

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, D, मुंबई ।

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

**श्री संजय गर्ग, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Sanjay Garg, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA NO.1672/Mum/2013
Assessment Year: 2003-04**

Deepak Fertilisers and Petrochemicals Corporation Limited, 10-B, Bakhtawar Nariman Point Mumbai-400021	<u>बनाम/</u> Vs.	Addl. CIT Range 3(1) Aaykar Bhavan, M.K.Rd. Mumbai
(Appellant)		(Revenue)
P.A. No. AAACD1388D		

Appellant by	Shri H.P. Mahajani, (AR)
Revenue by	Shri V. Tripathi (Sr. DR)

सुनवाई की तारीख/ Date of Hearing :	05/10/2016
आदेश की तारीख / Date of Order:	26/10/2016

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against the order of Ld. Commissioner of Income Tax (Appeals) -36, Mumbai {(in short 'CIT(A)'}, dated 19.07.2011 passed against

penalty order of the AO dated 30.06.2011 u/s 271(1)(c) for the Assessment Year 2008-09 on the following grounds:

“Being aggrieved by the order passed by the CIT (Appeals)-36, Mumbai the Appellant submits the following grounds of appeal for your sympathetic consideration.

On the facts and in the circumstances of the case and in law the learned CIT(A) erred in confirming order u/s 271(1)(c) passed by Asst CIT Central Circle 44 Mumbai levying penalty of Rs. 26.87,196 with reference to procurement commission of Rs. 7312,100 paid, as per normal trade practice, wholly and exclusively for the purposes of the business carried on by the Appellant.

In particular, the learned CIT(A) failed to appreciate that the said commission was offered to tax during the assessment proceedings specifically with the object of avoiding prolonged litigation and of buying peace and also keeping in mind the materiality of the amount involved and further that the disallowance was made solely on the basis of such offer made by the Appellant.”

2. During the course of hearing, arguments were made by Shri H.P. Mahajani, , Authorised Representative (AR) on behalf of the Assessee and by Shri V. Tripathi, Departmental Representative (Sr. DR) on behalf of the Revenue.

3. The solitary issue in this appeal is with regard to levy of penalty u/s 271(1)(c) of the Act. The representative of both the sides made detailed arguments. Ld. Counsel of the assessee took us through the orders of the lower authorities and drew our attention upon the facts that in this case the penalty was levied by the AO on account of disallowance of ‘Procurement Commission Expenses’ which was made by the AO as a result of withdrawal of said claim by the assessee. He drew our attention upon the order of the Settlement Commission dated 02.12.2011 showing that the similar claim had been offered to

tax by the assessee during all other assessment years i.e. 2004-05 to 2009-10 for an amount aggregating to Rs.5,13,35,902/- on account of discrepancies in proving services rendered by the agent for procurement of raw material. He drew our attention upon the reply submitted by the AO during the course of proceedings as well as penalty proceedings to show that the assessee had voluntarily withdrawn the claim without calling it as non-genuine expenses. It was submitted that though the claim was withdrawn as assessee was not able to prove rendering of services by the agent, but the claim was genuine otherwise. He argued that merely because a claim has been withdrawn by the assessee and consequently the AO had disallowed the same, it does not prove concealment or furnishing of inaccurate particulars of income, and therefore penalty cannot be levied under such cases. In support of his arguments, he has placed reliance upon following judgments:

1. Shri Hafeez S. Contractor v. ACIT in ITA No.6222 and 6223/Mum/2013 dated 02.09.2015
2. Heranba Industries Ltd. vs. DCIT in ITA No.2292/Mum/2013 dated 08.04.2015
3. CIT v. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 (SC)
4. Dushyant Development Corporation v. DCIT ITAT Mumbai dated 01.02.2013

3.1. Per contra, Ld. DR vehemently contested all the arguments of the Ld. Counsel and submitted that complete facts have not been narrated by the Ld. Counsel of the assessee. It was submitted that in this case, assessee did not

come up for withdrawal of claim voluntarily. The assessee had withdrawn the claim much after date of search when the assessment proceedings had begun after the search operations and assessee was cornered and therefore, assessee had no other option but to withdraw the impugned claim. It was further submitted that at no point of time assessee came up with further evidences to prove and substantiate the genuineness of the claim. On the one hand, the assessee had mentioned in its reply that claim was genuine, but simultaneously on the other hand, the claim was withdrawn. Thus overall conduct of the assessee was farce and self contradictory. If the claim was genuine, the assessee could have adduced some evidences in support and should have offered some inquiries to prove genuineness of the claim and even if the rendering of service was not possible to be fully substantiated but some more details could have been brought on record by the assessee to justify these expenses if these were genuine.

3.2. It was further submitted that the whole pattern of this case reveals that these expenses was fictitious and that is why assessee had withdrawn its claim. The claim made in all the years running from 2004-05 to 2009-10 was withdrawn through a petition filed before Settlement Commission. The withdrawal of claim in the impugned year was not an isolated action but part of series of actions. He distinguished all the judgments relied upon by the Ld. Counsel on the ground that wherever surrendered was made in these cases that was voluntary in nature and in some cases revised return was also

filed. Further, over-all facts of the case and pattern of behavior of the assessee in the cases relied upon by the learned counsel were quite distinguishable from the case of the assessee before us. Therefore, the assessee cannot be given benefit of these cases in the given facts of the case before us. Further, he heavily relied upon the judgment of the Hon'ble Supreme Court in the case of MAK data Pvt. Ltd. v. CIT (Civil Appeal No. 9772 of 2013) dated 30th October 2013 wherein it was held by the Hon'ble Supreme Court that where surrender of income was not voluntary and was made after lapse of time then it cannot be said that assessee had made full disclosure of its income and therefore under such circumstances penalty must be levied.

3.3. In rejoinder, Ld. Counsel reiterated its submissions and made an attempt to distinguish judgment of Hon'ble Supreme Court in the case of MAK Data P. Ltd. (supra) and submitted that assessee had withdrawn the claim only to buy peace and therefore he requested for deleting the penalty.

3.4. We have gone through the orders passed by the lower authorities, details and evidences, copies of judgments placed before us and arguments made by both the sides as well as over all facts and circumstances of the case. It is noted by us that in this case the facts are not as plain and simple as have been tried to be explained by the Ld. Counsel of the assessee. The chronology of events is that a search and seizure action u/s 132(1) was carried out upon the assessee company on 21.07.2009. Subsequently, information was received by the AO from the ADIT (Investigation), Pune vide letter dated

15.03.2010 informing that the assessee company had admitted and offered to tax undisclosed income to the tune of Rs.525.62 lakhs for A.Ys. 2004-05 to 2009-10 on account of payment of Procurement Commission paid to various parties, consequent to the search action carried out upon the assessee. Accordingly, 'reasons' for escapement of income in the impugned year were recorded and notice u/s148 dated 24.03.2010 was issued. Subsequently, notices were issued u/s 143(2)/142(1) of the Act. In these notices, the assessee was asked by the AO to submit full details and particulars of all the expenses claimed by the assessee during the impugned year and to substantiate the same with requisite evidences. It was in response to these notices when assessee for the first time furnished basic details of the impugned expenses vide its reply dated 14th December, 2010 and thereafter, when the assessee was cornered and was not able to substantiate the claim of Procurement Commissions, then, vide its letter dated 27th December 2010, the assessee withdrew its claim. The assessee had undoubtedly mentioned in the said letter that payment has been made by the account payee cheque on which TDS was deducted and it was also mentioned that though the claim was genuine but since the assessee was not able to prove the rendering of service, therefore the assessee company had withdrawn the claim. It has also been submitted that the claim was withdrawn to avoid litigation and to buy peace. But, no other evidence whatsoever, except few sample invoices, was furnished by the assessee. Therefore, under

these circumstances the AO disallowed the claim and also initiated the penalty proceedings.

3.5. Subsequently, during the penalty proceedings, the assessee submitted its reply dated 15th June, 2011 wherein the reply submitted during the course of assessment proceedings (by which the impugned claim was withdrawn) was reproduced and it was again reiterated that the payment was made by the account payee cheque and TDS was also deducted. The assessing Officer was not satisfied with the explanation of the assessee and therefore he levied the penalty.

3.6. Being aggrieved, assessee filed appeal before the Ld. CIT(A) and there also no relief was granted and penalty levied by the AO was confirmed, and that is how assessee is in appeal before us.

3.7. The first issue that needs to be decided by us is whether the withdrawal of claim made by the assessee was voluntary and *bona fide* in the given facts and circumstances of the case. If, we analyse overall conduct of the assessee and chronology of events as have been narrated above, it is noted that assessee had not withdrawn its claim voluntarily. Firstly, there was huge time gap. Further, even when the reassessment proceedings were initiated, in its first reply the assessee tried to explain the impugned expenses and did not come out with complete truth. It was at the time of second reply furnished vide letter dated 27.12.2010, when the assessee was cornered, then he submitted that claim is being withdrawn for want of sufficient documentary evidence, as per standard required by

the Income Tax Department towards rendition of the services. Further, even in the said reply the assessee merely submitted that the claim was genuine but did not support it with further evidences, except sample copies of invoice of the agents. Over all conduct of the assessee does not inspire confidence to say that the claim was made voluntarily. Therefore, in our view, assessee cannot get benefit of the judgments cited before us by its counsel wherein it has been held that if tax has been offered voluntarily by the assessee then it shall not prove concealment of income automatically and therefore penalty should not be levied under such cases. It is because of the reason that facts of this case are peculiar and different from the judgments relied upon by the Ld. Counsel.

3.8. The other issues to be decided by us are whether the impugned claim was *bonafide*/genuine claim or a false/fictitious claim, and whether it can be said that assessee had discharged its onus as envisaged under the law as prescribed u/s 271(1)(c) of the Act. We have pondered over these issues as well. Firstly, it is noted that withdrawal of claim in this year was not an isolated or solitary action on the part of the assessee. The perusal of abstract of the order of Settlement Commission dated 02.12.2011 reveals disturbing facts. It is noted that huge disclosures under various heads aggregating to Rs.18,71,19,769/- for the A.Ys. 2004-05 to 2009-10 were made by the assessee before Settlement Commission. One of the disclosures was on account of Procurement Commission aggregating to Rs. 5,13,35,902/- spread into six assessment years i.e. 2004-05 to 2009-10. It is

thus noted that withdrawal of claim was not in this year alone but it has been made in all the years. The impugned year is 7th year. It is noted that it has been mentioned by the assessee in the petition filed before Settlement Commission as well as before us that withdrawal has been made primarily due to difficulty in establishing rendition of services. It is not possible to believe the explanation of the assessee that with regard to commission paid to all the agents in all the years, it was difficult for the assessee to prove rendering of services. The explanation offered does not seem to be plausible. It may so happen in an isolated case once or twice that due to non-cooperation of agents, the assessee may not be in a position to substantiate rendition of services to the hilt, but it is unbelievable that in all the years all the agents would disappear and would not cooperate with the assessee. It is clear from the pattern of behavior and conduct of the assessee that the assessee has been using this expense head 'Procurement Commission' as a conduit to siphon off the funds from the company by making bogus and fictitious claims. It is further evident from the huge disclosures made by the assessee before the Settlement Commission that assessee was following the practice of making fictitious and bogus claim under various other heads also. It is further evident from this fact that even during the course of penalty proceedings, though, the assessee did mention that the claim was genuine but did not support its averment by furnishing any reliable evidences. It is noted that huge payments were made without there being any written agreement with the agents. Nothing

has been brought on record to show that payment was made by cheque and TDS was deducted upon them. No confirmation, income tax return or balance sheet and profit and loss account or any other agreement or correspondence, whatsoever, has been brought on record. No single piece of evidence has been brought (except sample copies of invoice) to show that the claim was genuine. Further, the assessee did not make any offer before the AO to assist him in making further inquiries, even during the course of penalty proceedings. If the assessee was sure that the impugned expenses were genuine, then definitely some more evidences could have been placed on record to establish *bona fide* of impugned claim as well as situation of the assessee. Nothing of this sort has been done by the assessee either during the course of assessment proceedings or penalty proceedings before the AO or even before the Ld. CIT(A) while contesting the appeal against the penalty order. Before us also, no evidences have brought on record. Thus, overall conduct and behavior of the assessee and pattern of transactions proves that assessee was following practice of making bogus and fictitious claims in a regular and systematized manner.

3.9. It is further noted by us that in the Profit and Loss account also, the claim of commission has not been made conspicuously by the assessee. The claim of Procurement Commission is not visible in any head of the P & L Account. On our inquiry from the Ld. Counsel, it was revealed that Procurement Commission has been made part of Purchases debited in the P & L A/c. Thus, from this gesture and

approach of the assessee it further indicates that complete facts were not disclosed and manner of working of the assessee while filing its income tax return was not fully transparent. With a view to dig out further facts related to disclosure of information by the assessee pertaining to this claim, it was found out by us that in the original assessment order passed u/s143(3) dated 08.02.2006 also there is no discussion at all with regard to the impugned claim viz Procurement Commission. Nothing has been shown to us if any query was raised and reply was given by the assessee during the course of original assessment proceedings related to the said claim. It appears that the impugned claim remained hidden as part of the amount of 'Purchases' debited in the P & L account. Thus, in our view, the claim of the assessee is not *bona fide*. Rather it is apparently bogus and fictitious and has been rightly treated as such by the lower authorities.

3.10. The last issue that comes to our mind is whether the assessee had discharged its onus under the law as contained in section 271(1)(c) of the Act. It Perusal of section 271(1)(c) reveals that law in this regard is that after the additions/disallowances are made in the assessment order, the assessee is expected to offer an explanation to show that impugned addition/disallowance does not lead to any concealment or furnishing of inaccurate particulars of income.

3.11. In the case before us the only explanation given by the assessee was that the impugned claim was genuine which has been voluntarily withdrawn due to difficulty in establishing

rendition of services. We have already held in above paragraphs of our order that the withdrawal of claim was not made voluntarily. The claim was genuine or not, that fact was only in the knowledge of assessee at the stage of filing of return, but the least as was expected from the assessee under such circumstances especially where huge disclosures had been made was to at least come out with full facts and put forth entire material on record so as to substantiate the claim in whatever manner it was possible and to also offer assistance to the AO for further inquiries so as to prove and establish *bona fide* of the assessee as discussed above in detail. But, no such assistance was provided by the assessee to the AO and no further material was brought on record. Under these circumstances, in our view, the burden envisaged upon the assessee under the law was not discharged. Further, taking into account all the facts of the case, it is evident that the explanation offered by the assessee is not a plausible explanation. The judgments relied upon by the Ld. Counsel are clearly distinguishable. In these cases, it was established that the withdrawal of claim was voluntary, which is missing in the facts of the case before us.

3.12. Our view finds support from the judgment of **Hon'ble Supreme Court** in the case of **MAK Data P. Ltd.** (supra), the relevant part of same is reproduced hereunder for the sake of ready reference:

“6. We have heard counsel on either side. We fully concur with the view of the High Court that the Tribunal has not properly understood or appreciated the scope of

Explanation 1 to Section 271(1)(c) of the Act, which reads as follows :- “Explanation 1 – Where in respect of any facts material to the computation of the total income of any person under this Act, -- (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or (B) 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 computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.”

7. The AO, in our view, shall not be carried away by the plea of the assessee like “voluntary disclosure”, “buy peace”, “avoid litigation”, “amicable settlement”, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.

8. Assessee has only stated that he had surrendered the additional sum of Rs.40,74,000/- with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. Statute does not recognize those types of defences under the explanation 1 to Section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.

9. We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements, memorandum of association of companies, affidavits, copies of Income Tax Returns and assessment orders and blank share transfer Page 8 8 deeds duly signed, have been impounded in the course of survey proceedings under Section 133A conducted on 16.12.2003, in the case of a sister concern of the assessee. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO, in our view, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under Section 271 read with Section 274 of the Income Tax Act, 1961.”

3.13. Thus, in view of the judgment of the Hon’ble Supreme Court and facts and circumstances of the case as discussed above, we find that penalty has been rightly levied by the AO and confirmed by Ld. CIT(A) and therefore order of Ld. CIT(A) is confirmed.

4. In the result, the appeal of the Assessee is dismissed.

Order pronounced in the open court on 26th October, 2016

Sd/-
(Sanjay Garg)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 26 /10/2016

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