

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Before S/Shri B.R. Baskaran (AM) & Sandeep Gosain (JM)

I.T.A. No. 2826/Mum/2016
(Assessment Year 2006-07)

M/s. Bermaco Energy System Limited D-73,/1, TTC Industrial Area, MIDC Turbhe Navi Mumbai-400 705. (Appellant)	Vs.	ACIT Central Circle-47 Mumbai. (Respondent)
--	-----	---

PAN No. AAACB2727N

Assessee by	Shri J.P. Bairagra
Department by	Shri Jagdish P. Jangid
Date of Hearing	16.5.2017
Date of Pronouncement	16.5.2017

O R D E R

Per B.R. Baskaran (AM) :-

The appeal filed by the assessee is directed against the order dated 23.2.2016 passed by the learned CIT(A)-47, Mumbai confirming the penalty of Rs 16.71 lakhs levied by the Assessing Officer u/s. 271(1)(c) of the Act for A.Y. 2006-07.

2. Facts relating to the issue are stated in brief. The assessee-company is engaged in the business of undertaking turnkey project work and consultancy work in power projects. The Assessing Officer noticed that the assessee has claimed a sum of ₹ 49.65 lakhs as debts written off. The assessee explained that its one of the co-promoters of the power project in Punjab which was undertaken by a business associate M/s. Jalkheri Power Private Limited (in short JPPL). It was submitted that the assessee have been incurring expenditure in respect of new venture from A.Y. 2001-02 onwards. The assessee incurred expenditure by way of salary, travelling, telephone, rent,

professional charges etc. to the tune of ₹ 69.24 lakhs. However, due to dispute with Punjab State Electricity Board, project was finally abandoned by JPPL. The expenditure incurred by the assessee could not be fully recovered i.e. as against aggregate ₹ 69.24 lakhs, the assessee could recover only ₹ 21 lakhs and hence balance amount of ₹ 48.24 lakhs was written off during the year under consideration. The Assessing Officer took the view that the assessee's claim could not be allowed u/s. 36(1)(vii) of the Act as the assessee did not satisfy the condition prescribed u/s. 36(2) of the Act. The Assessing Officer also observed that the assessee did not furnish agreement for the formation of joint venture with JPPL. In any case joint venture is separate entity and hence loss suffered by joint venture cannot be claimed by the assessee. Accordingly, he disallowed the entire claim of ₹ 49.65 lakhs. The said disallowance was confirmed by the learned CIT(A) as well as ITAT. The Assessing Officer levied penalty of ₹ 16.71 lakhs on the above said disallowance on account of filing of inaccurate particulars of income and thereby concealing income. Penalty so levied by the Assessing Officer was confirmed by the learned CIT(A) by following decision rendered by the Coordinate Bench in the case of Clariant Chemicals India Ltd. Vs. ACIT (25 Taxmann.com 83), wherein it was held that where the assessee was unable to produce evidence to substantiate its claim of having incurred expenditure eligible for deduction u/s. 35 of the Act, disallowance would lead to penalty. Aggrieved, the assessee has filed this appeal.

3. Learned AR submitted that the assessee initially did not furnish relevant details before the Assessing Officer during the course of assessment proceedings. However, all the details relating to the claim were furnished before the AO during the course of penalty proceedings. Ignoring those details, the Assessing Officer has observed in the penalty order that the assessee did not furnish any explanation. Before the learned CIT(A), the assessee furnished copy of letter dated 30.1.2014, which was filed before the Assessing Officer during the course of penalty proceedings. He further submitted that the assessee is engaged in trading activities and engaged in providing services

relating to the projects. He submitted that the assessee has entered into a joint venture along with JPPL for executing power projects in Punjab and he same may also be taken as extension of activities already carried on by the assessee. The expenses incurred by the assessee on behalf of the joint venture are part of investments made by the assessee in extension of its business activities. Since the project became unviable and the investment could not be recovered, it has claimed the same as revenue expenditure. Accordingly he submitted that the claim made by the assessee cannot be considered totally not possible claim. He further submitted that the assessee has furnished all the details relating to the claim and hence the same cannot be considered as a case of furnishing inaccurate particulars of income. Learned AR placed reliance on the following case law to substantiate its contention that mere disallowance of claim of the assessee would not lead to furnishing of inaccurate particulars of income.

- (a) Reliance Petro Products Pvt. Ltd. (322 ITR 158)(SC)
- (b) Narayan C. Shah Vs. ITO (386 ITR 304)(Gujarat)
- (c) Narangs International Hotels (P) Ltd. Vs. DCIT (137 ITD 53)(Del)
- (d) CIT Vs. S.M. Construction (233 Taxman 263) (Bom)

4. Learned AR submitted that the assessee has also furnished explanation before the Assessing Officer but the Assessing Officer has failed to consider those explanations and the learned CIT(A) has also failed to find any fault with the explanation filed by the assessee. He further submitted that the reliance placed by the learned CIT(A) in the case of Clariant Chemicals India Ltd. (supra) is not correct as the assessee in the instant case has furnished all the details during the course of penalty proceedings. Learned AR further submitted that the Tribunal, during the course of quantum proceedings, refused to admit additional evidences furnished by the assessee and hence disallowance of expenditure was confirmed by the Tribunal by holding the same as capital in nature. He submitted that the penalty proceedings being a

separate proceeding, impugned penalty is liable to be deleted for detailed submissions made by him (supra)

5. On the contrary, learned Departmental Representative submitted that the assessee has claimed expenditure which is not related to its business activities and further the assessee has failed to satisfy the condition to claim the same as bad debts u/s. 36(1)(vii) of the Act. The disallowance made by the Assessing Officer has also been confirmed by Hon'ble ITAT. Accordingly he submitted that the learned CIT(A) was justified in confirming the penalty levied by the Assessing Officer.

6. We have heard the rival contentions and perused the record. The undisputed fact is that the assessee, along with another concern named JPPL has started energy business in the State of Punjab as a joint venture project. The assessee has incurred certain expenditure aggregating to ₹ 69.24 lakhs in connection with the above said business, since as a joint venture partner it has to infuse funds to execute the project. It was submitted that the Punjab Electricity Regulations has provided for payment of tariff ₹ 4.10, but the same was subsequently reduced to ₹ 3.01 by the Electricity Board and hence energy business became unviable. Hence the assessee decided to exit from the consortium of joint venture. After the exit, the assessee could recover only ₹ 21 lakhs from the consortium as it was also not having funds. It is also pertinent to note that the assessee had incurred these expenditure during the A.Y. 2001-02 to 2003-04 and finally decided to write off during the A.Y. 2006-07, as prospects were recovering the balance amount was not there. We noticed that the assessee initially did not furnish relevant details before the Assessing Officer during the course of assessment proceeding. However, during the course of penalty proceedings, the assessee has furnished details vide its letter dated 30.1.2014. However, the Assessing Officer without taking cognizance of the letter has proceeded to levy penalty by stating that the assessee has furnished inaccurate particulars of income and thereby concealed income.

7. It is the contention of the assessee that all the details relating to the impugned write off has been furnished before the Assessing Officer during the course of penalty proceedings. Further the expenditure incurred by the assessee on behalf of the joint venture were in the nature of revenue expenses like salary, travelling expenses, telephone expenses, professional charges, staff quarters rent and other expenses. It was also submitted that the assessee has already engaged in the trading activities as well as in the power projects consultancy and hence energy business may also be considered as an extension of its existing business activities and on that count, above said expenditure are allowable as revenue expenses in its hands. Even though the ITAT has taken the view that these expenditures are capital in nature, the Ld A.R. contended that the same is one of the possible views. It is the contention of the assessee that it has furnished all the details relating to the claim and said claim came to be disallowed by the Assessing Officer as well as ITAT in view of a particular view taken by them, i.e., the AO has taken the view that the expenditure is allowable in the hands of the JV and not in the assessee's hand, while the ITAT has taken the view that it is a capital expenditure. He further submitted that the ITAT has decided against the assessee without admitting additional evidences filed before it. Accordingly it was submitted that mere disallowance of claim would not result in levying of penalty.

8. In case of Reliance Petro Products Pvt. Ltd. (supra), the assessee claimed interest expenditure, which came to be disallowed as the concerned loan was used to purchase IPL shares by way of its business policy. Since the assessee did not earn any income by way of dividend, the Assessing Officer disallowed the interest expenditure and levied penalty thereon. The Hon'ble Supreme Court noticed that the assessee has furnished all the details relating to expenses in its return of income which were not found to be inaccurate. It was further observed that merely because the assessee had claimed expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not attract penalty u/s. 271(1)(c) of the Act.

9. The Hon'ble Gujarat High Court in the case of Narayan C. Shah (supra) has also held that merely submitting an incorrect claim in law for the expenditure would not amount to furnishing inaccurate particulars of income.

10. The Third Member Bench of Mumbai Tribunal had also taken an identical view in the case of Narangs International Hotels (P) Ltd. (supra), wherein the assessee's claim for deduction of expenditure was rejected on the ground that it was a capital expenditure. It was held that since the assessee had made proper disclosure of facts material to claim in question, there was no concealment of particulars of income or furnishing of inaccurate particulars of income so as to attract penalty u/s. 271(1)(c) of the Act.

11. In the case of S.M. Construction (supra), the assessee entered into a development agreement with the owner of land at Pune after paying consideration of ₹ 54 lakhs. When the owner of the land cancelled the agreement, he paid the assessee a sum of ₹ 1.65 crores including amount of ₹ 54 lakhs originally paid by the assessee. Thus there was a surplus of ₹ 1.00 crore. The assessee did not offer the same as income on the plea that the amount received by him is capital receipt and the same was also not chargeable to tax as capital gain. The Assessing Officer did not accept the contention of the assessee and assessed the receipt, after allowing expenses, as capital gains. The learned CIT(A) also confirmed the order passed by the Assessing Officer and the assessee also accepted the order of the learned CIT(A) by not preferring the appeal before the Tribunal. Subsequently, the Assessing Officer levied penalty but the same was deleted by the learned CIT(A) by holding that the assessee has disclosed receipt of the amount of ₹ 1.11 crores and the claim unsustainable in law would not amount to furnishing of inaccurate particulars. The order passed by the Commissioner (Appeals) was upheld by the Tribunal. Under these of facts, Hon'ble Jurisdictional Bombay High Court upheld the order passed by the Tribunal by observing that there

has been complete disclosure of facts and further the claim made by the assessee was found to be not bonafide.

12. In the instant case also, we notice that the assessee has furnished all the details and claim made by the assessee, in our view, cannot be considered to be not bonafide, i.e., it was one of the possible claims. Further the assessee has offered explanation before the tax authorities and the same was not found to be false. Under these set of facts, we are of the view that the impugned penalty is not sustainable. Accordingly, we set aside the order passed by the learned CIT(A) and direct the Assessing Officer to delete the penalty.

13. Learned AR also urged many legal contentions. Since we have deleted the penalty on merit, we do not find it necessary to adjudicate them.

14. In the result, appeal filed by the assessee is allowed.

Order has been pronounced in the Court on 16.5.2017.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 16/5/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai

PS