आयकर अपीलीय अधिकरण, "बी" खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL,MUMBAI - 'B' BENCH.

सर्व श्री डी.मन्नमोहन,उपाध्यक्ष एवं राजेन्द्र,लेखा सदस्य

Before S/Sh.D.Manmohan,Vice-President & Rajendra,Accountant Member

आयकर अपील सं./ITA No.7328/Mum/2010 ,निर्धारण वर्ष/Assessment Year-1990-91

The Bombay Dyeing & Mfg. Co.Ltd, Neville House, J.N. Heredia Marg, Ballard Estate, Mumbai 400 001		ACIT (OSD) RG 2(1) Aayakar Bhavan Mumbai
PAN: AAACT2328K		

अपीलार्थी ओर से / Appellant by :**Sh. Aniket Jadhav**

प्रत्यर्थी की ओर से/**Respondent by** :**Sh. Pritam Singh**

सुनवाई की तारीख / Date of Hearing :**11/11/2013**

घोषणा की तारीख / Date of Pronouncement : **22/11/2013**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

Per Rajendra, A.M.

Challenging the order dtd.29.09.2010 of theCIT(A)-4,Mumbai,assessee has filed following Grounds of appeal:

> *"The appellant objects to the order dated 29.09.2010 received on 06.10.2010 passed by the Commissioner of Income Tax (Appeals)-4(hereinafter referred to as "CIT(A) Mumbai , in an appeal against an order u/s 271(1)(c) of the Income Tax Act, 1961("The Act") on the following ground of appeal.*
> *1.The learned CIT(A) has erred in confirming the penalty of Rs. 4,76,14,324/- under section 27l(1)(c) of the Act without appreciating the fact that the assessee has furnished full and accurate particulars of income.*
> *2.The Appellants; therefore prays that the order of the CIT(A) be set aside and grant the relief from penalty.*
> *3.The Appellants crave leave to add, alter or amend any of the foregoing grounds as and when necessary."*

Brief facts of the case:

2.Assessee-company filed its Return of income on 28/12/1990 declaring total income of Rs.7,51, 29,000/- and showing total income at Rs.10,64,55,502/- under the provision of section 115J of the Act.Initially,the return was processed u/s.143(1)(a) of the Act on 20/6/1991 and after making adjustment to the total income on account of provision for diminution in value of investment to the tune of Rs.1,59,46,000/-,the total income of the assessee was adopted at Rs.7,96,97,700/-. Later on the case was selected for scrutiny and assessment in the said case was completed u/s. 143(3)of the Act,on 30/3/1993 determining total income at Rs.10,64,55,502 under the provisions of section 115J of the Act.While finalising the assessment AO made certain additions to the income of the assessee.Additions made to the total income u/s.143(3) of the Act were challenged by the assessee before the First Appellate Authority(FAA).After considering the submission of the assesse e,FAA confirmed the following additions made by the AO:

1.	Disallowance of Entertainment Expenses	Rs.3,35,080/-
2.	Disallowance u/s. 43B	Rs.8,58,86,675/-
3.	Commission to Directors	Rs.22,88,000/-
4.	Carried forward of unabsorbed depreciation of A.Y. 1987-88	

ITAT,Mumbai vide its order dated 17.04.2009(ITA No.5798 & 6185/Mum/2003)decided the issue in favour of the department in respect of Disallowance u/s. 43B of Rs.8,58,86,675/- and Commission to Directors of Rs.22,88,000/-.Challenging the order of the Tribunal,assessee-company preferred an appeal before the Hon'ble Bombay High Court

2.1. Penalty Proceeding u/s. 271(1)(c) were initiated on completion of assessment and show cause notice u/s. 274 r.w.s. 271 was issued on the assessee on 03.09.2009.After considering the submissions of the assessee AO held that the deduction in respect of import duty could be allowed only if it had been actually paid in the year of accounts i.e. before the due date of filing of return,that the proviso to 43B also envisaged actual payment before the due date of filing of return,that there was nothing in the Duty Exemption Entitlement Certificate Scheme to warrant an interpretation that fulfillment of Export obligation would amount to actual payment of import duty.In respect of Commission paid to Directors of Rs. 25.88 lacs,AO held that the assessee company had actually paid only Rs.3,00,000/ as Commission to Directors,that it was a case of furnishing of inaccurate particulars of income by the assessee.Finally,AO levied a penalty of Rs.4,76,14,324/-u/s.271(1)(c)of the Act.

2.2. Assessee preferred an appeal before the FAA.After considering the penalty order and the submissions of the assessee he held that AO was justified in levying penalty, that the assessee had claimed expenses on account of import duty which was allowable u/s. 43B on payment basis only,that even then the assessee had claimed the expenses by making provision in the books of account,that the assessee had claimed director's commission on the basis of provision made which was allowable on the basis of actual payment, that FAA and Tribunal had upheld the additions,penalty was leviable for furnishing inaccurate particulars of income.He further held that penalty could be levied if the assessee had concealed particulars of income or if the assessee had furnished inaccurate particulars of income,that in the case under consideration assessee had filed inaccurate particulars of income by claiming expenses on the basis of provision made and not on the basis of actual payment whereas the expenses were allowable only on actual payment u/s. 43B.He was of the opinion that facts of Reliance Petro Products Pvt. Ltd. (322ITR158) were not applicable to the facts of the present case,that it was not a case of difference of opinion between the assessee and the Department,that the assessee had claimed expenses without incurring the same whereas section 43B provided that assessee could claim expenses only on pay -ment basis,held that the explanation of the assessee regarding claim of the expenses in respect of import duty and director's commission were not bonafide,that the assessee had made a wrong claim which was not allowable under the Act.Finally,he dismissed assessee's appeal.

2.3. Before us,Authorised Representative(AR)submitted that matter was pending before the Hon'ble High Court.Departmental Representative(DR)submitted that explanation 1 to section 271(1)(c)was applicable in the case.He supported the orders of the FAA.

2.4. We have heard the rival submissions and perused the material on record.Before proceeding further we would like to mention a few of the basic principles that govern imposition of penalty u/s.271(1)(c)of the Act.Courts are of the view that provisions of Sec.271(1)(c) have to be strictly applied in the larger interest of discipline in filing correct returns by the assessees.It has also been held by the courts that for levying penalty u/s.271(1)(c) two facts should co-exit-first that amount in question is part and parcel of the income of the assessee and secondly, the assessee must have filed inaccurate particulars or must have concealed particulars of such income.A careful circumspection of the said Explanation divulges that where in respect of any facts material to the computation of the total income of any person under this Act,such person fails to offer an explanation or offers an explanation which is found by the AO or the FAA to be false,or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,then,the amount added or disallowed in comput - ing the total income of such person as a result thereof shall, for the purposes of cl.(c) of this sub-section,be deemed to represent the income in respect of which particulars have been concealed.

2.4.1. Recently,Hon'ble Delhi High Court has dealt with the issue of levy of penalty u/s.271(1)(c) with regard to the provisions of section 43B of the Act.In that matter during the assessment proceedings,assessee admitted that unpaid interest charges,should have been disallowed u/s.43B, cannot be accounted for in the P&L account.It was also found that the assessee had accounted Rs.12, 610/- and Rs.4,715/-, due and payable on account of provident fund and ESI in the P&L account, although this was not permissible and was contrary to Section 43B of the Act.Along with these additions certain other additions were made by the AO and a notice,for imposing penalty u/s.271(1)(c) of the Act,was initiated.AO imposed penalty on account of concealment and/or furnishing of inaccurate particulars and FAA upheld the order imposing penalty. But,reversing the order of the FAA,Tribunal deleted the penalty.On appeal by the Revenue, Hon'ble High Court held as under:

> *"….furnishing of inaccurate particulars of income can have different connotations and may arise when income is enhanced, deduction denied or when head of income, is changed resulting in a higher rate of tax or increase in income. The real question is application of Explanation 1. Paragraphs 5.2and 5.3 of the Tribunal order refer to the disallowance u/s 43B and observe that ESI and PF deductions as claimed were a mistake and a case of not giving proper effect to P&L account. However, this cannot be read in isolation as the assessee had not made disallowance u/s 43B even in respect of interest payable but not paid,to the financial institutions;…Further, this is not the correct way of applying Explanation 1.In paragraph 5.5 of the Tribunal order it is recorded that one cannot be oblivious to the explanation and justification given by the assesse. Indeed one has to take into consideration the explanation and the justification given by the assessee,but it cannot be accepted as bona fide and true on mere asking.Onus under Explanation 1 is on the assessee to prove the reason as to why a particular claim or deduction was made.The justification and cause shown should be bona fide and acceptable. Penalty cannot be deleted by*

merely recording the explanation, though not proved and established. It is not for the Revenue to show that the explanation offered is not false or bogus;…Section 271(1)(c) of the Act as applicable has been considered and interpreted in several judgments of the Supreme Court and the Delhi High Court.The said Section is invoked when an assessee furnishes inaccurate particulars or conceals his income.Explanation 1 can come to the rescue of the assessee in case he had offered an explanation but was unable to substantiate it, provided he is able to establish that the explanation offered was bona fide and the facts relating to furnishing of inaccurate particulars and material for computation of total income were duly disclosed by him. ..The moot question and issue is whether the assessee has discharged the burden under Explanation 1 to Section 271(1)(c) of the Act or rather more precisely whether the tribunal has correctly applied the said Explanation as mandated and required by the statute;….mens rea is not required and necessary to impose penalty for concealment.In Union of India vs. Dharmendra Textile Processors **(*2008-TIOL-192-SC-CX-LB*)***, the Supreme Court examined Section 271(1)(c) of the Act and other provisions for imposition of penalty in different statutory enactments.It was held that penalty in such cases imposed for tax delinquency is a civil obligation,remedial and coercive in nature and is far different from penalty for crime or a fine or forfeiture as stipulated in criminal or penal laws.It refers to blameworthy conduct for contravention of the Act and it equally applies to tax delinquency cases.Mens rea or willful failure or conduct is not required to be proved and established.Mens rea is essential or sine-qua-non for criminal offences but is not an essential element for imposing penalty for breach of civil obligations or liabilities.Thus, penalty u/s 271(1)(c) is imposed when an assessee conceals his income or furnishes incorrect particulars.In terms of explanation I,we have to examine whether the case in question falls within the two limbs viz. clause (A) and (B) i.e. which of the two limbs and effect thereof. Clause (A) applies when an assessee fails to furnish explanation or when an explanation is found to be false. Clause (B) applies to cases where explanation is offered but the assessee is not able to substantiate the explanation.In such cases, we have to examine two conditions: (1) Whether the assessee has been able to show that his explanation was bonafide; (2) whether the assessee had furnished and disclosed facts and material relating to computation of his income.Onus of establishing that the assessee satisfies the two conditions is on the assessee. Both the conditions have to be satisfied. In case the assessee satisfies the twin condition, penalty should not be imposed;*

..On the second aspect, which relates to addition on account of disallowance u/s 43B of the Act, position remains the same.In the audited accounts, there is no mention or reference to the said Section or that in the P&L account expenditure which has to be disallowed u/s 43B has been debited and claimed.The fact that interest due and payable to the financial institution has not been paid but was treated as expenditure in the P&L account was not stated or adverted to.Thus, full facts relating to the assessment of income were not stated…..in the present case, additions or disallowance has been made on account of wrong claim of revenue loss, which was in fact capital loss and disallowance u/s 43B. From the reasoning given by the tribunal, it is not possible to decipher and hold that the explanation given by the assessee shows as to why his claims were bona fide and justified.The onus of establishing the reasons for the claim made is on the assessee. Penalty cannot be imposed because an assessee has taken a particular legal stand. However, this does not mean that the assessees can claim wrong deductions or claim without any basis or foundation to justify the claim. False, spurious and mendacious claims do not fall in this class;

…. It is not a case of a debatable issue or a legal provision which could have escaped or missed notice or consideration of the Chartered Accountant or the accountant or the directors of the company.We cannot stretch the plea that the issue was debatable or there was wrong advice beyond the point to believe or accept contentions when the claim itself is impossible to accept and is contrary to fundamentals of tax or accountancy. Income tax returns are mostly accepted

without scrutiny or regular assessment. Self and due compliance of tax provisions is required. ….It is not a case where the assessee suo motu *on his own or on immediately noticing the wrong claim rectified or corrected the purported errors and understatements….whether an assessee had offered an explanation and whether the explanation was bona fide when discussed and examined as stipulated in Explanation 1, is a question of fact and depends upon several factors, including whether the assessee is an individual or corporate assessee, literate or illiterate, the nature, character and quantum of the deduction, his past conduct relating to the same claim/deduction, the provision or section applicable etc.It is not one fact but several factors which have to be taken into consideration to determine whether or not the claim or explanation of an assessee is bona fide….in view of the aforesaid discussion, the question of law in favour of the Revenue and against the assessee and uphold levy of penalty u/s 271(1)(c) of the Act in respect of loss on account of investments, vehicle and disallowance u/s 43B. The claims were* ex facie *wrong being contrary to fundamental/basic principles of accounts and Act, would not have escaped notice or missed.***(2013-TIOL-746-HC-DEL-IT)**

2.5. After considering the above,now we would like to discuss the facts of the case.We find that assessee had made claims under the heads-payment of import duty and payment to directors-without any basis.As per the provisions of the Act expenditure under these heads could be claimed only if same is incurred during the year under consideration.It is a fact that assessee had not incurred expenditures on both the counts,but while filing the return of income it claimed these expenditure in the P&L account.Thus, the assessee had reduced its income and the resultant tax to that extent.Clearly, particulars filed by the assessee were inaccurate and concealed its true income.We find that assessee had taken the matter up to the level of Hon'ble High Court.We are aware that confirmation of an addition by the appellate authorities in quantum appeals do not lead to automatic levy of penalty.But,if there is difference between the returned and assessed income there is a presumption of concealment of income.In such circumstances Expl.1 to the section comes in to play.We find that during the penalty proceedings assessee had not filed any explanation,except stating that against the order of the Tribunal it had filed appeal before the Hon'ble High Court.In our opinion it cannot be termed an explanation.Genuineness or bona fide of the explanation comes in picture where prima facie believable explanation is filed.In the present case no explanation has been filed as to why the claims were made under the above referred two heads,when no expenditure was incurred at all.In our opinion,in these circumstance, it has to be held that the order of the FAA does not suffer from any legal infirmity.So,confirming his order,we decide the effective ground of appeal against the assessee-company.

As a result,appeal filed by the assessee stands dismissed.
निर्धारिती द्वारा दाखिल की गई अपील खारिज की जाती है.

Order pronounced in the open court on 22nd November,2013.
आदेश की घोषणा खुले न्यायालय में दिनांक 22 **नवंबर, 2013** को की गई ।

Sd/- **Sd/-**

(डी.मन्नमोहन/ D. Manmohan) **(राजेन्द्र/Rajendra)**

उपाध्यक्ष /Vice-President **लेखा सदस्य /Accountant Member**

मुंबई/Mumbai,दिनांक/Date: 22.11..2013

A.K.Patel

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. Assessee /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,**4.**The concerned CIT/संबद्ध आयकर आयुक्त

5. DR "D" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि.डी खंडपीठ,आ.अ.न्याया.मुंबई

6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai**