

IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH 'B' BENCH

**BEFORE SHRI B.R.MITTAL (JUDICIAL MEMBER) AND
SHRI SANJAY ARORA (ACCOUNTANT MEMBER)**

ITA No.587/Mum/2012
Assessment Year: 2003-04

Bhuvan Leasing & Infrastructures P.Ltd.,(formerly known as Ocean City Trading (I) P.Ltd., A-49/1360, MIG Colony, Mumbai. PA No.AAACO 1795 K	Vs.	ITO, Ward 7(1)(2), Aayakar Bhavan, M.K. Road, Mumbai.
(Appellant)		(Respondent)

Appellant by : Shri Rakesh Joshi
Respondent by: Shri Mohit Jain

Date of hearing: 28.1.2013
Date of pronouncement: 8 .2.2013

ORDER

Per B.R.Mittal, JM:

The assessee has filed this appeal for assessment year 2003-04 against order dated 24.10.2011 of Id CIT(A)-13, Mumbai confirming the levy of penalty u/s.271(1)(c) of the Act of Rs.4,22,164 on account of addition of Rs.11,48,746/-.

2. The relevant facts are that assessee filed return of income declaring income at Rs. Nil. The AO completed assessment u/s.143(3) assessing the loss of Rs.72,34,415 after setting off brought forward unabsorbed depreciation of Rs.94,70,234 under the normal provisions of the Act. Since the profit as per profit and loss account is of Rs.5,30,693/-, AO computed the book profit u/s.115JB of the Act at Rs.41,792/-. Thus, the computation was made u/s.115JB of the Act. Since in the normal computation of

income under the provisions of the Act, AO made disallowance of Rs.10,88,746/- claimed by the assessee on account of fee paid to Rochester Institute of Technology, New York State, USA on the computer course pursued by Mr Naval Kumar, S/O Shri B.R. Kumar who holds 99% shares of the assessee company and other 1% being held by his wife Mrs Pushpa Kumar and stated that said amount of Rs.10,88,746/- spent on account of training of Mr Naval Kumar by deputing him for computer related studies in printing to Rochester Institute of Technology, New York is not allowable as this amount has not been wholly incurred for the purpose of business as per section 37(1) of the Act. Besides above, assessee company also claimed an amount of Rs.60,000/- paid to Mr Naval Kumar towards salary as Executive of the assessee company and AO disallowed the same. AO stated that Mr Naval Kumar is not working for the company as there is no contribution by Mr Naval Kumar for running of the assessee company.

3. On account of above disallowances made, AO initiated penalty proceedings u/s.271(1)(c) of the Act. AO stated that assessee by claiming aforesaid expenses, which were not related to the business of the assessee company, thereby inflated expenses and reduced taxable income. AO stated that it is clear cut case of furnishing inaccurate particulars and, accordingly, levied penalty @ 100% of tax sought to be evaded u/s.271(1)(c) of the Act, which works out to Rs.4,21,164/-.

4. In the first appeal, Id CIT(A) confirmed the action of AO. It is relevant to state that Id CIT(A) placed reliance on the decision of Hon'ble Kerala High Court in the case of CIT vs. Gates Farm and Rubber C, 91 ITR 467 (Ker) and stated that assessee made false claim which would amount to concealing the income. Id CIT(A) also placed reliance on the decision of Hon'ble Gujarat High Court in the case of CIT vs. Vidyagauri Natverlal & Ors, 238 ITR 91(Guj). Hence, this appeal by assessee.

5. At the time of hearing, Id A.R. submitted that similar kind of expense was made in assessment year 2001-02, which was allowed by the AO himself. He referred pages 2 to 8 of PB, which contain copy of assessment order and profit and loss account for the said assessment year. He further submitted that in assessment year 2005-06, similar expenses were incurred and claimed by assessee. AO disallowed the claim on similar

facts and initiated penalty proceedings. However, AO subsequently dropped the penalty proceedings and Id counsel referred page 17 of PB, which is copy of letter dated 29.3.2011 of AO to drop the proceedings initiated u/s.271(1)(c) of the Act. Ld A.R. further submitted that if the assessment is finally made u/s.115JB of the Act because the total income computed as per normal provisions of the Act is less than book profit computed u/s.115JB of the Act, penalty u/s.271(1)(c) cannot be imposed because disallowance so made and alleged concealment had no role to play. He submitted that similar issue was decided by the Tribunal in the case of M/s. Ruchi Strips & Alloys Ltd vs. DCIT (I.T.A. No.6940/M/2008) vide order dated 21.1.2011 by following the decision of Hon'ble Delhi High Court in the case of CIT vs. Nalwa Sons Investments Ltd., 327 ITR 543(Del). Ld A.R. filed a copy of the said order of the Tribunal in the case of Ruchi Strips & Alloys Ltd (supra) as well as the decision of Hon'ble Delhi High Court in the case of Nalwa Sons Investments Ltd (supra) to substantiate his above submission. Ld A.R. submitted that said decision of Hon'ble Delhi High Court (supra) squarely applies to the case of the assessee and, therefore, levy of penalty is not justified on the facts of the case of the assessee.

6. On the other hand, Id D.R. supported orders of authorities below. He submitted that Mr Naval Kumar was only 19 years old in 1999 when he completed his B.Sc and immediately he was employed and sent for the computer course to Rochester Institute of Technology, New York. He submitted that assessee company was promoted by parents of Mr Naval Kumar as 99% of shares are held by Mr B.R.Kumar and 1% share held by Mrs Pushpa Kumar wife of Mr B.,R.Kumar. He further submitted that only Mr Naval Kumar was sent for such training programme after executing an agreement and no other employee was sent. He further submitted that at the time when Mr Naval Kumar was sent for pursuing said computer course, assessee company was not in the business of any computer related activity. He further submitted that said computer course is a period of 5 years from 30.11.2000 to 31.5.2005. Id D.R. submitted that said expenses claimed were not for business of assessee company but was an inflated claim. Therefore, levy of penalty on account of said payment of Rs.10,88,746/- as well as payment of salary of Rs.60,000/- are nothing but furnishing inaccurate particulars of

income by claiming said expenses as business expenditure. He submitted that levy of penalty be confirmed.

7. We have considered submissions of Id representatives of parties and orders of authorities below. We have also considered decisions cited before us.

8. We agree with Id D.R. that on the facts of the case, claim of the assessee is not bonafide as said claim of the assessee cannot be considered as business related expenses or for business purposes. On the other hand, said expenses claimed by the assessee are personal in nature of the promoters of the assessee company considering that 100% of shares of the assessee company are held by parents of Mr Naval Kumar. We, on the facts of the case, find merits in the submission of Id D.R. that these expenses were wrongly claimed to the knowledge of the promoters of the assessee company and, accordingly, claim was false.

9. Be that as it may, it is also a fact that income of the assessee was finally computed under the provisions of section 115JB of the Act as the total income computed as per normal provisions of the Act was less than the book profits computed u/s.115JB of the Act. The Hon'ble Delhi High Court in the case of Nalwa Sons Investments Ltd (supra) has considered similar issue, wherein, it was held that while considering levy of penalty u/s.271(1)(c) of the Act, it has to be considered as to whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded. It was held that under the scheme of the Income-tax Act, 1961, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the book profits computed under section 115JB of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, 'book profits' are deemed as the total income of the assessee in terms of section 115JB of the Act. It is stated that the income was computed as per the normal procedure was less than the income determined by legal fiction, namely, the book profits under section 115JB of the Act, the income of the assessee was assessed

under section 115JB and not under the normal provisions. Therefore, even if there is concealment but that had it repercussions only when the assessment was made under the normal procedure. Since the assessment as per normal procedure was not acted upon, on the contrary it is the deemed income assessed u/s.115JB of the Act, which has become the basis of assessment as it was higher of the two, tax is thus paid on the income assessed under section 115JB of the Act. Hence, when the computation was made under section 115JB of the Act, concealment had no role to play and was totally irrelevant. It was held that concealment did not lead to tax evasion at all. Therefore, penalty could not have been imposed even in respect of false claim made by assessee. Hon'ble Delhi High Court also distinguished the case of Hon'ble Apex Court in the case of CIT vs. Gold Coin Health Food (P) Ltd., 304 ITR 308(SC). The said decision of Hon'ble Delhi High Court was followed by the ITAT Mumbai Bench in the case of M/s. Ruchi Strips & Alloys Ltd(supra) and penalty levied u/s.271(1)(c) of the Act was cancelled on the ground that total income of the assessee was determined on the basis of book profits u/s.115JB of the Act as there was no tax sought to be evaded because the addition in respect of which penalty was imposed was made while computing the total income under the normal provisions of the Act and ultimately, total income of the assessee was determined on the basis of book profits u/s.115JB of the Act. Therefore, the said concealment has no effect on evasion of tax. Since above decisions squarely apply to the facts of the assessee under consideration before us, respectfully following the decision of the Hon'ble Delhi High Court (supra) and also the decision of coordinate bench (supra), we cancel the penalty levied u/s.271(1)(c) of the Act. Hence, grounds of appeal taken by assessee is allowed.

10. In the result, appeal filed by assessee is allowed.

Pronounced in the open court on 8th February, 2013

Sd/- (SANJAY ARORA) Accountant Member	Sd/- (B.R. MITTAL) Judicial Member
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Mumbai, Dated 8th February, 2013
Parida

Copy to:

1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals), 13, Mumbai
4. Commissioner of Income Tax, 7, Mumbai
5. Departmental Representative, Bench 'B' Mumbai

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BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI