आयकर अपीलीय अधिकरण "बी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

श्री आय. पी. बंसल, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI I. P. BANSAL, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 6026/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2005-06)

Mulla Associates 102, Saquib, Turner Road, Bandra (W), Mumbai-400 050	**बनाम**/ Vs.	Asst. CIT-19(3), 3rd Floor, Piramal Chambers, Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AABFM 7784 J		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri N. R. Agrawal
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Anurag Srivastava

सुनवाई की तारीख / **Date of Hearing**	:	05.08.2014
घोषणा की तारीख / **Date of Pronouncement**	:	25.09.2014

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-30, Mumbai ('CIT(A)' for short) dated 25.07.2011, confirming the levy of penalty u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2005-06 vide order dated 29.03.2010.

2. It would be relevant to recount the background facts of the case. The assessee is a firm of Advocates working as Labour Law Consultants. It was observed during the course of assessment proceedings to have received Rs.45,44,952/- (i.e., at net of TDS of Rs.2,99,548/-) from Britannia Industries Limited during the relevant previous year, i.e., financial year 2004-05. Further, the assessee, following the cash method of accounting,

had paid Rs.37 lacs to three parties, as under, claiming the same from its total profits for the year:

i) Grand Foundry Ltd. Rs.22 lacs
ii) Suleman Bharucha Rs.7.50 lacs
iii) Yasmin Bharucha Rs.7.50 lacs

It was explained that the receipt was for the project of the closure of the payee company's manufacturing unit at Sewri (also called as Reay Road Unit), Mumbai, which had 800 workmen on its rolls. The same involved convincing the workers; handling court cases; negotiating with trade unions; finalizing the settlement of VRS, etc. The project was undertaken jointly with the three payees afore-referred, and which explains the payment to them. *Further, the payments were not on profit sharing basis, but toward specific services rendered by them, each contributing to the project, so that there was no question of a joint venture (JV) or of an association of persons (AOP).* The payment for Rs.37 lacs (which was thus in the nature of professional fees and/or commission) was disallowed in view of the same being not proved in terms of the services rendered by the three payees afore-referred, being unevidenced and, in any case, non-deduction of tax at source, so that section 40(a)(ia) stood attracted. On the same footing was the payment of Rs.5 lacs to one, Mrs. Darshanna Bhatt, claimed in respect of a receipt, from Deepak Fertilizers & Petrochemicals Ltd., at a gross amount of Rs.8,46,059/-. The disallowance, being thus at a total of Rs.42 lacs, stood confirmed by the Tribunal (in ITA No. 6383/Mum(B)/2008 dated 07.05.2010). It found that the nature of the receipt had not been established. It is only, where so, that the nature of the payment/s, stated to be toward undertaking work in relation to the project/s, for which the remuneration had been received, could be confirmed. The penalty proceedings u/s.271(1)(c), initiated at the completion of the assessment on 28.12.2007, were accordingly proceeded with.

3. Before us, the assessee's case was in terms of having included the entire receipt as its' income in its accounts (under the account head 'professional fee'/PB pgs.11-34). The payments to Grand Foundry Ltd. and Bharuchas, as also to Mrs. Darshanna Bhatt, stood confirmed by them. Non-deduction of tax at source, leading to a disallowance

u/s.40(a)(ia), could not be a ground for levy of penalty, as explained by the tribunal in *Dy. CIT vs. Roop Singh Bagga* (in ITA No.44/Ind/2013 dated 31.05.2013). Furthermore, the assessee had deposited tax at source subsequently, i.e., during the period relevant to A.Y. 2010-11, and had, accordingly, claimed deduction in terms of section 40(a)(ia).

The ld. Departmental Representative (DR), on the other hand, relied on the orders by the authorities below as well as that by the tribunal in the quantum proceedings.

4. We have heard the parties, and perused the material on record, giving our careful consideration to the matter.

The issue, as we discern, is as to if the assessee has a plausible explanation with regard to its claim of Rs.42 lacs on account of payment to four persons. Where so, clearly, no penalty on account of concealment and/or furnishing inaccurate particulars of income u/s.271(1)(c) could be levied, while, where not so, the provision of *Explanation* (1B) would stand attracted. The onus to rebut the statutory presumption of *Explanation* (1A) and *Explanation* (1B), which puts the burden of substantiating its case on the assessee, failing which it would be deemed to have concealed and/or furnished inaccurate, particulars of income. Case law in the matter is legion, and for which we may rely on a host of decisions by the apex court, viz. *CIT v. Atul Mohan Bindal* [2009] 317 ITR 1 (SC); *Union of India v. Dharmendra Textile Processors* [2008] 306 ITR 277 (SC); *Guljag Industries v. CTO* [2007] 293 ITR 584 (SC); *K.P. Madhusudhanan vs. CIT* [2001] 251 ITR 99 (SC); *B.A. Balasubramaniam* and *Bros v. CIT* [1999] 236 ITR 977 (SC); *Addl. CIT vs. Jeevan Lal Shah* [1994] 205 ITR 244 (SC); *CIT vs. K. R. Sadayappan* [1990] 185 ITR 49 (SC); and *CIT vs. Mussadilal Ram Bharose* [1987] 165 ITR 14 (SC), besides by the hon'ble high courts, viz., *CIT vs. Mohd. Mohtram Farooqui* [2003] 259 ITR 132 (Raj); *CIT vs. Sree Krishna Trading Co.* [2002] 253 ITR 645 (Ker); *Shiv Kumar Tak vs. CIT* [2001] 251 ITR 373 (Raj); *CIT vs. Vidyagauri Natverlal* [1999] 238 ITR 91 (Guj), to name some. The law, in our humble view, would hold even where the disallowance leading to the variation between the assessed and returned incomes is u/s. 40(a)(ia), being independent of the provision where-under the same (disallowance) is effected. That is, the question of levy or otherwise of penalty would have to be

necessarily examined w.r.t. the assessee's case for the claim of expenditure in view of non-obstante clause of s.40(a)(ia), as indeed would be the case for any other provision.

There is, to begin with, no question of the assessee having not claimed the impugned sum for the relevant year. The assessee has debited the said payments in its' accounts (under a nominal account 'professional fees'/PB pgs.11-33), which gets thus reflected in its profit and loss account for the year, maintained on cash basis, at a net of Rs.90.64 lacs (PB pgs.6-8), i.e., as against the gross receipt of Rs.133.46 lacs. The said accounting treatment, which is in any case not determinative of the matter, enables the assessee to plead its case of the impugned sum (Rs.42 lacs) *either as an expense or for its exclusion by way of overriding title*, and which, as we shall presently see, it indeed does, or at least attempts to. We shall, accordingly, examine the assessee's case from both the stand points, the two claims being complementary or *pari materia*, at least in-so-far as the penalty proceedings are concerned in-as-much as they both lead to a reduction in its income chargeable to tax for the relevant year by the impugned sum.

Qua the claim for expenses, there is no *iota* of evidence on record to exhibit the services having been rendered by the different payees, and toward which the payments have ostensibly been made. Rather, there is in fact no delineation at any stage of the proceedings, either as to quantum or penalty, of the work undertaken or to be undertaken by the different payees in the execution of the project. On the contrary, by all available accounts, the receipt by the assessee firm is for a project to be undertaken as a JV, i.e., by the assessee as the driving force, along with the other payees. The assessee's case is thus contradictory and inconsistent with its own stand, based on the material on record (refer para 2 above). It is on account of this that the Assessing Officer (A.O.) states of the assessee having not claimed this sum as expenditure. The statement by him that, even so considering, the amount would stand to be disallowed on account of non-deduction of tax at source in view of section 40(a)(ia), is made in the alternative. The same cannot be considered as an argument in favour of the assessee having made a claim for expenditure, which on facts stands proved and/or established, which would amount to turning the A.O.'s observation/argument on its head, much less of the assessee having thus proved

the expenditure in terms of section 37(1), so that the only detriment to its allowability is the non-deduction of tax at source. The assessee's claim, made before us, that the only reason for the disallowance, or its sustenance, is invocation or applicability of section 40(a)(ia) is without basis in facts.

Qua the claim for diversion by overriding title. This claim stands made by the assessee, as far as appears to us, vide its letter dated 08.10.2010 to the ld. CIT(A) (PB pgs. 27-28); the assessee's written submissions vide letter dated 23.03.2010, mention of which we find in the penalty order, being not on record. Though an explanation, in terms of *Explanation* 1 to section 271(1)(c), can only be that furnished before the A.O., who decides on that basis (and after subjecting it to such verification as he in his wisdom may deem fit) the question of levy of penalty in the facts and circumstances of the case. We, still, giving the assessee the benefit of doubt, consider the same as an explanation by the assessee toward and in substantiation of its case. The basis of the assessee's claim, as we gather, is the fact that the parties had agreed to share the legal fees arising to it, as their share in the profit of the JV. The A.O. rejected the assessee's case on merits for two reasons. Firstly, in that case the income was of the AOP consisting of the assessee and the three payees as its members, which is clearly not the case; the entire payment having been made to the assessee-firm and there being no separate maintenance of accounts of the AOP. Further, the shares in the receipt having been *fixed*, there was no scope for shared control and losses, referring to the decision by the hon'ble apex court in *Faguni Chand Gulati vs. Uppal* dated 07.08.2008. Two, the assessee had, though thus considered only a part of the legal fee, i.e., Rs.11,44,500/- and Rs.3,46,059/- as its income (PB pgs.35, 36), it had claimed TDS on the entire sum received by it, i.e., at Rs.3,42,419/-, on payments to it by Britannia Industries Limited and Deepak Fertilisers & Petrochemicals Ltd. (at a gross of Rs.56.905 lacs). The payments were made to it as a firm, and the subsequent payments by it to the payees were only allocations made by way of self-made mutual arrangements (refer para 6 of the tribunal's order supra). We go a step further. Even assuming that the payments were not made with a view to reduce the tax incidence, as the tribunal seems to imply, the question is: Are they in the nature of the allocation or

distribution of profit or by way of diversion by overriding title? In our view, the same cannot, by any stretch of imagination, be considered as diversion by overriding title. It is at best a mutual arrangement by which the parties agreed to share the receipt, for whatever consideration/s, arising to the assessee on account of project work, in an agreed manner. Every single document we have came across in relation to the said payments viz., the assessee's books of account, being principally the ledger account of 'professional fees'; the summary of payments (PB pgs. 35-36); the communications dated 15.03.2004 and 22.03.2004 by Grand Foundry Ltd. to the assessee (PB pgs. 37-39, 40); and the confirmation by each of the four payees (PB pgs. 41, 44, 51, 56), refer to the said amounts as share of profit on the JV project, i.e., the project/s undertaken jointly. The payment is accordingly only an application of income, and there is no case of any diversion by overriding title. The assessee's claim in this regard is thus not only wholly unsubstantiated, but *de hors* and contrary to the material on record. *Can the assessee claim to have furnished a substantiation which in fact contradicts the material adduced by him*? Continuing further, it cannot be lost sight of that the assessee has failed to exhibit the true nature of the transaction/s which, going by its version, is inextricably linked with its contracts with the payee companies, i.e., Britannia Industries Limited and Deepak Fertilizers & Petrochemicals Ltd., and which are conspicuous by their absence, a fact sought to be emphasized by the tribunal. Further, the payment, or nearly the whole of it, stands received by the assessee in the months of April and May, 2004 (from Britannia Industries Limited at Rs.42.50 lacs and Rs.5.585 lacs respectively) and in May and July, 2004 (from Deepak Fertilizers & Petrochemicals Ltd. at Rs. 2 lacs and Rs.5.70 lacs respectively). The payments to its partners, however, are made only toward the end of the year, i.e., in February and March, 2005 (PB pgs. 35-36), and which is not understandable if the share (of profit) was, as stated, already fixed and, further, with reference to the gross fees received by the assessee. If their share was released after the completion of their work, it is a case of sub contract of a part of the work, in which case they would only raise a bill on the assessee for the same – nothing more and nothing less. Or at least confirm so, while even their confirmations, which are by way of confirming the payment

statement on the assessee's letter head, state of the payments being made and received as share of profit in the joint venture project. There is no material on record, except for self assertions, that would link the impugned payments to the receipt from the two payee companies. It is this complete lack of clarity in the matter that was sought to be emphasized by the tribunal vide its order in the quantum proceedings.

Even so, we could be prepared to extend the benefit of doubt to the assessee, so that though liable to be taxed in its hands, the assessee had reasonable reason/s to consider it as not so; the genuineness of the payments having presumably been not doubted. However, even *qua* this parameter we are unable to consider the assessee's case as falling within the realm of a reasonable explanation. The assessee admittedly is the main driver of the project. It has not specified the expenditure incurred and claimed by it on the relevant project, so that for all we know it may well have returned a loss thereon, i.e., particularly considering that it discloses only a part of the remuneration received as its income, i.e., at Rs.14.905 lacs (for both the payee companies). This is in fact quizzical in-as-much as though stated to be the main driver of the project, and for which reason it would also therefore undertake the bulk, if not the whole of the expenditure on the project, the assessee retains only a fraction (a little over 25%) of the total receipt of Rs.56.905 lacs. Two, we observe that the payees have claimed expenditure against the payments to them, returning only a part thereof to tax, contradicting the claim of the payments to them as being their share of profit (PB pgs. 45-49, 52-54). Also relevant in this regard is the huge build-up of cash with the assessee during the year; the assessee having withdrawn the legal fees received by it, for no ostensible reason, banking the same in February and March, 2005 for payment to the JV partners (refer para 3 of the assessment order). *The said build-up (to the tune of Rs.50 lacs) which remains unexplained, as well as the other incidences referred to above, directly impinge on the genuineness of the impugned payments*. Finally, the assessee has claimed the impugned sum as expenditure u/s. 37(1) r/w s. 40(a)(ia) by depositing TDS thereon – ostensibly as commission, for A.Y. 2010-11, thereby debunking its claims, both *qua* share of profit and diversion by overriding title. *We have already found it to have no case qua claim for*

expenditure, while it, by doing so, even retrieves back the tax paid by it for the current year. As such, whichever way one may look at it, the assessee has no case. The 'acceptance' of its' claim for A.Y. 2010-11 by the Revenue, as contended before us, would be of no consequence. The reason is simple. A return processed u/s.143(1) cannot be regarded as an acceptance of the assessee's return (or the claims preferred thereby); the said provision, w.e.f. 01.06.1999, does not even entitle the Revenue to make any *prima facie* adjustment to an assessee's return. Reference in this regard may be made to the decision by the apex court in *Asst. CIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* [2007] 291 ITR 500 (SC).

5. In view of the foregoing, we find the levy of penalty in the instant case u/s. 271(1)(c) of the Act as sustainable in law. We decide accordingly.

6. In the result, the assessee's appeal is dismissed.
परिणामतः निर्धारिती की अपील खारिज की जाती है ।

Order pronounced in the open court on September 25, 2014

Sd/-	Sd/-
(I. P. Bansal)	(Sanjay Arora)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 25.09.2014
व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**