

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C", NEW DELHI  
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER

	I.T.A. No.4980/DEL/2014		
	A.Y. : 2007-08		
DCIT, CIRCLE 12(1), NEW DELHI	VS.	M/S GE CAPITAL BUSINESS PROCESS MANAGEMENT SERVICES PVT. LTD., AIFACS BUILDING, 1, RAFI MARG, NEW DELHI (PAN: AABCG0222E)	
<b>(ASSESSEE)</b>		<b>(RESPONDENT)</b>	

Revenue by : Sh. Arun Kumar Yadav, Sr. DR  
Assessee by : Sh. Rahul Satija, Adv.

**ORDER**

**PER H.S. SIDHU : JM**

The Revenue has filed this Appeal against the impugned Order dated 23.6.2014 of the Ld. CIT(A)-XV, New Delhi relevant to assessment year 2007-08.

2. The grounds raised in the Appeal read as under:-

"1. Whether the Ld. CIT(A) is right in cancelling the penalty of Rs. 73,51,900/- imposed by the AO u/s. 271(1)(c) of the I.T. Act, 1961 by holding that the issue is debatable without

*appreciating that the assessee failed to discharge the onus cast on it by the Explanation 1 to Section 271(1)(c) of the I.T. Act, 1961.*

2. *Whether the Ld. CIT(A) is right in not appreciating that the assessee failed to prove the bonafide of its explanations that facts material to the computation of its total income were correctly disclosed.*
3. *Whether the Ld. CIT(A) is right in not appreciating that the penalty u/s. 271(1)(c) of the I.T. Act, 1961 is a civil liability meant to provide for ready for loss of revenue.*
4. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of the hearing.*

3. The brief facts of the case are that the assessee filed its return of income of Rs. 68,35,97,164/- on 30.10.2007. The assessment order u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred as the Act) was passed by completing the assessment at total income of Rs. 71,39,06,819/- on 21.11.2008 by making

disallowance / addition on account of disallowance of license fee of Rs. 2,19,60,467/-, which was held as capital in nature and on account of disallowance of depreciation on computers which was allowed @15% instead of 60%, for which an addition in respect of Rs. 83,49,188/- was made. Being aggrieved with the order of the AO, the assessee had filed the appeal before the Ld. CIT(A), New Delhi. The Ld. CIT(A) has confirmed the addition made on account of disallowance of license fee and has deleted the addition on account of excess depreciation on computer. In view of above, a fresh show cause notice u/s. 271(1)(c) of the Act was issued to the assessee on 8.3.2013 fixing the case for hearing and submitting the reply on 15.3.2013. The assessee has submitted its reply on 25.3.2013 and requested to keep the penalty proceedings in abeyance till the disposal of the said case by ITAT. However, the submission of the assessee was not acceptable. The AO held that it is established that the assessee has tried to suppress its taxable income by making wrong claims which were not allowable as per the provisions of Income Tax Act. Therefore, it is clear that the assessee has furnished inaccurate particulars of its income with the intention of suppressing the taxable income and satisfied that the penal provisions of section 271(1)(c) are clearly attracted in this case. Hence, he imposed the penalty to the extent of Rs.73,91,000/- vide

penalty order dated 26.3.2013 passed u/s. 271(1)(c) of the I.T. Act, 1961. Against the penalty order, the Assessee appealed before the Ld. CIT(A), who vide his impugned order dated 26.3.2014 has allowed the appeal of the assessee and deleted the penalty in dispute and held that the claim cannot be held as capital in nature. Aggrieved with the order of the Ld. CIT(A), Revenue is in appeal before the Tribunal.

4. Ld. Sr. DR relied upon the Order of the AO and reiterated the contentions raised in the grounds of appeal.

5. Ld. DR relied upon the penalty order passed by the AO and reiterated the contentions raised in the grounds of appeal.

6. On the other hand, Ld. AR relied upon the order of the Ld. CIT(A) and stated that he has passed the well reasoned order which does not need any interference on our part. At the time of hearing, Ld. Counsel of the assessee also filed the copy of the order dated 16.10.2015 passed in the case of the assessee for the assessment year 2007-08 in ITA No. 2806/Del/2011 (AY 2007-08) in the case of GE Capital Business Process Management Serves Pvt. Ltd. vs. ACIT, wherein the quantum addition of Rs. 2,19,60,467/- on account of license fee has been deleted by the Tribunal.

7. We have heard both the parties and perused the records, especially the impugned order as well as the order dated 16.10.2015 passed in the case of the assessee for the assessment year 2007-08 in ITA No. 2806/Del/2011 (AY 2007-08) in the case of GE Capital Business Process Management Serves Pvt. Ltd. vs. ACIT, wherein the quantum addition of Rs. 2,19,60,467/- on account of license fee has been deleted by the Tribunal. We find that Section 271(1)(c) of the Act provides for imposition of penalty in case the Assessing Officer, in the course of any proceeding under Act, is satisfied that:

- (i) any person had concealed particulars of his income or
- (ii) had furnished inaccurate particulars of such income.

7.1 We further find that after the insertion of Explanation 1 to Section 271(1)(c) "the onus is on the assessee to show that there was no intention of concealment and not on the Revenue. Mens rea was considered to be a necessary ingredient for levy of penalty as laid down by the Supreme Court in CIT Vs Anwar Ali (1970) 76 ITR 696. But after the introduction of Explanation 1 to Section 271(1)(c), the Supreme Court held that the requirement of proof of Mens rea on the part of the Revenue, would no longer be necessary as held in Addl. CIT Vs Jeevan Lal Shah (1994) 205 ITR 244 (SC)

and B.A. Balasubramaniam and Bros. Co. Vs CIT (1999) 236 ITR 977 (SC).

7.2 The role of the Explanation, it was pointed out, was only to place the burden of proof squarely on the taxpayer. It is however observed that the Explanation has been often overworked by the Assessing officers, so as to justify penalty in each and every case of difference, even where an addition was merely on estimated basis of for bona fide omissions.

7.3 Additions disputed on interpretation of law were also invariably subjected to penalty by relying on the Explanation. The various High Courts in the country understood the effect of the Explanation differently often leading to conflicting decisions. In this context two landmark judgments were given by Apex Court in Dilip N. Shroff Vs Joint CIT (2007) 291 ITR 519 (SC) and T. Ashok Pai Vs CIT (2007) 292 ITR 11 (SC), which spell out mainly the following rules for the purpose of penalty imposable:

(i) Both the expressions "concealment of income" and "furnishing of inaccurate particulars" indicate some deliberation on the part of the assessee, though the word "deliberately" and the word "willfully" are no longer part of the statute.

(ii) Mere omission or negligence would not constitute a deliberate act of suppressiio veri or suggestio falsi.

(iii) Primary burden of proof is on the revenue. The statute requires satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the department.

(iv) The Assessing officer while considering levy of penalty should consider whether the assessee has been able to discharge his part of the burden. He should not begin with the presumption that the assessee is guilty.

(v) Though penalty proceedings under the income tax law may not be criminal in nature, they are still quasi criminal requiring the Department to establish that the assessee has concealed his income.

(vi) It has to be understood that the Explanation to Section 271(1)(c) is an exception to the general rule raising a legal fiction by which the burden which is ordinarily with the Department is sought to be placed on the assessee. This burden on the assessee is

subject to “conditions precedent”, which are required to be satisfied before the Explanation could be applied.

7.4 We further note that was also pointed out as held by Supreme Court in *KC Builders vs. ACIT* (2004) 265 ITR 562 (SC) that “deliberatness” is implied in the concept of concealment.

7.5 However after the decision laid down in *Dilip N. Shroff* (Supra). *T. Ashok Pai* (Supra) in dispute under Central Excise Law the Apex Court in the case of *UOI vs. Dharmendra Textile Processors* (2008) 306 ITR 277 (SC) held that “default merited penalty without having to consider any intend of the assessee to evade tax. The Mens rea is essential only for matters of prosecutor and not penalty.” Thus after the decision in the case of *Dharmendra Textile Processor* (Supra), “Mesn rea is not necessary to be proved by revenue for civil penalties.”

7.6 However with the recent decision of the recent decision of the Supreme Court in the case of *CIT vs. Reliance Petro Products Pvt. Ltd.* (2010) 322 ITR 158 (SC), it is clear that the Supreme Court by giving the ruling in *Dharmendra Textile Processor’s Case* (Supra) has not overruled their decision in *Dilip N. Shroff’s case* except for its mention of Mensrea therein.



7.7 It is also pertinent to mention here that after the ruling of Dharmendra Textile Processor, the Supreme Court has come out with the ruling in 2 different case of CIT Vs Atul Mohan Bindal (2009) (317 ITR1) and UOI Vs Rajasthan Spinning & Weaving Mills (2010) (1GSTR66) (SC) and have given a finding that "that for applicability of Section 271(l)(c) the conditions stated therein must exist." Even in the recent decision in the case of CIT(LTU) Vs. MTNL, ITA No.626/2011 dated 10.10.2011, the jurisdictional Delhi High Court has upheld the same view.

7.8 Thus from this it is very clear that for imposing penalty under Section 271(1)(c), the AO have to be satisfied that:

- (a) assessee has concealed the particulars of income or
- (b) assessee has furnished inaccurate particulars of such income.

Thus in view of the above discussion and in view of the Hon'ble Supreme Court in Reliance Petroproducts (supra) it is clear that the legislature did not intend to impose penalty on every assessee whose claim was rejected by the assessing officer. What is sought to be covered under Section 271(l)(c) is concealment of "particulars of Income" or furnishing of "inaccurate particulars of income" and not making of an untenable claim.

7.9 From the various judicial precedents it is seen that the facts and circumstances in each case has to be seen in the context and then penalty provision should be applied to see whether there was the concealment of particulars of income or the appellant has furnished inaccurate particulars, so as to call for the penal action under Section 271(1)(c).

7.10 On careful consideration of the various grounds on which additions were made by the Ld. AO, it is to be ascertained whether the Assessee had concealed the particulars of income or furnished inaccurate particulars of income, in order to decide the appeal.

7.11 We find that the AO has levied the penalty by holding that the assessee had filed inaccurate particulars of income. This issue was earlier decided by the same Ld. CIT(A) and he while deciding the appeal for A.Y.2008-09, in which had held as under:

".....

*7.2 Regarding the Ground no. 2 of the appeal relating to treatment of License fees paid to tvvt/s GECC as capital in nature/ on careful examination of the relevant agreement (EULA) between the appellant and the GECC/ I find that the GECC holds a global license for*

*the software which is widely used and is available 'off the shelf' pursuant to its arrangement with Pay Sys. This Software enables carrying out of accounting and processing of credit card transactions. Vision plus is an /Application Software/ which manages aspects of Credit Cards right from the time the application for credit card is made/ evaluated/ account is created/ transactions are authorized/ raising disputes/ sending statements/ customer services and online payment processing. The software is mainly for credit card transaction processing by multinational banks and transaction processing companies. Various banks and financial institutions use this software application to store and process credit card/ debit card/ prepaid closed end loan accounts and process financial transactions which is available off the shelf. I also find that GECC itself has received the right to use the Software internally including its group entities*

*for its business. It does not have any right to commercially exploit the Software. The Appellant makes the payment to GECC only to use the licensed programs.*

*Further/ on careful consideration of the contents of EULA/ I observe that:*

*(i) The appellant has been vested with only the limited right to use the license by the GECC during the period the agreement is in existence and the EULA does not provide any exclusive use to the Appellant.*

*(ii) GECC is a global license holder of Vision plus software and the Appellant is one of the users of such software license which in itself implies that there is no exclusivity that the Appellant is entitled to.*

- (iii) *The EULA allows the GECC to receive license fee from the appellant on quarterly basis {Clause 3.1}. The agreement provides for periodic payment for use of software to GECC which has been subject matter of renewal and revision every calendar year.*
- (iv) *The appellant company is specifically forbidden from making the copies of the software and make it available to any other person or use the license for any purpose other than the clauses 2.2 or sell it or alienate in any other manner, or duplicate, market license or compete with the licensed program commercially, in any manner {Clause 2.3}*

*{v} The agreement is subject to termination where there is any 'breach in material terms including on the periodical payments for user' i.e., if there is a default in payment, then the agreement and consequentially the right of the*

*Appellant to use the software stands terminated forth with {Clause 5. 1 {a}}.*

*{v} Upon termination the right to use the licensed program shall end and the Appellant is required to with immediate effect deliver the licensed program to GECC and the Appellant is required to remove from its systems the licensed software {Clause 5.1 {a}}.*

*7.3 Keeping in view the above, I find that what is transferred to the Appellant through EULA is only a limited right to use the License for a limited period in a prescribed manner and subject to the specific conditions +put by the licensor. In view of the above, it is undisputed that the EULA did not have the effect of vesting in the Appellant any enduring benefit or any irrevocable transfer of bundle of rights on it. On the other hand, the Appellant is bound by various conditions in respect of the manner' of use of the License. Keeping in view the same, the Appellant Company's case gets squarely covered by the Hon'ble Supreme Court in the case of M/s. Empire Jute Co. Ltd. (Supra) and other cases cited by the appellant*

*company in its defense, since no enduring benefit has been acquired by the Appellant through payment of the license fee for the limited use of the License. The reliance by the Ld. AO on various judicial pronouncements has been distinguished by the appellant on facts.*

*7.4 My Ld. Predecessor, while deciding the appeal for AY 2007-08 had taken a different view in the matter by holding that since there is no sun-set clause in the agreement, the agreement is perpetual in nature and hence the transfer of license is on permanent basis. Respectfully disagreeing with the same, I hold that the licensee appellant does not become the owner of the license by virtue of the EULA in view of the fact that*



*the agreement provides for periodic payment for use of software, which itself is subject-matter of revision every year and that the agreement is subject to termination, in case of any breach in material terms and upon termination, the right to use the licensed program shall end and the Appellant will be required to deliver the licensed program with immediate effect to GECC and to remove from its systems the licensed software.*

*7.5 In view of the same, I hold that the impugned payment of Rs. 24,258,933 on account of License fee, Connectivity charges and Co-ordination charges for use of Vision plus' software was revenue in nature and allowable u/s 37 of the Act. Accordingly, this ground is*

*allowed in favour the appellant---".*

7.12 In view of the above, we are of the considered view that such an expense was an allowable expense and hence the addition made by the AO was in itself not on right footing. Without prejudice, as the stand of the AO has been upheld by the earlier Ld. CIT(A) while deciding the appeal for the current year, it is evidently clear that the issue is certainly debatable as making distinction between the capital and revenue expenditure itself requires appreciation of full range of facts, which may bring in subjectivity in the matter. Therefore, by no set of standards, two individuals can hold similar views for capital or revenue nature of expenditure. In the case of the assessee, evidently, the stand taken by the AO is in contrast to my stand. Moreover, in the light of various decisions cited above, such a claim cannot be held as capital in nature.

7.13 It is also a settled law that penalty proceedings are independent assessment proceedings and therefore, merely because the addition made by the AO has been upheld by the Ld. CIT(A), does not imply that the assessee had filed 'inaccurate particulars of income'. We further note that the Tribunal vide its order dated 16.10.2015 passed in the case of the assessee for the assessment year 2007-08 in ITA No. 2806/Del/2011 (AY 2007-08)

title GE Capital Business Process Management Serves Pvt. Ltd. vs. ACIT, has deleted the quantum addition on account of license fee to the extent of Rs. 2,19,60,467/-. Therefore, we uphold the order of the Ld. CIT(A) of deleting the penalty in dispute and reject the grounds raised by the Revenue.

8. In the result, the appeal filed by the Department stand dismissed.

Order pronounced in the Open Court on 23/10/2017.

**Sd/-**

**[L.P. SAHU]  
ACCOUNTANT MEMBER**

*Date 23/10/2017*

**SRBHATNAGAR**

**Copy forwarded to: -**

1. Assessee -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

**Sd/-**

**[H.S. SIDHU]  
JUDICIAL MEMBER**

By Order,

Assistant Registrar, ITAT, Delhi Benches