980/Del/2013 : Asstt. Year : 2001-02

M/s Vignette India Pvt. Ltd., C/o Perfect Accounting and Shared Services Pvt. Ltd., E-20, First Floor, Hauz Khas, New Delhi-110016	Vs	Deputy Commissioner of Income Tax, Circle-17(1), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AABCV0946J		

Assessee by : Sh. Salil Kapoor, Adv.

Revenue by : Ms. Naina Soin Kapil, Sr. DR

Date of Hearing: 13.08.2019

Date of Pronouncement: 05.09.2019

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the assessee against the orders of the Id. CIT(A)-19, New Delhi dated 01.12.2008 and 27.11.2012.

ITA No. 388/Del/2009

2. Following grounds have been raised in this appeal:

"1. That the learned Commissioner of Income Tax (Appeals)- V, New Delhi ["Ld. CIT(A)'] has erred both on facts of the case and in law in sustaining the disallowances/additions of Rs.52,654,094 made by the learned Additional Commissioner of Income Tax, Range - 17, New Delhi ("Ld. AO"), in the assessment order passed under section 143(3) of the Income Tax Act, 1961 (the Act').

2. That the Ld. CIT(A) has erred in sustaining the disallowance of Rs 1,63,76,759 being expenditure incurred after set up of business without giving proper justifications for the same. The Ld. CIT(A) erred in failing to pass a speaking order without giving proper reasoning for upholding the disallowance and summarily rejecting the contentions of the Appellant.

3. That the Ld. CIT(A) has erred both on facts and in law in wrongly placing reliance on the decision of the Hon'ble Delhi Tribunal in the case of Akzo Nobel Refinishes India (P) Ltd. (2008) 25 SOT 226 while sustaining the disallowance on account of pre-commencement expenditure.

4. That the Ld. CIT(A) has erred on facts and in law in sustaining the disallowance of an ad-hoc amount of Rs 41,00,000 out of salaries paid to employees. The Ld. CITA) has erred in ignoring the relevant evidence filed by the Appellant in support of the genuineness of the expenditure.

5. The Ld. CIT(A) has erred on facts and in law in upholding the disallowance of Rs 3,09,565 on account of the appellant's contribution to Provident Fund Trust even though the said Trust was approved by Commissioner of Income Tax.

6. That the Ld. CIT(A) has erred on facts and in law in upholding the disallowance of Rs 93,92,243 on account of various expenses incurred by the Appellant without appreciating the fact that the same were incurred for the purpose of business of the Appellant. The Ld. CITA) has erred in failing to take cognizance of the fact that the expenses were duly vouched and verified by the statutory auditors and there was no adverse comment thereon.

7. That the Ld. CIT (A) has erred in upholding the disallowance of Rs 75,41,892, being rent incurred as 'business loss', on account of the same being related to the period beyond the close of the financial year under consideration. The Ld. CIT(A) has erred in failing to take cognizance of the fact that the liability for the same had accrued and arisen during the year under consideration.

8. The Ld. CIT(A) has erred both on facts of the case and in law in upholding the disallowance of Rs 1,42,14,540 being deposits written off and Rs

1,45,40,956 for assets written off incurred as 'business loss' against without appreciating the fact that the liability on account of termination of the rent agreement had accrued and arisen during the year under consideration.

9. That the Ld. CIT(A) has erred both on facts and in law in upholding the disallowance of Rs 2,26,435 out of communication expenses even though the liability to pay this amount has accrued in the year under consideration and had been duly accounted for in the books in accordance with the accepted accounting principles.

10. That the Ld. CIT(A) has erred on facts and in law in upholding the disallowance of Rs 4,92,660 out of legal & professional expenses even though the same had been incurred by the appellant during the relevant year in the course of the carrying on of the business.

11. That the order of the Ld. CT(A) is contrary to the facts, law and the principles of natural justice."

3. The assessee was incorporated on July 6, 2000 as a 100% subsidiary of Vignette International Inc., USA. The assessee filed return of income declaring loss of Rs.4.30 crores. During the assessment proceedings, the assessee was given opportunity of hearing on various dates as listed below:

"6.11.2002, 7.12.2002, 10.12.2002, 6.1.2003, 20.1.2003, 31.1.2003, 10.2.2003, 24.2.2003, 6.3.2003, 31.3.2003, 24.6.2003, 10.7.2003, 24.11.2003, 18.12.2003, 2.1.2004, 28.1.2004, 10.2.2004, 19.2.2004 & 24.2.2004"

4. The Assessing Officer noted a number of discrepancies from the statutory audit report filed along with return and referred the case for audit u/s 142(2A) of the Income Tax Act and subsequently disallowed all the expenses in the assessment proceedings. The Id. CIT (A) has confirmed the disallowance of salaries, recruitment & relocation, rent, travelling & conveyance, legal & professional charges and common services

expenses on the grounds that the expenses are not allowable as they have been incurred before commencement of the business.

5. During the hearing, before us, the Id. AR argued that company was incorporated on July 6, 2000. The company has set up infrastructure for software development services on 08.01.2001 and employees for these activities have been appointed on 09.01.2001. Hence, it can be said that the business has already set up and all the expenses are to be allowed. He relied on *the following judicial precedence*:

- *CIT v. Modi Industries Ltd. (No. 3) 200 ITR 341 (Delhi HC)*
- *Standard Refinery and Distillery Ltd. v. CIT (1971) 79 ITR 589 (SC)*
- *Satebganj Sugar Mills Ltd. V CIT (1961) 41 TR 272 (SC)*
- *CIT v. Prithvi Insurance Co. Limited (1967) 63 ITR 632 (SC)*
- *B.R. Limited v. Gupta (V.P.) CIT (1978) 113 ITR 647 (SC)*
- *Hooghly Trust (Private) Limited v. CIT (1969) 73 ITR 685 (SC)*
- *Produce Exchange Corporation Limited v. CIT (1970) 77 ITR 739 (SC)*
- *Karnataka Light Metal Industries (P) Ltd. v CIT (1997) (225 ITR 947)(Karnataka HC)*
- *Commissioner of Income tax v Srinivasa Iyer (1991) 192 ITR 50 (Madras HC)*
- *Commissioner of Income tax v Monnet Industries Ltd. [2009] 176 Taxman 81 (Delhi HC)*

6. The Id. AR further argued that a bank account was opened with HSBC Bank on 28.07.2000 and office premises were taken on lease on August 7, 2000. The sales Manager were appointed in July 2000 and the first invoice relating to training activity was raised on 16th August 2000, so as the first invoice for sale of software license was dated 30th September 2000 and first invoice for consulting services was raised on November 27,

2000. It was argued that since the business operations have already commenced, the Assessing Officer observation that the business of the assessee has not commenced is incorrect as per the facts on record. It was also argued that the objects of sale of software license, support & maintenance services, training and consultancy services, software development services are integrated business and hence, it cannot be said that non-commencement of one of the object of business must not lead to a conclusion that the business has not commenced.

7. On the other hand, the Id. DR argued that in respect of software development activity, it was categorically admitted by the assessee that the commencement of the activity was postponed and ultimately closed down. So, the Assessing Officer disallowed the relevant expenditure claimed by the assessee bringing out the difference between setting up of business and commencement of business. It was argued that the Assessing Officer has disallowed the expenditure holding that the business has not commenced. In this regard, the Id. DR placed reliance on the judgment in the case of Akzo Nobel Car Refinishes India (P) Ltd. Vs DCIT (2008) 25 SOT 226 (Del.).

8. Heard the arguments of both the parties and perused the material available on record.

9. We find that it is a fact that the assessee due to slow down in information technology sector globally the company decided to postpone the commencement of its software development activities. Thus, leading to a conclusion that though business was set up the business activities have not been commenced.

Hence, it can be conveniently held that the expenditure not incurred wholly for the purpose of the business can be disallowed. We also find that the relevant bills & vouchers for the expenses have not been produced before the Assessing Officer in order to prove that the genuineness and allowability of the expenses. Thus, the expenditure incurred before commencement of business have been rightly segregated by the Id. CIT (A) under the head salaries, recruitment & relocation, common services, travelling & conveyance, legal & professional charges as pre-commencement expenditure which are hereby confirmed. Further, regarding the expenses of business promotion, sales commission, communication, travel & conveyance, repair & maintenance, legal & professional fee, contribution to PF, the assessee could not submit any voucher before the assessing authorities. It is the primary duty of the assessee to produce the basic evidences in relation to the expenses claimed, so as to allow the expenses u/s 37 of the Income Tax Act. Since, no details could be produced as to the expenses claimed, no allowance can be given by the revenue. Reliance is placed on the judgment of the Hon'ble Bombay High Court in the case of ALD Automotives Pvt. Ltd. 91 taxmann.com 475 wherein it was held that where assessee failed to produce necessary evidence to prove that business was set up and it was ready to commence, expenditure incurred by assessee prior to setting up of business could not be allowed. Hence, we decline to interfere with the decision of the Id. CIT (A) on this issue. Regarding the disallowance out of the salary, we find that the assessee could provide the PAN number of only three employees correctly out of the 28 employees on the list. The

assessee could not furnish the details of salary payment even through the bank statement or by any documentary evidence regarding the rendering of the services by the employees to support the claim. Hence, based on the judgment of Hon'ble Apex Court in the case of Swadeshi Cotton Mills 63 ITR 57, in the absence of any other evidence produced by the assessee, we decline to interfere in the order of the Id. CIT (A).

10. Regarding the rent claimed for the year ending 31.03.2001, the same is allowed as the expenses is related to setting up of the business notwithstanding the fact that the revenue earning business activities have not been commenced. At the same time, the rental expenses claimed by the assessee for the subsequent period are not allowable as they do not pertain to the assessment year in question. Regarding the claim of business loss on account of rent, the Id. AR's contentions that the expenses was incurred during the year as the liability for payment of which in terms of lease deed has accrued and arisen during the year under consideration. Since, we have already allowed the rent paid for the current year, no future allowance for the rent can be allowed during the year even it is deemed to have accrued by the virtue of leased deed entered during the year.

11. All the grounds are taken by the assessee are hereby treated as disposed off. The appeal of the assessee is partly allowed.

ITA No. 980/Del/2013

12. Following grounds have been raised in this appeal:

"1. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax Appeals - XIX, New Delhi ['learned CIT(A)] has erred in confirming the penalty levied by the Deputy Commissioner of Income Tax ('learned AO') vide order passed under section 271(1)(c) of the Income Tax Act, 1961 ('Act').

2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that sufficient opportunity of being heard was provided by the learned AO before levy of penalty without considering the submission of the Appellant and without making any enquiry in this regard.

3. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in failing to pass a speaking order without giving proper reasoning for upholding the levy of penalty and summarily rejecting the contentions of the Appellant."

13. The relevant part of the submission of the assessee before the Id. CIT (A) and the reasoning of the Id. CIT (A) in confirming the penalty u/s 271(1)(c) of the Act is as under:

"7. The appellant has argued that this is a case of their claims not being found acceptable and there was no concealment as there was full disclosure of facts in their return. In the penalty order, the A.O. has pointed out that the onus lies on the assessee to prove the genuineness and allowability of the claims made by it on which amount the penalty proceedings had been initiated. However, the assessee failed to give any reasons or substantiate its claim during the course of the assessment as well as the appellate proceedings. Not only the assessee has furnished inaccurate particulars of its income but also has failed to give any evidence that the same were based on any bonafide belief on its part. The A.O. has further observed that the assessee has failed to give any satisfactory answer to prove the genuineness and allowability of its claim. The A.O. has held that there are sufficient facts/evidences on record to establish that the assessee had concealed its income and also furnished inaccurate particulars of its income to the extent confirmed by the

Id. CIT (A). In his order, the Id. CIT (A) has given detailed and valid reasons for confirming the additions. Even in the penalty appeal, the appellant has failed to furnish any explanation in respect of the additions made, on which penalty has been imposed. He has failed to show how the penalty order is erroneous.

8. Considering the facts pointed out by the A.O. in the asstt. and penalty order and the Id. CITA) in the quantum appeal, the arguments of the appellant are not acceptable. The discussion in these orders shows that this is not a case where the explanation given was bona-fide and there was full disclosure of facts. The provisions of Explanation 1 to section 271(1)(c) are applicable because the assessee has offered an explanation before the A.O., which he is not able to substantiate and has also failed to prove that such explanation is bona fide, and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

9. The imposition of penalty is supported by the following judicial decisions:

CIT v. Zoom Communications (P) Ltd. (2010) 327 ITR 510 (DEL.)

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 the Explanation 1 to section 271(1) 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). If one takes 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 the unscrupulous assessee 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) 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 could 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.

(ii) CIT v Harparshad & Co Ltd [2010] 328 ITR 53 (DELHI)

A claim, which is ex facie bogus, may attract penalty under section 271(1)(c). The findings given in the assessment proceedings are relevant and have probative value. Where the assessee produces no fresh evidence or presents any additional or fresh circumstance in the penalty proceedings, he would be deemed to have failed to discharge the onus placed on him and the levy of penalty could be justified. Explanation 1 below section 271(1)(c) suggests that the assessee would be deemed to have failed to furnish full and accurate particulars of income, if it failed to offer an explanation, or offers an explanation, which is found by the Income-tax Officer to be false or it has not been able to substantiate it in respect of any facts material to the computation of the total income of that person under the Act.

The law has developed to the extent that even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision. Cases of bogus hundi loans or bogus sales or purchases have been treated as that of concealment or inaccuracy in particulars of income by the judicial pronouncements.

Where during assessment proceeding, Assessing Officer disallowed assessee's claim of payment of commission to its director on the ground that it was a bogus claim inasmuch as said director had not provided any services to the assessee and during penalty proceedings initiated on the basis of that addition, assessee had failed to offer any explanation in respect of that addition, it was held that Assessing Officer was justified in levying penalty under section 271(1)(c).

(iii) CIT v. Escorts Finance Ltd. (2010) 328 ITR 44 (DEL.)

Even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision."

14. We find that the assessee has fully disclosed the facts in their return. However, owing to closer of the business and non-availability of the documents, the same could not be produced before the revenue authorities which led to the disallowance. We hold that the per se disallowance of expenses do not automatically lead to levy of penalty, in the absence of sufficient evidences brought on record by the revenue to prove that the assessee has concealed its income or furnished inaccurate particulars of its income. The Id. CIT (A) reliance on the case of CIT Vs Zoom Communications (P) Ltd. (2010) 327 ITR 510 (Del.) is not applicable to the facts of the case as no malafide intention to evade tax has been actuated by the assessee in the present case. Similarly, the case of CIT Vs Harparshad & Co. Ltd. (2010) 328 ITR 53 (Del.) relied by the revenue authorities is not applicable to the facts of these case as no instance of bogus claim has been brought out by the revenue in the case of the assessee. The assessee owing to

closure of the business could not furnish the details which certainly have not been proved by the revenue as bogus in nature. Further, no case has been made by the revenue to prove that the claim of the assessee is *ex-facie* bogus has held in the case of Escort Finance Ltd relied upon by the Ld.CIT(A). Hence, keeping in view the peculiar facts and circumstances of the case that the disallowances have been made by the revenue merely on the reason that the assessee could not produce the relevant vouchers & bills owing to closure of the business in India, we hereby delete the penalty levied u/s 271(1)(c) of the Act.

15. In the result, the appeal of the assessee in ITA No. 388/Del/2009 is partly allowed and the appeal of the assessee in ITA No. 980/Del/2013 is allowed.

(Order Pronounced in the Open Court on 05/09/2019).

Sd/-

(Bhavnes Saini)
Judicial Member

Dated: 05/09/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR