IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F', NEW DELHI

Before Sh. N. K. Saini, AM And Sh. Sudhanshu Srivastava, JM

ITA No. 5110/Del/2011 : Asstt. Year : 1993-94

RCI Industries Technologies (P) Ltd., B-97, All Heavens Building, Wazirpur, Delhi-110052	Vs	Deputy Commissioner of Income Tax, Circle-15(1), New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAACR5727Q		

Assessee by : Sh. K. P. Garg, CA
Revenue by : Sh. R.B. Meena, CIT DR & Sh. N.J. Singh, Sr. DR

Date of Hearing : 08.02.2016		**Date of Pronouncement : 23.03.2016**

ORDER

Per N. K. Saini, AM:

This is an appeal by the assessee against the order dated 05.08.2011 of ld. CIT(A)-XVIII, New Delhi.

2. The only grievance of the assessee in this appeal relates to the sustenance of penalty of Rs.6,97,613/- levied by the AO u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

3. Facts of the case in brief are that the assessee was engaged in the business of running banquet hall, restaurant and coffee shop as well as trading in non ferrous metal items and filed the return of income on 31.12.1993 showing

loss of Rs.12,98,697/-. Thereafter a search and seizure action u/s 132 of the Act was carried out at the premises of the assessee on 24.01.1995. In the course of said action, certain incriminating documents were found and seized. The assessment in this case, was completed by the AO at an income of Rs.19,33,995/- u/s 147/144 of the Act vide order dated 22.03.1999.

4. Being aggrieved the assessee carried the matter to the ld. CIT(A) who allowed the relief to the assessee. Thereafter the department preferred an appeal to the ITAT wherein the order of the ld. CIT(A) was reversed and the conclusion of the AO was upheld but the G.P ratio was slightly reduced and the loss was determined at Rs.85,458/- instead of Rs.12,98,697/- declared by the assessee. Thereafter the AO levied the penalty u/s 271(1)(c) of the Act at Rs.6,97,613/-.

5. Being aggrieved the assessee carried the matter to the ld. CIT(A) and submitted that the order on quantum was made by the ITAT *ex-parte* due to non-attendance of assessee and application was moved to the ITAT to reopen the matter. The ld. CIT(A) did not find merit in the said submission of the assessee by observing that as on date the

order of the ITAT was final and the order of the ITAT was a detailed speaking order. Accordingly, the penalty levied by the AO was confirmed.

6. Now the assessee is in appeal. The ld. Counsel for the assessee reiterated the submissions made before the authorities below and further submitted that the AO estimated the income of the assessee by applying the G.P rate and also disallowed expenses on estimate basis. It was further submitted that the addition made by the AO were deleted by the ld. CIT(A) and thereafter the ITAT on the appeal of the assessee reduced the loss claimed by the assessee by applying the G.P rate. However, the said order of the ITAT was recalled vide order dated 18.11.2011 and this fact was not appreciated by the ld. CIT(A) while confirming the penalty levied by the AO. It was also submitted that the ld. CIT(A) sustained the penalty when the order of the ITAT relied by the AO was not inexistence and the addition had been deleted by the ld. CIT(A). Therefore, the penalty levied by the AO and sustained by the ld. CIT(A) was not justified.

7. In his rival submissions the ld. DR supported the orders of the authorities below.

8. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it appears that the AO levied the penalty only on this basis that the ITAT sustained certain additions made by the AO by passing an *ex-parte* order which was later on set aside u/s 254 of the Act. It is well settled that the assessment proceedings and the penalty proceedings are two different and distinct proceedings. The addition made in the assessment proceedings are although material but are not the conclusive proof of concealment, particularly when the income has been determined by the AO on estimate basis. In the present case, the ld CIT(A) allowed relief to the assessee and the additions made by the AO were deleted. The ITAT also by passing the *ex-parte* order dated 21.08.2009 reduced the additions made by the AO on estimate basis. The said order dated 21.08.2009 of the ITAT was recalled vide order dated 18.11.2011 in MA Nos. 542 to 544/Del/2010 for the assessment years 1993-94 to 1995-96. In this manner, the ITA No. 1696/Del/2000 filed by the department for the assessment year 1993-94 was restored which we have dismissed vide our order dated 21.03.2016 on account of tax effect being less than Rs.10,00,000/- and by considering the CBDT Circular No.

21/2015 dated 10.12.2015 wherein instructions are given that the department ought not to have filed the appeal. Therefore, the admitted fact in this case is that the additions made by the AO were deleted by the ld. CIT(A) vide order dated 21.01.2000 and the appeal of the department in ITA No. 1696/Del/2000 against the said order has been dismissed by the ITAT. As such no addition is inexistence on the basis of which penalty u/s 271(1)(c) of the Act was levied by the AO and sustained by the ld. CIT(A). We, therefore, considering the totality of the facts as discussed hereinabove delete the penalty u/s 271(1)(c) of the Act levied by the AO and sustained by the ld. CIT(A).

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

(Order Pronounced in the Court on 23/03/2016)

Sd/-	Sd/-
(Sudhanshu Srivastava)	**(N. K. Saini)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 23/03/2016
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR