

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI
BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. No. 4366/DEL/2013	
	A.Y. : 2009-10	
ACIT, CENTRAL CIRCLE-2, NEW DELHI ROOM NO. 323, 3 RD FLOOR, ARA CENTRE, JHANDEWALAN EXTN., NEW DELHI	VS.	M/S SHYAM BASIC INFRASTRUCTURE PVT. LTD., A-60, NARAINA INDL. AREA, PHASE-I, NEW DELHI (PAN: AABCS3455R)
(APPELLANT)		(RESPONDENT)

Department by : Sh. BRR KUMAR, SR. DR.
Assessee by : Sh. ROHIT JAIN, ADV. AND MS.
DEEPASHREE RAO, CA

Date of Hearing : 03-06-2015

Date of Order : 05-06-2015

ORDER

PER H.S. SIDHU, JM

Revenue has filed this appeal against the Order dated 10.5.2013 passed by the Ld. Commissioner of Income Tax (Appeals)-III, New Delhi pertaining to assessment year 2009-10.

2. The grounds raised by the Department read as under:-

"1. On the facts and in the circumstances of the case, the CIT(A) has erred in cancelling the penalty of Rs. 31,41,308/- levied by the AO under section 271(1)(c) of the Income Tax Act, 1961.

2. *The order of the CIT(A) is erroneous and is not tenable on facts and in law.*
3. *The appellant craves leave to add, alter or amend any/ all of the grounds of appeal before or during the course of the hearing of the appeal.*

3. The brief facts of the case are during the course of assessment proceedings AO noticed that the assessee has earned a dividend income of Rs. 1,83,157/- which did not form part of the total income. As per the assessee the disallowance u/s. 14A came to Rs. 9,735/-, whereas as per the AO the disallowance under section 14A was to be made as per Rule 8D and thus disallowance of Rs.92,41,858/- has been made by the AO while completing the assessment in dispute.

3.1 Assessing Officer levied the penalty of Rs.31,41,308/- by relying upon the various decision of the Hon'ble Supreme Court of India in the case of Dharmendra Textile Processor 306 ITR 277 (SC) and Delhi High Court's decision in the case of CIT vs. Zoom Communication Pvt. Ltd. (2010) 327 ITR 510 (Delhi) holding that the assessee has filed inaccurate particulars of income, hence, the penalty is leviable u/s. 271(1)(c) of the Act.

4. Aggrieved with the penalty order, assessee appealed before the Ld. CIT(A), who vide impugned order dated 10.5.2013 deleted the penalty in dispute by allowing the appeal filed by the assessee.

5. Now aggrieved with the impugned order, Revenue filed the present Appeal before the Tribunal.

6. At the time of hearing, Ld. DR relied upon the order of the AO and reiterated the contention raised by the Revenue in the grounds

of appeal as well as the citations cited by the AO in the assessment order and the penalty order.

7. On the contrary, Ld. Counsel of the assessee relied upon the order passed by the Ld. First Appellate Authority and documentary evidence filed by him in the shape of Paper Book containing pages 1 to 81 in which he has attached various documentary evidences and copies case laws to support the impugned order.

8. We have heard both the parties and perused the relevant records available with us, especially the order passed by the Revenue Authority. We are of the considered that the Ld. CIT(A) has deleted the penalty in dispute by thoroughly examining the written statement filed by the assessee and the order of the lower authorities as well as the various decision rendered by the Hon'ble Supreme Court of India and the Hon'ble High Court of Delhi.

8.1 After going through the submissions filed by the assessee alongwith the case law as well as the orders of the revenue authorities, it is very relevant to go through the relevant provisions of section 271(1)(c), which provides for imposition of penalty where the AO has to be satisfied that:-

- i) any person had concealed particulars of his income
or
- ii) had furnished inaccurate particulars of such income.

Further, after insertion of Explanation 1 to Section 271(1)(c), the onus is on the assessee to show that there was no intention of concealment and not on the revenue.

8.2 We find that Mens rea was considered to be a necessary ingredient for levy of penalty as laid down by the Hon'ble Supreme

Court in CIT Vs Anwar Ali (1970) 76 ITR 696. But after the introduction of Explanation 1 to Section 271(1)(c), the Hon'ble Supreme Court has held that the requirement of proof of Mens rea on the part of the Revenue, would no longer be necessary as held in Addl. CIT Vs Jeevan Lal Shah (1994) 205 ITR 244 (SC) and B.A. Balasubramaniam and Bros. Co. Vs CIT (1999) 236 ITR 977 (SC). The role of the Explanation was only to place the burden of proof squarely on the taxpayer.

8.3 We note that in this context two landmark judgments were given by Apex Court in Dilip N. Shroff Vs Joint CIT (2007) 2911TR 519 (SC) and T. Ashok Pai Vs CIT (2007) 292 ITR 11 (SC), which spell out mainly the following rules for the purpose of penalty imposable:

(i) Both the expressions "concealment of income" and "furnishing of inaccurate particulars" indicate some deliberation on the part of the assessee, though the word "deliberately" and the word "willfully" are no longer part of the statute.

(ii) Mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi.

(iii) Primary burden of proof is on the revenue. The statute requires satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the department.

(iv) The Assessing officer while considering levy of penalty should consider whether the assessee has been able to discharge his part of the burden. He should not begin with the presumption that the assessee is guilty.

(v) Though penalty proceedings under the income-tax law may not be criminal in nature, they are still quasi-criminal requiring the Department to establish that the assessee has concealed his income.

(vi) It has to be understood that the Explanation to section 271(l)(c) is an exception to the general rule raising a legal fiction by which the burden which is ordinarily with the Department is sought to be placed on the assessee. This burden on the assessee is subject to "conditions precedent", which are required to be satisfied before the Explanation could be applied.

It was also pointed out as held by Hon'ble Supreme Court in K. C. Builders Vs AC/T {2004} {265 ITR 562} {SC} that "deliberateness" is implied in the concept of concealment.

8.4 However after the decision laid down in Dilip N. Shroff (Supra), T. Ashok Pai (Supra) in a dispute under Central Excise Law the Apex Court in the case of UOI Vs Dharamendra Textile Processors (2008) (306 ITR 277) (SC) held that "default merited penalty without having to consider an intend of the assessee to evade tax. The Mens rea is essential only for matters of prosecutor and not penalty."

8.5 Thus after the decision in the case of Dharamendra Textile Processor (Supra) "Mens rea is not necessary to be proved by revenue for civil penalties."

8.6 However with the decision of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products Pvt. Ltd (2010) (322 ITR 158) (SC), it is clear that the Hon'ble Supreme Court by giving the ruling in Dharmendra Textile Processor's Case (Supra) has not overruled their decision in Dilip N. Shroff's case except for its mention of Mens rea therein.

8.7 It is also pertinent to mention here that after the ruling of Dharamendra Textile Processor, the Hon'ble Supreme Court has come out with the ruling in 2 different cases namely CIT Vs Atul Mohan Bindal (2009) (317 ITR1) and UOI Vs Rajasthan Spinning & Weaving Mills (2010) (IGSTR66) (SC), and where they have reiterated again that "that for applicability of Section 271(l)(c) the condition stated therein must exist."

8.8 Even in the decision in the case of (IT (LTU) Vs. MTNL, ITA NO.626/2011 dated 10.10.2011, the Hon'ble Jurisdictional Delhi High Court has upheld the same view.

8.9 We note from the above, it is very clear that for imposing penalty under Section 271(1)(c), the AO have to be satisfied that:

- (a) assessee has concealed the particulars of income or
- (b) assessee has furnished inaccurate particulars of such income.

8.10 Thus, in view of the Hon'ble Supreme Court's decision in Reliance Petroproducts (Supra) it is clear that the legislature did not intend to impose penalty on every assessee whose claim was rejected by the assessing officer. What is sought to be covered under Section 271(l)(c) is concealment of "particulars of income" or furnishing of "inaccurate particulars of income" and making of an untenable claim.

8.11 From the various judicial precedents it is seen that the facts and circumstances in each case has to be seen in the context and then penalty provision should be applied to see whether there was the concealment of particulars of income or the appellant has furnished inaccurate particulars so as to call for the penal action under Section 271(1)(c).

8.12 We find that assessee had earned a dividend income of Rs.1,83,157/-, which is an exempt income. The assessee on its own disallowed a sum of Rs.9,735/-, under section 14A. However, the AO was not satisfied with the appellant's quantum of disallowance and he accordingly, applied Rule 8D and computed the disallowance.

8.13 It is also an established proposition that the assessment proceedings a penalty proceedings are two different proceedings. An issue may call for a addition to income under section 143(3) of the I.T. Act, but in order to invoke a penalty, the AO has to walk little extra mile to prove that there is failure on the part of the assessee to "conceal the particulars of income" or "furnishing of inaccurate particulars." The mere non acceptance of appellant's submissions and without any positive evidence from the AO that assessee has "concealed" or "furnishing of inaccurate particular" didn't ipso facto warrant penalty under Section 271(1)(c). It is also seen that in the present case that the dividend income earned by the appellant is to the tune of Rs.1,83,157 and assessee's believe that no direct expenditure is incurred in earning the exempt income, shows that there is a difference of opinion and it is a vexed question of law.

8.14 Keeping in view of the above facts and circumstances of the case, we find considerable force in the finding of the Ld. CIT(A) that in the present case the conditions laid down in Section 271(1)(c) are not being fulfilled, because "inaccurate particulars" means the details filed in the return of income are "not accurate or exact or correct according to truth or erroneous."

8.15 In this regard, Ld. CIT(A) has rightly placed reliance upon the decision of the of the Hon'ble Supreme Court of India in the case of Reliance Petro Products (Supra) wherein it was held that when assessee furnished all the material in the return which was not

found to be incorrect, it is upto the authorities to accept the claim in the return or not, but the same couldn't be considered as concealment or furnishing of inaccurate particulars.

8.16 Keeping in view of the facts and circumstances as explained above, we are of the view that Ld. CIT(A) has rightly held that there is no concealment or inaccurate particulars of income where the addition and/or disallowance is based on bona-fide claims, debatable claims and difference of opinion as held inter-alia by the Hon'ble Supreme Court in a recent judgment in the case of Commissioner of Income tax vs. Reliance Petroproducts Pvt. Ltd. reported in 322 ITR 158 (SC) the head notes of the said case reads as under:

"A glance at the provisions of Section 271(l)(c) of the Income Tax Act 1961, suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in Section 271(l)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in

the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under Section 271 (1)(c). A mere making of a claim, which is not sustainable in law by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars."

8.17 We find that the above view of the Apex court in the case of Reliance Petroproduct has been followed by jurisdictional Delhi High Court and also Delhi Tribunal in numerous subsequent cases.

8.18 We are of the view that addition has been made by the AO on the basis of difference of opinion, as accordingly to him Rule 8D is applicable and whereas as per the appellant Rule 8D is not applicable.

8.19 Accordingly, in view of the above facts and circumstances, we are of the considered opinion that in the present case, the penalty under section 271(1)(c) is not leviable and it deserves to be deleted, hence, Ld. CIT(A) has rightly deleted the penalty made by the Assessing Officer. Our view is supported by the decision of the Hon'ble High Court in the case of ACB India Limited vs. ACIT in ITA No. 615/2014 and the decision of the ITAT, Delhi Bench in the case of EspireInfolabs (P) Ltd. vs. ITO in ITA No. 4190 and 4091/Del/2013 dated 6.6.2014. Therefore, we do not see any reason to interfere

with the order of the Ld. CIT(A), accordingly, we uphold the same and decide the issue against the Revenue by dismissing the Appeal filed by the Revenue.

9. In the result, the Appeal filed by the Revenue stands dismissed.

Order pronounced in the Open Court on 05/06/2015.

Sd/-

[S.V. MEHROTRA]
ACCOUNTANT MEMBER

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 05/6/2015

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches