

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

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER  
& SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA Nos. 3254 & 3333/Mum/2024  
Assessment Years : 2010-11 and 2011-12

Diamond Tool Industries, 108, Udyog Bhavan, Sonawala Road, Goregoan East, Mumbai 400 063.	Vs	ITO Circle 31(1), Mumbai
PAN AAAFD4673L (Appellant)		(Respondent)

Appellant by : Shri Hariom Tulsyan  
Revenue by : Smt Mahita Nair (Sr. DR)

Date of Hearing : 14.08.2024	Date of Pronouncement : 3.09.2024
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**ORDER**

**Per Sandeep Singh Karhail, Judicial Member:**

The present appeals have been filed by the assessee challenging the separate impugned orders of even date 30/04/2024, passed under section 250 of the Income Tax Act, 1961 ("*the Act*") by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*learned CIT(A)*"], which in turn arose from the penalty order passed under section 271(1)(c) of the Act, for the assessment years 2010-11 and 2011-12.

2. Since both appeals pertain to the same assessee and involve similar issues arising out of a similar factual matrix, these appeals were heard

together and are being decided by way of this consolidated order. The assessee has raised similar grounds in both appeals, therefore the grounds raised in ITA no.3254/Mum./2024 are reproduced as follows:-

*"1. That the learned National Faceless Appeal Centre (NFAC), Delhi, has erred both in law and on facts in confirming penalty of Rs. 3,59,638/ levied by assessing officer under section 271(1)(c) of Income Tax Act, 1961.*

*2. That the learned National Faceless Appeal Centre (NFAC), Delhi, has erred both in law and on facts in confirming penalty of Rs. 3,59,638/- levied by assessing officer under section 271(1)(c) of Income Tax Act, 1961 without affording proper opportunity of being to appellant.*

*3. That on the facts and circumstances of the case and in law the Learned National Faceless Appeal Centre (NFAC), Delhi, erred in upholding levying penalty of Rs. 3,59,638/- u/s 271 (1)(c) of Income Tax Act. 1961, levied by Ld. Assessing Officer in absence of any satisfaction drawn that the disallowances forming basis of penalty made at assessment stage are on account of deliberate, malafide intention of the assessee to conceal the particulars or nor furnished inaccurate particulars.*

*4. That That on the facts and circumstances of the case and in law the learned National Faceless Appeal Centre (NFAC), Delhi, erred in upholding levying penalty of Rs. 3,59,638/- u/s 271 (1)(c) without appreciating that the Ld. A.O. levied penalty without establishing that the explanation furnished by the appellant was false.*

*5. That on the facts and circumstances of the case and in law the Learned National Faceless Appeal Centre (NFAC) Delhi, erred in upholding penalty order pervasive to binding decisions interpreting provision explained by courts.*

*6. That without prejudice and in the alternative the order passed by the Ld. Assessing Officer and confirmed by Learned National Faceless Appeal Centre (NFAC), Delhi, is bad in law.*

*7. That the appellant craves to add, amend, alter or forgo any ground(s) either before or at the time of hearing of the appeal."*

3. The brief facts of the case are that the assessee is in the business of manufacturing all types of stone-cutting tools at its factory in Goa, where it has two units. For the assessment year 2010-11, the assessee filed its return of income on 24/09/2010 declaring a total income of INR 27,46,570 and for the assessment year 2011-12 the assessee filed its return of income on 23/09/2011 declaring a total income of INR 78,29,972. The returns filed by the assessee were selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) of the Act along with a questionnaire were issued and served on the assessee. The assessee claimed commission on sale amounting to INR 49,63,799 during the assessment year 2010-11 and INR 56,76,580 during the assessment year 2011-12. On verifying the details, it was found that the assessee has paid commission on sales at different rates to different parties. On perusal of the details during the assessment proceedings, it was noticed that the assessee firm has paid commission @5% amounting to INR 29,09,689 during the assessment year 2010-11 and INR 23,43,702 during the assessment year 2011-12 to the sister concern of the assessee firm, i.e. Shatul Commercial Co. Pvt. Ltd. Further, it was noticed that the assessee has paid commission to another party, i.e. M/s Shanthi Udyog @1.5%. Since the assessee paid an excess commission of 3.50% to the sister concern, the assessee was asked to show cause as to why excess payment made to the sister concern should not be disallowed as per the provisions of section 40A(2)(a) of the Act. The Assessing Officer ("AO") did not agree with the submissions of the assessee

and held that the commission payment shown by the assessee to the sister concern is excessive and there is no documentary evidence to show that the related party had rendered any extra service or there exist any extraordinary circumstances which could justify such higher rate of commission to related party. The AO further noted that the Tribunal vide its order dated 02/12/2012 while deciding this issue has stated that commission to the extent of 3% is reasonable and any excess commission of more than 3% is unreasonable. Accordingly, following the decision of the Tribunal, the payment of commission in excess of 3% given to the sister concern, i.e. Shatul Commercial Co. Pvt. Ltd was considered excessive and the payment amounting to INR 11,63,876 in the assessment year 2010-11 and payment of INR 12,89,480 in the assessment year 2011-12 was disallowed under section 40A(2)(a) of the Act. In further appeal, the learned CIT(A) dismissed the quantum appeal filed by the assessee.

4. In the meanwhile, penalty proceedings under section 271(1)(c) of the Act were initiated and vide order dated 27/03/2018 for the assessment year 2010-11 and order dated 28/03/2018 for the assessment year 2011-12, the AO levied a penalty of INR 3,59,638 and INR 3,98,499, respectively, on the basis that the assessee has concealed the particulars of his income to the extent of excess payment of commission paid to the sister concern, as the assessee has failed to furnish the explanation for excessive payments made to related party.

5. The learned CIT(A), vide separate impugned orders, upheld the penalty levied under section 271(1)(c) of the Act for the assessment years 2010-11 and 2011-12. Being aggrieved, the assessee is in appeal before us.

6. We have considered the submissions of both sides and perused the material available on record. Ostensibly, in the present case, the addition resulting in the impugned penalty is arising out of disallowance made under section 40A(2)(b) of the Act. During the assessment proceedings, on verifying the details submitted by the assessee it was noticed that the assessee has paid commission at different rates to different parties. On one hand commission @5% was paid to the sister concern, however, on the other hand, the assessee paid a commission to another party @1.5%. It is evident from the record that the assessee filed its response to the show cause notice issued during the assessment proceedings on the issue of why the excess payment made to the sister concern should not be disallowed as per the provisions of section 40A(2)(b) of the Act. It is discernible that the submissions filed by the assessee were not accepted by the AO, and accordingly by relying upon the decision of the Tribunal, the AO held that commission to an extent of 3% is reasonable and any excess commission over and above the same is disallowable under section 40A(2)(b) of the Act. It is pertinent to note that the AO has not given any finding that the expenditure on commission paid to the sister concern is excessive having regard to either the market value or the fair market value

of the services or the legitimate needs of the business or the benefit derived by the assessee. It is further worth noting that considering a 3% commission to be reasonable is also based on the previous judicial precedent, which is not of the years under consideration. Therefore, it is sufficiently evident that it is not a case where the particulars of income or expenditure were found to be inaccurate. However, the AO disagreeing with the submissions of the assessee found the commission paid to the sister concern to be excessive. We find that while examining the meaning of the term "*particulars*" in section 271(1)(c) of the Act, the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts (P) Ltd.; [2010] 322 ITR 158 (SC) held that mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. The relevant findings of the Hon'ble Supreme Court, in the case cited supra, are as follows:—

*"9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as :—*

*"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."*

*We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars."*

7. Therefore, respectfully following the decision of the Hon'ble Supreme Court in Reliance Petroproducts (P) Ltd. (supra), we are of the considered view that the levy of penalty under section 271(1)(c) of the Act in the facts of the present case is not justifiable, and accordingly the same is deleted. As a result, the impugned order in both appeals is set aside and grounds raised by the assessee are allowed.

8. In the result, the appeals by the assessee for the assessment year 2010-11 and 2011-12 are allowed.

Order pronounced in the open court on 3<sup>rd</sup> September, 2024

Sd/-  
(Narendra Kumar Billaiya)  
ACCOUNTANT MEMBER

Sd/-  
(Sandeep Singh Karhail)  
JUDICIAL MEMBER

Mumbai, Date : 3<sup>rd</sup> September, 2024.  
SA

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "D" Bench, Mumbai

By Order

(Assistant Registrar)  
Income Tax Appellate Tribunal, Mumbai