

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, A, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "A", MUMBAI**

**Before Shri Mahavir Singh, Judicial Member, and  
Shri Ashwani Taneja, Accountant Member**

**ITA No.2486/Mum/2014  
Assessment Year: 2005-06**

ALD Automotive Pvt. Ltd. 3 <sup>rd</sup> Floor, Wing B, Commercial I Office Tower, Kohinoor City, Kirol Road, Kurla -(W) Mumbai-400070	<b>बनाम/ Vs.</b>	DCIT Circle 3(1), 6 <sup>th</sup> Floor, Aayakar Bhavan, Mumbai-
(Appellant)		(Respondent )
P.A. No.AAFCA0924K		

Appellant by	Shri B.M. Agarwal (AR)
Revenue by	Shri M.V. Rajguru (DR)
सुनवाई की तारीख/ <b>Date of Hearing:</b>	<b>28/11/2016</b>
आदेश की तारीख / <b>Date of Order:</b>	<b>15/12/2016</b>

**आदेश / O R D E R**

**Per Ashwani Taneja (Accountant Member):**

This appeal has been filed by the Assessee against order of Ld. Commissioner of Income Tax(Appeals), Mumbai-5 (in short 'CIT(A)'), dated 25.02.2014 passed against penalty order u/s 271(1)(c) of the Act, dated 25.02.2013 for Assessment Year 2005-06 on the following Grounds:

*"1. The Learned Assessing Officer (Dy. Commissioner of Income Tax, Circle 3(1), Mumbai) has erred in levying penalty of Rs.13,07,785/- u/s 271(1)(c) of the Income Tax*

*Act, 1961 and further the Learned Commissioner of Income Tax (Appeals)-5 has also erred in confirming the penalty levied by the Assessing Officer.”*

**2.** During the course of hearing, arguments were made by Shri B.P. Agarwal, Authorised Representatives (AR) on behalf of the Assessee and by Shri M.V. Rajguru, Departmental Representative (CIT-DR) on behalf of the Revenue.

**3.** The brief background is that the assessee company was incorporated for carrying out the business as operators of carriers, transport vehicles, agricultural vehicles and other vehicles. During the course of assessment proceedings, it was noted by the AO that profit and loss account of the company reflected that no income was earned during the year. Accordingly, the AO gave a show cause notice to the assessee for disallowing entire expenses in absence of commencement of business. In response, the assessee submitted to the AO vide its letter dated 12.12.2007 as under:

*“The assessee company was incorporated on 11-02-2005. The company was set to carry on the business of providing operational lease to customers with regard to the vehicles as per their requirements. There is a clear distinction between commencement of business and setting up of the business. The question as to when business can be said to have been set up anti commenced will depend on facts and surrounding circumstances of each case and not on the accounting treatment in the books of account of the assessee. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organization then it can be said the at the unit has been set up. The assessee can he said to have set up its business from the date when one of the essential categories of its business activities is started and it is not necessary that all categories of its business activities must start either simultaneously or that the last stage must start before it can be said the business was set up”.*

**3.1.** The AO considered the submissions of the assessee but found the same as unacceptable. It was held by him that no business was done by the assessee during the year, therefore entire expenses were disallowed. The assessee had filed return at loss of Rs.36,63,262/- which was converted into nil by the AO by disallowing entire expenses claimed in the Profit & Loss Account. The matter reached up to Tribunal where the disallowance made by the AO was confirmed.

**3.2.** Subsequently, the penalty proceeding were initiated by the AO u/s 271(1)(c). The assessee was asked to justify, why penalty should not be levied. In response the assessee explained to the AO vide its letter dated 23.01.2013 as under:

*“(a) The assessee company was incorporated in February, 2005. The necessary infrastructure was put in place by acquiring office premises, staff, furniture and fittings etc. A whole time Director was also appointed.*

*(b) The assessee company therefore contended that as the company was entirely set up during the previous year and hence the expenses incurred after its setting up are entirely allowable under the Act and accordingly claimed.*

*(c) It is well settled that for the purpose of allowance of any expenses u/s 37 of the Act, it is not necessary that the assessee should have earned income out of such activity.*

*(d) It had already started the business, only because any sales could not be received, it cannot be considered that no business was started. The assessee placed reliance on various case laws including the following contending that where the expenses were not allowed by holding that there was no business activity, the same cannot automatically lead to the view of concealment/ furnishing of inaccurate particulars for penalty u/s.271(1)(c) of the Act.*

*(e) It is a settled law that in case of bonafide claims or rejection of claims no penalty can be levied despite the fact that wherever there is difference between returned income and assessed income, the presumption is raised against assessee for concealment of income or furnishing inaccurate particulars of income.*

*(f) Penalty cannot be levied merely because the assessee's explanation was not accepted, whereas all the facts and the materials relevant to computation of income were before the AO.*

*(g) Reliance is placed by the assessee company on various judicial pronouncements in support of its above contentions including the case of Reliance Petroproducts Pvt. Ltd.”*

**3.3.** But, the AO was not satisfied with the submissions of the assessee. It was observed by him that entire facts and circumstances of the case suggest that neither the business of the assessee was set up nor it was commenced. Thus, the assessee was not justified in claiming the expenses, therefore, the expenses claimed by the assessee cannot be said to be for the purpose of business of the assessee, therefore, the assessee was wrong in claiming the impugned expenses under the head of business. It was held by him that under these circumstances, it cannot be said that the assessee made legal or bonafide claim. Under these circumstances, penalty was levied by him @ 100% of the 'tax sought to be evaded' upon the disallowance of Rs.36,63,262/- amounting to Rs.13,07,785/-.

**3.4.** In the appeal before the Ld. CIT(A), the assessee submitted in detail that the assessee had started its business on 11.02.2005. The company had appointed its managing director Mr. K. Sugit Reddy, who was Chartered Accountant by profession. He was a professional employee and did not own any ownership in the company. The company incurred

expenses on salary of its employee which included fee for his children as per terms of the employment, the rent of office premises, brokerage for office taken on rent, legal and professional fee, printing & stationary and motor expenses for the purpose of business of the company. The assessee had made all the requisite arrangements to cater to its customers. Thus, in the view of the same, though business of the assessee was set up, but could not be commended for want of orders from the customers. But, as per law expenses are allowable immediately after the setting up of business. Therefore, these expenses were claimed in the profit and loss account and in the return under the head business. Thus, the claim of the assessee was made in bonafide manner and full disclosure was made in the profit and loss account. Nothing in-genuine or bogus or false could be discovered by the lower authorities. Under these circumstances, no penalty was leviable, therefore penalty should be deleted. But, Ld. CIT(A) was not satisfied and he endorsed the action of the AO by confirming the penalty.

**4.5.** During the course of hearing before us, Ld. Counsel vehemently opposed the levy of penalty. He reiterated the submissions made before the Ld. CIT(A) in detail. Our attention was also drawn on the evidences enclosed in the paper book comprising of Board Resolution for appointment of managing director of the company and Form No.16 issued to the managing director who was employee of the company. Our attention was also drawn upon the list containing names and particulars of employees who were appointed in the impugned

year as well as in the subsequent year. Our attention was also drawn on the facts that company had earned income in all the subsequent years. It was submitted that the claim was made by the assessee in bonafide manner making full disclosure and noting false or bogus has been found by the lower authorities. It was requested that under these circumstances, levy of penalty was not justified.

**4.6.** We have gone through the facts and circumstances of the case. It is noted by us that expenses were claimed by the assessee in the profit and loss account which were disallowed by the AO on the ground that business was not commenced. Our attention was drawn on the facts that AO has not found any expenses as in-genuine or false or bogus. The assessee claimed the expenditure in the profit & loss account under this belief that the business of the assessee had been set up even if it was not yet commenced and accordingly expenses were claimed in the return since as per law expenses are allowable immediately after the setting up of the business. But, as per the AO the business was not even set up and therefore he disallowed the expenses.

**4.7.** Under these circumstances, we need to examine whether the belief of the assessee was based upon some material or it was wholly unfounded and devoid of any logic. In the facts brought before us it has been demonstrated by the assessee that the assessee had appointed its managing director and other employees in the impugned year itself. In the immediately subsequent year, the assessee had employed 25 employees and also made huge income as is evident from the

profit and loss account of A.Y. 2006-07. The assessee claimed that it was ready to cater to its customers in F.Y. ending 31.03.2005 (i.e. A.Y. 2005-06), but in absence of any order from the customers, no revenue could be earned. The claim of the assessee cannot be said to be without any basis. Under these circumstances, the view adopted by the assessee that its business was set up cannot be said to be devoid of any *bonafide* belief. As per AO, assessee's claim of set up of business in A.Y. 2005-06 remained unsubstantiated therefore, it was rejected by him. But, it is noted that the AO was also not able to disprove the claim of the assessee. The possibility of the claim of the assessee being correct cannot be totally ruled out. Under these circumstances, it can certainly be said that the claim of the assessee was not disproved by the AO. Further, it is noted from the order of the Tribunal dated 17.04.2014 passed in the quantum proceedings that it was found by the Tribunal after analyzing all the facts and circumstances of the case that assessee's case was unsubstantiated and unproved.

**4.8.** Apart from that, it is further noted by us that full particulars of expenses claimed have been furnished. Nothing has been brought on record by the AO indicating if any expense was bogus or false. Thus, taking into account, all the facts and circumstances of the case, we find that the judgment of Hon'ble Supreme Court in the case of **CIT v. Reliance Petroproduct Pvt. Ltd. 322 ITR 158** would be fully applicable on the facts of this case. The relevant part of observation of Hon'ble Supreme Court is reproduced as under:

*“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 u/s 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount of furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.”*

**4.9.** Coming back to the facts of the case before us, it may be noted that though the claim of expenses made by the assessee has been found to be not sustainable by the AO, but without bringing anything on record to show whether any inaccurate particulars were filed by the assessee or if any concealment was done by the assessee. Rather, in the given facts and circumstances, it can be said that the claim of the assessee was *bonafide*. Under these circumstances, we do not find it to be a fit case for levy of penalty. Thus, the penalty levied by the AO is directed to be deleted.

**5.** In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 15<sup>th</sup> December, 2016.

Sd/-  
(Mahavir Singh )

Sd/-  
(Ashwani Taneja)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 15/12/2016

*Patel, P.S.* नि.स.

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**