

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER AND
SHRI PAWAN SINGH, JUDICIAL MEMBER**

**ITA No.139/RPR/2017
Assessment Year: 2011-12**

Shri Mohan Sukumaran,
Bindu Bhawan,
Near Carmel School,
Raigarh (C.G.).
[PAN – AJFPS 7530 K]
(Appellant)

vs. The Dy. Commissioner of Income
Tax, Circle-1(1), Bilaspur (C.G.).

(Respondent)

Appellant by : Smt. Richa Khatri, C.A.
Respondent by : Shri Sanjay Kumar, D.R.

Date of hearing : 12.08.2021
Date of pronouncement : 21.10.2021

ORDER

PER PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER :

The captioned appeal has been filed at the instance of the assessee seeking to assail the order of CIT(A) dated 27.01.2017 in confirming the penalty amounting to Rs.12,88,205/- imposed on account of disallowance carried out under section 43B of the Income Tax Act, 1961 (the Act in short) for the Assessment Year (A.Y.) 2011-12.

2. Briefly stated, the assessee is a proprietor of M/s Gayatri Constructions which is engaged in the business of fabrication and labour work on contract basis. In the assessment proceedings the A.O. *inter alia* observed that a component of total amount of service tax claimed has remained unpaid amounting to Rs.41,98,281/-. It was thus alleged that the assessee has furnished inaccurate particulars of income by claiming excess expenses to the aforesaid extent. The disallowances were thus carried out with the aid of section 43B of the Act and the income was assessed by making an addition towards unpaid service tax. Simultaneously, penalty was imposed by the A.O. amounting to Rs.12,88,205/- under section 271(1)(c) of the Act on the

aforesaid additions alleging inaccurate particulars of income vide order dated 24.09.2014.

3. In the first appeal, the assessee did not get any relief from the CIT(A) on the penalty so imposed. Further aggrieved, the assessee preferred appeal before the Tribunal.

4. We have carefully considered the rival submissions. In defence of the stance of the assessee for cancellation of penalty so imposed, several contentions have been placed on behalf of the assessee:

- i) The disallowance has been carried out under the deeming fiction of section 43B of the Act which artificially seeks to disallow expenditure where the payments have not been made before the due date of filing of return of income. It is the contention of the assessee that although disallowance in the quantum proceedings may be possible with the aid of deeming fiction, it cannot dilute the fact that the assessee has actually incurred liability for payment of service tax and thus the claim of the assessee does not fall within the sweep of expression "inaccurate particulars of income". It is further contended that such service tax, in any case, is entitled to be allowed on actual payment of tax in subsequent year. Thus, the whole exercise over a period of time is tax neutral and consequently the claim although wrong has inherent trappings of bonafide.
- ii) The disallowance is primarily on account of technical or venial breach of deeming provisions of the Act.
- iii) The object of penalty provisions is to bend the assessee and not to break him by imposing huge penalty which is totally disproportionate to the nature of fault.
- iv) The Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC) has made wide ranging observations and *inter alia* held that the assessee cannot be held guilty of furnishing inaccurate particulars merely on account of an incorrect claim for deduction. It was also

submitted that penalty should not be imposed merely because it is lawful to do so. The statutory discretion vested with the A.O. must be exercised in favour of the assessee in such inadvertent error.

- v) Reference was made to the decision of jurisdictional High Court in ACIT vs. Ganapati Motors, Bhilai, in Income Tax Appeal No.30 of 2016, judgment dated 25.04.2017 where in the similar factual matrix the relief was granted to the assessee.
- vi) The claim of service tax has not been routed through Profit & Loss Account.

5. On appraisal of the orders of the lower authorities and on a combined reading of various facets of arguments raised on behalf of the assessee, the plea of the assessee merits acceptance. The provision of section 43B is in the nature of deeming fiction which seeks to artificially disallow the unpaid statutory liabilities & levies with an inherent mechanism to allow the same in the year of payment. Thus, when seen holistically, the exercise is tax neutral albeit with time difference on account of delay in payment of statutory levies etc. In such a situation, such lapse cannot be foundation for holding the assessee guilty for furnishing inaccurate particulars of income when read in conjunction with the decision of the Hon'ble jurisdictional High Court quoted on behalf of the assessee. In the facts of the case, one cannot attribute the motive of the assessee to claim excess expenses so disallowed on the touchstone of deeming fiction. It is not the case of the revenue that liability has never accrued to the assessee and was wrongly claimed. The disallowance was made mainly because of the deficit in payment of the liability. Needless to say, disallowance of an expenditure *ipso facto* does not mean concealment of income. In the circumstances narrated on behalf of the assessee, it is reasonable to infer bonafide and consequently difficult to approve the action of the revenue for imposition of penalty with the aid of section 271(1)(c) of the Act.

6. In totality of the circumstances, we find merit in the plea of the assessee for cancellation of the penalty imposed. Consequently, the first appellate order is set aside and penalty imposed by the A.O. is cancelled.

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

PRONOUNCED ON 21.10.2021 as per Rule 34(4) of the Income Tax Appellate Tribunal Rules,1963.

Sd/-
(PAWAN SINGH)
Judicial Member

Sd/-
(PRADIP KUMAR KEDIA)
Accountant Member

True Copy

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Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Raipur Bench, Raipur