

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

**BEFORE SHRI R.C.SHARMA, AM
&**

SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No.5405/Mum/2015

(निर्धारण वर्ष / Assessment Year :2005-2006)

M/s Richline Leasing and Finance Pvt. Ltd., Room No.9-10, Brijwasi Mansion, Dadi Seth Agiary Lane, 6, Navi Wadi, Mumbai-400002	Vs.	ITO-4(3)(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACR 2114 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Vijay Mehta

राजस्व की ओर से /Revenue by : Shri Randhir Gupta

सुनवाई की तारीख / Date of Hearing : **28/07/2016**

घोषणा की तारीख/Date of Pronouncement **21/09/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A), Mumbai, for the assessment year 2005-2006, in the matter of imposition of penalty u/s.271(1)(c) of I.T.Act.

2. In this appeal assessee is aggrieved for levying penalty by disallowing sub-brokerage payment made by the assessee.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is a sub-broker of M/s Caprilloy Polymers Pvt. Ltd., which is a member of National Stock Exchange and is engaged in the business of share broking. During the course of scrutiny assessment payment made to sub-broker was disallowed and penalty was levied u/s.271(1)(c) for the disallowance so made. The AO also did not accept

short term capital gain of assessee amounting to Rs.1,99,097/-. However, no penalty was levied for non-accepting short term capital gain. By the impugned order the CIT(A) confirmed the action of AO, against which assessee is in further appeal before us.

4. It was contended by Id. AR that there was no concealment of income or furnishing of inaccurate particulars so as to invoke penal provisions under section 271(1)(c) of the Act in respect of the disallowance so made. It was further contended that the assessee during the course of the assessment proceedings, submitted all the relevant documents and details in order to substantiate the genuineness of the transactions entered into by it with M/s. Regina Investment & Trading Pvt. Ltd. and other sub brokers amounting to Rs. 74,15,000. Further, there has been no subsequent search / survey action or discovery of any incriminating material/ confessional statement in case of the assessee or the sub-brokers that indicates that the amounts paid by the assessee towards sub-brokerage were not genuine. In spite of non-availability of any solid material to back his contention, the learned AO proceeded to disallow the sub-brokerage expense claimed by the appellant contending it to be non-genuine and bogus. Our attention was invited to the order passed by Tribunal in the first round, wherein matter was restored back to the file of AO vide order dated 25-4-2012 and it was contended that if the evidences were sufficient to confirm the disallowance in the original proceedings, the Hon'ble IT AT vide its order dated 25.04.2012 would not have set aside the matter to the AO for further examination. Hence, if

enough evidence was not available to the satisfaction of the ITAT for confirming the quantum order, penalty under section 271(1)(c) of the Act cannot be confirmed based on the same material available on record. The above contention. is supported by the fact that no new facts were found nor any new line of enquiry was done by the AO during the set aside proceedings. He further contended that the A.O., without giving any weightage to the assessee's contentions and examining various documents submitted during the course of assessment proceedings, erred in making disallowance of sub-brokerage expense. As per Id. AR following are some of the noticeable facts which bring out the genuineness of the assessee's case that remains unconsidered by the learned AO:

- Clear business expediency for entering into the transaction.
- Confirmations of parties regarding provision of services.
- Bank Statements reflecting the payments.
- Normal trade practice of paying sub-brokerage.

5. On the other hand it was contended by Id. DR that assessee could not substantiate genuineness of the payment so made to the sub-broker, therefore, the AO was justified in levying penalty u/s.27(1)(c) of the Act by disallowing the same.

6. We have considered rival contentions, carefully gone through the order of authorities below and found from the record that documents placed on record clearly establish the identity of the brokers and the receipt of sub-brokerage. Also, the parties to whom sub-brokerage has been paid have explicitly confirmed the provision of sub-brokerage services to the assessee. The Revenue has no evidence to substantiate

its claim regarding the alleged suspicion of the sub-brokerage expenses claimed by the assessee. Furthermore, ITAT in its order dated 25-4-2012 had clearly observed and stated that the appellant company has furnished all the relevant bank accounts of the payee parties during the course of the assessment proceedings, which remains unexamined by the learned A.O. before making the said disallowance. Relevant extract of the said order is reproduced hereunder

... 19. After hearing both the sides and perusing the material available on record and in absence of any distinguishing feature brought on record by the parties, and keeping in view of our findings recorded in paras 11 to 13 of this order, we set aside the issue to the file of the A.D. to decide the same afresh in the light of our above observations mentioned therein and according to law after providing reasonable opportunity of being heard to the appellant. The ground taken by the appellant is therefore partly allowed for statistical purpose."

The findings of the Hon'ble ITAT recorded in paras 11 to 13, as mentioned in para 19 above, are reproduced as under :-

" ... 11. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that there is no dispute that the appellant has filed relevant documentary evidence to prove that the payment of sub-brokerage of Rs. 35 lacs was made by him to M/s Surasik Services Ltd. However, the same was denied by M/s Surasik Services Ltd. We further find that in support of its claim, the appellant has also filed relevant bank account showing the clearance of the cheques by the said party. The A.D. without examining the material evidence i.e. the bank account of the said party or other relevant material has made the disallowance which the Id. CIT(A) has also confirmed.

12. In appellant's own case in ITA No. 2435/Mum/2008 order dated 30.3.2009 for AY. 2004-05 the Tribunal on the issue of disallowance of sub-brokerage of Rs. 1,35,66,000/- paid to Larite Industries Ltd. while observing that the case was not properly examined by the Revenue and it requires a fresh adjudication has set aside the issue to the file of the A O.

13. Since the issue needs further examination at the end of the A.O., and keeping in view the order of the Tribunal in appellant's own case (supra) we are of the view that the matter should go back

to the file of the AO. and accordingly we set aside the orders passed by the Revenue Authorities on this account and send back the matter to the file of the AO. to decide the same afresh in the light of our observations hereinabove and in accordance with law after providing reasonable opportunity of being heard to the appellant. The ground taken by the appellant is, therefore, partly allowed for statistical.”

It is clear from the above order of ITAT that the matter has been restored back to the file of AO with the clear direction that the bank statements and other issues, which remained unobserved during the course of assessment proceedings and required fresh adjudication, be properly examined again by the learned AO before passing any judgment. However, it is evident that the learned AO had passed the order disregarding the directions of the Hon'ble ITAT and refused to analyze facts of the case in light of the appellate authorities, similar to the assessment proceedings.

7. Now, coming to the merit of the penalty, we found that the parties to whom the sub-brokerage was paid were not associated to the assessee in any way, therefore, the possibility of any collusion by the assessee with the said parties to evade the payment of taxes has to be disregarded. Also, it would not be out of place to state that unless there is some benefit element involved or there is receipt of some substantial services, no prudent businessman would outgo any sizable quantum of money to a third party.

8. We also found that assessee has made payment to the sub-brokers through the normal banking channel. The same can be evidenced by the copy of bank statements submitted by the assessee during the course of

assessment proceedings to the learned A.O. The said bank statements also indicate that the amount of sub-brokerage had been paid from their bank account. Further, the bank statement also affirms the validity of the payment by the assessee towards sub-brokerage. Hence, the same is an outgo which can be validly claimed as an expense for the purposes of computing the taxable income of the assessee. There is neither allegation nor any evidence on record that the assessee has received back the cash from the parties to whom sub-brokerage has been paid. The above aspects make the levy of penalty unjust and liable to be quashed. Merely on the plea that payee party have not replied to the queries made after a period of 10 years or more, cannot be made a reason to hold that transaction was not genuine. There is no positive evidence relied on by the A.O. to make the disallowance. Reliance has been placed on the judgment pronounced by the Hon'ble Supreme Court of India in the case of Commissioner Of Income-Tax, Orissa vs Orissa Corporation (P) Ltd on 19 March, 1986 wherein the Hon'ble Supreme Court relied on its decision in the case of Messrs. Lalchand Bhagat Ambica Ram vs The Commissioner Of Income-Tax, Bihar and Orissa [37 ITR 288]. Relevant extract the said judgement relied upon by the Supreme Court is reproduced as under:

"This Court was concerned there with the encashment of high denomination notes. In that case some unexplained high denomination notes were treated as the undisclosed income of the appellant. This Court held that when a court of fact arrives at its decision by considering material which is irrelevant to the enquiry, or act on material, partly relevant and partly irrelevant, and it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its decision, a

question of law arises, whether the finding of the court is not vitiated by reason of its having relied upon conjectures, surmises and suspicions not supported by any evidence on record or partly upon evidence and partly upon inadmissible material. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises, nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures and surmises"

From the above judgement of the Hon'ble Supreme Court, it can be concluded that mere suspicions, surmises and 'no evidence' should not form basis for adjudicating any matter where strong evidence against the assessee is not available with the Revenue. In the instant case, the assessee has been able to substantiate its transactions with the payee parties and has also provided confirmations. The Revenue, on the other hand, has no evidence to substantiate its claim as regards the alleged dubiousness of the appellant's sub-brokerage expenses.

9. In view of the above discussion, we do not find any merit for the penalty so imposed by AO.

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

Order pronounced in the open court on this 21/09/ 2016.

Sd/-

SANDEEP GOSAIN

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 21/09/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

Sd/-

R.C.SHARMA

लेखा सदस्य / ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /
ITAT, Mumbai