

THE INCOME TAX APPELLATE TRIBUNAL
"SMC-I" Bench, Mumbai
Shri Shamim Yahya (AM)

I.T.A. No. 1663/Mum/2019 (Assessment Year 2014-15)

M/s. N.G. Bhanushali & Co. 301, Sai Enclave, C-Wing Hariyali Village, Vikroli-E Mumbai-400 083. PAN : AAAFN5294K (Appellant)	Vs.	ITO-17(2)(4) Mumbai (Respondent)
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Assessee by	None
Department by	Shri Kailash Gaikwad
Date of Hearing	15.10.2020
Date of Pronouncement	25.11.2020

ORDER

This appeal by the assessee is directed against order of learned Commissioner of Income Tax (Appeals)[in short learned CIT(A)] dated 11.1.2019 and pertains to assessment year 2014-15.

2. The grounds of appeal read as under :-

GROUND I : LEVY OF PENALTY ON INTEREST ON LATE PAYMENT OF SERVICE TAX AND TAX DEDUCTED AT SOURCE (TDS)

1. On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income Tax (Appeals) ["the CIT(A)"] erred in upholding the action of the Assessing Officer ("the AO") by levying penalty on interest on late payment of service tax and TDS.
2. The Appellant humbly prays that the Assessing Officer be directed to delete the penalty levied u/s 271 (1)(c).

GROUND II : LEVY OF PENALTY ON NOTIONAL INCOME

1. On the facts and circumstances of the case in law, the CIT(A) erred in upholding the action of the AO by levying penalty on notional interest on loan.
2. The Appellant humbly prays that the Assessing Officer be directed to delete the penalty levied u/s 271(l)(c).

3. In this case in the assessment proceedings there were following disallowances:-

- i) disallowance on account of delayed payment of PF/ESIC
- ii) disallowance of interest on late payment of service tax and TDS
- iii) disallowance under section 36(1)(iii) of the I.T. Act.

The assessing officer also levied penalty under section 271(1)(c) of the I.T. Act on account of the above.

4. Upon assessee's appeal learned CIT(A) deleted the penalty levied qua disallowance on account of payment of PF/ESIC . However he sustained the penalty with respect to the other disallowances. The learned CIT(A) has held as under :-

"5.6. I find that if we go back to the order of the AO in the quantum proceedings it shall be seen that the AO made the following additions and based on which the impugned penalty has been levied. These additions are as below:-

<u>Sr.No.</u>	<u>Nature of addition</u>	<u>Amount (Rs.)</u>
1.	Disallowance of delayed PF/ESIC	2,01,155/-
2.	Disallowance of Interest on late Payment of Service Tax 86 TDS	1,12,701/-
3.	Disallowance u/s.36(1)(iii)	2,11,804/-

5.7. On perusal of the above, it is seen that there is no justification at all for levy of penalty on the addition on account of the delayed PF/ESIC, since, it is very much clear that the claim made by the appellant regarding the disallowed amount is such a claim of PF/ESIC, which might have been after the due date as per the Governing Rules. However, the payment was duly made before filing of return of income for the year. Therefore, the penalty with respect to this addition cannot stand and is therefore, deleted.

5.8. However, the same cannot be said about the other two additions which have been enumerated above i.e. the addition on account of interest on delayed payment of Service Tax and TDS and also the addition u/s.36(1)(iii). This is because as far as the addition on delayed payment of service tax and TDS is concerned, it is very clear that the appellant was perforce required to pay the interest because in the first place, the service tax and TDS payment was made much beyond the statutorily prescribed time limit. Therefore, the same is more or less akin to penalty for violation prescribed time limit. Moreover, it is also clear that the appellant cannot be allowed to take benefit when it has itself delayed the payment. Further, when it comes to the penalty with respect to addition u/s.36(1)(iii), it is clear that in the quantum proceedings the AO gave a clear finding that certain portion of the borrowing were diverted towards giving interest free loans to Staff members. Therefore, it

was a clear case of the necessary nexus as necessitated by Sec.36(1)(iii) was not made out. Rather, on the other hand there was non-business diversion of the funds. Therefore, the penalty is very much leviable on the addition u/s.36(1)(iii).

5.9. Further, while the judicial pronouncement relied upon by the appellant have been most respectfully considered. However, with the utmost and due respect to the above judicial pronouncements, it is respectfully observed that it is a trite law that each judicial decision is rendered in the very peculiar and factual matrix of that case and therefore it is not either judicially expedient or prudent to superimpose the facts of the various case laws cited. In this sense, each case is undisputedly unique and stands on different pedestal.

5.10. Based on the above discussion, the penalty with respect to the addition of Rs.2,01,155/- is deleted. However, the penalty with respect to the addition of (Rs.1,12,701/- and Rs.2,11,804/- i.e. total Rs.3,24,505/-) if hereby confirmed.”

5. Against this order assessee has filed appeal before the ITAT.
6. I have heard the learned departmental representative and perused the records. None Appeared on behalf of the assessee.
7. Upon careful consideration I find that with respect to the disallowance of interest on late payment of service tax and TDS there cannot be any issue of concealment or furnishing of inaccurate particulars by the assessee. Assessee has simply claimed these payments as allowable. The assessing officer has disallowed it. As in his opinion the same was penal in the nature. In our opinion the claim of the assessee is not ex facie wrong. A denial of the assessee's claim by the assessing officer cannot ipso facto render the assessee liable for penalty under section 271(1)(c) of the Act. This proposition is duly supported by the decision of honourable Supreme Court in the case of reliance Petro Products Pvt. Ltd. (322 ITR 158)
8. As regards the disallowance of interest under section 36(1)(iii) of the Act, this again is an issue on which assessee cannot be held to have furnished inaccurate particulars of income or done any concealment. That interest bearing funds and been diverted to interest to staff and others is not something which can be held to be ex-facie not for the purpose of business.

Here again a denial of assessee's claim cannot ipso facto lead to levy of penalty.

9. Accordingly in the background of aforesaid discussion and precedent in my considered opinion assessee should not be visited with the rigours of penalty under section 271(1)(c) of the Act. Accordingly I set aside the orders of authorities below and delete the penalty.

10. In the result assessee's appeal stands allowed

Order pronounced under Rule 34(4) of the ITAT Rules by placing the result on notice board on 25.11.2020.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 25/11/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

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