IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI C.M. GARG: JUDICIAL MEMBER

ITA no. 3469/Del/2011
Asstt. Yr: 2001-02

DCIT, Circle 15(1), New Delhi.	Vs.	Reach Interactive Com. Pvt. Ltd., 7, Local Shopping Centre, Panchsheel Park, New Delhi. PAN: AABCR 9137 R
(Appellant)		(Respondent)

Appellant by : Ms. Kesong Y. Sherpa Sr. DR
Assessee by : None

Date of hearing : 05/05/2016.
Date of order : 10/05/2016.

O R D E R

PER S.V. MEHROTRA, A.M:

This is revenue's appeal assailing the order dated 8.4.2011, passed by the ld. CIT(A)-XVIII, New Delhi in appeal no. 22/10-11, for A.Y. 2001-02, deleting the penalty levied by the AO U/s 271(1)(c) of the I.T. Act.

2. Notice of hearing of the appeal was sent through DR. The ITO, Ward21(1), New Delhi has submitted his report that the notice has been served by affixture. However, none put in appearance on behalf of the assessee at the hearing. Accordingly, we proceed to dispose of the department's appeal, ex parte, qua the assessee, on merits and in that process we have heard ld. DR and perused the record of the case.

3. Brief facts of the case are that the assessee filed its return of income declaring loss of Rs. 99,81,640/- along with audited copies of balance-sheet, P&L A/c. Original assessment was completed u/s 143(3) vide order dated 28.3.2003 at returned loss of Rs. 99,81,640/-. Subsequently, proceedings u/s 263 were taken as it was noticed that the assessee had debited an amount of Rs. 1,49,74,289/- under various heads and shown only nominal income of Rs. 6455/- on account of interest and misc. income. The conclusion drawn was that assessee company was in its pre-operative stage and the expenses claimed were related to pre-operative stage and, accordingly, expenses should have been capitalized. Therefore, proposal was sent to the CIT for cancellation of assessment u/s 263. The CIT, Delhi-V, New Delhi cancelled the assessment made u/s 143(3) vide order dated 30.3.2005 passed u/s 263 of the Act. The AO completed the assessment at Rs. 6445/- in respect of income from interest and bank deposit and misc. income after denying all the expenses claimed by assessee, inter alia, observing that though the assessee had claimed to have commenced its business during the year but no evidence thereof had been brought on record. He further observed that commencement of a website being in question, the assessee could have, at least, provided evidence of uplinking of its website with the server. He observed that no evidence was brought on record to prove conclusively that the assessee had in fact set up its shop on the internet. The AO had initiated penalty proceedings u/s 271(1)(c). In the penalty order the AO has observed that before ld. CIT(A) also the assessee failed to produce any document to show the commencement of the business. He further observed that ITAT vide order dated 17.9.2009 received in the office of Ld. CIT, Delhi-V, New Delhi on 8.1.2010, dismissed the appeal of the assessee for non-prosecution. The AO, therefore, issued show cause notice for imposition of penalty u/s

271(1)(c). The assessee vide its reply dated 21.7.2010, inter alia, submitted that the assessee's company's business had been set up, commenced during FY 2000-01, entire expenditure (as incurred during the year), had been bifurcated into 4 categories:

a. Total expenditure incurred during the said year.
b. Pre-operative expenditure [out of (1) above]
c. Web/software development expenditure [out of (1) above]
d. Balance Revenue expenditure [i.e. (1) less (2) & (3)].

4. The assessee further explained the difference between "setting up" and "commencement of business" and pointed out that when a business is established and is ready to commence business, only then, it can be said that the business has been set up. He pointed out that the AO had confused this issue in his order, where he specifically says "the decision relied upon by the assessee company to the effect that the expenditure on purchase of software or as the case may be, acquiring a right to use is of revenue nature, does not hold good for the reason that the question of allowability of expenditure comes only when the business is commenced". The assessee further pointed out that the website of the company, namely, www.ureachus.com got inaugurated on 19.3.2001. The assessee also filed photo copy of advertisement in various news papers for inauguration as well as the bill for advertisement. The assessee further explained various steps taken by it to submit that the assessee company had undertaken various steps and the business had been duly set up and also commenced during the current year. Further, the web-portal had become active during the current financial year. The AO, after considering the assessee's detailed reply, as has been extracted in the penalty order, concluded that the assessee during the course of assessment proceedings u/s 263 and subsequently before the AO could

not prove the commencement of business during the year. He, accordingly, concluded that assessee had furnished inaccurate particulars of its income in the form of claiming allowable expenditure of Rs. 99,88,097/-.

5. Ld. CIT(A) deleted the penalty observing in para 5.2 as under:

> *"5.2 On careful examination of the matter, I find that the appellant's claim, that full details of all expenditure had been provided in the Balance Sheet and the Income Tax Return and the AO has not established the same to be false, cannot be denied. The issue involved is a debatable one as the AO in the original assessment had allowed the expenses in full, after examination of details and specific discussion in the assessment order. Mere confirmation of addition by the CIT(A) cannot be a ground for levy of penalty u/s 271 (1)(c). In this context, I find that the Hon'ble ITAT, Pune in the case of Kanbay Software India (P) Ltd. (2009) 31 SOT 153 after considering the decisions of the Apex Court in Dharmendra Textile Processors 295 ITR 244 (SC) and Dilip N. Shroff 291 ITR 519 (SC) has inter alia held as under:*
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> > "Whether details or information about income deal with factual details of income and this cannot be extended to areas which are subjective , such as status of taxability of an income, admissibility of a deduction and interpretation of law-Held, yes - Whether admission or rejection of a claim is a subjective exercise; whether a claim is accepted or rejected has nothing to do furnishing of inaccurate particulars of income -Held, yes-Whether raising a legal claim , even if it is ultimately found to be legally unacceptable , cannot amount to furnishing inaccurate particulars of income-Held, yes"
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> Further, I find that the decision of the Hon'ble Rajasthan High Court in the case of CIT vs Harshvardhan Chemicals and

Mineral Ltd., 259 ITR 212, as extracted below, would be relevant in this case.

> "While rejecting the application under section 256(1), the Tribunal has considered and reproduced the facts stated in penalty order. The relevant part of the -Tribunal's order reads as under:
>
> "The consistency of the assessee's conduct is further established from the fact that it filed an appeal against the assessment order though it was later not pressed due to there being no tax effect allowed. From the foregoing discussion it follows that such a deduction could be an arguable, controversial or a debatable question. In such a situation the claim could not be said to be false. If this were not so, it would become impossible for any assessee to raise any claims or claim any deductions which are debatable. It is not certainly the intention of the Legislature to make punishable such claims or deductions under section 271 (1)(c), if they are not accepted. Further the total income as per the original and revised computation of the assessee as also after the final assessment, remained the same, namely, Rs. 13, 07,646 so also the income-tax computed by the assessee in both the returns and as computed on the basis of final assessment remained the same, namely, Rs. 6,86,519. In such §- situation, therefore, when no further tax was payable, the question of concealment or computation of the penalty could not arise. The observation and findings of the income-tax authorities to the contrary were, therefore, not right. What is more, since the assessee had paid tax amounting to Rs. 6,90, 000 a

> refund of Rs. 3,481 became payable to it as a result of the final assessment. There is another fact which also required to be noticed, namely, as against the deduction of Rs. 6,73,298, claimed by the assessee on the basis of the original return the total deduction allowed as a result of the final assessment was more, namely, Rs, 10, 17,306_ Therefore, in whatever manner the matter is looked at on the basis of the foregoing facts, it is not possible to uphold the levy of any penalty under section 271 (I)(c) in this case and the assessee can be said to have successfully discharged the burden of proof, which lay on it in terms of the applicable Explanation to section 271 (I)(c). The penalty has, therefore, to be deleted. "
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> The finding of the Tribunal that when the assessee has claimed some amount though that is , in such cases, it cannot be said that the assessee has concealed any income or furnished inaccurate particulars for evasion of the tax. In view of the findings of the Tribunal, no case is made out for interference by this court.

Further, it has been held by the Hon'ble jurisdictional High Court in the case of CIT vs H.M.A. Udyog (P) Ltd. 159 Taxman 394 in the context of revenue vs. capital expenditure, that in case of a debatable issue, even if it was ultimately decided against the assessee, it could not be said that the assessee had attempted to conceal the particulars of his income or furnish inaccurate particulars so as to attract the penal provisions of section 271 (1)(c). I find that the ratio of the above case laws squarely applies to the present appeal. I find that in the penalty order the AO has failed to make out any case of concealment of particulars of income/furnishing of inaccurate particulars of income which could justify levy of

penalty u/s 271 (1)(c). It is pertinent to mention that as held in the case of CIT v. Bagga (K.L.) (1973) 92 ITR 578 (Del.), it is settled law that while levying penalty, it needs to be ensured that the person to be penalized comes fairly and squarely within the language of the statute which makes his act an offence. Further, it is trite law that levy of penalty is not a matter of course or an automatic concomitant of assessment. Considering the facts and plethora of judgments above on the issue, I find that the impugned penalty cannot be sustained. The same is, therefore, deleted."

6. After hearing ld. DR we do not find any reason to interfere with the order of ld. CIT(A), because assessee had furnished all the relevant details in regard to these expenses and the AO in the original assessment had allowed these expenses. Therefore, this was definitely a debatable issue. The department has not been able to point out any particulars furnished by assessee which were inaccurate. Accordingly, order of ld. CIT(A), deleting the penalty in question, is upheld.

7. In the result, revenue's appeal is dismissed.

Order pronouncement in open court on 10/05/2016.

Sd/-	Sd/-
(C.M. GARG)	(S.V. MEHROTRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 10/05/2016.

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.