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

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT, AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No. 1533/Del /2012
Assessment Year: 2008-9

M/s Rathi Pragati Steels Manufacturing Ltd 1356(II), 5811, Loni Road Shahdra, Delhi	Vs.	The A.C.I.T Circle -15(1) New Delhi
PAN : AADCR 6902 J		
[Appellant]		[Respondent]

Date of Hearing : 18.05.2016
Date of Pronouncement : 18.07.2016

Assessee by : Shri Vinod Agrawal, CA
Revenue by : Shri Amrit Lal, Sr-DR

ORDER

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal filed by the assessee is directed against the order of the CIT(A)-XVIII, New Delhi dated 09/02/2012 passed in first appeal No. 24/11-12 for A.Y 2008-09 vide which penalty of Rs. 1,19,560/- imposed by the AO u/s 271(1)(c) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] has been upheld.

2. Although the assessee has raised as many as eight grounds of appeal, the main effective grounds challenging the denial of opportunity of being heard to the assessee and upholding the

penalty have been stated in Ground Nos. 1 and 4 and other grounds are supportive to these main grounds. Ground Nos. 1 and 4 read as under:

> *"1. That on the facts and circumstances of the case and in the law, Ld. Commissioner of Income Tax(Appeals) has erred when he has sustained the penalty amount of Rs. 1,19,860/- imposed by Ld. Assessing officer U/s 271 (1)(c) of the Income Tax Act, 1961 because the Assessing officer did not discuss the finding to reach on his conclusion of the fact that in what manner appellant company concealed the particulars of its income.*
>
> *4. That on the facts and circumstances of the case and in the law, the impugned order is arbitrary and illegal in as much as it is suffering from denial of rules of natural justice. Ld. Commissioner of Income Tax(Appeals) failed to grant fair opportunity of hearing as contemplated by the provisions of Section 271 (1) (c) and the rules of natural justice."*

GROUND NO. 4

3. We have heard the rival submissions and have perused the relevant material on record. The ld. AR submitted that the order of the CIT(A) is arbitrary and illegal in as much as it is suffering from denial of natural justice as the assessee company filed written submissions before the CIT(A) on 6.2.2012 and the CIT(A) ought to have granted an opportunity for presenting his arguments, which she failed to do so, which is clear violation of principles of natural justice. The ld. AR further contended that

the CIT(A) wrongly assumed that the assessee company requested to decide its appeal on the basis of written submissions only and after filing written submissions on 6.2.2012 without affording opportunity of being heard, the CIT(A) passed impugned order on 9.2.2012 i.e. only after two days.

4. Per contra, the ld. DR pointed out that after filing written submissions in the office of the CIT(A) by DAK, the assessee requested that the case may be disposed off as per material available on record and in this situation, the first appellate authority was quite justified in deciding the appeal after considering the material available on record inter alia. The ld. DR finally submitted that in this situation, the first appellate authority had no option but to decide the appeal exparte, therefore, there was no violation of principles of natural justice and thus the allegation of the assessee in this regard may kindly be rejected.

5. From the relevant operative para 4.1 to the end of the impugned order, we observe that the CIT(A) has reproduced written submissions of the assessee and thereafter noted the facts regarding imposition of penalty but there is no specific discussion regarding all the three issues on which penalty has been imposed by the assessee i.e. donation paid but added by the

AO in the computation of income, excess depreciation claim and deduction denied as per clause 32(b) of Form 3CD. We further note that the CIT(A) filed written submissions through DAK in the office of the CIT(A) on 6.2.2012 but the CIT(A) did not allow opportunity to explain the stand of the assessee taken in the grounds of appeal. Therefore, we are satisfied that the CIT(A) passed the impugned order violating the principles of natural justice.

GROUND No. 1

6. Apropos Ground No. 1, the ld. AR pointed out that the CIT(A) has erred in sustaining the penalty imposed u/s 271(1(c) of the Act because the AO did not discuss and record any finding to reach to a conclusion of the fact that in what manner the assessee company concealed the particulars of its income. The ld. AR further pointed out that the assessee was not allowed to explain his case before the AO and the AO wrongly observed that the assessee has not file any reply in respect of additions made and he was quite unjustified in levying penalty on the assessee. The ld. AR further submitted that the assessee filed detailed written submissions on 6.2.2012 and the same have been reproduced by the CIT(A) in the impugned order at paras 3 and 4. The ld. AR further pointed out that after reproducing the

submissions of the assessee, the CIT(A) simply noted the facts leading to imposition of penalty and thereafter without dealing with all the three issues independently held that the assessee has made wrong claims in his return of income and claims which are clearly not admissible as per provisions of the Act attract penalty.

7. Reiterating its submissions made before the CIT(A), the ld. AR submitted that the expenditure on donation was nothing but absolute business expenditure which was duly declared as per Income-tax return filed and thus the imposition of penalty in respect of said amount of donation is erroneous and unjustified. The ld. AR finally pointed out that the claim of donation was not allowed as the recipient done was not enjoying the exemption u/s 80G of the Act and the amount of donation was paid to non eligible institutions in pursuance of business needs of the assessee and merely because the same was not allowed to the assessee, penalty cannot be imposed by alleging that the assessee furnished inaccurate particulars of income or concealed particulars of its income.

8. On the issue of depreciation, the ld. AR pointed out that disallowance of depreciation as per the assessment order was on the basis of arithmetical error in calculation of deprecation and

arithmetical error of calculating of deprecation for full year instead of six months cannot be said to be concealment of income and furnishing of inaccurate particulars of income and hence penalty on this count cannot be imposed.

9. On the issue of deduction, which was claimed by the assessee company on account of VAT paid to the Sales tax department, the ld. AR submitted that provisions of section 43B of the Act make the assessee entitled to claim the said deduction. The auditor of the assessee company in his tax audit report issued u/s 44AB of the Act specifically gives a note on the subject matter, which is available in Form 3CD. The said amount was disallowed by the ld. AO without considering the provisions of law whereas the assessee company placed on record the complete details of statutory payment made to Sales tax department which is also available on the record of the AO. The ld. AR vehemently pointed out that when all the details of payments of VAT has been disclosed in Form 3CD report, then the allegation of concealment of particulars of income or furnishing of inaccurate particulars of income cannot be levelled against the assessee.

10. Replying to the above, the ld. DR strongly supported the penalty order as well as the impugned order of the CIT(A) and

contended that the assessee has been unable to justify its claim of filing of wrong particulars of income on all three counts and it is not a case of bonafide mistake on the part of the assessee. The ld. DR vehemently pointed out that the assessee has filed inaccurate particulars of income, therefore, intention of the assessee was to evade tax and mens rea therein are clearly established. Therefore, the AO was correct in imposing penalty which was rightly upheld by the CIT(A).

11. On careful consideration of the above rival submissions, on the issue of donation, we note that neither the assessee nor the CIT(A) has brought out any fact that the claim of the assessee towards donation was bogus or not correct. We further observe that merely because the claim of donation was dismissed by the AO on account of non eligibility and non registration of recipient done u/s 80G of the Act, it cannot be said that the assessee concealed its particulars of income or furnished inaccurate particulars of income on this count. Further, on the issue of excess claim of deprecation, we are satisfied that the disallowance of depreciation has been made by the AO on the basis of arithmetical error in the calculation of deprecation which leads to disallowance cannot be said to be concealment of income of filing of inaccurate particulars of income and on this count penalty u/s 271(1)(c) of the Act cannot be imposed.

12. On the issue of deduction of Rs. 1,83,409/-, the claim of the assessee on account of VAT paid to Sales tax department, the ld. DR could not controvert this fact that the assessee furnished all details on this issue in the report in Form 3CD and statutory payment made to Sales tax department which was disallowed on technical grounds cannot be held as basis of imposing penalty u/s 271(1)(c) of the Act as there is no allegation by the AO that the said claim is bogus or baseless and it is also not the case of the AO that the assessee has not paid VAT to the Sales tax department.

13. Before we consider the factual matrix of this case to ascertain as to whether in the eyes of the provisions of the Act as explained by numerous judicial pronouncements, penalty can be levied in this case or not, we would like to discuss in nut shell the relevant legal position regarding levy of penalty u/s 271(1)(c) of the Act and as to how and when such penalty can be levied under this section. There are no two opinions about the settled position of law that regular assessment proceedings and penalty proceedings are two entirely different subjects which operate in distinct and separate spheres so much so that entirely different parameters are applicable for making quantum addition and for levying penalty under section 271(1)(c) of the Act. There can be no dispute with regard to the position of law that under section 271(1)(c) penalty can be levied only if either the act of "concealment of particulars of income" or "furnishing of inaccurate particulars of income" is found to have been committed by the assessee. These are two different omissions or defaults albeit they refer to

deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of either suppressio veri or suggestio falsy. By the mere reason of such concealment or of furnishing of inaccurate particulars alone, the assessee does not, ipso facto, become liable to a penalty. Imposition of penalty is not at all automatic. Meaning thereby, any addition in quantum would not lead to automatic levy of penalty and this is also true in respect of furnishing of inaccurate particulars of income. Not only is the levy of penalty discretionary in nature but the discretion has to be exercised keeping the relevant factors in mind and the approach of the taxman must be fair and objective. This subject has been a matter of great controversy. Finally, after referring to the decisions in the case of Dilip N. Shroff vs JCIT & Another, 291 ITR 519, Union of India vs. Dharmendra Textile Processors [2008] 13 SCC 369, as well as Union of India vs Rajasthan Spg. & Wvg. Mills [2009] 13 SCC 448, the Hon'ble Supreme Court in the case of CIT vs Reliance Petroproducts Pvt. Ltd, 322 ITR 158, has recently held as under:

> "A glance at the provisions of section 271(1)(c) of the Income-tax Act, 1961, suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty

provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

14. Reverting to the above noted facts and circumstances of the case, we are satisfied that the penalty u/s 271(1)(c) of the Act on the issue of VAT paid to the Sales tax department and disallowed by the AO cannot be imposed and thus explanation of the assessee in this regard cannot be brushed aside at the threshold and action of the AO and impugned order on this issue is not sustainable. On the basis of foregoing discussion, to reach to a logical conclusion that the CIT(A) did not provide due opportunity of being heard to the assessee and passed an order without proper adjudication and she simply upheld the penalty order which is not a proper and justified approach of a first appellate authority.

15. On merits, as per discussion in the earlier part of this order, we are inclined to hold that the penalty imposed by the AO u/s 271(1)(c) of the Act and upheld by the CIT(A) is not sustainable on all the three counts and thus we demolish the same and the AO is directed to delete the entire penalty.

16. In the result, the appeal of the assessee stands allowed.

The order is pronounced in the open court on 18.07.2016.

Sd/-	**Sd/-**
(G.D. AGARWAL)	**(C.M. GARG)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 18th July, 2016.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi