

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

**BEFORE SHRI SHAMIM YAHYA, AM AND
SHRI PAVAN KUMAR GADALE, JM**

ITA No. 115/Mum/2020
(Assessment Year: 2011-12)

M/s. Aanya Real Estate Pvt. Ltd. 120 A Wing 02, Commercial Building 23-24, Minerva Industrial Estate, Aasha Nagar, Mulund (W), Mumbai-400 080	Vs.	Dy. CIT 15(1)(1) R. No. 470, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No. AAGCA 6193 D		
(Appellant)	:	(Respondent)

Appellant by	:	Shri K. P. Dewani
Respondent by	:	Shri Brajendra Kumar

Date of Hearing	:	14.07.2021
Date of Pronouncement	:	20.07.2021

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-24, Mumbai ('ld.CIT(A) for short) dated 05.09.2019 and pertains to the assessment year (A.Y.) 2011-12.

2. The grounds of appeal read as under:

1. The order imposing penalty u/s. 271(1)(c) passed by A.O. and confirmed by Hon'ble CIT(A) is illegal, invalid and bad in law.
2. The penalty imposed at Rs.11,93,303/- u/s.271(1)(c) is unjustified, unwarranted and excessive.
3. The A.O. and Hon'ble CIT(A) erred in holding imposing that penalty u/s.271(1)(c) is impossible on addition made under normal provision of income tax where returned income and income assessed u/s.115JB is same.
4. The Hon'ble CIT(A) erred confirming the order imposing penalty u/s.271(1)(c) of I. T. Income Tax Act, 1961 1961 passed by the A.O. without giving reasonable opportunity of being heard.

3. Brief facts leading to the levy of penalty are that during the course of assessment proceedings, disallowance was made of Rs.35,92,393/- on account of treating revenue expenses as capital expenditure. It was noticed that the assessee company had made a payment of Rs.19,68,682/- to M/s. Nifinity Ltd. and Rs.15,60,782/- to M/s. Cobweb Solutions Ltd. as Exchange Server Services. As the reply of the assessee in this regard was not found satisfactory, the same amount was added to the total income of the assessee. Further, the Assessing Officer was satisfied that this was a fit case to initiate penalty proceedings u/s.271(1)(c) of the Act for furnishing inaccurate particulars of income on the above issue. He, therefore, issued a show cause notice u/s.274 r.w.s 271(1)(c) of the Act on the assessee.

In this regard, while levying the penalty, the A.O. placed reliance on the decision of Hon'ble Supreme Court in the case of *Union of India vs. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC), *Mak Data Pvt. Ltd. vs. CIT* and Hon'ble Delhi High Court decision in the case of *CIT vs. Zoom Communications Pvt. Ltd.*(ITA No. 07/2010 dated 24.05.2010).

4. Upon the assessee's appeal, the Id. CIT(A) confirmed the order of penalty. While passing the order he did not deal with the issue in appeal or the fact of the case. Rather he gave a theoretical treatise to the provision of section 271(1)(c) and the meaning of word concealment. He also referred some issues which were not at all arising in this appeal.

5. Against this order, the assessee is in appeal before us.

6. We have heard both the parties and perused the records. The Id. Counsel of the assessee summarized his submissions as under:

1. Assessee is engaged in activity of Management Consultancy Services in Real Estate. Sum of Rs.35,29,464/- was paid as annual subscription for Exchange Server Services to M/s, Nifinity Limited at Rs,19,68,682/- and to Ws. Cobweb Solutions Limited at Rs.15,60,782/-. Amount was paid for Information Technology Server Management Services rendered by aforesaid parties In the course of carrying on activity of business. Above sum was disallowed by holding same as capital expenditure in the assessment framed u/s 143(3).

2. Income determined under normal provisions of tax was at Rs.1,10,60,730/- and income determined u/s 115JB of IT. Act 1961 was at Rs,1,87,44,509/- at para 6 of

assessment order. There is 10 addition to returned book profit for determining income u/s 115JB of I.T. Act 1961 Whereas addition of Rs-35,29,464/- was made under normal provisions of I.T. Act 1961 to determine taxable income.

Tax was levied in the assessment framed on the basis of provisions of section 115JB of I.T. Act 1961 in view of same being more than the tax payable under the normal provision. Thus income stood assessed u/s 115JB wherein no addition, is made to book profit returned.

3. Appeal tiled challenging addition made at Rs.35,29,464/-was dismissed in default of non attendance of counsel vide order dated 04/09/2017 and no decision was rendered on merita.

4. Issue in appeal is covered in favour of assesses by CBDT Circular No.25/2015 dated 31/12/2015, Tax has been levied on the income determined under the provision of section 115JB of IT. Ac! 1961 at Rs.1,87,44,509/- being same as income declared h the return u/s 115JBof IT. Act 1961. In respect to addition made under normal provision no penalty u/s 271(1)(c) is leviabale as there is no loss of revenue.

Reliance on:

i) Circular No.25/2015 dated 31/12/2015.

ii) 327 ITR 543 (Delhi)

GIT vs Nalwa Sons investments Ltd.

iii) Supremg Court orderin SLP Civil No.18564/2011 in the case of Nalwa Sons Investments Ltd. vide judgment dated 04/05/2012.

iv) ITAT Delhi Bench In ITA No.1026/Del/2012 in the case of M/s. Century Communication Ltd. vide judgment dated 21/09/2012,

5. Perusal of assessment order does not show any satisfaction or even Initiation of penalty proceedings u/s 271(1)(c) of J.T Act 1961. Penalty levied in absence of satisfaction in assessment order is bad in law.

Reliance on:

i) ITAT Kotkata Bench in ITA Nc,477/Ko//2017 in the case of Late Baijnafh Agary/alvide judgment dated 23/01/2019,

6. The assesses has incurred expenditure for services rendered by W/s. Nifinity Ltd- and M/s. Cobweb Solution Ltd. in the course of business. The expenditure incurred does not bring into existence any capital asset or benefit/ advantage of an enduring nature. It is annual subscription for services rendered and is no capital expenditure. It is in the.nature of allowable revenue expenditure. Addition itself being unsustainable question of levy of penalty does not arise. Penalty levied is bad in law.

7. Expenditure Incurred is annual subscription for Exchange Server Services and was claimed as revenue expenditure, A,(X has concluded the same as capital expenditure. Complete particulars of expenditure incurred furnished before A,O. it was a case of difference of opinion and at best debatable matter, it is no case/ of concealment of income or furnishing inaccurate particular of income.

Reliance on:

i) ITAT Delhi Bench in ITA 94-J/Del/2Q12 in the oase of New Delhi Television Ltd. order dated 2/03/2020.

8. Perusal of penalty order indicate that penalty has been levied for furnishing inaccurate particulars of Income by invoking Explanation 1 to Section 271(1)(c) of IX Act 1961 Explanation 1 is a deeming provision and is applicable only when an amount is

added or disallowed in computation of total income as concealment of income, Explanation 1 is not applicable in case of furnishing inaccurate particulars of Income. In view of above, penalty levied by invoking Explanation 1 is bad in law,

Reliance on;

j) ITAT order in ITA NoJ457/Del/2010 in the case of Tristar Intech (P) Ltd, vide order dated 07/09/2015

9. The observation of Hon'ble CIT(A) at page 10 para 8 & 9 that during assessment proceedings assessee has filed a revised return disallowing interest and other expenses is factually incorrect. The assessee has filed original return declaring income at Rs.74,88,340/- under the normal provisions of the Act and same is observed by A.O. at para 1 of assessment order. A.Q. has computed income under normal provision by taking total income as per computation of Income at Rs.74,88,340/- at para 6 of assessment order by making addition of Rs.35,92,393/- to determine assessed income at Rs.1,10,80,730/- under normal provision. It is specifically asserted that no revised return is filed by assessee as observed by CIT(A) in appellate order. In fact no disallowance on account of interest and other expenses at Rs.26,53,500/- and submission of revised return and sum of Rs.1,00,76,980/- as observed in CIT(A) order at para 8 & 9 is found in assessment order. Above facts are indicative of non application of mind while "upholding levy of penalty u/s 271(1)(c) by CIT(A).

10. A.O. in penalty order at para 5.1 has placed reliance on decision of Union of India vs, Dharmendra Textile Processors & Others (2008) reported at 306 ITR 277 (SC), The Hon'ble Apex Court in aforesaid decision has concluded that Mens rea is not an essential ingredient of s. 271(1)(c). Hon'ble Apex Court in the case of Reliance Petroproducts (P) Ltd. reported at 322 ITR 0158 after considering decision in the case of Dharmendra Textile Processors & Others concluded that mere making of the claim which is not sustainable in law will not amount to furnishing inaccurate particulars regarding the income of assessee. Ratio laid-down by Apex Court in the case of Reliance Petroproducts (P) Ltd. is more appropriate to the facts in the case of assessee and thus nothing adverse remain out of decision relied upon by A.O.

11. A.O. in penalty order at para 5,2 has placed reliance on decision of MAK Data Pvt, Ltd. vs. GIT reported at 355 ITR 0593. In the aforesaid case incriminating evidence was found in the course of survey proceedings from premises of sister concern before the original return was filed by assessee. Income emanating out of incriminating evidence was not shown in original return and was surrendered subsequently. On aforesaid facts it was concluded by Hon'ble Apex Court that surrender of Income is not voluntary and assessee is liable for penalty u/s. 271(1)(c) of I.T, Act 1961. The facts in the case of assessee are distinguishable, in the case of assessee there is merely disallowance of bonafide expenditure claimed. No incriminating evidence is brought on record to make addition. Penalty levied is unsustainable in terms of decision of Hon'ble Apex Court in the case of Reliance Petroproducts (P) Ltd, In view of above, nothing adverse can be held against assessee from decision of MAK Data Pvt Ltd

12. A.O. in assessment order at para 5,3 has placed reliance on decision of Hon'ble Delhi High Court in the case of CIT vs. Zoom Communication (P) Ltd. In the aforesaid case amount of Income tax paid and amount claimed on account of certain equipment being written off was claimed as deduction, it was explained that daftn was made due to oversight. Hon'ble High Court in the judgement has noted that assessee did not explain

either to the-Income Tax Authorities or to the Tribunal as to in what circumstances and on account of whose mistake same had remained to be added. No name of person committing mistake was told but general explanation was being given, in the case of assessee bonafides of claim of assessee in respect to expenditure incurred is beyond doubt. In fact penalty proceedings are independent proceedings. Revenue expenditure incurred for annual subscription for exchange server in no manner of consideration can be considered as capital expenditure. The facts in the case of assessee are clearly distinguishable. Nothing adverse remains out of decision of Hon'ble Delhi High Court in the case of Zoom Communication (P) Ltd.

7. Furthermore, the Id. Counsel of the assessee referred to CBDT Circular and case laws as under:

1. Circular No-25/2015 dated 31/12/2015
2. Supreme Court order in SLP(C) No.18564/2011 in the case of Nalwa Sons Investment Ltd, vide order dated 04/05/2012
3. (2010) 327 ITR 0543 (Delhi) CIT vs, Natwa Sons investments Ltd.
4. ITAT order in ITA No.1026/Del/2012 in the case of M/s. Century Communication Ltd. vide order dated 21/09/2012
5. ITAT order in ITA No.941/Del/2012 in the case of New Delhi Television Ltd. vide order dated 25/03/2015
6. ITAT order in ITA No,477/Kol/2017 in the case of Late Baijnath Agarwal vide order dated 23/01/2019
7. Assessment order u/s 143(3) in case of assessee for Asstt. Year 2011-12 vide order dated 18/02/2014
8. ITAT order in ITA No,1457/Del/2010 in the case of Tristar Intech (P) Ltd, vide order dated 07/09/2015
9. (2010) 322 ITR 0158 (SC) CIT vs. Reliance Petroproducts (P) Ltd.

8. Per contra, the Id. Departmental Representative (Id. DR for short) relied on the orders of the authorities below.

9. Upon careful consideration, we note that the penalty has been levied on an addition of Rs.35,92,393/-. The said expenditure was claimed as revenue expenditure. The same was disallowed and held to be in capital field. The nature of the expenditure was service rendered by two parties, which was of the nature of annual subscription of exchange service. The assessee's claim is that the same does not bring into existence any asset of capital nature. The A.O. has held otherwise. Now the first question in the aforesaid circumstances is whether the aforesaid can be treated as concealment of income and or furnishing of inaccurate particulars of income.

10. In this regard, the exposition of Hon'ble Supreme Court in the case of *CIT vs. Reliance Petro Products Pvt. Ltd.* [2010] 322 ITR 158 (SC) applies on all fours to the facts of the present case. In the aforesaid case, the Hon'ble Supreme Court has expounded that mere disallowance of claim cannot ipso facto lead to the conclusion that the assessee is guilty and needs to be visited with the rigors of penalty u/s.271(1)(c) of the Act, unless the claim made by the assessee is found to be ex-facie bogus.

11. Examining the present case, on the touchstone of the afore-said decision, we find that the assessee's claim is that an expenditure on account of annual exchange service charge is to be treated as revenue expenditure. In our considered opinion, the aforesaid claim, by no stretch of imagination can be said to be ex-facie bogus. In this view of the matter, a disallowance of the same cannot lead to the conclusion that the assessee is guilty of furnishing of inaccurate particulars of income or concealment of income on the touchstone of aforesaid Hon'ble Supreme Court decision.

12. Furthermore, we are of the opinion that on the facts and circumstances of the case, the conduct of the assessee is not contumacious to warrant levy of penalty u/s.271(1)(c) of the Act. In this regard, we draw support from the decision of the larger bench of Hon'ble Supreme Court in the case of *Hindustan Steel Ltd. vs. State of Orissa* [1972] 83 ITR 26 (SC) or the proposition that an authority may not levy penalty unless the conduct of the assessee is found to be contumacious.

13. In this view of the matter and on the touchstone of the afore-said Hon'ble Supreme Court decisions, the penalty u/s.271(1)(c) is not at all leviable on the facts of the case. The reference to the decision of Hon'ble Supreme Court in the case of *Dharmender Textile* and Hon'ble Delhi High Court in the case of *CIT vs. Zoom Communications Pvt. Ltd.*(supra) by the A.O. are not at all relevant on the facts here. In our considered opinion, on the facts of this case, the aforesaid two Supreme Court's decisions referred by us are germane and applicable on all fours on the facts of this case. We agree with the Id. Counsel of the assessee that the Id. CIT(A) has made irrelevant observation in his appellate order, which are not only factually incorrect but have no relationship to the

issue by way of penalty u/s.271(1)(c). This amply reflects lack of application of mind by the Id. CIT(A).

14. The Id. Counsel of the assessee has also further raised the ground that since the assessee has been made liable to pay tax only on book profit, the penalty u/s.271(1)(c) cannot be sustained with reference to addition in normal computation. For this proposition, he has relied upon the decision of Hon'ble Supreme Court in the case of *Nalwa Sons Investment Ltd.* (supra) and CBDT Circular in this regard. In our considered opinion, since we have already held on merits that the penalty levied is not at all sustainable, adjudication of this aspect of Id. Counsel of the assessee's submission is only of academic interest. Hence, we are not engaging into the same. In the result, we set aside the orders of the authorities below and direct that the penalty in this case be deleted.

15. In the result, this appeal by the assessee stands allowed.

Order pronounced in the open court on 20.07.2021

Sd/-

(Pavan Kumar Gadale)
Judicial Member

Mumbai; Dated : 20.07.2021
Roshani, Sr. PS

Sd/-

(Shamim Yahya)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai