

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 1355/Mum/2017 (Assessment Year 2011-12)

Leading Edge Integrated Marketing Services Pvt. Ltd. C/o. Bachi Homi Mistry 804, Sai Niketan, Babasaheb Ambedkar Road Dadar TT, Mumbai-400 014 PAN : AABCL4864F (Appellant)	Vs.	ITO-6(3)(2) Room No. 514 5 th Floor Aayakar Bhavan M.K. Road New Marine Lines Mumbai-400 020. (Respondent)
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Assessee by	Ms. Neha Paranjpe
Department by	Shri Brajendra Kumar
Date of Hearing	08.02.2021
Date of Pronouncement	10.02.2021

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 28.9.2016 and pertains to assessment year 2011-12.

2. Grounds of appeal read as under :-

1. The Ld. Commissioner of Income Tax (Appeals)-13, Mumbai [hereinafter referred to as "CIT(A)"] erred in upholding the order of the Assessing Officer ("A.O." for short) for levy of penalty of Rs.8,39,460/-under section 271(l)(c) of the Act without appreciating the facts and circumstances of the case.
2. The Ld. CIT(A) failed to appreciate that the Appellant has neither furnished any inaccurate particulars of income nor concealed any particulars of income. Therefore the levy of penalty of Rs.8,39,460/-under section 271(l)(c) is unjustified and the same may be deleted.
3. The Ld. CIT(A) failed to appreciate that the non-payment of MVAT and sales tax liability was due to dispute between the Appellant and the sales tax department. Hence, the levy of penalty under section 271(l)(c) on the disallowance of Rs.27,15,360/- invoking the provisions of section 43B of the Act is not at all justified and the same may be deleted.

4. The Ld. CIT(A) further failed to appreciate that during the course of assessment proceedings the Appellant itself voluntarily offered to tax the outstanding MVAT and sales tax liability as its income. Hence, levy of concealment penalty on the disallowance of Rs.27,15,360/-under section 43B is unjustified and the same may be deleted.
 5. Without prejudice to the above the Ld. CIT(A) has failed to appreciate that the Appellant has given bonafide explanation with respect to non-payment of MVAT and sales tax liability. Hence, the levy of penalty on the disallowance of Rs.27,15,360/- under section 271(l)(c) is not at all justified and the same may be deleted.
 6. The Ld. CIT(A) further erred in upholding the action of Ld. A.O. in levying concealment penalty on the disallowance of Rs.1,257/- being difference as per AIR information and the income disclosed in the Profit & Loss Account without appreciating the facts and circumstances of the case. Hence, the levy of concealment penalty under section 271(l)(c) on the addition of Rs.1,257/- is not at all justified and the same may be deleted.
3. This appeal was earlier disposed of by this Tribunal vide ex-parte order dated 9.11.2018, thereafter the same was recalled in Miscellaneous Application No. 325/Mum/2009 vide order dated 13.11.2019. Pursuant to the above recall this appeal has been heard by us.
4. There is a small delay of 67 days in filing the appeal. Upon hearing both the parties and perusing the records the same is condoned.
 5. Brief facts of the case leading to levy of penalty arising as under :-

In the quantum proceedings, the AO had made two additions. Firstly, he had disallowed an amount of Rs. 27.15 lakhs under section 43B of the I.T. Act. Secondly, he had added back an amount of Rs. 0.01 lakh on account of short credit in the P & L a/c (Profit and Loss Account), The Assessing Officer noted that the assessee had not voluntarily disallowed under section 43B of the Act the Service Tax and Maharashtra Value Added Tax (hereinafter-referred to as 'ST' and 'MVAT' respectively) to the tune of Rs. 22.61 lakhs and Rs. 4.53 lakhs respectively altogether totalling Rs. 27.15 lakhs. In other words, the assessee had not paid the ST and MVAT liability of Rs. 27.15 lakhs at the time of the due date of filing of return of income. But it had claimed that it was allowable.

The AO also noted that the appellant had not gone in appeal against these additions it having found no merit in doing so. Thus according to the AO the claims made by the appellant were incorrect claims and had been so made deliberately. No disallowance on these counts had been made voluntarily by the assessee. Hence, had the case not been selected for scrutiny the assessee could have easily walked away with the wrong claims. Holding it to be a case of inaccurate furnishing of particulars of income, the AO imposed penalty of Rs. 8.39 lakhs on the said addition of Rs. 27.15 lakhs under section 271(1)(c) of the Act.

6. Insofar as the smaller amount of addition of f 0.01 lakh is concerned, the AO had made the same on account of the inability of the appellant to reconcile the difference between its P & L a/c and form no. 26AS. The AO noted no income of Rs. 709/- in the computation with regard to M/s Globus Sport Ltd., similarly no income of Rs. 570/- in the computation with regard to M/s Supercraft Events & Activations, nor to the extent of Rs.7/- in the case of M/s Ingram Micro India Ltd. and lastly none with regard to Rs. 1/- in the case of M/s. Box Office India. In assessment the assessee had accepted the said understatement. Once more, as pointed out by the AO in the penalty order, no further appeal has been filed by the assessee against this understatement. Accordingly, once more the AO concluded that this was a clearly a case of filing of inaccurate particulars of income. He then levied penalty on this slew of additions totalling Rs. 1,287/-.

7. Upon assessee's appeal, learned CIT(A) noted following submission on behalf of the assessee :-

"In so far as the addition, made under section 43B of the Act is concerned he stated that as per the provisions of Service Tax Rules the payment of service tax was not due. Similarly as per the Maharashtra Value Added Tax Act, 2002 the payment of MVAT was not due. Both these amounts were not due as a result of a consequence of a dispute. They had accordingly not been paid even as on 31st March 2011. Here, the AR pointed out that both the ST and MVAT became payable on billing basis from 1st July 2011. The Finance Act, 2011 introduced with effect from 1st April 2011 had introduced the Point of Taxation Rules which Rules would determine the point in time when the

services shall be deemed to have been provided. The general rule in this regard is that the time of provision of the service shall be the earliest of the following dates - firstly the date on which the service was provided or would be provided, secondly the date of Invoice and thirdly the date of actual payment. The option to pay service tax on a receipt basis was thus available only till 30th June 2011. The assessment under consideration payable only on actual receipt basis. Due to disputes, payments had not been released by several parties and accordingly ST and MVAT had not been paid, it would accordingly not be due to be paid, the actual receipt thereof not having happened. As a matter of fact the actual receipt of the amounts - as submitted by the AR - has not happened even as of today. He further clarified that this position had been clarified even in the Tax Audit Report filed in form no. 3CD. He clarified that entry no, 21 of Part B of form no. 3CD stated that ST of t 22.61 lakhs and VAT of Rs. 4.53 lakhs remained payable. Thus, the AR stated that firstly the addition was not warranted. Now that it has been made and not disputed by the appellant, at least the imposition of penalty was not warranted. All the necessary facts had been disclosed by the appellant in the tax audit report. To this extent, there was no furnishing of inaccurate particulars of income *per se*. Accordingly, the AR sought to rely on the decision of the Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Pvt. Ltd. (322 ITR 128) and pleaded for deletion of the penalty imposed. In so far as the penalty relating to the smaller additions amounting to Rs. 1,257/- is concerned, no submissions were made by the AR.”

8. Learned CIT(A) did not find above convincing, he referred to the assessee's argument that it was a disputed liability as no payment has been received. But he found that tax audit report does not mention so that assessee's own tax audit report is clearly goes against it. It simply mentioned unpaid liability of tax. He held that once the tax audit report has stated that there was liability of tax, the only option left before the assessee was to voluntarily add it under section 43B of the Act. Hence, he dismissed the assessee's reliance upon the decision in the case of Reliance Petroproducts Pvt. Ltd. (supra). He also confirmed the penalty to the extent of Rs. 1,257/- for 26AS showing higher income and assessee showing lower income.

9. Against this order assessee is in appeal before us.

10. We have heard both the counsel and perused the records. We find that learned CIT(A) is totally wrong in holding that just because 43B liability is shown by tax audit report penalty has to be fastened upon the assessee. In an identical situation this Tribunal in ITA No. 895/Mum/2015 for A.Y. 2005-06

vide order dated 30.7.2018 has deleted the similar penalty by observing as under :-

“We have carefully considered the submissions and perused the records. We find that in this case penalty u/s. 271(1)(c) has been levied for the disallowance of provision for excise duty payable amounting to Rs.30,00,000/- by invocation of section 43B. In this connection, we find ourselves in agreement with the submission of the learned counsel of the assessee that all the necessary particulars were duly disclosed by the assessee. Hence, there is no case of concealment of income or furnishing of inaccurate particulars of income. In this regard, the case laws relied upon by the Id. Commissioner of Income Tax (Appeal) and as canvassed by the learned counsel of the assessee are germane and support the case of the assessee. Furthermore, as held by the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. 322 ITR 158, the disallowance of a claim made by the assessee cannot itself give rise to levy of penalty under section 271(1)(c) of the Act. Accordingly, in the background of aforesaid discussion and precedent M/s. Total Lubricants India Ltd.

We do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). Accordingly, we uphold the same.”

11. We find that the situation is analogical in this case. The assessee has furnished all particulars there is no concealment or furnishing of inaccurate particular of income. Just because assessee's claim is not accepted the same does not ipso facto lead to levy of penalty. Similarly, there is small difference between 26AS and income returned. This is also very minor and the assessee does not deserve to be visited with the regour of penalty. We are of the considered opinion that assessee's conduct is not contumacious and his claims are not malafide. Hence, assessee should not be visited with regour of penalty. Accordingly, we set aside the orders of the authorities below and delete the penalty.

11. In the result, this appeal filed by the assessee stands allowed.

Order pronounced under Rule 34(4) of the ITAT Rules by placing the result on notice board on 10.2.2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 10/02/2021

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//

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai