IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC", NEW DELHI
BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER

ITA Nos.462 & 463/Del/2018
Assessment Years : 2007-08 & 2008-09

Dehradun Club Ltd., 10, New Survey Road, Dehradun, Uttarakhand.	**Vs.**	DCIT, Circle- 1(1)(1), Dehradun.
PAN : AAACD8246L		
(Appellant)		**(Respondent)**

Assessee by	:	Shri S. Krishnan, Adv. Shri V. Raja Kumar, Adv.
Department by	:	Shri S. L. Anuragi, Sr. DR
Date of hearing	:	16-07-2018
Date of pronouncement	:	31-07-2018

O R D E R

PER R. K. PANDA, AM :

The above two appeals filed by the assessee are directed against the separate orders dated 31.08.2017 passed by the CIT(A), Dehradun for the assessment years 2007-08 and 2008-09 respectively. In both the appeals, the assessee has challenged the order of the ld. CIT(A) in confirming the penalty levied by the Assessing Officer u/s 271(1)(c) of the I.T. Act, 1961 amounting to Rs.4,30,000/- for assessment year 2007-08 and Rs.4,95,000/- for assessment year 2008-09 respectively. For the sake of convenience, both the appeals were heard together and are being disposed of by this common order.

2. There was a delay of 54 days in filing of both the appeals for which the assessee has filed an application seeking condonation of delay. The ld. counsel

for the assessee referring to the said condonation application filed along with an affidavit submitted that the financial affairs of the club are being looked after by the Convenor Finance of the Club. During the period of December, 2017, the Convenor Finance, Mr. Bharat Naithani was busy arranging for his departure to the USA to pursue his Green Card and, therefore, was busy in securing the requisite travel documents and visa for his travel to the US. Due to this contingency he was generally away from Dehradun and therefore, was unable to attend to the Club matters regularly. He submitted that the delay in filing of the appeals by the assessee company is not intentional. He accordingly submitted that the delay in filing of the appeals should be condoned.

3. The ld. DR on the other hand opposed the delay in filing of the appeals.

4. After hearing the rival contentions made by both the sides, the delay in filing of the appeals by the assessee are condoned.

5. First we take up the appeal for assessment year 2007-08 as the lead appeal. Facts of the case, in brief, are that the original assessment in this case was completed u/s 143(3) on Nil income vide order dated 26.11.2009. The income has been claimed exempt as the assessee company is a mutual benefit club registered as a joint company limited by guarantee and registered u/s 25 of the Indian Companies Act, 1956. The club is established only for the benefit of its Members and no services or facilities are available to any persons other than

the members. It is not engaged in any business activities. Therefore, the assessment was completed on returned Nil income.

6. During the assessment year 1999-2000 the assessment was completed u/s 143(3) on an income of Rs.10,64,400/- wherein interest earned on FDR at Rs.8,30,336/- and messing commission received from contractor at Rs.2,34,064/- was disallowed. The ld. CIT(A) confirmed the disallowance and on further appeal, the Tribunal granted relief to the assessee. On further appeal by the Revenue, the Hon'ble High Court set-aside the judgement of the Tribunal in so far as the same related to the question pertaining to mutuality and the judgement of the ld. CIT(A) in whole and restored the order of the Assessing Officer.

7. Since the assessee during the impugned assessment year has earned income under the head “interest and dividend” at Rs.10,85,323/-, therefore, the Assessing Officer following the order of the Jurisdictional High Court reopened the assessment u/s 147 to tax such interest income in the hands of the assessee. Accordingly, notice u/s 148 was issued. Rejecting the various explanations given by the assessee and following the decision of the Jurisdictional High Court, the Assessing Officer made addition of Rs.10,85,323/- on account of interest on FDRs. The Assessing Officer also made addition of Rs.1,88,000/- on account of messing commission.

8. Rejecting the various explanations given by the assessee, the appeal filed by the assessee was dismissed by the ld. CIT(A). Thereafter, the Assessing Officer initiated penalty proceedings u/s 271(1)(c). Rejecting the explanation given by the assessee and relying on various decisions, the Assessing Officer levied penalty of Rs.4,28,600/- being 100% of tax sought to be evaded. While doing so, he observed that the Assessing Officer had added such interest on FDRs and messing commission in the case of the assessee for assessment year 1999-2000. The ld. CIT(A) allowed the claim of the assessee and appeal filed by the Revenue was dismissed by the Tribunal but on further appeal by the Revenue, the Jurisdictional High Court decided the issue in favour of the Revenue and the SLP filed by the assessee was dismissed by the Hon'ble Supreme Court. The assessee in response to notice u/s 148 filed the return showing Nil income, inspite of the fact that it had lost the case before the Apex Court. This, according to the Assessing Officer, indicates that assessee has furnished inaccurate particulars of income leading to concealment. According to the Assessing Officer, once the matter is decided by the Hon'ble Supreme Court in favour of the department, the assessee would have at least declared true income in its return of income u/s 148 of the I.T. Act. This goes to prove mala-fide intention of the assessee. Relying on various decisions, he levied the

penalty of Rs.4,28,600/- being minimum penalty leviable at the rate of 100% of tax sought to be evaded.

9. Before the ld. CIT(A), the assessee submitted that the ld. CIT(A) in the order for assessment year 2012-13 has deleted such penalty levied u/s 271(1)(c) on the ground that the issue was debatable at one point of time. Therefore, it was not a fit case for levy of penalty. The decision of the Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt. Ltd. reported in 322 ITR 158 and various other decisions were also brought to the notice of the ld. CIT(A) and it was argued that the Assessing Officer could not have levied penalty for concealment or furnishing of inaccurate particulars of income on account of this change of opinion.

10. However, ld. CIT(A) was not satisfied with the explanation given by the assessee and upheld the penalty so levied by the Assessing Officer by observing as under :-

> *"9. Having considered the submissions, I am not convinced with the same. The decision of the Hon'ble Supreme Court in the case Cawnpore Club Ltd. (Supra) was not on the subject interest income from FDR or messing charges from contractor. On the other hand, the decision of the Hon'ble Supreme Court in the case of Bangalore Club Ltd. was on this very subject & it was delivered before the filing of return in response to the notice u/s 148 of the assessee. The decision of the Supreme Court defines the law of the land. Once the Hon'ble Supreme Court had decided the matter, the assessee was obliged to take this into account while filing its return of income. The fact that it had lost the appeal before the Hon'ble Uttarakhand High Court for the A.Y. 1999-2000 and also failed to obtain admission of its SLP on the matter, ought to also have weighed with the assessee. No doubt, there are no incorrect particulars in the amounts shown as interest on FDR and messing charges from contractor, but in seeking to claim the exemption on the same after the same had been defined by the Supreme Court to be inadmissible to it in law, the assessee would definitely in my*

opinion culpable for furnishing inaccurate particulars of its taxable income. The decision of the Hon. Supreme Court in Reliance Petroproducts (Supra) was delivered with regard to disallowance of claimed expenditure, which the A.O. held to be inadmissible. It stands on a somewhat different footing from an income not offered for tax. In the circumstances, I am inclined to agree with the A.O. to confirm the penalty levied by him."

11. Aggrieved with such order of the ld. CIT(A), the assessee is in appeal before the Tribunal.

12. The ld. counsel for the assessee submitted that the original return for assessment year 2007-08 was filed on 30.10.2007 and for assessment year 2008-09 was filed on 13.09.2008. He submitted that at the time of filing of the return, the doctrine of mutuality was in favour of the assessee. At the time of completion of the original assessment for both the years, the law stood in favour of the assessee. In view of the various decisions prevailing at that time both for and against the assessee, the claim of the assessee may be a wrong claim but it is not a false claim. Therefore, it is not a fit case for levy of penalty.

13. The ld. DR on the other hand heavily relied on the order of the ld. CIT(A).

14. I have considered the rival arguments made by both the sides and perused the material available on record. It is an admitted fact that when the original return of income was filed by the assessee for both the assessment years the law of mutuality on such income was in favour of the assessee by the decision of the Tribunal. Only when the matter for assessment year 2009-10 travelled to the

Hon'ble Jurisdictional High Court that the matter was decided in favour of the Revenue and against the assessee. Based on it, the Assessing Officer reopened the assessment. No doubt, the assessee in the returns filed in response to the notice u/s 148 for both the years did not offer the interest income on FDR to tax and claimed the same as exempt. At the same time, it is to be kept in mind that all particulars were very much available in the records based on which the Assessing Officer had reopened the assessment and also made the addition subsequently in the reopening assessment. I find merit in the argument of the ld. counsel for the assessee that the claim of exemption made by the assessee can at best be a wrong claim but it cannot be called a false claim. The Courts have invariably held in various decisions that while the penalty proceedings u/s 271(1)(c) are attracted for making a false claim, however, such penalty is not leviable merely because the assessee has made a wrong claim. The Hon'ble Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. (supra) has held that mere making of a claim which is not sustainable in law by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. It has further been held that merely because the assessee has claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue that by itself would not, in our opinion, attract the

penalty u/s 271(1)(c). The relevant observation of Hon'ble Supreme Court read as under :-

> *"12. It was tried to be suggested that Section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the Legislature."*

14.1 I further find the ld. CIT(A) has cancelled the penalty levied by the Assessing Officer u/s 271(1)(c) for assessment year 2010-11 to 2012-13 and on appeal by the Revenue, the Tribunal vide ITA Nos.5360 – 5362/Del/2015 order dated 14.05.2018 has dismissed the appeals filed by the Revenue.

15. In view of the decision of the Hon'ble Supreme Court (cited supra) and the decision of the Tribunal in assessee's own case and considering the fact that all details are already available in the assessment records, I am of the considered opinion that it is not a fit case for levy of penalty u/s 271(1)(c) of the I.T. Act.

Therefore, I set-aside the order of the ld. CIT(A) and direct the Assessing Officer to cancel the penalty so levied. The ground raised by the assessee is accordingly allowed.

16. The facts for assessment year 2008-09 in ITA No.463/Del/2018 are identical to that of the facts in assessment year 2007-08. Following the parity of reasoning for assessment year 2007-08, the penalty levied by the Assessing Officer and confirmed by the ld. CIT(A) for assessment year 2008-09 is also cancelled.

17. In the result, both the appeals filed by the assessee are allowed.

Order pronounced in the open Court on this 31st July, 2018.

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

Dated: 31-07-2018.
Sujeet

Copy of order to: -

1) The Appellant
2) The Respondent
3) The CIT
4) The CIT(A)
5) The DR, I.T.A.T., New Delhi

By Order

//True Copy//

Assistant Registrar
ITAT, New Delhi