

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.2661/M/2023
Assessment Year: 2012-13**

The Deputy Commissioner of Income Tax -14(1)(1), Room No.432, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Michael Page International Recruitment Pvt. Ltd., 5 th Floor, 2 North Avenue Maker Maxity, Bandra (East) Mumbai - 400 051 PAN: AAGCM8425N
(Appellant)		(Respondent)

**CO No.04/M/2024
(Arising out of ITA No.2661/M/2023)
Assessment Year: 2012-13**

M/s. Michael Page International Recruitment Pvt. Ltd., 5 th Floor, 2 North Avenue Maker Maxity, Bandra (East), Mumbai - 400 051 PAN: AAGCM8425N	Vs.	The Deputy Commissioner of Income Tax -14(1)(1), Room No.432, 4 th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Hirali Desai, C.A. &
Shri Amol Mahajan, A.R.
Shri Tejal Saraf, A.R.

Revenue by : Smt. Mahita Nair, Sr. D.R.

Date of Hearing : 03 . 04 . 2024

Date of Pronouncement : 30 . 04 . 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

1. The present appeal and cross objections have been preferred by the Revenue and the Assessee respectively, against the order dated 31.05.2023 impugned herein passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2012-13.

2. For the sake of brevity, first we are deciding Revenue's appeal and relevant facts for adjudication of the same are that in this case the assessee being engaged in the business of providing manpower recruitment services and career advice to various clients in India had declared total loss of Rs.23,79,32,221/- by filling its return of income on dated 29-11-2012, which was selected for scrutiny and therefore statutory notices were issued to the assessee, whereby the assessee was asked to file certain details and documents. The assessee filed the relevant details as called for by the Assessing Officer (AO) who after considering the same and observing "*that in the statement of computation of the income for assessment year under consideration the assessee company has claimed an expenditure to the tune of Rs.2,16,88,667/- on account of expenditure incurred for leasehold improvements*", show caused the assessee "*as to why the said expenditure should be treated as revenue expenditure instead of capital expenditure*".

2.1 The assessee before the AO claimed that during the assessment year under consideration the assessee had

entered into leave and license agreements for use and occupation of the following premises:

1. Express Towers, Nariman Point, Mumbai
2. DLF Cyber City, DLF Phase II, Gurgaon

2.2 The assessee further claimed that expenses incurred by the assessee were for the leasehold improvements and mainly in the nature of civil work, plumbing, painting, carpentry work, false ceiling work, flooring, door frame fixtures, electrical work, heating, ventilation and air conditioning work, security system work etc. The leave and license agreement entered with the owner of properties at Nariman Point, Mumbai and DLF Cyber City, Gurgaon were for a period of 36 months (5 years) and 36 months (3 years) respectively and the assessee was not permitted to remove, alter or demolish any fixtures and fittings permanent in nature. The expenditure incurred by the assessee was commercially expedient for smooth functioning of the business and was necessary for the purpose of carrying on and conducting business and for the purpose of properly utilization of the premises on lease. The expenditure incurred did not bring into existence any capital asset to provide enduring benefits to the assessee. As per section 37(1) of the Act, any expenditure not being as described in section 32 to 36 of the Act and not being in the nature of capital expenditure for personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the income chargeable under the head profits and gains of business or profession are permitted to be allowed. The provisions of section 37(1) further mandates that the expenditure must not be personal expenses of the assessee

and must not be "capital in nature". As the conditions prescribed under section 37 are satisfied in the instant case, therefore the expenditure for leasehold improvements should be considered as an allowable expenditure. The assessee also relied on various judgments including by the Jurisdictional Hon'ble High Court in the case of Commissioner of Income Tax vs. Hede Consultancy Pvt. Ltd. and another (258 ITR 380) (Bom-HC) wherein the Hon'ble High Court has allowed the expenses incurred on interior decoration which resulted in replacement existing roof of bathroom etc., as expenditure revenue in nature.

3. The AO, though considered the claim and the judgments relied upon by the assessee, however, not being satisfied, ultimately disallowed the amount of Rs.2,16,88,667/- as claimed by the assessee on account of leasehold improvements by distinguishing the judgments quoted by the assessee and by relying on the judgment rendered by Hon'ble Apex Court in the case of Assam Bengal Cement Co. Ltd. vs. CIT, West Bengal (27 ITR 34) wherein the expenditure incurred for the enduring benefit of the business has been treated as capital expenditure instead of revenue expenditure.

3.1 The AO further observed that on verification of the expenses on rent of Rs.3,66,44,045/- the assessee has also included a sum of Rs.18,56,375/- being straight line of rent expenses. On being asked, the assessee explained that the same was only an adjustment entry. The AO considered the submission of the assessee, however, also disallowed the sum of Rs.18,56,375/- under section 37(1) of the Act by holding that the said amount is not expenditure actually and only an

adjustment entry and not being expended for the business of the assessee.

4. The AO in the assessment order, also recorded satisfaction for initiating the penalty proceedings under section 271(1)(c) of the Act for **furnishing the inaccurate particulars of income** qua the claims of expenditures of Rs.2,16,88,667/- on account of leasehold improvements and the amount of Rs.18,56,375/- on account of adjustment entry. The AO simultaneously, in para-No.9 of the assessment order also recorded that accordingly a penalty notice under section 271(1)(c) read with section 274 of the Act is issued for **concealment of the particulars of income and furnishing the inaccurate particulars of such income.**

5. The assessee being aggrieved with the aforesaid additions made by the AO, challenged the same, by filing first appeal, before the then Ld. CIT(A), who though affirmed the aforesaid additions, however allowed the depreciation on leasehold improvements of Rs.2,16,88,667/-. The assessee against the order passed by the Ld. CIT did not prefer any appeal.

6. Subsequently, the AO started the penalty proceedings and issued a notice dated 04.09.2018 (page No.4 of the paper book) whereby the final opportunity was given to the assessee to show cause as to why penalty under section 271(1)(c) of the Act is not leviable. The assessee in response to the said show cause notice filed its reply before the AO in the penalty proceedings. The assessee in support of its case also relied on various judgments. However, the AO not being convinced with the claim of the assessee, ultimately held that "*after*

taking into consideration the facts and legal position discussed in detail he is satisfied and of the opinion that the assessee has concealed/furnished inaccurate particulars of income qua computation of total income for the assessment year under consideration within the meaning of section 271(1)(c) read with explanation 1 to this section” and consequently levied the penalty to the tune of Rs.76,39,190/- @ 100% of the income sought to be evaded on the additions/disallowances totaling to Rs.2,35,45,042/-.

7. The assessee being aggrieved, challenged the levy of penalty before the Ld. Commissioner, who by impugned order deleted the aforesaid penalty by concluding as under:

“I have perused the penalty order, grounds of appeal and submission filed by the appellant and arguments made during the course of VC. I find from para 1 of the penalty order that during the assessment proceedings two disallowances were made on account of disallowance improvements to lease hold property claimed as revenue expenditure and disallowance of rent claiming using straight lining method. For both the above additions, penal proceedings u/s 271(1)(c) were initiated for furnishing of inaccurate particulars of income. However as per para 14 of the penalty order, the AO has levied penalty for the reason that "assessee concealed/furnished inaccurate particulars of income". Thus I find that the AO was not sure about the limb of the default while imposing the penalty.

The appellant by relying on the decision of Hon'ble Karnataka High Court in the case of CIT vs. Manjunath Cotton & Ginning Factory 35 taxmann.com 250 and the decision of Hon'ble Supreme Court of India in the case of Ashok Pai vs. CT (292 ITR 11) and decision of Hon Bombay High Court in the case of CIT vs. Samson Perinchery (392 ITR 4) and many other decisions, submitted that the penalty was initiated for furnishing inaccurate particulars of income but the penalty is levied invoking explanation 1 to section 271(1)(c), therefore requested to squash the penalty. The appellant has further on without prejudice basis

submitted that the AO has given the effect to the order of LdCIT(A) to allow the depreciation and thus there is calculation error in imposing penalty.

I have considered the facts of the case and submission made by the appellant. I find that the AO has not adhered to the satisfaction recorded for initiating the penal proceedings while imposing the penalty. Thus I find the penalty was initiated for furnishing inaccurate particulars of income but while imposing the penalty, the AO has applied both the limb, which is incorrect approach. Further the appellant by relying on the various decisions, submitted that where two views are possible on a particular claim, penalty cannot be levied. Therefore considering the submissions and case relied upon by the appellant, the penalty of Rs.76,39,189/- imposed by the AO is deleted. Thus the grounds of appeal raised by the appellant are allowed.”

8. The Revenue Department being aggrieved, challenged the deletion of the penalty under consideration. The Ld. D.R. at the outset claimed that the additions made by the AO have been confirmed by the Ld. Commissioner holding the same to be **“Capital expenditure”** and **“straight lining of rent expenditure”**. As no further appeal was filed by the assessee before the Hon’ble Tribunal, therefore the determination of the expenditure as capital in nature by the AO on being affirmed by the Ld. Commissioner, has attained finality and consequently the penalty is liable to be restored. Ld. D.R. further relied on the judgment passed by the Hon’ble Bombay High Court in the case of Veena Estate (P) Ltd. (2024) 158 taxmann.com 341 wherein non striking of the limb in the notice issued under section 271(1)(c) read with section 274 of the Act and defective notice has not been considered as a relevant factor for deletion of the penalty. The Ld. D.R. further submitted that furnishing of inaccurate particulars of income leads to concealment of income and therefore if in the penalty order the AO has cited both the limbs then it cannot

be said that the penalty has not been levied on the ground on which the proceedings were initiated. In the instant case the proceedings were initiated for furnishing the inaccurate particulars of income and penalty is also levied for furnishing of inaccurate particulars of income leading to concealment of income, therefore, the penalty order passed by the AO may be restored and penalty levied may be upheld.

9. On the contrary the Ld. A.R. while relying on various judgments including T. Ashok Pai vs. CIT (supra) and CIT vs. Samson Perinchery (supra), HPCL Mittal Energy Ltd. vs. ACIT in ITA No.554 & 555/ASR/2014 and CIT vs. Manu Engineering Works (1980) 122 ITR 306 contended that concealment of income and furnishing of inaccurate particulars of income are two separate connotations and satisfaction of the AO qua only one of the breaches under section 271(1)(c) of the Act for initiation of penalty proceedings will not permit levy of penalty for other breach. Further, it is incumbent upon the AO to come to a positive finding as to whether there was concealment of income or furnishing of inaccurate particulars of income. In absence of such clear cut finding the penalty order is liable to be struck down. With regard to the judgment passed by the Hon'ble Bombay High Court in the case of Veena Estate (P) Ltd. vs. CIT (supra) the Ld. Counsel tried to justify its case by submitting that in the said case, the contention qua defective penalty notice was raised for the first time before the Hon'ble High Court i.e. after more than 20 years of passing of the Tribunal order. Further, no such contention qua defective notice was raised either before the AO/CIT/Tribunal/Hon'ble High Court, until the admission of the appeal. The Hon'ble High Court, in fact did not entertain the

defective notice on the ground that the appellant never raised an objection from the very inception i.e. since the last 30 years and therefore could not be allowed to be raised the same in the absence of prejudice caused to the appellant. Here the case is not the same as dealt by the Hon'ble High Court. The Ld. A.R. further contended that even without prejudice to the submissions made above, the issue qua expenditure whether it is a capital or revenue nature, is always debatable and the fact that the Ld. CIT(A) has allowed depreciation on the said expenditure indicates that the claim made by the assessee was bonafide and all material facts were disclosed and therefore on this ground also the penalty is not warranted.

10. Having heard the partes and perusing the orders passed by the authorities below, material available on record and the rival claims of the parties, following two questions emerged.

1. *Whether the penalty can be imposed on a limb on which no satisfaction was recorded and no penalty proceedings were initiated in the assessment order?*
2. *What would be the result of notice issued under section 274 read with section 271(1)(c) of the Act, without specifying the particular limb for which notice has been issued and/or penalty proceedings have been started?*

10.1 First we will deal with the issue "Whether the penalty can be imposed on a limb on which no satisfaction was recorded and no penalty proceedings were initiated in the assessment order?"

10.2 The AO vide assessment order dated 31.03.2015 under section 143(3) of the Act completed/assessed at loss and also made following additions:

1. *Disallowance of leasehold improvements of Rs.2,16,88,667/-*
2. *Addition of Rs.18,56,375/- on account of straight lining of rent expenditure.*

10.3 The AO though recorded the satisfaction for initiation of penalty proceedings under section 271(1)(c) of the Act for **furnishing the inaccurate particulars of income** qua both the additions/claims of the assessee and in last para i.e. para-No.9 of assessment order recorded that penalty notice under section 271(1)(c) read with section 274 of the Act is issued for **concealment of income** and **furnishing of inaccurate particulars of income**, however, in fact issued the notice dated 31.03.2015 for **concealing the particulars of income OR furnishing of inaccurate particulars of such income** and ultimately in the penalty proceedings imposed the penalty for **concealment of income/furnishing of inaccurate particulars of income**. The Ld. Commissioner in appeal against the penalty order considered the said aspects vis-à-vis initiation of penalty proceedings for furnishing inaccurate particulars of income but levy of penalty for **concealment of income /furnishing of inaccurate particulars of income** and while relying on the judgments passed by the Hon'ble Karnataka High Court in the case of CIT vs. Manjunath Cotton & Ginning Factory 35 taxmann.com 250 and by the Hon'ble Apex Court in the case of T. Ashok Pai vs. CIT (292 ITR 11)

and by Hon'ble Bombay High Court in the case of CIT vs. Samson Perinchery (392 ITR 4) and many other decisions and by observing *“that the AO has not adhered to the satisfaction recorded for initiating the legal proceedings while imposing the penalty. The penalty was initiated for furnishing the inaccurate particulars of income but while imposing the penalty, the AO has applied both the limbs, which is incorrect approach”*, ultimately deleted the penalty imposed by the AO.

10.4 As we have observed above that admittedly the penalty proceedings qua two additions made by the AO, were initiated for **furnishing of inaccurate particulars of income**. However, the notice dated 31-03-2015 under section 274 read with section 271(1)(c) of the Act was issued without satisfying any particular limb of penalty and the AO ultimately levied the penalty for concealment/ furnishing of inaccurate particulars of income.

10.5 The Hon'ble Jurisdictional High Court in the case of CIT vs. Samson Perinchery (supra) while respectfully following the judgement rendered by Hon'ble Apex Court in the case of T. Ashok Pai vs. CIT (supra), has clearly held that concealment of income and furnishing of inaccurate particulars of income are two separate connotations.

10.6 Further, the Tribunal in the Third Member case i.e. HPCL Mittal Energy Ltd. vs. ACIT (supra) in majority view held that penalty levied would not be sustainable in the case where the AO records satisfaction while initiating the penalty proceedings under section 271(1)(c) of the Act qua alleged “concealment of income” but finally imposes penalty for

“concealment/furnishing the inaccurate particulars of income”. The Hon’ble Third Member has categorically held that the AO may initiate the penalty proceedings for both the limbs or the AO during initiation of penalty proceedings may be confused but while imposing the penalty has to come to definite findings.

10.7 Further, Hon’ble Gujarat High Court in the case of CIT Vs. Manu Engineering Works (supra) has also clearly laid down the principle that it is incumbent upon the AO to come to a positive finding “*as to whether there was concealment of income or furnishing of inaccurate particulars of income*”. In the absence of such clear-cut findings, the penalty order is liable to be struck off.

10.8 On the aforesaid analyzations, we are of the considered view that where there is confusion in recording the satisfaction for initiation of penalty proceedings **or** levy of penalty on the limb for which no satisfaction was recorded and no penalty proceedings were initiated in the assessment order, then the penalty levied is un-sustainable, hence we answer the issue no. 1 accordingly.

10.9 Coming to the claim of the Ld. D.R. that the additions made by the AO as affirmed by the Ld. Commissioner and not further appealed by the assessee before higher courts, have attained finality, therefore penalty is liable to be levied. We are not in agreement with such claim of the assessee, as the Hon’ble Apex Court in the case of CIT Vs. Reliance Petro Products Pvt. Ltd. [(2010) 322 ITR 158 (SC)] has clearly laid

down the dictum "that merely making an incorrect claim does not tantamount to furnishing of inaccurate particulars".

10.10 We are also of the considered view that rejection of claim does not ipso facto leads to levy of penalty. Even otherwise in this case the penalty levied failed to pass the legal tests, as determined by the Higher Courts and therefore on the aforesaid analyzations and peculiar facts and circumstances in cumulative effects, the decision of the Ld. Commissioner for deletion of the penalty does not require any interference, as the same is neither perverse nor suffers from any impropriety and/or illegality. Consequently, deletion of penalty is sustained and Revenue's appeal i.e. ITA no 2661/Mum/2023 is dismissed.

11. Now coming to the second issue qua defective notice issued under section 274 read with section 271(1)(c) of the Act without specifying the particular limb of penalty, as we have already affirmed the decision of the Ld. Commissioner for deletion of penalty, hence for the sake of brevity are inclined not to delve into this aspect, as adjudication of the same would prove futile exercise.

12. Coming to the Cross objections filed by the Assessee, we observe that cross objections raised by the Assessee more or less are in support of impugned order, therefore in view of our judgement in Revenue's appeal i.e. ITA no 2661/Mum/2023, the same do not require any independent adjudication, hence the **CO No.04/M/2024** under consideration also stands dismissed.

13. In the result, Appeal and CO filed by the Revenue and Assessee respectively, stands dismissed.

Order pronounced in the open court on 30.04.2024.

**(MS. PADMAVATHY S)
ACCOUNTANT MEMBER**

**(NARENDER KUMAR CHOUDHRY)
JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT,
Mumbai.