

**IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM**

ITA No.5606/Mum/2015

(A.Y:2011-12)

ITA No.4521/Mum/2016

(A.Y:2012-13)

Lift & Shift India P. Ltd. 96 Chembur Mankhurd Link Road, Shivaji Nagar Mumbai-400043 PAN No. AACCB6406A	Vs.	Asst. Commissioner of Income Tax, Circle 7(1) R. No. 660/663, 6 th Floor, Aayakar Bhavan, MK Road Mumbai-400 020
Appellant	..	Respondent
Assessee by	..	Shri Ashwin P Damania, AR
Revenue by	..	Shri M.C. Omi Ningshen, DR
Date of hearing	..	11-05-2017
Date of pronouncement	..	31-05-2017

ORDER

PER MAHAVIR SINGH, JM:

These two appeals by the assessee are arising out of the different orders of CIT(A)-49 in appeal No. CIT(A)-49/IT-305-2014-15 & CIT(A)-49/IT-6/2015-16 dated 01-10-2015 & 23-05-2016. The Assessments were framed by DCIT CC-40 & ACIT CC 7(1) Mumbai for the A.Ys. 2011-12 & 2012-13 vide orders dated 24-03-2014 & 15-03-2015 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’).

2. The only common issue in these two appeals of assessee is as regards to the order of CIT(A) confirming the disallowance made by AO by invoking explanation to section 37(1) of the Act on the compounding fee paid for oversized / overweight heavy lift. The facts and circumstances are exactly identical in both the years and the grounds raised are identically worded in both the years. Hence, we take the ground from AY 2011-12 and decide the issue which reads as under: -

*“1. The learned Commissioner of Income –tax
(Appeals) has erred in disallowing under section 37(1) of*

*the Income Tax Act, 1961 a sum of Rs. 6,38,017/- towards
compounding fees paid.”*

3. Briefly stated facts are that the assessee paid a sum of Rs. 6,38,017/- in AY 2011-12 and sum of Rs. 4,37,621/- for the AY 2012-13 towards compounding fees paid for transportation of lifts oversized and overweight as per the permissible limit under the Motor Vehicles Act, 1988. The AO for both the assessment years while framing assessment under section 143(3) of the Act disallowed the aforesaid sums on the ground that the expenditure incurred is in violation of law and therefore not allowable in term of explanation to section 37(1) of the Act. Aggrieved assessee preferred the appeal before CIT(A), who also confirmed the action of the AO by relying on the decision of the Hon'ble Supreme Court in the case of Haji Aziz and Abdul Shakoor Bros V. CIT (1961) 41 ITR 350 (SC) by observing in Para 5.5 as under: -

“5.5. I find that the facts of the case remain the same during the AY 2012-13 since the compounding fees have been paid for violation of Motor Vehicle Act. Such violations are definitely against the public policy and the compounding charge is nothing but a penalty or settlement in view of undergoing the consequences of lengthy prosecution process Since these expenses are incurred by the appellant in proceedings against it for an infraction of law, the same cannot be said to have been incurred for the purpose of business in view of the provisions of section 37 read with Explanation 1 of the Act which specifically provide that any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by Law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure Reliance is also placed on the decision of the Hon'ble Supreme Court of India in the case of Haji Aziz and Abdul Shakoor Bros V.

CIT (1961) 41 ITR 350 (SC) in which it has been observed as under:-

A review of these cases shows that expenses which are permitted as deductions are such as are made for the purpose of carrying on the business, i.e., to enable a person to carry on and earn profit in that business. It is not enough that the disbursements are made in the course of or arise out of or are concerned with or made out of the profits of the business but they must also be for the purpose of earning the profits of the business. As was pointed out in Von Glehn's case (1) an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot be described as such. If a sum is paid by an assessee conducting his business, because in conducting it he has acted in a manner, which has rendered him liable to penalty it cannot be claimed as a deductible expense. It must be a commercial loss and in its nature must be contemplable as such. Such penalties which are incurred by an assessee in proceedings launched against him for an infraction of the law cannot be called commercial losses incurred by an assessee in carrying on his business. Infraction of the law is not a normal incident of business and therefore only such disbursements can be deducted as are really incidental to the business itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader. Therefore, where a penalty is incurred for the contravention of any specific statutory provision, it cannot be said to be a commercial loss falling on the

assessee as a trader the test being that the expenses which are for the purpose of enabling a person to carry on trade for making profits in the business are permitted but not if they are merely connected with the business.

In view of the above discussion, the disallowance of Rs. 4,37,621/- is upheld and this ground is dismissed.”

Now, aggrieved assessee is in second appeal before Tribunal.

4. We have heard the rival contentions and gone through the facts and circumstances of the case. Before us, the learned Counsel for the assessee has filed copies of sample invoices and also payment invoices of compounding fee for overloading of truck and oversizing and the relevant invoices clearly are for compounding fee for overloading of 3600 kgs at Rs. 1600/- and also compounding fee others for oversizing on both the sides (Multiaxial Trlor 1 C.F.) Rs. 10,000/-. That way a total sum of Rs. 11,600/- is charged as compounding fees. It seems from the invoices of the assessee that the total expenses claimed against this amount of Rs. 11,600/- at Rs. 13,700/-. It is not clear that on what account this extra Rs. 2,100/- is claimed by assessee.

5. There are two elements one is compounding fee i.e. Rs. 11,600/- and one expenditure of Rs. 2,100/- which is unknown. As regards to the unknown expenditure, we do not allow. However, as regards to the compounding fee, assessee claimed that it is engaged in the business of warehousing, heavy lift transport operation and clearing & forwarding activity. He explained that this is in its ordinary course of business i.e. transporting of goods to various destination and for that it has to cross various states to reach the final destination. During crossing of various states, the assessee has to pay compounding fee for loading of goods above the permissible limit as per Motor Vehicles Act, 1988. The learned Counsel for the assessee stated that it has to pay additional freight by way of compounding fee levied under Motor Vehicles Act as levied by RTO at check posts, which itself is treating as compounding fee and not penalty / fine.

According to the learned Counsel, the assessee was transporting goods above the permissible limit and for which it is paying compounding fee under the Motor Vehicles Act, 1988, which is in the nature of compensation as well as additional freight. It was also claimed that the compounding fee is not in the nature of penalty / fine falling under explanation to Section 37(1) of the Act. We find that this compounding fee was not in violation of law but an option is given to assessee to pay compounding fee for transportation of over dimensional consignment generally termed as overloading charges. We find that in the present case also as per the verification carried out on sample basis of the receipts issued by RTO, the RTO knowing very well that the assessee is carrying over dimensional consignment / over weighted goods and levying fee while allowing the trucks to be transported on road and it is in violation and contravention of law but the compounding fee paid for transportation of over consignment / over weighted goods which is part of assessee's business itself but it is not in the nature of penalty / fine falling explanation to section 37(1) of the Act. We find that this issue has to be considered by Co-ordinate Bench of this Tribunal in the case of DCIT vs. Bharat C. Gandhi (2011) 46 SOT 258 (Mum) reads as under

"8. We have considered the issue. As rightly considered by the CIT(A) fees paid is not in violation of law but an option given to the assessee to pay compounding fees for transporting over dimensional consignments generally termed as over loading charges. This issue was elaborately discussed by the ITAT in the case of M/s. Chadha & Chadha Co. in ITA No. 6140/Mum/2009 dated 17.09.2010 relied upon by the assessee wherein the ITAT in its order has considered as under: -

"9. The liability for additional freight charges was considered in the case of ITO vs. Ramesh Stone Wares by the ITAT Amritsar Bench in 62 TTI (Asr) 93 wherein the additional freight charges paid to Railway Department for overloading was

considered and held that Shri Bharat C. Gandhi the expense was not penal in nature because it is not the infringement of law but same is violation of contract that too not by the assessee but by his agent, i.e. Coal Authority of India. In terms of an agreement, if coal is finally found by the authorities to be overloaded then the assessee has to pay additional freight charges which according to the terminology of the contract is called penalty freight. This liability was not considered as penal nature and allowed. In assessee's case also the overloading charges are to be incurred regularly in view of the nature of goods transported for the said steel company and since the nature of the goods is indivisible and generally more than the minimum limit prescribed under the Motor Vehicle Act, the assessee has to necessarily pay compounding charges for transporting goods as part of the business expenses. These are not in contravention of law and the RTO authorities neither seized the vehicle nor booked any offence but are generally collecting as a routine amount at the check post itself while allowing the goods to be transported. In view of the nature of collection and payment which are necessary for transporting the goods in the business of the assessee, we are of the opinion that it does not contravene the M V Act as stated by the A.O. and the CIT(A).

10. Similar issue also arose with reference to fine and penalty paid on account of violation of National Stock Exchange Regulations in the case of Master Capital Services Ltd. vs. DCIT and the Hon'ble ITAT Chandigarh "A" Bench in ITA No. 346/Chd/2006 dated 26th February 2007 (108

TTJ (Chd) 389 has considered that fines and penalties paid by the assessee to NSE for trading beyond exposé limit, late submission of margin certificate due to software problem and delay in making deliveries of shares due to deficiencies are payments made in regular course of business and not infraction of law, hence allowable. In the assessee's case also these fines are paid regularly in the course of assessee's business for transportation of goods beyond the permissible limit and these payments are being made in the regular course of business to the same RTO authorities at the check post every year, in earlier years and in later years also. Accordingly it has to be held that these payments are not for any infraction of law but paid in the course of assessee's business of transportation and these are allowable expenses under section 37(1)."

9. In view of the legal principles established above and also noticing that the assessee has made about 230 trips by paying compounding fees, as per the rules in the Motor Vehicle Act, it cannot be stated that assessee's payments of compounding fees is in violation of law. Since assessee is engaged in transporting of over dimensional capacities in its transport business, it is necessary business expense wholly for the purpose of Shri Bharat C. Gandhi business. Therefore, the same is allowable under section 37(1). CIT(A)'s order on this is confirmed."

6. In view of the above facts and circumstances, we are of the view that once the assessee is engaged in transportation of cargo of over dimensional consignment / over weighted, whether front side or rear side dimension of consignment as well as weight of consignment exceeded the limits allowed

under Motor Vehicles Act, 1988 is allowable expenditure being compounding fee in the normal course of business. In this case, the nature of payment is not penalty but as a compounding fee under an option given to assessee for transporting of over dimensional consignment generally termed as overloading charges and hence, the same is to be treated as business expenditure, allowable under section 37(1) of the Act. In term of the above, we reverse the orders of the lower authorities and allow the appeal of the assessee.

7. Similar is the position in regard to ITA No.4521/Mum/2016 for the AY 2012-13, taking a consistent view we allow this appeal also.

8. **In the result, appeals of assessee are allowed.**

Order pronounced in the open court on 31-05-2017.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 31s-05-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,
Assistant Registrar
ITAT, MUMBAI