आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,D,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**
श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.2197/Mum/2013
Assessment Year: 2008-09

Qpro Infotech Ltd., Ratnajyot 1-B, Pushpam, 30E, Cawasji Patel Street, Fort, Mumbai-400001	**बनाम**/ Vs.	DCIT 2(3) Mumbai
(Assessee)		(Revenue)
		P.A. No.AAACQ0953H

Appellant by	Shri Dharmesh Shah (AR)
Revenue by	Capt. Pradeep S. Arya (Sr. DR)

सुनवाई की तारीख / **Date of Hearing :**	**29/06/2016**
आदेश की तारीख /**Date of Order:**	**13/07/2016**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against order of Ld. order of Ld. Commissioner of Income Tax (Appeals) -6, Mumbai, {(in short 'CIT(A)'}, dated 29.01.2013 passed against

penalty order u/s 271(1)(c) of the Act, dated 30th May 2011 for the A.Y 2008-09.

2. During the course of hearing, arguments were made by Shri Dharmesh Shah, Authorised Representative (AR) on behalf of the Assessee and by Capt. Pradeep S. Arya, Departmental Representative (DR) on behalf of the Revenue.

3. In this case both the parties made their respective submissions before us and the same has been considered while disposing this appeal.

3.1. Ld. Counsel of the assessee relied upon following judgments in support of his arguments that no penalty should be levied on this case.

1. Decision of Hon'ble Supreme Court in case of CIT v. Reliance Petroproducts Pvt. Ltd [322 ITR 158].

2.Decision of Hon'ble Supreme Court in case of Price Waterhouse Coopers Pvt. Ltd v. CIT & Ors [348 ITR 3061

3. Order of Hon'ble Mumbai Tribunal in case of B. Melaram & Sons v. ACIT [ITA No.5143/Mum/2014] dated 25.02.2016 for A.Y. 2008-09.

4. Order of Hon'ble Mumbai Tribunal in case of ACIT v. Mangalya Trading & Investments Ltd [ITA No. 4165/Mum/2011] dated 20.04.2012.

5. Order of Hon'ble Mumbai Tribunal in case of Shri Rajesh Mulchand Joshi v ITO [ITA No.1448/Mum/2014] dt 22.04.2016.

3.2. We have gone through the judgments relied upon by the parties before us as well as facts of this case as borne out from the orders of the lower authorities. It is noted that assessee's claim on account of bad debt of share application money which had become irrecoverable was disallowed on the ground that it (i.e. impugned amount) was not eligible as bad debt u/s 36(1)(iii). The assessee company did not file appeal in quantum because it had filed the return showing loss of Rs.63,21,756/- which was not even available for carry forward as the return was filed late. Even after the addition, the assessment was done by the AO at loss of Rs.44,96,756/-. Under these circumstances, the assessee did not contest the issue of disallowance any further to bury litigation. Subsequently, the AO issued penalty notice u/s 271(1)(c) and levied the penalty on the ground that since claim made by the assessee was disallowed, therefore, penalty was leviable and thus, the penalty was levied by the AO. The assessee contested the penalty order but before Ld. CIT(A) who passed four line order and confirmed the penalty. The entire order passed by the Ld. CIT(A) is reproduced hereunder:

"*Order*

The appellant concealed the particulars of income as well as furnished inaccurate particulars of such income by claiming a deduction of Rs.18,25,000/- in the garb of bad debt' even though the Rs.18,25,000/- was paid towards application money for acquisition of shares and the money lost was not related to any business activity. Under the circumstances, the levy of penalty at the

minimum rate of 100% amounting to Rs 6,14,2951- is found to be perfectly valid.

2. The appeal is dismissed.

Sd/-

Commissioner of Income Tax (Appeals)-6, Mumbai."

3.3. Before us, it was vehemently submitted by the Ld. Counsel that he was yet to see such a non-speaking and cryptic order passed by the any appellate authority. He further made his arguments in detail to justify that in this case penalty was not leviable at all.

3.4. We have considered all these submissions carefully. Undoubtedly the claim of the assessee was rejected on the ground that it was not allowable as bad debt u/s 36(1)(iii). But, it is noted by us that that while levying the penalty in the penalty order, the AO has not made out a case for levy of penalty. He has not demonstrated how there was concealment of income or furnishing inaccurate particulars of income. If the claim of the assessee was not allowable as bad debt u/s 36(1)(iii), then, alternatively, the assessee may have been entitled for its claim as business loss u/s 37(1). No observations or findings have been given by any of the authorities in this regard. It has nowhere been mentioned in any of the orders passed by the lower authorities that claim of the assessee was not allowable under any circumstances at all or under any other provisions of the Act. The penalty has been levied in a highly mechanical manner. Ld. CIT(A) has also

confirmed the penalty in a cryptic, non-speaking, disregardful and casual manner.

3.5. In the facts of the case before us, the genuineness of payment of share application money has not been doubted at any stage by any of the authorities. The only dispute was with regard to allowability of claim of bad debts made by the assessee for the reason that share application money had become irrecoverable. The disallowance made by the AO was not contested vigorously by the assessee as the same was revenue neutral as the assessee had incurred huge losses, which were not even available for carry forward and set off in future years. Thus, apparently, there was no motive with the assessee to make a bogus or inflated claim while filing its return of income. Under these circumstances, it was imperative on the part of the lower authorities to examine the aspect of levy of penalty within the provisions of the Act, independently and with liberal attitude.

3.6. The levy of penalty and its confirmation has far reaching serious implications upon an assessee, since it may also invite prosecution of the assessee. Thus, matters with regard to 'levy' of penalty cannot be taken lightly or casually as it may cause unintended and avoidable hardship to the tax payers. Further, it is well settled law that levy of penalty is not automatic upon the making of disallowance itself by the AO in the assessment order. Any disallowance/addition in the assessment order **would not** necessarily lead to levy of penalty '*ipso facto*' as a

natural consequence. The determination of tax liability and levy of penalty are two different events under the income tax law. The AO is duty bound and obliged under the law to make out a case for levy of penalty, independent of the assessment proceedings. Therefore, the conditions under section 271(1)(c) must exist before the penalty is imposed, which are to be mandatorily shown by the AO before levying the penalty in any given case.

3.7. In our country's legal and constitutional frame work, the role assigned to the income tax department is to act like a 'watch dog' to ensure that tax evasion is checked and legitimate tax collection is augmented, but not to act like a 'scare crow'. In our view, it has been observed on the basis of past experience that by passing such orders which are in blatant disregard of law, the Revenue does not gain anything substantive, but it surely scares away even sincere and honest tax payers. In our considered view, such kind of approach should be avoided in all circumstances so that faith of the tax payers upon the income tax department for its fair, transparent and hassle-free functioning can be increased and as a result of it, voluntary tax compliance can also be strengthened.

3.8. It is further noted by us that time and again and Hon'ble Apex Court has given guidance through its various landmark judgments with regard to levy of penalty u/s 271(1)(c) upon a disallowance made by the AO in the assessment order.

Immediate reference can be made in this case to judgment of Hon'ble Supreme Court in the case of **CIT v. Reliance Petro Product Pvt. Ltd, 322 ITR 158 (SC)** and **Price Waterhouse Coopers Pvt. Ltd. v. CIT 348 ITR 306 (SC)**. In the case of Reliance Petro Product Pvt. Ltd. (supra), Hon'ble Supreme Court came down heavily upon the approach of the assessing officer whereby penalty was levied on 'automatic' basis on making of disallowance of a claim of the assessee in the assessment order. Some of the useful observations of the Hon'ble Supreme Court are reproduced hereunder:

> ***"In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal [2009] 9 SCC 589, where this court was considering the same provision, the court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This court referred to another decision of this court in Union of India v. Dharamendra Textile Processors [2008] 13 SCC 369 as also, the decision in Union of India v. Rajasthan Spg. & Mg. Mills [2009] 13 SCC 448 and reiterated in paragraph 13 that (page 13 of 317 ITR):***
>
> ***"13. It goes without saying that for applicability of section 271(1)(c), conditions stated therein must exist."***
>
> ***Therefore, it is obvious that it must be shown that the conditions under section 271(1)(c) must exist before the penalty is imposed."***

3.9. In the facts of the case before us nothing has been brought by the authorities to show that the claim of the

assessee was bogus. Nothing has been shown to establish whether there was concealment of income or furnishing of inaccurate particulars of income and how. It has been merely mentioned by the AO in the last para of the penalty order that in case return of the assessee was not selected for scrutiny, then it would have resulted in excess carry forward of the losses to be adjusted against the income of future years. But, here also, Ld. AO went factually wrong, since return of the assessee was filed beyond time limit prescribed u/s 139(1) and therefore, the assessee was not eligible to carry forward loss claimed in the return. Thus, whole premise of the AO was built under misconception of facts and incorrect understanding of law. Above all, Ld. CIT(A) also miserably failed in his duty, by passing a casual order and collapsing the **'check and balance'** mechanism envisaged by the statute. The levy of penalty was highly unjustified and the same is directed to be deleted.

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

Order pronounced in the open court on 13th July, 2016.

Sd/-	Sd/-
(Joginder Singh)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 13 /07 /2016

*Patel, P.S.*नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

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