

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

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER**

ITA NO. 4403/MUM/2013 : (A.Y : 2007-08)

M/s. Lokhandwala Construction Industries Pvt. Ltd.,
48, Indranarayan Road, Santa Cruz (W), Mumbai 400 054.
PAN : AAACL0941J

Vs. DCIT-9(2),
Mumbai.

(Appellant)

(Respondent)

**Assessee by : Shri K. Shivaram &
Shri Rahul Sarda**

Revenue by : Ms. Radha Katyal Narang

Date of Hearing : 12/04/2016

Date of Pronouncement : 29/04/2016

ORDER

PER G.S. PANNU, AM :

The captioned appeal by the assessee is directed against the order of CIT(A)-20, Mumbai dated 04.03.2013, pertaining to the Assessment Year 2007-08, which in turn has arisen from the order passed by the Assessing Officer dated 30.03.2012 under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, the only issue raised by the assessee is against the action of the CIT(A) in sustaining the penalty of Rs.1,19,31,643/- u/s. 271(1)(c) of the Act imposed by the Assessing Officer.

3. In brief, the relevant facts are that the appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter-alia*, engaged in the business of construction and development of township and other properties. In the return of income filed for Assessment Year under consideration, income was computed from such business by following the 'project completion' method of accounting, as in the earlier years. In an assessment finalized u/s. 143(3) of the Act dated 24.12.2009, the Assessing Officer disallowed an expenditure of Rs.3,54,47,542/- claimed towards advertisement/sales promotion. This difference between the returned and assessed income formed the basis for the Assessing Officer to subsequently hold the assessee guilty u/s. 271(1)(c) of the Act. In the order dated 30.03.2012 (*supra*), the Assessing Officer has held that assessee has filed inaccurate particulars of income within the meaning of u/s. 271(1)(c) of the Act and, accordingly he levied penalty of Rs.1,19,31,643/- being 100% of the tax sought to be evaded on the income of Rs.3,54,47,542/-. This action of the Assessing Officer has since been upheld by the CIT(A), against which the assessee is in appeal before us.

4. Before us, the learned representative for the assessee has made varied submissions on facts and in law to justify that there was no concealment of income or furnishing of inaccurate particulars of income within the meaning of u/s. 271(1)(c) of the Act in the present case *qua* the disallowance of Rs.3,54,47,542/- being advertisement/sales promotion expenses. The learned representative explained that the aforesaid expenses were claimed as revenue expenditure on the basis of the

method of accounting followed by the assessee consistently since Assessment Year 1990-91. It is pointed out that the action of the Assessing Officer is based on the stand of the Revenue of Assessment Year 2006-07 whereby, for the first time, such expenses were sought to be disallowed. The learned representative explained that as per the Revenue such expenditure, though relatable to business, were not to be allowed in the year of their incurrance but in the year of the sale of flats, in connection with which such expenditure has been incurred. The learned representative pointed out that the manner of claim made by the assessee in the return of income was consistent with the past and also accepted by the Revenue upto the Assessment Year 2005-06, and it was only in the preceding Assessment Year of 2006-07 that the Assessing Officer made a departure. As regards the status of the quantum assessment proceedings, the learned representative explained that since the expenditure was otherwise allowed to the assessee in subsequent years even applying the methodology devised by the Revenue for the first time, in Assessment Year 2006-07, the assessee has not pursued the same any further. In any case, it was pointed out that the same does not tantamount to any concealment or furnishing of inaccurate particulars of income for the purpose of Sec. 271(1)(c) of the Act. In the first year of dispute in Assessment Year 2006-07, it has been asserted by the learned representative that the Assessing Officer initiated the penalty proceedings u/s. 271(1)(c) of the Act but considering the explanations furnished, the same was dropped. Similarly, in Assessment Year 2008-09 also similar disallowance was made by the Assessing Officer but no penalty was initiated in the assessment order itself and in this connection reference

was made to the assessment order u/s. 143(3) of the Act for Assessment Year 2008-09 placed at pages 66 to 71 of the Paper Book. Apart therefrom, the learned representative pointed out that a mere difference in the year of taxability of an amount cannot be a ground to levy penalty u/s. 271(1)(c) of the Act. In support of his submissions, reference has been made to the *ratio* of the judgment of the Hon'ble Supreme Court in the case of *Reliance Petroproducts Pvt. Ltd., 322 ITR 158 (SC)* and also the judgment of the Hon'ble Bombay High Court in the case of *Nalin P. Shah (HUF), 40 taxmann.com 86 (Bom)* and also that of the Hon'ble Delhi High Court in the case of *New Holland Tractors (India) Pvt. Ltd., 228 Taxmann 66 (Delhi)*.

5. On the other hand, the Id. DR has defended the action of the lower authorities by pointing out that the assessee had wrongfully claimed advertisement/sales promotion expenses of Rs.3,54,47,542/- against the income of the current year whereas such expenditure did not pertain to such income. The Id. DR pointed out to the assessment order wherein it was noted that the claimed expenses were in relation to the upcoming projects, for which no income had been offered during the year under consideration, whereas the income offered during the year related to the flats sold in respect of which Occupation Certificates were obtained from the local municipal authorities. It was, therefore, contended that the claim of such expenses in the year under consideration was wrong, thus, liable for penalty u/s. 271(1)(c) of the Act.

6. We have carefully considered the rival submissions. Sec. 271(1)(c) of the Act empowers the Assessing Officer to impose penalty on being

satisfied that an assessee has either concealed particulars of his income or furnished inaccurate particulars of such income. In other words, in order to attract the penal provisions of Sec. 271(1)(c) of the Act it is required to be established that in a given fact-situation, assessee has either concealed particulars of his income or furnished inaccurate particulars of such income.

7. In the above context, we may now refer to the fact-situation in the instant case. The assessee before us is engaged in the business of construction and development of properties and such income is being historically computed following the 'project completion method' of accounting. The pertinent dispute revolves around the advertisement/sales promotion expenses of Rs.3,54,47,542/- claimed during the year to arrive at the business income. The Assessing Officer, in the course of the assessment proceedings, held that the expenses are relatable to ongoing projects and the same should be allowed in the year in which corresponding flats are sold, i.e., advertisement expenditure is to be allowed in the year in which the flats are sold in respect of which the advertisement expenses is incurred. The aforesaid stand of the Revenue in the quantum assessment proceedings has become final and, in any case, we are not concerned with the merits of the rival stands thereof. Presently, we are examining the fact-situation with the objective of determining as to whether the claim made in the return of income was *bona fide* or not. It emerges from record that such a dispute arose, for the first time, in Assessment Year 2006-07 which travelled to the Tribunal, which set-aside the matter back to the file of the Assessing Officer, who

ultimately upheld the disallowance. Be that as it may, it is quite evident that from Assessment Year 1990-91 the assessee has been claiming deduction for such expenses in the same way as it did in its return of income filed for Assessment Year 2007-08, and upto Assessment Year 2005-06 it stood accepted. The Assessing Officer differed with the assessee for the first time in Assessment Year 2006-07 and in that year penalty u/s. 271(1)(c) of the Act has not been levied, a fact-position asserted by the learned representative for the assessee at bar which has not been controverted by the Department. On this factum itself, in our view, the action of the Assessing Officer in levying penalty in this year becomes untenable because it militates against consistency in approach.

8. Another aspect of the controversy is that consequent to the disallowance of the impugned expenditure in this year, the Assessing Officer in the subsequent Assessment Years of 2009-10 and 2010-11 in the assessments finalized u/s. 143(3) of the Act, copies of which have been placed in the Paper Book at pg. 42 to 52 and 53 to 58 respectively, allowed the claim of the assessee. Notably, the claim was disallowed in the instant year on the ground that such advertisement/sales promotion expenses should be allowed in the year in which the sale of flats were undertaken in respect of which such expenses were incurred. Pertinently, in Assessment Years 2009-10 and 2010-11 such expenses were allowed following the methodology devised by the Assessing Officer in the instant Assessment Year. The aforesaid factual matrix goes to amply demonstrate that the difference between the assessee and the Revenue does not hinge on allowability or genuineness of expenditure but merely

on the year of allowability. In fact, the methodology devised by the Assessing Officer in the Assessment Year 2006-07 for the first time only seeks to postpone the allowability of expenses but does not reflect any disagreement on the merit of the expenses claimed. Therefore, the moot question is as to under such circumstances is there any concealment of particulars of income or furnishing of inaccurate particulars of such income within the meaning of Sec. 271(1)(c) of the Act. The answer, in our view, is clearly 'No'. In all the Assessment Years starting from Assessment Year 1990-91 and upto 2005-06 the claim for deduction of expenses has been allowed in the manner claimed by the assessee following the 'project completion' method of accounting. Therefore, if in a subsequent period the Assessing Officer re-visits an accepted position and makes a disallowance, same would not be construed as a deliberate attempt by the assessee to furnish inaccurate particulars of income or concealment of particulars of his income. The Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (*supra*) held that in a situation where no information given in the return is found to be incorrect or inaccurate, assessee cannot be held guilty of furnishing inaccurate particulars. Furthermore, it has been held by the Hon'ble Supreme Court that a mere making of a claim which is not found sustainable by the Assessing Officer, by itself will not amount to furnishing of inaccurate particulars of income within the meaning of u/s. 271(1)(c) of the Act.

9. Therefore, in view of the aforesaid discussion, in our view, where the difference between the assessee and the Revenue is merely on account of difference in the year of allowability of claim, and in the

absence of any finding or doubt with regard to the genuineness of the expenses claimed, the penal provisions of Sec. 271(1)(c) of the Act are not attracted. In our considered opinion, the aforesaid proposition clearly covers the instant case and the penalty levied u/s. 271(1)(c) of the Act deserves to be deleted. Apart therefrom, on the issue of uniformity of approach, it has also been established by the appellant that similar disallowance made in the Assessment Years 2006-07 and 2008-09 have not resulted in levy of penalty by the Assessing Officer itself. This fact-situation also justifies the assertion of the assessee that the impugned penalty deserves to be set-aside, and we do so.

10. In the result, we set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty of Rs. 1,19,31,643/- imposed u/s. 271(1)(c) of the Act.

11. Resultantly, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 29th April, 2016.

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 29th April, 2016

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned

- 4) The CIT concerned
- 5) The D.R, "A" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai