

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D" NEW DELHI  
BEFORE SHRI R.P. TOLANI AND SHRI T.S. KAPOOR

ITA No. 2555/Del/2012

A.Yrs. 2006-07

M/s Lala Harbhagwan Das  
& Memorial & Dr. Prem  
Hospital (P) Ltd., Bishan Saroop  
Colony, Panipat.

Vs. Commissioner of Income-tax,  
Karnal.

**PAN: AAACL 9072 G**

( Appellant )

( Respondent )

Appellant by : Shri Ashwani Taneja Adv.  
Assessee by : Shri D.K. Mishra CIT (DR)

**ORDER**

**PER R.P. TOLANI, J.M.:**

This is assessee's appeal against order dated 22-3-2012 passed by the Commissioner of Income-tax, Karnal u/s 263(1) of the Income Tax Act, 1961, relating to A.Y. 2006-07. Following grounds are raised:

*"1. That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 by holding that the penalty order dated 29-05-2009 was erroneous and prejudicial to the interest of revenue.*

*2. That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 and passing the order under that section, setting aside the penalty proceedings to the file of Ld. AO is bad in law and against the facts and circumstances of the case.*

3. *That having regard to facts & circumstances of the case, Ld. CIT has erred in law and on facts in assuming jurisdiction u/s 263 is not sustainable on various legal and factual grounds.*

4. *That the appellant craves the leave to add, amend, modify, delete any of the grounds of appeal before or at the time of hearing and all the above grounds are without prejudice to each other.”*

2.1. Before we proceed with the adjudication of appeal, it is very crucial to dwell upon the unbecoming conduct of the ‘D’ Bench in-charge CIT (DR) Shri D.K. Mishra. When the Bench set for hearing at 10.30AM on 20-11-2013, to our surprise, none of the DR was present in the courtroom. It may be worthwhile to mention that about 33 appeals were fixed for hearing. With the current pendency an adjournment takes about 4 to 5 months’ period for fixation of any appeal for next hearing in normal course.

2.2. Thus the situation before us as it stood, neither any DR was present in the courtroom nor any application for adjournment from the revenue’s side. We could not have allowed to crash the Bench, therefore, in public interest and interest of justice, Bench continued first with the adjournment applications filed by the assesseees and thereafter to proceed with further hearing of the remaining appeals.

2.3. After adjournment motion this matter was called out. Since none of the DRs including the in-charge of the Bench Shri D.K. Mishra CIT (DR) was present, the matter was passed it over and the Bench continued with proceedings of other cases.

2.4. At about 10.50 AM Shri D.K. Mishra CIT(DR) entered the courtroom in a huff and gave a vague reason for his absence that he was held up some where. Observing that Shri D.K. Mishra is now present, this 263 matter, which was to be argued by him was called out.

2.5. Ld. Counsel for the assessee contended that the issue in question is squarely covered by ITAT order in its own case for A.Y. 2005-06 wherein the ITAT vide its order dated 13-4-2012 rendered in ITA no. 5023/Del/2011 has deleted the penalty levied u/s 271(1)(c) of the Act on the same set of facts namely, in respect of claim of disputed rate of depreciation.

2.6. Shri D.K. Mishra straightway replied that he has not seen the file and not prepared the case. He was reminded that being CIT (DR), In-charge of the Bench it was not fair on his part to come late without intimation; don't read the file; not apply for the adjournment and make the whole process come to stand still. Shri Mishra then asked for more time to go through the file. In the interest of justice the Bench was kind enough to grant him time to go through the file. In the meanwhile the case of M/s Laksons Footwear P. Ltd. was also proceeded ex parte qua the department, as the Sr. DR was also not present and there was no adjournment application. It may be pertinent here to mention that vide order dated 20-11-2013 the Bench has expressed its displeasure towards the DR's of "D" Bench. After reading the file, Shri Mishra offered himself for the arguments.

2.7. The merits of the appeal will be dealt in subsequent paras. After the assessee completed the arguments Shri Mishra replied to it. However, he wanted to cite the case laws whose names or citations neither he remembered nor had the copies of the citation. He contended that they will be filed in a day or two.

2.8. It was pointed out to him that it is not fair on his part not to remember the cases, the exact citation and the proposition laid down by these judgments. It was not a fair way to argue that the case laws not remembered by him will be submitted subsequently. He was told that in this situation how the assessee's counsel will counter the case laws which are not being

given, nor properly represented and cited. It will not be possible to allow him time to file list, gist and citations of case laws subsequent to hearing which are neither heard by us nor put up to assessee for reply thereon.

2.9. At this juncture Shri Mishra in a malicious and contemptuous manner alleged that the “Bench is hurrying the justice and burying the justice”. Such type of unprovoked utterances from a Commissioner of Income Tax, who is the “D” Bench incharge officer from the Revenue’s side came as a shock to the Bench and cannot be taken lightly. It appears that Mr. Mishra is not aware of his responsibilities, court discipline, procedure and proper court mannerism. His accusation on the Bench that it was hurrying justice and burying the justice is totally irresponsible, contemptuous and malicious allegation and totally against the glaring facts and proceedings which happened in the open court.

2.10. Out of 33 appeals that were listed, the Bench had granted adjournments in 31 cases mainly at the request of the Id. D.R., though the half heartedly written adjournments were filed by the department at about 11.30 AM on that day, which itself was against the prescriptions of ITAT Rules 1963. This demonstrates that Bench was kind and tolerant to the department despite these glaring irregularities. On one hand Bench tried to help and redeem the objectionable situation in which the department was put by Shri D.K. Mishra i.e. being not present in the court room, not filing any adjournment applications and least of all not putting any representative to explain all these anomalies. On the other hand to cover up his fallacies Shri Mishra ventured to pounce on the court by making such false, malicious and contemptuous allegations.

2.11. Shri Mishra was told that it was not the Bench which was hurrying or burying the justice but it was he who was obstructing the process of

dispensation of justice. At the first instance he comes late in the Bench, does not come prepared with the case files, makes the entire court room and litigants wait without justification. The Bench showing kindness and in the interest of justice passes over the matter, after coming the CIT (DR) without remorse, says that he was held up and not studied the files, some time may be given, which was also given. Thereafter he was not in a position to cite the case laws and wanted to press his insistence that he will name, cite and give the proposition of case laws later on. He was clearly told that it is not the Bench which was hurrying or burying the justice but rash and contemptuous conduct of Shri Mishra which was obstructing the sacrosanct object of dispensation of justice. His contemptuous behaviour was proposed to be reprimanded and fit to be visited with cost and appropriate consequential action.

2.12. In view of the foregoing facts and circumstances we find Shri Mishra's total behaviour as unfortunate, contemptuous and condemnable and deserves to be visited with appropriate action to inculcate sense of judicial discipline and awareness of responsibilities of duties and further to protect the dignity of the court, which stands offended by the contemptuous conduct of Shri D.K. Mishra.

2.13. Mr. Mishra was then reminded that his allegations are unbecoming and may be visited with costs. Mr. Mishra did not say anything in reply.

2.14. After the Bench rose and retired to the Chamber of Sr. Member for discussion of the heard cases and signing of the judicial proceedings, Shri Mishra barged into the Chamber of Sr. Member without asking permission and threatened that the Bench has insulted him and that he is going to lodge complaint.

2.15. In order to pacify, he was offered to sit and have a cup of tea which the Members of the Bench were sharing. He did not show any response to this kind gesture being extended by the Members of the Bench. Looking at his hostile demeanour he was told that it was not permitted to enter in the Chamber of the Judges without intimation and hurl such threats of complaint to intimidate the bench. In our view his over all actions, behaviour and utterances amount to contempt of court. Any party to the litigation has no authority to enter the Judge's room without permissions and endeavour to intimidate and put up such threats.

2.16. In view of the entirety of facts and circumstances we have no hesitation but to impose costs of Rs. One thousand on the delinquent CIT (DR) Shri D.K. Mishra which should be deducted from his salary. The Registry is directed to forward the copies of this order to CIT(DR)-I, CCIT In-charge; Chairman CBDT for record purpose and take appropriate action including placing the observations in his service record at their end.

2.17. Separate and appropriate action for initiating contempt of court proceeding will be taken in due course after giving Mr. D.K. Mishra CIT(DR) adequate opportunity of being heard.

2.18. It may be further mentioned that despite Bench's direction that no cognizance of case laws being filed by the Id. CIT(DR) subsequent to the hearing will be considered, the audacious Mr. D.K. Mishra vide letter dated 21-11-2013 without permission has filed the case laws with the Bench Clerk. Same will not be considered as being in the defiance of the court's direction coupled with the fact that the assessee could not be heard on the same post closure of hearing.

3. Now adverting to the appeal, brief facts are: In assessment year 2005-06 i.e. preceding assessment year assessee hospital purchased a C.T. scan

system and claimed 40% depreciation thereon under a belief that it amounts magnetic resonance imagine system, which was eligible for 40% depreciation. During the course of assessment for A.Y. 2005-06 the assessing officer held that assessee was eligible to depreciation @ 15% and accordingly the depreciation was partly disallowed. Assessing officer initiated penalty proceeding qua the excess claim of depreciation and imposed the same. In first appeal it was confirmed by CIT(A). Aggrieved, assessee preferred appeal second appeal, ITAT vide order dated 13-4-2012 in ITA no. 5023/Del/2011 deleted the penalty, inter alia, observing as under:

*“17. In view of the foregoing, we are of the opinion that mere erroneous claim in the absence of any concealment or furnishing of inaccurate particulars, is no ground for levying penalty, especially when there is nothing on record to show that the explanation offered by the assessee was not bona fide or any material particular were concealed or furnished inaccurate. In these circumstances, we have no hesitation in observing that no penalty is exigible in relation to claim for deduction of excess depreciation and interest on amount borrowed for building which was incomplete. Therefore, we hold that penalty is not imposable in this case and action of authorities below in imposing/ confirming the penalty u/s 271(1)(c) of the Act is neither proper nor justified. As such, while accepting the plea of the assessee, we direct to delete the impugned penalty imposed/ confirmed.”*

3.1. Following the earlier claim of depreciation in A.Y. 2006-07 also, assessee claimed the same rate which was disallowed by assessing officer. The assessing officer disallowed the same following A.Y. 2005-06 and initiated the penalty proceedings in AY 2006-07 also. The assessee filed reply to the penalty proceedings in response to show cause notice dated 11-5-2009, pleading that depreciation @ 40% was claimed under bona fide belief that C.T. scan machine amounted to magnetic imaging system. The

bona fide belief was based on its interpretation of the equipment and its professional use which were purely medico technical terms. The assessee's reply was supported by various case laws which are mentioned therein. Copy of the reply is placed at pages 7-9 of the paper book. Assessing officer in AY 2006-07 dropped the penalty proceeding by a short order which is as under:

*“Penalty proceedings initiated u/s 271(1)(c) are hereby dropped.”*

3.2. CIT invoked power u/s 263 of the Act and was of the view that order was erroneous and prejudicial to the interests of revenue. Assessee filed detailed reply to 263 notice, rejecting the same and relying on Delhi High Court judgment in the case of CIT Vs. Toyota Motor Corporation 306 ITR 49 to the effect that the proceedings before the AO are quasi judicial proceedings and his order must be supported by reasons. The CIT observed that assessing officer has passed a cryptic order dropping penalty proceedings u/s 271(1)(c), which was erroneous and prejudicial to the interests of revenue. Accordingly, acting u/s 263 the CIT set aside the penalty order, restored it back to the file of assessing officer.

Aggrieved, assessee is before us, challenging the 263 jurisdiction.

4. Ld. Counsel for the assessee contends that:

- (i) After claim of depreciation in the preceding year i.e. A.Y. 2005-06 the C.T. Scan machine became part of the block of assets and assessee had no choice but to follow what was followed in earlier year. Therefore in this year assessee having followed the earlier method it cannot be imputed that assessee's claim was not bona fide.



- (ii) Assessee's reply to show cause notice clearly show that assessing officer had called the assessee for hearing, considered his reply and chose to pass a short order which is not in the hands of the assessee. Thus, the necessary process for initiation, hearing and completion of penalty proceedings i.e. statutory process has been duly followed by the assessing officer.
- (iii) The CIT has held the order of the assessing officer to be erroneous and prejudicial to the interests of revenue on following counts:
  - (a) The preceding year's assessment had become final about the claim of depreciation;
  - (b) The action of assessing officer was not in consonance with Hon'ble Supreme Court judgment in Union of India Vs. Dharmendra Textile Processors & others 306 ITR 277;
  - (c) Ratio of decision of Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products (P) Ltd. 230 CTR 320 was not applicable.
  - (d) Cryptic one line order passed by assessing officer dropping the penalty proceedings u/s 271(1)(c) was not sustainable.
- (iv) Penalty is to be considered on peculiar facts and circumstances of each case and each year. It is evident that in this case the bona fide belief sustained by assessee in first year was continued in second year. Therefore, as far as second year was concerned the assessee had a bona fide belief of following earlier practice.
- (v) Merely because penalty proceedings in particular facts of case was imposed in preceding year will not suggest that automatically the penalty will be levied in succeeding year as the penalty is not

automatic and depends upon the facts and satisfaction of the assessing officer in that year.

- (vi) Reliance is placed on following judgment for the proposition that merely because the order was not elaborate it cannot be held that the same was erroneous or was passed without application of mind:
- CIT v. Design & Automation Engineers (Bombay) (P) Ltd. [2008] 323 ITR 632 (Bom.)(HC);
  - Manish Kumar v. CIT (2012) 134 ITD 27 (Indore) (Trib)
- (vii) It is evident that assessing officer passed the penalty order after perusing the assessee's explanation and completing the statutory process in this behalf. Therefore, it cannot be held that there was lack of inquiry. Consequently, the order passed by the assessing officer cannot be held to be erroneous and prejudicial to the interest of revenue resorting to sec. 263 as held by CIT Vs. Sunbeam Auto Ltd. (2009) 289 Taxman 436 (Del)(HC); and Vodafone Essar South Ltd. Vs. CIT (2011) 141 TTJ 84 (del.)(Trib.).
- (viii) It cannot be assumed that there was lack of inquiry by assessing officer and assuming even if it is so as long order was passed after considering assessee's explanation was considered, it cannot be held to be a case of total lack of inquiry and cannot be revised u/s 263 – CIT v. Vikas Polymers (2010) 194 Taxman 57 (Del.)(HC).
- (ix) CIT's observation that the order of assessing officer dropping penalty proceedings is unsustainable because it is cryptic, is not tenable as it does not make the order of assessing officer erroneous and prejudicial to the interests of revenue in view of Delhi High Court judgments cited above.

- (x) CIT has held that the order was erroneous and prejudicial to the interest of revenue in view of the decision of Hon'ble Supreme Court in the case of Dharmendra Textile Processors (supra). A perusal of the written reply filed by the assessee to the penalty proceedings will demonstrate that the assessee itself has relied on Dharmendra Textile Processors (supra) and the assessing officer has dropped the penalty proceedings after considering the reply.

4.1. It is further pleaded that in case of Master Vijay Oswal Vs. ITO 87 ITD 98, Rajkot Bench of the ITAT has held that even non-initiation of penalty proceedings u/s 271(1)(c) cannot be held to be erroneous and prejudicial to the interest of revenue.. Assessing officer's impugned order in any case is in consonance with the previous year's ITAT order which has held the assessee's explanation to be bona fide. It is not binding on him to necessarily follow the preceding year's penalty order in peculiar facts of the case in second year. In the second year the said goods merged in the block of assets and assessee under bona fide belief claimed the same rate of depreciation @ 40%

4.2. In the case of Toyota Motor Corporation (supra), relied on by the CIT, the assessing officer passed a cryptic order without carrying out necessary investigation and ITAT from its own side gave a finding that assessee was under bona fide and reasonable belief. In these particular facts it was held that the order was erroneous and prejudicial. The facts are distinguishable as in this case the assessing officer carried out inquiries by calling explanation

and dropped the penalty proceedings after considering the reply of the assessee.

4.3. Assessing officer's order dropping the penalty proceedings is a possible, plausible and reasonable view, merely because CIT holds another view on the same facts, cannot make Assessing officer's order as erroneous and prejudicial as held by Hon'ble Supreme Court in Malabar Industrial Co. 243 ITR 83.

5. Ld. CIT (DR) supported the order of the CIT and contends that:

- (i) The cryptic order passed by the assessing officer is unsustainable
- (ii) Having held the excess claim of depreciation in preceding year as liable for penalty u/s 271(1)(c) itself shows lack of application of mind by assessing officer in dropping the penalty proceedings in this year. Reliance is placed on Toyota Motor Corporation (supra) and Allahabad High Court judgment in the case of CIT Vs. Braj Bhushan Cold Storage 275 ITR 360.
- (iii) Necessary inquiries were not carried out by assessing officer.

6. As already mentioned, ld. CIT (DR) did not give further case laws and the Bench gave a ruling that any case law filed by the CIT(DR) after the hearing is over, will not be considered. The case laws filed on 21-11-2013 in defiance of Bench order, we are unable to consider them in view of our oral order pronounced in the court.

7. We have heard rival contentions and gone through the relevant material available on record. It is undisputed that the ITAT in preceding year has deleted the penalty levied u/s 271(1)(c), which was the first year of purchase of C.T. scan machine which was held to be magnetic imagine

machine by the assessee. The bona fide belief of the assessee has been upheld by the ITAT.

7.1. Apropos this year, looking from any angle there is no choice but to follow the coordinate Bench judgment in assessee's own case deleting the penalty on the same machine, as the bona fide belief is a final finding of fact by co-ordinate bench, which we have to respectfully follow. In this year the facts are stronger as assessee followed the preceding year's practice which by itself constitute a bona fide belief. Superimposing the ITAT in preceding year has already held the assessee's belief in claiming depreciation @ 40% to be bona fide.

7.2. Apropos cryptic order, as mentioned above, demonstrate that a cryptic order per se cannot be held to be erroneous. In the case of Toyota Motor Corporation (supra), the cryptic order was held to be unsustainable as assessing officer did not carry out necessary inquiries and the ITAT from its own side assumed that there was bona fide belief. In juxtaposition, in this case the penalty notice was issued, the assessee duly filed a detailed reply citing detailed reasons, explanation, case laws including Dharmendra Textile Processors (supra). Ld. CIT has erroneously assumed that it was not considered by assessing officer. In our considered view once the assessee has filed the written reply and attended the proceedings it cannot be held that necessary inquiries were not carried out.

7.3. In view of the facts mentioned above looking from any angle there is no escape from the conclusion that assessee cannot be visited with penalty u/s 271(1)(c). In our view the penalty order dropping penalty proceedings u/s 271(1)(c), merely because it is cryptic order cannot be held to be erroneous or prejudicial to the interest of revenue. It amounts to multiplicity

of proceedings on hyper technical issues. In view of the foregoing, we quash the 263 order.

8. In the result, assessee's appeal is allowed.

Order pronounced in open court on 06-12-2013.

Sd/-  
( T.S. KAPOOR )  
ACCOUNTANT MEMBER

Dated: 06-12-2013.

**MP**

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR

Sd/-  
( R.P. TOLANI )  
JUDICIAL MEMBER