IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ''A '' BENCH – AHMEDABAD

Before Shri R. P. Tolani, JM, & Shri Manish Borad, AM.

ITA No.2147/Ahd/2013
Asst. Year: 2007-08

Inject Care Parenterals P. Ltd. Devashish Building, 1st Floor, Ellisbridge, Ahmedabad.	Vs.	ACIT, Circle-4, Ahmedabad.
Appellant		Respondent
PAN AABCL 0232J		

Appellant by	Shri P. F. Jain, AR
Respondent by	Shri B.P.K. Panda, Sr.DR

Date of hearing: 30/5/2016
Date of pronouncement: /6/2016

O R D E R

PER Manish Borad, Accountant Member.

This appeal of the assessee is directed against the order of ld. CIT(A) –VIII, Ahmedabad, dated 11.7.2013 in appeal No.CIT(A)-VIII/ACIT/Cir.4/13/12-13 passed against order u/s 271(1)(c) of the IT Act, 1961 (in short the Act) for Asst. Year 2007-08 framed on 15.3.2012 by ACIT Circle-4, Ahmedabad. Assessee has raised following grounds of appeal :-

1. The ld. CIT(A) has erred in law and on facts in upholding the levy of penalty on the disallowance of Rs.9,59,886/- being amount spent on cables on the ground of furnishing inaccurate

particulars of income without property appreciating the facts of the appellant.

2. On facts of the appellant no such penalty ought to have been levied.

3. The appellant craves leave, to add to alter and/or modify any ground of appeal.

2. Briefly stated facts as culled out from the records are that the assessment u/s 143(3) of the Act for Asst. Year 2007-08 was framed on 24.12.2009 at an assessed loss of Rs.37,87,178/- after making addition of Rs.28,76,411 and penalty proceedings u/s 271(1)(c) of the Act were initiated; against which assessee went in appeal before ld. CIT(A) and got part relief vide ld. CIT(A)'s order dated 17.01.2011.

3. Pursuant to the order of ld. CIT(A), ld. Assessing Officer initiated penalty proceedings for imposition of penalty u/s 271(1)(c) of the Act on the addition confirmed by ld. CIT(A) relating to claiming of expenditure of Rs.959886/- spent on laying of cables for 950 KVA transformer as revenue expenditure which was denied by ld. Assessing Officer by treating the same as capital in nature. Ld. Assessing Officer was not convinced with the reply of assessee and imposed penalty u/s 271(1)(c) of the Act. Penalty was confirmed on another issue also relating to payment of Rs.93552/- on account of legal and professional charges for non-furnishing of copies of bill(s).

4. On appeal before ld. CIT(A) against the order u/s 271(1)(c) of the Act penalty was confirmed on the disallowance of expenditure of

Rs.959886/- and deleted penalty on disallowance of expenditure of Rs.93552/- by observing as under :-

2.3 Decision:

I have carefully considered the penalty order and the submission given by the appellant. It is noted that the penalty has been imposed on two issues. For the sake of convenience and clarity the issues are discussed separately as under:-

i) The **first issue** which have been considered for penalty is the electric power expenses of Rs. 9,59,886/- on account of electric power. The appellant has claimed these expenses as revenue whereas the A.O held to be capital expenditure. The facts are that the appellant started manufacturing pharmaceuticals from 1/2/2003 and separate unit was set up at Vapi, Silvasa which started commercial production in May 2006. The appellant made certain payments to Dakshin Gujarat Electricity Board on 17/8/2005 out of which an amount of Rs. 9,58,382/- was adjusted by the electricity board towards cable line charges which was claimed as revenue expenditure. The entry for this adjustment was passed by the appellant on 27/9/2006, whereas the commercial production started in May 2006. The CIT(A) upheld the addition made by the A.O and accordingly the penalty has been imposed by the A.O .

It has been explained by the appellant that the above expenditure could not be capitalized as there was time lag of 6 months between the date of production and the appropriation of the expenses out of the deposits. There was an inadvertent error of not including it in preoperative expenses. The appellant during the appellate stage for the quantum proceedings claimed that since it was not in the owner of the P & M it should be taken as a revenue expenditure. The appellant has further submitted that the mistake was a bonafide one.

The fact remains that the expenditure pertain to the period prior to commencement of production and therefore, irrespective of the nature of expenditure that is capital or revenue, it has to be capitalized in the books of account and the appellant should have claimed depreciation on the same. Therefore, there is an incorrect claim made by the appellant which has resulted into concealment of income. The claim is ex-facie not admissible. The issue is now to be analyzed from the point whether there was a bonafide mistake or reasonable cause for making such claim. It is noted that the appellant had no bonafide reason or reasonable cause for not capitalizing the expenditure. The deposit with the electricity board was made in the month of August 2005, the power was connected by the electricity board in the month of October 2005 and the commercial production started in May 2006. The adjustment of the amount of Rs. 9,58,382/- has been made before commencement of production and there is no doubt about it. The claim of the appellant that the journal entry was passed after 6 months of start of production

and it resulted in the wrong claim is without any merit as there was no bonafide reason to pass such journal entry so late. No reason have been given by the appellant for the delay. Therefore, the claim of bonafide or the reasonable cause has no merit.

The appellant has further relied on certain judgements such as Gujarat Textile Co. P. Ltd. (99 ITR 514) wherein penalty was held to be not imposable on account of expenditure held to be capital nature as against revenue claimed by the assessee. This judgement and the other judgement claimed by the appellant is not applicable to the current facts as there is no dispute about the nature of expenditure in the present case. The expenditure clearly pertains to preoperative period whereas in the cases quoted by the appellant, there was a doubt about the nature of the claim.

In view of the above clear facts, I am constrained to hold that the imposition of penalty u/s. 271(1)(c) on the appellant was justified on this issue. The action of the A.0 is accordingly upheld. Therefore, this issue is **dismissed.**

ii) The **second issue** on the penalty has been imposed to related to payment of Rs. 93,552/- on account of legal and professional charges. The appellant could not furnish the copies of the bill as the same were misplaced. The facts show that the genuineness of the expenses has not been disproved by the A.O. The payment has been paid by a/c. payee cheques and TDS has also been deducted. The A.O on his part has not brought anything on record which proves or establishes that the expenditure claimed by the appellant was false. It was a different matter that due to non-availability of the bill the appellant could not substantiate the claim before the A. 0 and the addition was made. The expenditure has not been to proved to be bogus and therefore, it cannot be held to be concealment of income and no penalty cannot be imposed for the same. The penalty imposed by the A 0 on this issue therefore, directed to be **deleted.**

5. Now the assessee is in appeal before the Tribunal against the order of ld. CIT(A) confirming penalty u/s 271(1)(c) of the Act for claiming expenditure of Rs.959,886/- relating to laying of cable as revenue expenditure and not capital expenditure.

6. Ld. AR submitted that the payment of Rs.959,886/- was made to Dakshin Gujarat Vij Company Ltd. .(DGVCL) for laying cables for 950 KVA transformers and claimed as revenue expenditure because

DGVCL is open to use the transformer, cables, accessories etc. situated at assessee's premises for supplying of electricity to other customers and payment made by the assessee to DGVCL is merely contribution of the total cost on transformer. He further submitted that there is a clear stipulation evidencing the ownership and liberty of DGVCL regarding the use of transfer for supplying electricity to other customers. Therefore, as the ownership is not vested with the assessee but to DGVCL it was claimed as revenue expenditure. However, the lower authorities denied assessee's claim of revenue expenditure and treated it as capital expenditure but certainly there was no furnishing of inaccurate particulars or evidence showing concealment of income at any stage and, therefore, ld. CIT(A) was not correct in confirming the penalty u/s 271(1)(c) of the Act.

7. In support of his submissions, Ld. AR placed reliance on the judgment of Hon. Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 (SC) and the decision of the co-ordinate bench in the case of Areez Pirozsha Khambatta vs. ACIT in ITA No.1574/Ahd/2012 for Asst. Year 2006-07 dated 18.07.2014 .

8. On the other hand, ld. DR along with supporting the orders of lower authorities also placed reliance on the decision of Hon. Delhi High Court in the case of CIT vs. Zoom Communication Pvt. Ltd. in ITA No.07/2010 dated 24.05.2010.

9. We have heard the rival contentions and perused the material on record. Through this appeal, assessee is aggrieved with the action

of ld. CIT(A) upholding the penalty on the disallowance of Rs. 9,59,886/- being spent on cables on the ground of furnishing inaccurate particulars of income. We observe that assessee company set up a new unit at Vapi –Silvasa Road to manufacture buffered dry powder (injectables) requiring larger quantity of electricity energy which was obtained from Daxin Gujarat Electricity Board and made payment of Rs.33,21,710/- on 17.8.2005. Electricity Board required power load by October, 2005 but due to fire at Vapi Unit, commercial production commenced in May, 2006. Out of the total deposit held with DGVCL a sum of Rs.959,886/- was adjusted by DGVCL towards cable laying charges of 950 KVA and entry for such adjustment was passed in the books of account by the assessee on 27.09.2006 and claimed as revenue expenditure. However, ld. Assessing Officer treated the same as capital in nature and is further confirmed by ld. CIT(A).

10. Now examining the above facts in the light of provisions of section 271(1)(c) of the Act which deals with imposition of penalty if an assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, we observe that there is no dispute on the part of revenue as regards the figure of expenditure of Rs.9,59,886/- as the same have been furnished accurately in the books of account.

11. Ld. AR placed reliance on the decision of Hon. Supreme Court in the case of CIT vs. Reliance Petro Products Pvt. Ltd. (supra) wherein it has been held that "*if information given in return is not*

found to be incorrect, simply by making incorrect claim, it does not amount to concealment of particulars. By no stretch of imagination making an incorrect claim tantamounts to furnishing inaccutate particulars. When the details supplied by the assessee in the return are not found to be incorrect or erroneous or false, there is no question to invite penalty u/s 271(1)(c). A claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars of income by the assessee."

12. We further observe that ld. DR referred and relied on the decision of Hon. Delhi High Court in the case of CIT vs. Zoom Communication ITA No.07/2010 dated 24.5.2010 wherein the Hon. Court has distinguished the case before them with the facts in the case of Reliance Petro Products Pvt. Ltd. (supra) and has observed as under :-

"21. We find that the assessee before us did not explain either to the Income Tax Authorities or to the Income Tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this case were not added, while computing the income of the assessee company. We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income, and its accounts are compulsorily[1] subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee company and how it could also have escaped the attention of the auditors of the company.

22. The explanation offered by the assessee company was not accepted either by the Assessing Officer or by the Commissioner of Income Tax(Appeals). The view of Income Tax Appellate Tribunal regarding admissibility of the deduction on account of written off of certain assets, under Section of the Act is wholly erroneous. The Tribunal has not recorded a

finding that the explanation furnished by the assessee in respect of the deduction due to certain assets being written off was a bonafide explanation. The Tribunal has nowhere held that it was due to oversight that the amount of this deduction could not be added while computing the income of the assessee company.

23. As regards deduction on account of income tax paid by the assessee, the Tribunal felt that since no person would claim the same as deduction, to evade payment of tax, the claim made by the assessee was not malafide. In the absence of the assessee company telling the Assessing Officer as to who committed the oversight resulting in failure to add this amount while computing the income of the assessee, under what circumstances the oversight occurred and why it was not detected by those who checked the Income Tax Return before it was filed and later by the auditors of the assessee company, we cannot accept the general view taken by the Tribunal. In our view, no such view could have reasonably been taken, on the facts and circumstances prevailing in this case and, therefore, the decision of the Tribunal in this regard suffers from the vice of perversity. We cannot accept the general proposition that no person would ever claim the amount of income tax as a deduction with a view to avoid payment of tax. No hard and fast rule in this regard can be laid down and every case will have to be decided considering the facts and circumstances in which such a deduction is claimed, coupled with as to whether the explanation offered by the assessee for making the claim, is shown to be bonafide or not.

24. For the reasons given in the preceding paragraphs, we answer the question of law framed in this case in favour of the revenue and against the assessee. The Income Tax Appellate Tribunal erred in law in deleting the penalty in respect of the amount of Rs.i lakh claimed as deduction on account of payment of income tax and the amount of Rs.i3,24,539/- debited under the head equipment written off, in the Profit and Loss Account of the assessee. The appeal stands disposed of accordingly."

13. From going through the decision referred and relied by the ld. DR we observe that the issue in that case related to claim of income-tax paid as revenue expenditure and write off of Rs.1324539/- under

the head equipment and for making such incorrect claim penalty imposed u/s 271(1)(c) of the Act was confirmed. However, we observe that the facts of the case in the appeal before us are fairly different because at the time when the expenditure of Rs.959886/- was booked in the books as revenue expenditure the assessee was having certain belief which was duly supported with the agreement with DGVCL evidencing that the ownership and liberty regarding the use of transformer for supply of electricity to other consumers will rest upon the DGVCL only and, therefore, cost of laying of cables attached to the Transformer was treated as revenue expenditure. Certainly in such a situation when both the possible views i.e. revenue or capital expenditure are going side by side and there remains a thin line to differentiate the same. Also dispute is not in regard to the quantum of expenditure but it is with regard to nature i.e. capital/revenue. Even if ld. Assessing Officer has treated the amount of Rs.9,59,886/- as capital expenditure, certainly assessee will be entitled to claim depreciation but the crux is, it is allowable expenditure. Such situation certainly does not call for a penalty u/s 271(1)(c) of the Act. So, assessee cannot be held for furnishing inaccurate particulars.

14. We also observe that assessee has declared business loss of Rs.66,63,589/- in its e-return filed on 31.10.2007 which further substantiate the view that assessee was not having any benefit by claiming a revenue expenditure so as to evade income-tax.

15. In such situation, we are of the view that case of the assessee is squarely covered by the decision of Hon. Supreme Court in the case of CIT vs. Reliance Petro Products Pvt. Ltd. (supra) and therefore, assessee should not be visited with penalty u/s 271(1)(c) of the Act. We accordingly, set aside the orders of lower authorities and allow the appeal of the assessee.

16. Other grounds are general in nature, hence no adjudication is needed.

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

Order pronounced in the open Court on 1st June, 2016

Sd/-	sd/-
(R.P. Tolani)	(Manish Borad)
Judicial Member	Accountant Member

Dated 01/6/2016

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 31/05/2016
2. Date on which the typed draft is placed before the Dictating Member: 31/05/2016 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 1/6/2016
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: