

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

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

ITA NO. 5725/MUM/2013 : (A.Y : 2005-06)

M/s. Bhisma Realty Ltd.,
Sir Vithaldas Chambers,
16, Mumbai Samachar Marg,
Mumbai 400 001 (Appellant)
PAN : AAACB5995N

Vs. ACIT, Circle-2(1),
Mumbai (Respondent)

ITA NO. 5726/MUM/2013 : (A.Y : 2007-08)

M/s. Bhisma Realty Ltd.,
Sir Vithaldas Chambers,
16, Mumbai Samachar Marg,
Mumbai 400 001 (Appellant)
PAN : AAACB5995N

Vs. DCIT, Range-2(1),
Mumbai (Respondent)

Assessee by : Shri Arvind Sonde

Revenue by : Shri M. Rajan

Date of Hearing : 27/09/2016

Date of Pronouncement : 30/09/2016

ORDER

PER G.S. PANNU, AM :

The captioned appeals have been preferred by the assessee for Assessment Years 2005-06 & 2007-08. In both the appeals, the common issue involved relates to penalty imposed u/s 271(1)(c) of the Act. Since the facts and circumstances in both appeals stand on an

identical footing, appeal for Assessment Year 2007-08 is taken as the lead case to appreciate the controversy.

ITA No. 5726/MUM/2013 (A.Y : 2007-08)

2. In this year, assessee is aggrieved by the action of CIT(A) in sustaining the penalty imposed by Assessing Officer u/s 271(1)(c) of the Act amounting to Rs.1,01,62,606/-.

3. In brief, the relevant background of the case can be summarized as follows. The appellant is a company incorporated under the provisions of Companies Act, 1956 and is engaged in the business of real estate development. Assessee-company is one of the three Special Purpose Vehicles (SPVs) which have been entrusted with the task of meeting the liabilities (secured/unsecured), workers dues, etc. by developing or otherwise dealing with the real estate transferred to it from 'The Hindoostan Spinning & Weaving Mills Ltd.' in terms of the order passed by the Board of Industrial & Financial Reconstruction (BIFR) dated 1.4.2004. Assessee was pursuing the aforesaid objective and for the Assessment Year 2007-08 it filed a return of income declaring loss of Rs.3,02,04,025/-, which was subject to a scrutiny assessment u/s 143(3) of the Act vide order dated 16.12.2009 wherein the assessed loss was scaled down to Rs.12,088/-. The difference between the returned and assessed loss was on account of the treatment of expenses incurred by the assessee. It was noticed that assessee was carrying out activities in terms of the rehabilitation scheme sanctioned by the BIFR whereby Dadar property of 'The

Hindoostan Spinning & Weaving Mills Ltd.' was assigned to the assessee for development. The assessee-company undertook development of the real estate so transferred and was required to defray the debts and liabilities of 'The Hindoostan Spinning & Weaving Mills Ltd.' secured against the assets so transferred to it. All the expenses incurred by the assessee in pursuance to said objective were debited to the Profit & Loss Account and claimed as expenditure deductible while computing the returned loss. In the course of assessment proceedings, on being show-caused, assessee filed a revised computation of income, wherein expenses on account of workers legal due, ex-gratia to workers, interest on bank overdraft and interest on amount payable to workers totalling to Rs.3,01,91,937/- was considered as to be transferred to project work-in-progress account and thus the loss for the year was arrived at Rs.12,088/- only. The aforesaid difference between the originally returned loss and the finally assessed loss was considered by the Assessing Officer to be 'furnishing of inaccurate particulars of income' within the meaning of Sec. 271(1)(c) of the Act. Accordingly, in the order passed u/s 271(1)(c) of the Act, Assessing Officer levied penalty of Rs.1,01,62,606/- being 100% of the tax sought to be evaded on such income of Rs.3,01,91,937/-. The said penalty has since been affirmed by the CIT(A) and accordingly, assessee is in further appeal before us.

4. Before us, the learned representative for the assessee, at the outset, submitted that assessee was one of the SPVs set-up as per the rehabilitation scheme of 'The Hindoostan Spinning & Weaving Mills Ltd.' and that in the case of another SPV, being M/s. Chaitra Realty Ltd., similar additions were made in the assessment proceedings on which

penalty was imposed u/s 271(1)(c) of the Act. It was pointed out that the Tribunal vide its order in ITA No. 2520/Mum/2010 dated 18.3.2011 deleted the levy of such penalty, and a copy of such order has been placed on record. On this basis it was sought to be pointed out that the penalty imposed in the present case is unsustainable since on similar facts, penalty has been deleted by the Tribunal in the case of M/s. Chaitra Realty Ltd. (supra).

5. The aforesaid factual matrix has not been controverted by the Id. DR before us.

6. In the aforesaid background, we have perused the decision of our coordinate Bench in the case of M/s. Chaitra Realty Ltd. (supra), which is a sister concern of the assessee and is also one of the three SPVs (apart from the assessee) which has been tasked with the implementation of the rehabilitation scheme dated 1.4.2004 sanctioned by the BIFR in the case of 'The Hindoostan Spinning & Weaving Mills Ltd.'. In the case of M/s. Chaitra Realty Ltd. also, similar additions were made and penalty was imposed u/s 271(1)(c) of the Act. In fact, in the impugned order passed by the Assessing Officer levying the penalty, a reference has also been made to the penalty imposed by him in the case of M/s. Chaitra Realty Ltd. In the case of M/s. Chaitra Realty Ltd. (supra), the Tribunal deleted the penalty by making the following discussion :-

"6. We have perused the records and considered the rival contentions carefully. The assessee is a developer who was executing a property development project and method of accounting followed was project completion method. The assessee had however claimed

expenses amounting to Rs.33,11,617/- consisting interest of Rs.25,22,797/- and other day to day expenses in the profit and loss account. This has been disallowed by the AO on the ground that the expenditure could be claimed only in the year of completion. The disallowance had been accepted by the assessee. However the AO had also imposed penalty under section 271(1)(c) @ 200% of tax sought to be evaded which in appeal was reduced to 100% of tax sought to be evaded. The issue is whether on the facts of the case penalty under section 271(1)(c) can be levied.

6.1 A penalty under section 271(1)(c) is only a civil liability as held by the Hon'ble Supreme Court in case of Dharmendra Textiles and Processors (supra) and willful concealment is not required to be proved by the revenue. However each and every addition in the assessment cannot automatically lead to penalty under section 271(1)(c). A case for penalty has to be evaluated in terms of the Explanation 1 to section 271(1)(c) as per which in case of any addition made in assessment even if the assessee is not able to substantiate the explanation but is able to prove that the explanation is bonafide and all necessary details have been submitted penalty under section 271(1)(c) cannot be levied. In this case there is no dispute that details of expenses had been given. The case of the assessee is that the claim had been made under the bonafide belief that such expenses were allowable from year to year basis. We also note that allowability of expenses such as interest etc on year to year basis or in the year of completion of project has been a debatable issue. There have been contrary decisions of the various benches of the tribunal. The special bench of the tribunal in case of Wall Street Construction Pvt. Ltd. Vs JCIT (supra) had rendered decision only vide order dated 22.9.2005 in which it was held that the interest has to be allowed in the year of completion of the project. The said decision it has been pointed out was published in the ITD only in the year 2006. Moreover the decision of the special bench has been disputed before the High Court where the appeal is pending. Under such circumstances in our view it is possible to form a bonafide belief on the date of filing return of income i.e. on 31.10.2005 that the expenses could be allowed from year to year basis. The Learned AR has also submitted that the

assessee had no other income even till today and therefore there was no advantage to the assessee in claiming expenses and declare losses from year to year as the losses could be carried forward only for a limited number of years. In such a situation claiming the expenses in the year of completion would have been advantages to the assessee as in that case all the expenses could have been allowed. Considering the entirety of facts and circumstances, in our view, explanation of the assessee that the claim had been made under bonafide belief has to be accepted and it will not be appropriate to levy penalty under section 271(1)(c) in this case. Accordingly we set aside the order of CIT(A) and delete the penalty levied.”

7. Following the aforesaid precedent, which has been rendered under identical circumstances, we set-aside the order of CIT(A) and direct the Assessing Officer to delete the penalty imposed u/s 271(1)(c) of the Act.

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

9. Since the issue as well as the facts and circumstances in appeal for Assessment Year 2005-06 are *pari materia* to those considered by us in the assessee's appeal for Assessment Year 2007-08 in the earlier paragraphs, our decision in the appeal for Assessment Year 2007-08 shall *mutatis mutandis* apply for Assessment Year 2005-06 also.

10. Resultantly, both the appeals of assessee are allowed.

Order pronounced in the open court on 30th September, 2016.

Sd/-

(AMARJIT SINGH)
JUDICIAL MEMBER

Mumbai, Date : 30th September, 2016

SSL

Sd/-

(G.S. PANNU)
ACCOUNTANT MEMBER

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "B" Bench, Mumbai
- 6) Guard file

By Order

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