IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
and
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

(THROUGH VIDEO CONFERENCE)

ITA No.4542 /Del./2017
(Assessment Year : 2012-13)

My Guest House Accommodations Pvt. Ltd., A – 65A, Nizamuddin East, New Delhi – 110 013.	vs.	DCIT, Circle 17(1), New Delhi.

(PAN : AAGCM5756L)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri R.P. Mall, Advocate
Shri Shyam Sunder, Advocate
Ms. Sumangla Saxena, Advocate
REVENUE BY : Shri Gaurav Pundir, Senior DR

Date of Hearing : 22.09.2021
Date of Order : 30.09.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, My Guest House Accommodations Pvt. Limited (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 01.03.2017 passed by the Commissioner of Income - tax (Appeals)-38, New Delhi qua the assessment year 2012-13 on the grounds inter alia that:-

"1. On the facts and in the circumstances of the case and in law, the ld. Commissioner of Income-tax (Appeals) has failed to observe the principal of natural justice and the impugned order of penalty is bad in law on the grounds that penalty based on an assessment order where AO never offered any opportunity of being heard on the subject matter of addition and conclusions drawn were arbitrary based on conjectures and assumptions and calculated on ad hoc basis.

2. On the facts & circumstances of the case, the penalty has been levied without appreciating the facts and documents pleaded on record during assessment as were called for from time to time and without making out or alleging any case of concealment of income or furnishing of inaccurate particulars of income as has been held by the apex court in the case of Reliance Petrochemical Ltd.

3. On facts and circumstances of the case and in law, Ld. CIT (A) has erred and was not justified in upholding the penalty u/s 271(1)(c) on an addition merely based on hypothetical presumption & conjectures without any cogent reason, evidence or records bringing on record justifying a case of concealment or furnishing of inaccurate particulars of income.

4. The above grounds of appeal are independent without prejudice to each other."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : On the basis of assessment framed under section 143(3) of the Income-tax Act, 1961 (for short 'the Act') whereby Assessing Officer made disallowance of expenditure of Rs.1,03,03,818/- being 50% of expenditure claimed of Rs.2,06,07,635/- considering the same being capital in nature having enduring benefits; made addition of Rs.11,77,467/- being the alleged difference between income shown in 26AS and income shown by the assessee in profit and loss account on his failure to file reconciliation, AO initiated penalty

proceedings under section 271(1)(c) of the Act. On failure of the assessee to file any explanation to the show-cause notice issued u/s 271(1)(c) read with section 274 of the Act, AO proceeded to levy the penalty for furnishing inaccurate particulars of income to the tune of Rs.39,38,820/- @ 100% of the tax sought to be evaded.

3. Assessee carried the matter before the ld. CIT (A) by way of filing the appeal who has given part relief by deleting the penalty levied on the basis of addition of Rs.6,58,710/- by partly allowing the appeal. Feeling aggrieved by the order passed by the ld. CIT (A), the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Ld. AR for the assessee challenging the impugned order contended inter alia that assessee has not furnished any inaccurate particulars of income in claiming deductions and all true and correct facts were brought on record; that merely on the basis of disallowance/addition made during the assessment, provisions contained u/s 271(1)(c) of the Act are not attracted and that whether the expenses are capital or revenue in nature is a debatable

issue and no penalty can be levied on the same and relied upon the decisions rendered by **Hon'ble Apex Court in cases of CIT vs. Reliance Petro Products (P) Ltd. 322 ITR 158 & Empire Jute Co. Ltd. vs. CIT (1980) 124 ITR 1** and decisions rendered by Hon'ble High Courts in cases of **CIT vs. Krishna Maruti Ltd. 330 ITR 547 (Del.), CIT vs. Gurdaspur Cooperative Sugar Mills Ltd. 354 ITR 27 (P&H) & CIT vs. Amtek Auto Ltd. 352 ITR 354 (P&H).**

6. However, on the other hand, ld. DR for the Revenue contended that the assessee has failed to discharge the onus that he has not furnished any inaccurate particulars as he has not appeared before the AO despite numerous opportunities and relied upon the order passed by the AO and ld. CIT (A).

7. Undisputedly, penalty in this case has been initiated on the basis of ad hoc disallowance/addition of Rs.1,03,03,818/- being 50% of the expenditure debited in the profit & loss account under different heads and for making addition of Rs.11,77,467/- being the alleged difference between the income shown in 26AS and income shown in the profit & loss account. It is also not in dispute that income in this case was assessed at loss and no tax was payable by the company. It is also not in dispute that during the first appellate proceedings, ld CIT (A) has given part relief by deleting the

penalty qua disallowance/addition of Rs.6,58,710/- on account of non-deduction of TDS.

8. In the backdrop of the aforesaid facts and circumstances of the case, order passed by the lower authorities and arguments addressed by the authorized representatives of both the parties, the sole question arises for determination in this case is:-

> ***"as to whether the assessee has concealed particulars of income or has furnished inaccurate particulars of income during assessment proceedings?"***

9. So far as penalty levied by the AO and confirmed by the ld. CIT (A) qua ad hoc disallowance/addition of Rs.1,03,03,818/- being 50% of the expenditure debited in the profit & loss account by treating the expenditure as capital in nature is concerned, it is a settled principle of law that on the basis of mere disallowance of expenditure claimed as per books of account, penalty u/s 271(1)(c) of the Act cannot be levied unless any particulars in the return of income has been found to be false or incorrect.

10. Hon'ble Supreme Court in a case cited as ***Reliance Petro Products Pvt. Ltd. – 322 ITR 158 (SC)*** while interpreting the provisions contained u/s 271(1)(c) of the Act decided the identical issue in favour of the assessee. Operative part of which is reproduced for ready reference as under :-

> ***"A glance at the provisions of section 271(1)(c) of the I.T. Act, 1961 suggests that in order to be covered by it, there has to be***

> ***concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the detail of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.***
>
> ***Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A 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."***

11. Making ad hoc disallowance by the AO to the extent of 50% of the expenditure claimed by the assessee on account of salary & wages, communication expenses, marketing expenses, professional & legal expenses and tour & travel expenses by holding the same to be capital in nature itself shows that the AO himself was not satisfied as to in which of the case assessee furnished inaccurate particulars because everything decided by the AO as well as ld. CIT (A) on ad hoc basis on the basis of their guesswork. Identical issue has been decided by the **Hon'ble Apex Court in case of Empire Jute Co. Ltd.** (supra) by returning following findings :-

> ***"If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."***

12. Even otherwise, we fail to comprehend as to what enduring benefit has been created in favour of the assessee by incurring expenses on salary & wages, communication expenses, marketing expenses etc. because these are expenses which are necessary to carry out day-to-day business.

13. Moreover, it is a debatable issue if the expenditures are capital or revenue in nature as has been held by **Hon'ble Punjab & Haryana High Court in case of CIT vs. Gurdaspur Cooperative Sugar Mills Ltd.** (supra) by returning following findings :-

> ***"Assessee received a sum as grant-in-aid from State Government and same was disclosed as capital receipt – Assessing Officer, however, treated receipt of grant-in-aid as revenue receipt and thereafter levied penalty under section 271(1)(c) – Whether since issue whether amount of grant-in-aid was capital receipt or a revenue receipt was a debatable issue, penalty under section 271(1)(c) was not imposable – Held, yes."***

14. So far as question of levying the penalty qua addition of Rs.11,77,467/- being the difference between income shown in 26AS and income shown in the profit & loss account is concerned, ld. AR for the assessee contended that as per Form 26AS, income

credited was Rs.21,96,701/- whereas income shown in the profit & loss account was Rs.10,19,234/- and the difference is on account of the fact that vendors have deducted TDS on full value of invoice which include third party charges like airfare, hotel, room charges, etc. whereas the income of the assessee is limited to the commission it received for facilitating the services and accordingly shown the remaining amount having been paid to the vendors. All these facts have been given in the table available at pages 60 to 140 of the paper book.

15. We have perused the documents brought on record by the assessee, available at pages 60 to 140 of the paper book, which go to shows that how much revenue was booked by the assessee and how much was the reimbursement of the expenses leading to no difference in the income shown in the 26AS and profit & loss account. Ld. DR for the Revenue has failed to point out any difference in the income shown in Form 26AS and profit & loss account as explained by the assessee. So, on this score also, the Revenue has failed to prove if inaccurate particulars have been furnished by the assessee.

16. In view of what has been discussed above, we are of the considered view that AO has failed to make out the case of furnishing of inaccurate particulars of income by the assessee so as

to levy the penalty. Consequently, question framed is decided in favour of the assessee and against the Revenue. Resultantly, the penalty levied by the AO and sustained by the ld. CIT (A) is deleted and the appeal filed by the assessee is hereby allowed.

Order pronounced in open court on this 30th day of September, 2021.

Sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 30th day of September, 2021
TS

Copy forwarded to:
1.Appellant
2.Respondent
3.CIT
4.CIT(A)-38, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.