IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA.No.4301/Del./2015
Assessment Year 2012-2013

M/s. Bhayana Builders Pvt. Ltd., 7, Factory Road, Near Safdarjung Hospital, New Delhi. PAN AAACB4147N	vs.	The DCIT, Circle-2(1), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri M.P. Rasotgi & Shri Deepak Malik, Advocates.
For Revenue :	Ms. Shweta Nakra Datta, Sr.D.R

Date of Hearing :	30.08.2017
Date of Pronouncement :	06.09.2017

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order of the Ld. CIT(A)-2, New Delhi, dated 30th April, 2015 for the A.Y. 2012-2013, challenging the levy of penalty under section 271(1)(c) of the I.T. Act, 1961.

2. Briefly the facts of the case are that original return of income was filed declaring income of Rs.17.27 crores, later on,

assessee-company revised its return of income declaring loss of Rs.17.66 crores. The assessee-company is engaged in the business of construction of wide range of structural building and selling and installation of tiles/grids. During the course of assessment proceedings, the assessee-company was provided the AIR information generated from system. In the said information, there was a difference of Rs.38,39,628 in the gross receipts as per reconciliation submitted by the assessee and 26AS. The assessee submitted that this difference should be added back to the total income. The A.O. accordingly, made addition of Rs.38,39,628. The A.O. also noted that he is satisfied that the assessee-company has furnished inaccurate particulars of such income. The A.O. initiated penalty proceedings under section 271(1)(c) of the Act and assessee replied before A.O. that his contractee M/s. Pioneer Urban Land & Infrastructure Ltd., had erroneously deducted TDS on the gross billing amount including service tax which they should not have done. It shows the billing amount of Rs.9,27,53,832 and by adding service tax of Rs.38,21,458 total would comes to Rs.9,65,75,290. This is the reason for the difference of Rs.38,21,458. The assessee,

therefore, requested that penalty may not be imposed. The A.O. however, was not satisfied with the explanation of the assessee and held that assessee has concealed the particulars of income and furnished inaccurate particulars of income and liable to penalty under section 271(1)(c) of the I.T. Act and accordingly, levied the penalty.

3. The assessee challenged the penalty order before the Ld. CIT(A). The written submissions of the assessee is reproduced in the appellate order in which the assessee reiterated the same facts regarding service tax in respect of M/s. Pioneer Urban Land & Infrastructure Ltd., who have deducted TDS on the gross billing amount including the service tax. The observations of the A.O. that assessee had not filed any documentary evidence is not factually correct, as the assessee, as per copy of the reply, had furnished a statement giving complete details in respect of reconciliation of billing amounts, work done, service tax, TDS etc., in the statement in respect of M/s. Pioneer Urban Land & Infrastructure Ltd. The statement gave the break-up of service tax totaling to Rs.38,21,458 and the total amount inclusive of service tax and billing/work done

at Rs.9,65,75,290. The gross amount/total amount as per statement and the TDS figures are verifiable and matched with 26AS, which gives complete break-up in respect of M/s. Pioneer Urban Land & Infrastructure Ltd., for assessment year under appeal. The details of tax deducted at source would also explained. The explanation given by the assessee is bonafide and factually correct and verifiable as such. It was submitted that penalty and quantum proceedings are different and independent proceedings. Merely because an addition has been made in the assessment order by itself would not lead to conclusion/inference of concealment of the particulars of income or furnishing inaccurate particulars of income. On mere difference in gross receipts as per TDS details as contained in 26AS would not lead to levy of penalty. The details have already been part of the receipts shown by the assessee. The assessee in its books of account had not included the service tax in its gross receipts which are routed through P & L A/c as per accounting practice. In otherwords, the service tax was not routed through the P & L A/c but was shown separately as an item of balance sheet. The Auditor has also quantified the same. Relevant photo copies are filed on record. The amount remaining

unpaid as on 30th September, 2012 appearing at Rs.82,04,104 has been duly added back in the return. In the statement of taxable income, a sum of Rs.1,35,91,766 has been disallowed and added back in the computation of income as per copy of the computation and income tax return which is separately enclosed. The Tax Auditor had not stated that the service tax was not passed through P & L A/c. Therefore, in the first instance, service tax of Rs.38,21,458 pertaining to M/s. Pioneer Urban Land & Infrastructure Ltd., should not form part of total income, as it was not an item of P & L A/c but an item of balance sheet, which was duly taken into consideration separately for the purpose of disallowance under section 43B of the I.T. Act. The Board has clarified that no TDS is required to be made on service tax component. The CBDT issued a clarificatory Circular No.1 of 2014 dated 13th January, 2014 clarifying that wherever in terms of agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, the tax shall be deducted at source under Chapter-XVIIB of the I.T. Act, on the amount paid/payable without including such service tax component. It was, therefore, submitted

that as per the Circular, TDS was not required to be deducted on the service tax component and M/s. Pioneer Urban Land & Infrastructure Ltd., had wrongly deducted tax on service tax of Rs.38,21,458, resulting the same forming part of the gross amount for TDS purposes as shown in 26AS. The assessee relied upon certain case law in support of the contention that penalty is not leviable. In any case, it is highly debatable issue whether gross receipts as per 26AS which refers to TDS claim, can be made the basis for an addition. It is a bonafide mistake and would not invite levy of penalty.

4. The Ld. CIT(A) by referring to the contention of the assessee and Board Circular above, noted that since the assessee itself has conceded the addition of the aforesaid amount before A.O, therefore, penalty was correctly levied and dismissed the appeal of assessee.

5. We have heard the Learned Representatives of both the parties and perused the material on record. Learned Counsel for the Assessee reiterated the submissions made before the authorities below. Paper book, page-1 is reply before A.O. at the penalty stage supported by reconciliation of M/s. Pioneer Urban Land &

Infrastructure Ltd., copy of which is filed at page-2 of the paper book. Paper Book-42 is particulars of sum referred under section 43B of the I.T. Act being the liability which was increased in the previous year. Paper Book, page-83 is computation of income showing entire amount of disallowance under section 43B of the I.T. Act. Therefore, it was a double addition and further, the difference is explained which was on account of TDS deducted by M/s. Pioneer Urban Land & Infrastructure Ltd. The service tax is not income of the assessee. The service tax is credited separately. The claim of the assessee has not been found incorrect. The A.O. has not noted in the penalty order as to under which limb of Section 271(1)(c) of the Act, he has levied the penalty. He has relied upon the order of ITAT, Delhi Bench in the case of Bengali Sweets Centre vs. ACIT ITA.No.2068 & 2069/ Del./2014 dated 20th April, 2017, in which, on the same issue, penalty have been cancelled. He has also submitted that earlier Board Circular have been clarified on enactment of GST Act and the same principle have been reiterated vide Circular No.23 of 2017 dated 19th July, 2017. He has, therefore, submitted that penalty may not be levied in the facts and circumstances of the case.

6. On the other hand, the Ld. D.R. relied upon the orders of the authorities below and submitted that assessee admits the addition which is not further challenged in appeal. Therefore, penalty has been correctly levied in the matter. The Ld. D.R. relied upon the decision of Delhi High Court in the case of CIT vs. Zoom Communication 191 taxman. 179.

7. We have considered the rival contentions of learned Representatives of both the parties and perused the material on record. The assessee filed revised return at loss of Rs.17.66 crores. The A.O. while making addition of Rs.38,39,628 in dispute, computed the income of the assessee, has started the figure from profit as per P & L A/c (before taxes of Rs.(-)20,43,59,939 and thereafter added several items which includes disallowance under section 43B of Rs.1,35,91,866. The same is the figure mentioned by the assessee in the statement of taxable income for the assessment year under appeal, copy of which is filed at page 83 of the paper book, as was filed with the return of income. The A.O. made further addition of Rs.38,39,628 on account of difference in gross receipts and computed the total income of assessee at (-) Rs.11,75,64,275.

The assessee has filed details of liability under section 43B of the I.T. Act at page 42 of the paper book. The total of the amount unpaid on the date of tax audit has been mentioned at Rs.1,35,91,866 which is mentioned by the A.O. in the assessment order. However, it includes the service tax of Rs.82,04,104 which was the amount unpaid. The assessee filed reply before A.O. at the penalty stage explaining that his contractee M/s. Pioneer Urban Land & Infrastructure Ltd., had erroneously deducted TDS on the gross billing amount including service tax on the total amount of Rs.9,65,75,290. The reconciliation and details of the same are filed at page-2 of the paper book which shows the billing amount of Rs.9,65,75,290, work done at Rs.9,27,53,831, service tax was of Rs.38,21,460 and the total comes to Rs.9,65,75,290, on which, TDS @ 2% has been deducted in a sum of Rs.19,31,506 and after other deductions, the net amount comes to Rs.8,61,43,082. It, therefore, clearly proved that assessee filed reply before A.O. at the penalty stage supported by the reconciliation certificate. The assessee, thus, has been able to explained that his contractee M/s. Pioneer Urban Land & Infrastructure Ltd., had erroneously deducted TDS on the gross billing amount including

service tax. This was the reason, when higher TDS is shown in 26AS and the A.O. had taken item of service tax to the higher receipts. The assessee has referred to Board Circular No. 1 of 2014 dated 13th January, 2014, in which, in para-3, it is clarified as under:

> *"3. The matter has been examined afresh. In exercise of the powers conferred under section 119 of the Act, the Board has decided that wherever in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/payable without including such service tax component."*

7.1. The same Circular is re-affirmed by further Circular No.23 of 2017 dated 19th July, 2017 on enactment of GST Act in which it is again reiterated in para-4 that *"in the light of fact that even under New GST Regime, the rational of excluding the tax component from the purview of TDS remains valid."*

7.2. Thus, the assessee has explained the above difference in the receipts as per the details submitted before A.O./CIT(A) and the details noted in 26AS. The assessee also explained that since service tax is not income of the assessee, which is also not disputed by the Ld. D.R, therefore, it would not form part of total receipts of the assessee and has to be given treatment separately in the Balance Sheet. The assessee has declared in the return of income along with statement of taxable income, disallowance under section 43B in a sum of Rs.1,35,91,866 which is also adopted by the A.O. in the assessment order, would clearly prove that the same includes the service tax. When A.O. had taken the figure of the taxable income and made separate addition of Rs.38,39,628, it would certainly amount to double addition. It is well settled law that quantum and penalty proceedings are independent and distinct proceedings. Even if the addition is agreed by the assessee, if the assessee is able to explain the addition, then, penalty may not be leviable in the facts and circumstances of the case. The above facts clearly indicate that the explanation of assessee at the penalty stage was factually correct based on the material on record and assessee successfully explained

the addition so made which is the basis for levy of the penalty. Since the difference is reconciled at the penalty stage and claim of assessee have not been doubted or rejected, therefore, Ld. CIT(A) was not justified in confirming the levy of penalty merely because assessee conceded for addition of the amount in question. Considering the totality of the facts and circumstances of the case, we are of the view that since the assessee explained the above addition, therefore, penalty need not be imposed in the facts and circumstances of the case. Further, we may note that the A.O. in the assessment order has noted that he is satisfied that assessee-company has furnished inaccurate particulars of such income. However, in the penalty order, the A.O. levied penalty on both limbs i.e., *assessee has concealed the particulars of income and furnished inaccurate particulars of income and liable to penalty under section 271(1)(c) of the I.T. Act.* The ITAT, Delhi Bench in the case of Bengali Sweet Centre vs. ACIT (supra) - considering the decisions of Hon'ble Karnataka High Court in the case of CIT vs. SSA's Emerand Meadows in ITA.No.380/2015 and in the case of CIT vs. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565, in para-6 it has been held as under :

"6. Respectfully following the above decisions, we hold that omission of A.O. to explicitly mention that penalty proceedings are being initiated for furnishing inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation and accordingly proceed to quash the same".

7.3. Since, in the present case, the A.O. has not mentioned as for which limb, the penalty have been levied against the assessee, no penalty would be leviable. In view of the above discussion, we find that it is not a fit case for levy of the penalty. We, accordingly, set aside the orders of the authorities below and cancel the penalty. We, clarify that findings in this order shall have no bearing on the quantum matter.

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

Order pronounced in the open Court.

Sd/-	Sd/-
(O.P. KANT)	(BHAVNESH SAINI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Delhi, Dated 06th September, 2017

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'E' Bench, Delhi
6.	Guard File.

// By Order //

Asst. Registrar : ITAT Delhi Benches :
DELHI.