

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'ए' अहमदाबाद ।  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“ A ” BENCH, AHMEDABAD**

सर्वश्री एन.के. बिल्लैया, लेखा सदस्य एवं महावीर प्रसाद, न्यायिक सदस्य के समक्ष ।  
**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER And**  
**SHRI MAHAVIR PRASAD, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.1398/Ahd/2012  
(निर्धारण वर्ष / Assessment Year : 2006-07 )

M/s. Johnson Enterprises Ltd., 414, Sahajanand Arcade, Opp. Helmet Circle, Memnagar, Ahmedabad.	<b>बनाम/</b> Vs.	ITO, Ward-4(2), Ahmedabad.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCJ 4134 E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से / Appellant by :	Shri K.C. Thaker, A.R.
प्रत्यर्थी की ओर से/Respondent by :	Shri Alok Kumar, Sr. D.R.

सुनवाई की तारीख / Date of Hearing	19/01/2017
घोषणा की तारीख/Date of Pronouncement	20 /01/2017

आदेश / ORDER

**PER SHRI MAHAVIR PRASAD, JUDICIAL MEMBER :**

This appeal has been preferred by the assessee/appellant is directed against the order of the Commissioner of Income Tax(Appeals)-VIII, Ahmedabad, dated 30/04/2012 for the Assessment Year (AY) 2006-07. Assessee/appellant has taken following grounds of appeals:

- i. *The Learned CIT(A) has erred in law and on facts in holding that the appellant has concealed the particulars of its income when the penalty proceedings were initiated for furnishing of inaccurate particulars of income.*
- ii. *The Learned CIT(A) has further erred in confirm the penalty imposed u/s.271(1)(c)of the Act to the extent of Rs.19,70,027/- ignoring the submissions made before him and the case law cited before him.*

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- iii. *On the facts and in the circumstances of the case and in law the Ld.CIT(A) ought to have cancelled the penalty proceedings.*
- iv. *It is therefore prayed that the orders of the Lower Authorities may be cancelled.*
- v. *Your appellant craves leave to add, alter or amend and ground of appeal at the time of hearing.*

2. The facts of the case are on perusal of the assessment order and appeal order, it is noticed that the AO has disallowed the assessee claim of deduction u/s. 80IA of the Act observing the following:

- (i) As a developer of the project the assessee has failed to prove it is involved in the conceiving, planning, designing and financing of **the** Infrastructure project. But it is involved only in carrying out the execution of certain jobs planned, specified and well laid out by the developer as work contract. The assessee is not planning the project but is carrying out the part of activities and raising the detailed RA bills to the developer and getting the payment for the same on supervision by the developer. The assessee in no way is involved in financing the project as revealed by the RA bills issued and TDS certificates issued by the developers. Thus, the assessee has raised RA bills for the activities undertaken by it at the part rate as agreed by in the tender and work contract and collected the payment for the same.
- (ii). It is seen from records that TDS has been deducted on payments made to Assessee Company @2% which is the rate applicable to TDS on contractors u/s. 194C of the Income-tax act. In the said certificate of TDS it is mentioned that the assessee is a contractor in the nature of payment column. The TDS certificate also lays down the specific nature of the activity carried down by the assessee.
- (iii). The assessee company fails to prove that **Investment, Risk and Reward** is belonging to it for the development project, which is basic requirement of developer. However, the assessee has incurred the operative investment and taken risk and reward for the execution of the work delegated to them through tender for the

very well defined and planned activities. The major risk of the development of the project is with the developer only.

(iv). In the profit & loss account submitted together with the audit report in form No. 10CCB the income side of profit & loss account shows OGS sales, work contract labour, work contract sale, consignment sale, resale, OGS sales trading items as income instead of development project income.

(v). Further from the perusal of the explanation below section 80IA (13) which has been brought on statute by the Finance Act, 2007 with retrospective effect from 1-4-2000 it can be seen that any person who executes a work contract entered into with undertaking or enterprises shall not be eligible for the deduction u/s. 80IA of the Act. The provision of the said explanation is reproduced hereunder:

"Explanation: For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a work contract entered into with the undertaking or enterprise, as the case may be."

In the Memorandum explaining the provisions of Finance Bill, 2007 the Hon'ble Finance Minister has clarified above mentioned explanation as under:

"The tax benefit was introduced for the reason that the industrial modernization required a massive expansion of, and qualitative improvement in, infrastructure (viz., express ways, highways, airports, ports and rapid urban rail transport system) which was lacking in our country. The purpose of the tax benefit has all along for encouraging private sector participation by way of investment in development of the infrastructure sector and not for person who merely execute the civil construction work or any other works contract."

(vi) Further, sub-section (4) of section 80IA stipulates as under:

"(4) This section applies to-

- (i) any enterprise carrying on the business of (i) developing or
- (ii) operating and maintaining or (iii) developing, operating and

maintaining-any infrastructure facility which fulfils all the following conditions namely:-

- (a) it is owned by a company registered in India or by a consortium of such companies or by an authority or an authority or a board or a corporation or any other body established or constituted under any Central or State Act;
- (b) it has entered into an agreement with the Central Government or a State Government or local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

The assessee is a works contractor only. There is no financial stake or investment in the above projects of Assessee Company and the contract is for civil work which makes it ineligible for claiming of deduction u/s. 80IA. Further, as per the provision of sub-section (4) of section 80IA for claiming deduction u/s. 80IA of the Act, the assessee has to directly enter into agreement with the Central Government or a State Government or a local authority or any other statutory body for developing a new infrastructure facility. In this case, the assessee has not entered into any agreement with Central Government or a State Government or a local authority or any statutory body for developing new infrastructure facility. The assessee has only done labour contract work on behalf of other Developers/contractors. Therefore, the assessee has not fulfilled the conditions laid down in sub-section (4) of section 80IA of the Act to claim the deduction.

(vii) Further, the assessee is also not entitled for deduction u/s 80IA in view of the provisions of sub-section (3) of Section 80IA of the Act. For ready reference, sub-section (3) of Section 80IA is reproduced hereunder:

"(3) This section applies to an undertaking referred to in clause (iv) of sub-section (4) which fulfils all the following conditions, namely:-

- (i) it is not formed by splitting up, or the reconstruction, of a business already in existence;

Provided that this condition shall not apply in respect of an undertaking which is formed as a result of the reestablishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(ii) It is not formed by the transfer to a new business of machinery plant previously used for any purpose.

Explanation 2: Where in the case of an undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with."

In this case the assessee has not fulfilled the conditions specified in sub section (3) of Section 80-IA of the Act. The assessee company was formed by taking over all the assets and liabilities of proprietorship concern of Shri P.A. Shah functioning in the name and style of M/s. Johnson Enterprise. The company was incorporated on 20-05-2004. The current fixed assets as per the balance-sheet of the assessee company as on 31-3-2006 shows at Rs. 51,82,739/-. Out of total current fixed assets, the value of fixed assets transferred from the proprietorship concern, M/s. Johnson Enterprise was of Rs. 38,20,154/- which is more than 50% of the total fixed assets of the assessee company. Hence, the assessee company has not fulfilled the condition laid down vide sub-section (3) of the Section 80IA of the Act.

4.1 The Ld. CIT (A) has confirmed the above findings of the AO and upheld that the assessee is not entitled for deduction u/s 8-IA of the Act. Which established that the assessee had made wrong claim for deduction u/s 80IA just to reduce its tax liability.

5. Coming to the issue of levy of penalty, it is being taken note that the assessee company has not furnished any reply of penalty notices till date. The variation between income returned by the assessee company and the income assessed by department is quite huge. Therefore, the case of the assessee company falls within the ambit of explanation to section 271 (1) of the act, which is being invoked in this case. As per Hon'ble Allahabad high Court's decision in the case of Banaras Textorium vs. CIT (1988) 169 ITR 782 and Zeekoo Shoe Factory v CIT (1981) 127 ITR 837, the burden of proving lack of fraud or gross or willful negligence is on the assessee. If assessee fails to discharge its onus then it can be presumed that the assessee has concealed its income or furnished inaccurate particulars thereof. Reliance is also placed on the decision of Hon'ble Delhi High Court in the case of Motor General Finance Ltd v CIT 254 ITR 449 wherein it was held that failure to furnish the documents and details goes against the assessee company and further observed that the assessee could not produce any document in the regard, an adverse inference in terms of section 114 of the Evidence Act should be drawn to the effect that had those documents been produced, the same would have gone against the interest of the assessee. As per Hon'ble Gujarat high Court's decision in the case of Jamnadas & Co v CIT (1994) 210 ITR 218, if the assessee who is required to prove that the failure to return the-correct income did not arise from any fraud or any gross or willful negligence on its part, fails to prove these elements, the presumption as contemplated by the said explanation can be raised. The assessee company did not furnish any evidence in its support at all despite opportunities being given. Therefore, in the light of explanation section 271 (1) and above mentioned case law the assessee company is liable for penalty u/s 271 (1) (c) of the act for furnishing inaccurate particulars of income.

5. In view of the above, I am satisfied that the assessee has deliberately and will fully furnished inaccurate particulars of income with an intention to reduced its tax liability within the meaning of Section 271(1) (c) read with Explanation (1) of the Act. The minimum penalty leviable u/s. 271(1) (c) of the Act is 100% of tax effect which works out to Rs. 19,70,027/- and

maximum penalty is 300% of tax effect which works out to Rs. 59,10,081/-. Accordingly, considering the facts and circumstances of the case, I levy minimum penalty of Rs. 19,70,027/- u/s 271 (1) (C) of the Act.

3. Against the said order assessee preferred statutory appeal before the Ld. CIT(A), who dismiss the appeal of the assessee/appellant.

4. Ld. A.R. filed return submission in support of its contention. On the other hand Ld. D.R. rely on AO as well as CIT(A).

5. We have heard both the parties and gone through the impugned orders and paper filed by the assessee. As it invoiced from the record that ITO has issued a printed notice u/s. 274 r.w.s. 271 of the Income-tax Act and only tick mark is there against the column.

6. “Have concealed the particulars of your Income or ..... furnished inaccurate particulars of such Income.”

Against the blanks nothing has been filled, it appears that before issuing the notice Ld. I.T.O. has not applied his mind.

7. We have an order of our own Bench in ITA No.909/Ahd/2010 in the assessee’s own case for the A.Y.2005-06, whereas this present case in question is of A.Y.2006-07. In ITA No. 909/Ahd/2010, it has been held by this Bench, the only reason for levying the penalty was disallowance of a claim made u/s.80IA of the Act. However, the assessee has disclosed the facts in respect of the claim of deduction u/s.80IA as per the return filed and the statement of total income annexed therein. The assessee has

also furnished a requisite form No.10CCB for the purpose of claim of deduction u/s.80IA of the I.T. Act. The said report was duly certified by a Chartered Accountant. Rather, it was vehemently argued that the assessee had made the said claim on the basis of the advice of a Chartered Accountant. In support of those arguments, the assessee has placed reliance on CIT vs. Caplin Point Laboratories Ltd. 293 ITR 524 (Mad). We have noticed that in this precedent the assessee has made a wrong claim of deduction. The deduction was claimed u/s.80HHC and 80I of the I.T. Act by showing interest income as business income. The Hon'ble Court has held that neither there was furnishing of inaccurate particulars nor the assessee has concealed the income. In the present case as well, under wrong advice and incorrect understanding of law, the assessee has made the claim. The assessee has carried out an infrastructure development and on that basis he was of the opinion that the said contract work was eligible to a sub-contractor being contract was connected to Highway Authorities. It was advised by a tax consultant that the income generated from infrastructural contract work qualifies from the deduction. We, therefore, hold that following the case laws cited, considering the totality of the facts and circumstances of the case, the assessee should not be penalized u/s.271(1)(c) of the I.T. Act. The assessee has offered an explanation which was not found altogether untrue or false, therefore in view of Explanation-1 to section 271(1)(c), we hereby direct to delete the penalty, Grounds are allowed.



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8. On account of serving a printed notice where non-application mind of AO was there and respectfully considering the above said case. We direct the AO to delete the penalty.

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

<b>This Order pronounced in Open Court on</b>	<b>20/01/2017</b>
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Sd/-  
एन.के. बिल्लैया  
(लेखा सदस्य)  
( N.K. BILLAIYA )  
**ACCOUNTANT MEMBER**

Sd/-  
महावीर प्रसाद  
(न्यायिक सदस्य)  
( MAHAVIR PRASAD )  
**JUDICIAL MEMBER**

Ahmedabad; Dated 20/01/2017

प्रीति यादव, व.नि.स. /Priti Yadav, Sr.PS

*True copy*

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)  
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad