



IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA no.3827/Mum./2019
(Assessment Year : 2011-12)

Asstt. Commissioner of Income Tax
Circle-31(3), Mumbai Appellant

v/s

Shaheen Enterprises
Flat no.112, Building no.4
Sultanbad Villa Housing Society Respondent
Beharam Baug, Jogeshwari (W)
Mumbai 400 102 PAN-AMBFS7145R

Assessee by : None
Revenue by : Shri T.S. Khalsa

Date of Hearing - 31.05.2021

Date of Order - 12.07.2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The captioned appeal has been filed by the Revenue challenging the impugned order dated 15th March 2019, passed by the learned Commissioner of Income Tax (Appeals)-42, Mumbai, deleting the penalty ₹ 24,81,280, imposed under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") by the Assessing Officer which pertain to the assessment year 2011-12.

2. When the case was called for hearing, no one was present on behalf of the assessee to represent the case. There is no application for adjournment of hearing either. Therefore, we proceed to dispose off the appeal ex-parte qua the respondent assessee after hearing the learned Departmental Representative and on the basis of material available on record.

3. Facts in brief:- In this case, as stated by the Assessing Officer, the assessee being a partnership firm is engaged in the business of executing various jobs related to civil construction works as a sub-contractor for the main contractors who are working for Government and the assessee firm has developed specialization in irrigation work. The assessee, for the year under consideration, filed its return of income on 30th September 2011, declaring total income of ₹ 50,72,870. The Assessing Officer completed the assessment under section 143(3) of the Act determining income at ₹ 16,56,73,530, by making an addition of ₹ 16,06,00,655, on account of disallowance of direct expenses after the assessee failed to file the complete details with supportive documentary evidences. The Assessing Officer also initiated penalty proceedings under section 271(1)(c) of the Act in respect of the disallowance of direct expenses after the assessee failed to file the complete details with supportive documentary evidence. The assessee, being aggrieved by the orders passed by the Assessing

Officer, went in appeal before the first appellate authority wherein the assessee contested the quantum disallowance made by the Assessing Officer. The learned CIT(A) confirmed the disallowance of ₹ 16,06,00,655, on account of disallowance of direct expenses. Since the disallowance so confirmed by the learned CIT(A), consequently, the Assessing Officer imposed penalty of ₹ 24,81,280, under section 271(1)(c) of the Act.

4. The assessee once again being aggrieved with the penalty order under section 271(1)(c) of the Act issued by the Assessing Officer approached the first appellate authority with its grievances on account of imposition of penalty.

5. The learned CIT(A) deleted the penalty by observing as under:–

"6.3 Decision :

6.3.1 I have considered the submission of the appellant, perused the material on record and carefully gone through the order of the A.O.

6.3.2 In this case, the learned A.O. has made additions of an addition of ` 16,06,00,655, on account disallowance of direct expenses after the appellant failed to file the complete details with supportive documentary evidence. And though the CIT(A) has also confirmed the addition, the Hon'ble ITAT Mumbai has restricted the addition on estimated basis @ 5% of the bogus purchase.

6.3.3 The facts of the present case are now tested in the light of the above background. The penalty proceedings are distinct from the assessment proceedings. The proceedings for imposition of penalty though emanate from proceedings of assessment, it is independent and separate aspect of the proceedings. Even if addition is sustained, it is not necessary that penalty would

automatically be sustained. In the case of Kanbay Software Pvt. Ltd. Vs DOIT : (2009) 119 ITD 0153, it has been observed by the Hon'ble ITAT, Pune Bench that-

"48. The views expressed by their Lordships in Dharamendra Textile Processors case (supra) cannot be viewed as an authority for the proposition that a penalty under S. 271(1)(c) is an automatic consequence of an addition being made to income of the taxpayer, for the reason that whether it is a civil liability or a criminal liability, penalty under s. 271(1)(c) can only come into play when the conditions laid down under that section are satisfied. In view of the elaborate discussions in the preceding paras. by no stretch of logic or rationale it could be said that imposition of penalty under S. 271(1)(c) has a cause and effect relationship with addition being made to the returned income per se. An addition being made to income does, because of impact of Expin.1 effectively raise a presumption against the assessee but that is an entirely rebuttable presumption and the scheme of rebuttal is provided in the Explanation itself."

6.3.4 Thus, it can be inferred from the above decision that if the assessee offers an explanation, the revenue authorities have to consider the acceptability of the explanation and pass necessary orders. If the explanation is found to be acceptable, notwithstanding addition made, penalty may not be levied. But if the explanation is found to be fake or fanciful and without any foundation or basis, it is certainly open to the revenue authorities to impose penalty. It would all depend upon the acceptability of the explanation offered by the assessee in the background of the statutory provisions as prevailing at the relevant time.

6.3.5 In the present case, the learned AO has made an addition of Rs. 15,06,00,655/- on account disallowance of direct expenses after the appellant failed to file the complete details with supportive documentary evidence, which was confirmed by the CIT(A). However, the Hon'ble ITAT Mumbai; has restricted the addition on estimated basis @ 5% of the alleged purchases finding that the appellant has filed party wise details of expenses claimed in P&L A/c, furnish details of parties with address, PAN numbers in respect of some of the expenses incurred and that the appellant could not furnish the vouchers and bills for the direct expenses which were lying in the site office was the view of the Hon'ble ITAT that simply because the assessee could not furnish the complete information but only partial information is furnished regarding the expenses and also could not produce the confirmations from laborers the entire expenditure of Rs.16.06 Cr cannot be treated as expenditure not incurred and wholly arid exclusively for the purpose of business when it is not in dispute

of assessee carrying out the project work. Thus, it is seen that it is only due to the absence of the verification of bills and vouchers the correctness of that expenditure could not be verified, however, the appellant was in possession of vital evidence to prima facie substantiate the direct expenses to some extent. The appellant has offered an explanation, which could not be termed as not bona fide and the same was coupled with documentary evidence, however the same remained inconclusive

6.3.6 Thus, it can only be concluded in this case that except for rejection of the explanation furnished by the assessee, there is no material to sustain the plea of concealment.

6.3 7 It is also seen that the addition has been made only on the basis of estimate made by the A.O. It is settled legal position that when income is estimated, then there can be no question of imposing penalty u/s 271 (1)(c) of the Act. The Hon'ble Delhi High Court in CIT Vs, Aero Traders Pvt.Ltd (2010) 322 ITR 316 (Del.) has held that no penalty us 271 (1)(c) can be imposed when income is determined on estimate basis. The similar view has been taken by:

a) Hon'ble Punjab and Haryana high Court in Harigopl Singh V. CIT, (2002) 256 ITR 85 (P&H);

b) Hon'ble Gujarat High Court in CIT v/s Subhash Trading Co. 22 ITR 110 (Guj.).

6.3.8 Further, it is seen that the assessment order of the AO in the quantum proceedings was altered by the Hon'ble ITAT in a significant way, hence, the very basis of initiation of the penalty proceedings was rendered non-existent. Hence, the AO could not have thereafter continued the penalty proceedings on the basis of the same notice as held by the Hon'ble High Court of Delhi in Pr. Commissioner of Income Tax Vs. Fortune Technocomps (P) Ltd. ITA no.313/2016 dated May 13, 2016."

The Revenue being aggrieved by the order so passed by the learned Commissioner (Appeals) is in appeal before Tribunal.

6. The learned Departmental Representative supported the order of the Assessing Officer.

7. Having considered the submissions of the learned Departmental Representative and on a perusal of the material on record, we find that the Assessing Officer determined total income at ₹ 16,65,73,530, after making disallowance of ₹ 16,06,00,655. During the quantum proceedings, the learned CIT(A) confirmed the aforesaid quantum disallowance on account of direct expenses at ₹ 16,06,00,655. Aggrieved, the assessee carried the issue of quantum addition before the second appellate authority wherein the Tribunal vide order dated 30th June 2017, passed in assessee's appeal being ITA no.6566/Mum./2016, restricted the disallowance on account of direct expenses to 5% of ₹ 16,06,00,655, [i.e., ₹ 80,30,032 (₹ 16,06,00,655 x 5% = ₹ 80,30,032)]. Although, none appeared on behalf of the assessee before us, however, the assessee's case before us is, whether or not the learned CIT(A) was justified in deleting the penalty under section 271(1)(c) of the Act imposed by the Assessing Officer. After hearing the learned Departmental Representative, we are of the considered opinion that penalty under section 271(1)(c) of the Act levied by Assessing Officer has no legs to stand, when the corresponding additions made by the Assessing Officer has already been reduced substantially on the basis of estimation by the Tribunal vide its order cited supra. In other words, when the aforesaid quantum addition is based purely on estimation, the penalty levied under section 271(1)(c) of the Act cannot be sustained. Such proposition of law has been laid

down by the Tribunal time and again in plethora of cases. Consequently, we do not have enough reason or do not find any infirmity in the order of the learned CIT(A) deleting the penalty under section 271(1)(c) of the Act imposed by the Assessing Officer. Accordingly, the order of the learned CIT(A) is hereby upheld. The grounds raised by the Revenue are dismissed.

8. In the result, appeal is dismissed.

Order pronounced in the open court on 12.07.2021

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

Sd/-
S. RIFAUZ RAHMAN
ACCOUNTANT MEMBER

MUMBAI, DATED: 12.07.2021

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai