

आयकर अपीलीय अधिकरण, 'ई' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "E" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं संदीप गोसाई, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Sandeep Gosain, Judicial Member
आयकर अपील सं./ITA No.2655/M/2013, निर्धारण वर्ष/Assessment Year-2009-10

M/s. Star Gold Pvt. Ltd. Mukund M. Chitale & Co. CA 205, Agarwal, Shyamkamal "A" Building, Vile-Parle (E), Mumbai-400 057. PAN:AAICS 3712 N	Vs.	ACIT- Ward-5(3) Mumbai.
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(अपीलार्थी / Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Anil Sathe (AR)

राजस्व की ओर से/ Revenue by : Shri M.M. Utture (DR)

सुनवाई की तारीख/ Date of Hearing : 05-11-2015

घोषणा की तारीख / Date of Pronouncement : 01.01.2016

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order 28.01.2013 of CIT(A)-9, Mumbai the assessee has filed the present appeal.

2. Assessee-company, engaged in the business of providing facilities and infrastructure for business, filed its return of income on 30.09.2009, declaring income at Rs.1.07 Crores. Later on, a revised return of income was filed on 16.08.2010 at total income of Rs. 1.13 Crores. Initially the return was processed u/s.143(1) of the Act. Later on, it was selected for scrutiny. The Assessing Officer(AO) completed the assessment on 08.12.2011, u/s.143(3) of the Act, determining the income of the assessee at Rs.1,66,52,310/-.

3. Effective ground of appeal is about sustaining the penalty levied by the AO u/s.271 (1) (c) of the Act. During the assessment proceedings, the AO found that the assessee had claimed depreciation to the tune of Rs.53.44 lakhs on the land and building, that it had let out the premises on rent, that it had offered rental income of Rs.1.56 Crores and had claimed deduction u/s.24(1) of the Act, that the premises let out and the depreciation claimed was one and the same, that the assessee had offered the rental income under the head business income. He directed the assessee to show cause as to why the claim of depreciation against the income offered under the head House property income should not be disallowed. The assessee did not file any reply. The AO, considering the above facts held that there was no provision under the Act to claim such unwarranted depreciation against the income offered under the head Income From House Property(IFHP), that the assessee was entitled to claim only one deduction from rental income i.e. statutory deduction u/s.24(1) of the Act, that it was not eligible to claim deduction u/s.32 of the Act which fell under the head income from business of profession, that the assessee had claimed deduction u/s.24(1) of the Act, that it was not eligible for deduction available u/s.32 of the Act. The AO disallowed the depreciation of Rs.53,44,627/-, claimed by the assessee and added it to

the total income of the assessee. He also initiated penalty proceedings against the assessee u/s.271(1)(c) of the Act for furnishing inaccurate particulars and concealing the income.

4. In response to the penalty notice the assessee contended that it had shown the rental income under the head IFHP, that it had also rendered additional facilities such as security services, pantry services, that income received from such services was offered under the head business income, that it had claimed depreciation on land and building inadvertently, that it withdrew the claim of depreciation while scrutiny of the case was going on, that it had no intention to misrepresent or conceal the particulars its income. After considering the explanation of the assessee, the AO held that presence of mensrea was not required to be established. He referred to the cases of B.A. Balasubramaniam (236ITR977), Jeevanlal Shah (205ITR244), K P Madhusudan (251 ITR 99), Shree Krishna Trading Company (253 ITR645) Dharmendra Textile Processers and observed that the assessee had filed any appeal against the additions made during the assessment proceedings, that it had admitted its default. Finally, the AO levied a penalty of Rs.18,16,640/- u/s.271(1)(c) of the Act for furnishing inaccurate particulars of income.

5. Aggrieved by the penalty order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, the assessee made the same contentions that were made before the AO during the penalty proceedings. After considering the order of the AO and the submissions of the assessee, he held that the assessee had not disputed that it had furnished inaccurate particulars of income in respect of the admissibility of depreciation claim on land and building, that it had claimed depreciation and deduction u/s.24 of the Act while filing its original return of income, that falsehood in account could take either of the two forms i.e. either an item of receipt could be suppressed fraudulently or an item of expenditure could be falsely claimed, that both were to be taken as concealment of income, that where the assessee itself voluntarily conceded that a particular item of income had been concealed or where inaccurate particulars of income furnished by the assessee in the original return was offered for taxation the AO was justified in levying penalty u/s.271(1)(c) of the Act. He relied upon the cases of Durga Timber Works (79 ITR63), Banaras Chemical Factory (108ITR98), Ayyasami Nadar and bros (30ITR565), India Sea Foods (114ITR124), H.V. Venugopal Chettiar (153ITR376), Western Automobiles (India) (112 ITR1048), Krishna & Co. (120ITR144), P.B. Shah & Co. Pvt. Ltd. (113ITR587), Dr. R.C. Gupta and Co. (122 ITR 567), Mahavir Meta Works (92ITR513), K.P. Madhusudhanan (251ITR99), Union of India & Ors. (306ITR277), Jyoti Lakshman Konkar (292ITR163), Indus Engineering Company (323ITR302), P. Rajaswamy, Raja Jewellers (323ITR527), Rakesh Suri (233CTR184). Finally, he upheld the order of the AO.

6. Before us, the Authorised Representative (AR) contended that assessee was under the bonafide belief that it was entitled to claim depreciation, that it had revised the returns of the earlier years once it came to know about the legal position, that it was an error that was occurred without any intention, that it had not filed any appeal against the addition made in quantum proceedings. He relied upon the cases of reliance Petro products (322 ITR 158) and PWC (348ITR306) and stated that assessee had not filed inaccurate particulars of income. Departmental Representative (DR) argued that cases relied upon the assessee were not applicable to the facts under appeal, that the assessee had made a false claim, that but for the scrutiny the assessee would have not accepted that depreciation was wrongly claimed, that the assessee had filed inaccurate particulars of income. He relied upon the cases of Zoom Communication (327ITR510) and Escort Finance (328ITR44).

7. We have heard the rival submissions and perused the material before us. We find that the assessee. First, we would like to discuss the cases relied upon by the assessee. In the matter of Price Water House Pvt. Ltd. (supra), in the statement, it was indicated that the provision towards payment of gratuity was not allowable, but it claimed a deduction thereon in its return of income. Considering the 'peculiar' and 'somewhat unique' facts of the case, Hon'ble Apex Court held that the tax audit report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under section 40A(7) of the Act, that it indicated that the assessee made a computation error in its return of income, that the contents of the tax audit report suggested that there was no question of the assessee concealing its income or of the assessee furnishing any inaccurate particulars. It was further held that the AO himself had not noticed the error committed by the assessee. In these circumstances, Hon'ble Court reached the conclusion that due to a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. In our opinion, facts of the case under consideration are totally different from the facts of Price Water House Pvt. Ltd. (supra). In that matter error had occurred in filing the return and not in the statement or the audit report. Besides, AO in the present case had found that the claim with regard to depreciation made by the assessee was not an allowable deduction.

In the matter of Reliance Petro-products Pvt. Ltd. (supra) the assessee has duly disclosed about the claim of interest under section 36(1)(iii) and in earlier year claim was allowed. No statement or details supplied by the assessee had been found to be factually incorrect by the AO. Considering the facts of that case Hon'ble Court had deleted the addition. But, in the case before us, a patently wrong claim was made. The assessee had rented out a property and had claimed deduction u/s. 24(1) of the Act. Besides, claiming said deduction, it had also claimed depreciation for the said property. It was only after the query raised by the AO the assessee admitted that it was not entitled for claiming depreciation. Had the AO not cornered the assessee and had the return not been selected for scrutiny it would have got the benefit for which it was not entitled at all. The so called surrender of claim was not voluntary - it was pointed out by the AO and a specific query was raised by him in that regard vide his order sheet noting. Here, we would like to refer to the case of Mak Data delivered by the Hon'ble Delhi High Court (358 ITR 593) wherein the Court has held as under:

"Explanation 1 to section 271(1)(c) of the Income-tax Act, 1961, raises a presumption of concealment, when a difference is noticed by the Assessing Officer, between the reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation has been discharged by him, the onus shifts to the Department to show that the amount in question constituted income and not otherwise.

Voluntary disclosure does not release the assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty. The Assessing Officer should not be carried away by the plea of the assessee such as "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income.

It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The Assessing Officer had recorded a categorical finding that he was satisfied that the assessee had concealed the true particulars of income and was liable for penalty

proceedings under section 271 read with section 274 of the Act. There was no illegality in the Department initiating penalty proceedings.”

We would also like to refer to the judgment of Zoom Communication(supra), cited by the DR. In that matter Hon'ble Delhi High Court has held as under :

“Section 271(1)(c) of the Act, to the extent it is relevant, provides for imposition of penalty in case the Assessing Officer, in the course of any proceedings under the Act, is satisfied that any person had concealed particulars of his income or had furnished inaccurate particulars of such income. Explanation 1 to clause (c) sub-section (1) of section 271 provides that where in respect of any facts material to the computation of the total income of any person, such person fails to offer an explanation or offers an explanation which is found to be false or he offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income, have been disclosed by him, then the amount added or disallowed in computing the total income of such person, as a result thereof, shall for the purpose of clause (c) be deemed to represent the income in respect of which particulars have been concealed. Thus, in case of failure of the assessee to offer any explanation or the explanation furnished by him being found false, penalty may be imposed on him. However, if an explanation is offered by the assessee, mere failure on his part to substantiate it will not be enough to warrant penalty, if the explanation is bona fide and all the facts relating to the same were disclosed by him in the return. Explanation 1 to section 271(1)(c) would be inapplicable in respect of any amount added or disallowed as a result of rejection of the explanation furnished by the assessee, provided that his explanation is shown to be bona fide and all the facts relating to the same and material to the computation of his total income were disclosed by him..... If the explanation is neither substantiated nor shown to be bona fide, Explanation 1 to section 271(1)(c) would come in to play and the assessee will be liable to for the prescribed penalty.

It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bona fide. If the claim besides being incorrect in law is mala fide, Explanation 1 to section 271(1)(c) would come into play and work to the dis-advantage of the assessee. The court cannot overlook the fact that only a small percentage of the income-tax returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it would be difficult to say that he would still not be liable to penalty under section 271(1)(c) of the Act. If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bona fide while making a claim of this nature, that would give a licence to unscrupulous assesseees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self-assessment under section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a mala fide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have.

In the case under consideration, the assessee had made a claim that was wholly untenable and unsustainable. A non-genuine claim and debatable claim are two different concepts. When an unreal thing or untrue fact is projected or presented as true or genuine same is termed to be a bogus claim. Courts are unanimous that for a debatable claim assessee cannot be penalised, but when it makes a bogus claim levy of penalty is justified. Assesseees are expected, rather required,

not only produces evidence, but to produce positive evidence in respect of a claim made. Onus of proving a claim is always on the assessee and they have to be discharge it fully. Mere making of a claim is not sufficient. In the case under consideration, the assessee has failed miserably to substantiate and support claim that depreciation was allowable on a property where a claim u/s.24(1) was already made. The AO and the FAA had found that the assessee had failed to file any bonafide explanation. As far as revising the returns of subsequent years and withdrawing the depreciation claim, we would like to state that the assessee had no option but to withdraw the claim after the AO made inquiry during the year under appeal. By withdrawing the claim it saved itself from penalty proceedings. It was also argued that the assessee was providing services and income from such services was offered under the head income from business and that created confusion and resulted in making a claimed that it thought to be a bona fide claim.

It is sufficient to say that the assessee is not a small-time trader of a muffed place and not having knowledge of taxation laws. It is a corporate assessee and assisted by professionals. Income shown by it was more than Rs.1 Crores. For such an assessee to claim that it was under bonafide belief of claiming depreciation on an asset that was not part of the business asset is nothing but to try to wriggle out of an adverse condition which is creation of its own deeds. The claim made by the assessee under the provisions of a particular section (u/s. 24 as well as u/s. 32) shows that it was aware of the provisions of both the section. Under the Act, the income of an assessee for a particular has to be computed under various heads and all the heads are exclusive. None of the sections can be treated as general or specific for the purpose of computation of income under various heads. In short, the sections of the Act are mutually exclusive and deal with different heads in which an item of income of an assessee falls. They also provide for deduction/exemptions/rebates that can be claimed under particular heads. If the assessee makes a claim to reduce its tax incidence by claiming a deduction that is prima facie inadmissible it has to be held that the particulars filed by him or her are not accurate. A return is not only an ordinary document or a piece of paper. Assessee has to verify the returns and declare that details furnished are true. We are of the opinion that the claim made by the assessee about depreciation was not a bonafide. It cannot be said that two views were possible about the said claim and the assessee had opted for one of the views. In the case before us, only one view was possible. By claiming depreciation about a property that was not part of business assets it had made a claim that was not genuine or bonafide-rather is was totally unsustainable. Therefore, we have no hesitation in holding that it had filed inaccurate particulars of income. In our opinion, the order of the FAA does not suffer from any legal or factual infirmity. Confirming the same, we decide effective ground of appeal against the assessee.

As a result, appeal filed by the assessee stands dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 1st January, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 01 जनवरी, 2016 को की गई।

Sd/-

(संदीप गोसाईं / Sandeep Gosain)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Date: 01.01.2016

व.नि.स. *Jv.Sr.PS.*

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

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

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्यायालय मुंबई
- 6.Guard File/गार्ड फाईल

सत्यपित प्रति //True Copy//

आदेशमुसल/ **BY ORDER,**
उप/सहअक पंजीकर **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**