

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, "एच" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND B.R.BASKARAN (AM)
सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.6222 and 6223/Mum/2013

(निर्धारण वर्ष / Assessment Year :2007-08 & 2008-09)

Shri Hafeez S Contractor, 29, Bank Street, Sonawal Building, Mumbai-400023	बनाम/ Vs.	Asstt. Commissioner of Income Tax –Central Circle-44, Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN :AADPC1634R

अपीलार्थी ओर से / Appellant by	Shri Neelkanth Khandelwal
प्रत्यर्थी की ओर से/Rspondent by	Shri Jitendra Kumar

सुनवाई की तारीख / Date of Hearing : 7.7.2015

घोषणा की तारीख /Date of Pronouncement: 2.9.2015

आदेश / O R D E R

PER B.R. BASKARAN (AM)

Both the appeals filed by the assessee are directed against the common order dated 29.8.2013 passed by Ld CIT(A)-38, Mumbai and they relate to the assessment years 2007-08 and 2008-09.

2. The assessee is aggrieved by the decision of Id.CIT(A) in confirming the penalty levied in both the years u/s 271(1)(c) of the Act.

3. The facts relating to the issue are stated in brief. The Revenue carried out the search and seizure operation under section 132(1) of the Act in the hands of the assessee on 22.01.2009. During the course of search proceedings, it was noticed that the assessee has claimed

expenditure in respect of commission paid to two parties namely (a) M/s Nischal Corporate Services Private Limited and (b) M/s Twinkle Vanijya Pvt.Ltd. The first party was paid a sum of Rs.2 crores in the year relevant to the assessment year 2007-08 and the second party was paid a sum of Rs.1.5 crores in the year relevant to the assessment year 2008-09. The assessee had paid the commission by way of cheques and also had deducted tax at source. The recipients had also collected service tax from the assessee. In the statement taken from the assessee under section 132(4) of the Act, the assessee submitted that the above said commission payments were made to persons who gave the lead for the contract works obtained by the assessee and such kind of commission payments are normal. He submitted that he got the work of ICICI, India Bulls and Cloud Nine, which was to the tune of about Rs.100 crores, through M/s Nischal Corporate services private limited. He further submitted that he got the work of Chennai and Bangalore projects of M/s Carmen Builders & Constructions Pvt Ltd, worth about Rs.24 crores, through M/s Twinkle Vanijya Pvt Ltd, Kolkatta.

4. The search officials pointed out to the assessee that M/s Nischal Corporate Services Pvt Ltd has admitted that it was providing only accommodation entries. With regard to the payment made to M/s Twinkle Vanijya Pvt Ltd also, the search officials pointed out that the commission payment is made to a Kolkatta based company for the work obtained in Chennai and Bangalore and the enquiry made through an Inspector located Kolkatta revealed that the office of the above said company generally remains closed. In reply, the assessee submitted that he had given the cheque in the name of the concerns as sought by the concerned person, who brought the work. The assessee further submitted that he does not normally verify the bonafides of the company, since huge contract work was brought by them. He further submitted that he had

not received cash against the cheque so given and accordingly contended that the commission payments were genuine. The assessee was asked to produce the persons who brought the work and the assessee also initially agreed to produce them. However, at the time of conclusion of the sworn statement, he expressed his inability to produce those parties and accordingly agreed to offer the above said commission payments as his income, in order to buy peace of mind. The assessee also filed returns of income for both the years declaring the above said amount as his income and the same was also accepted by the AO.

5. The AO initiated penalty proceedings in both the years under consideration and accordingly levied the penalty u/s 271(1)(c) of the Act on the commission expense surrendered by the assessee, with the reasoning that the assessee would not have offered these amounts, had there been no search and the same proves the malafide intention on the part of the assessee to conceal true and correct income.

6. In the appellate proceedings, the Id CIT(A) also confirmed the penalty levied by the AO for both the years. Aggrieved, the assessee has filed these appeals before the Tribunal.

7. We heard the parties and perused the record. We feel it pertinent to extract the reply given by the assessee, wherein he had surrendered the above said amount of Rs.2.00 crores and Rs.1.50 crores respectively for assessment years 2007-08 and 2008-09:

I have been repeatedly asked to prove the genuineness and bonafide of two parties i.e. M/s.Twinkle Vanijya Pvt.Ltd. and M/s.Nishchal Corporate Services Pvt. Ltd. To whom we had made payments. I have also been told by you about certain facts about genuineness of payments. I have made payments to these companies as per request of persons who has got me the work. It is my inability as of now to produce these parties to support my contention that the payments are for genuine business

purpose. However, I am once again saying that I have not received cash from anyone, else you would have found unaccounted investments, cash or expenses during the course of search. My investments and expenses are properly accounted for. When I am paying so much tax honestly for so many-years, I have no intention to book these expenses to save or evade taxes. These are technical matters for which I have no answer at present and now they are adversely affecting my mental state and professional work. I have no time to spend on these matters as my professional assignments require more attention from me. Therefore, to buy my peace of mind and on the condition that there will not be any adverse consequences including penalty and/or prosecution I offer a sum of Rs.4 crores as income which will take care of the alleged bogus payments, the excess and possible any other discrepancies in any payment and/or jewellery the year wise breakup of the additional income being offered is as under:

Financial Year	Asstt.Year	Amount (Rs.In lakhs)
2006-07	2007-08	200
2007-08	2008-09	150
2008-09	2009-10	50

Since I have co-operated with the Department, I request you that lenient view be taken and no penalty and prosecution should be imposed on me. I shall pay the taxes shortly.

8. In the reply to the penalty notice issued u/s 271(1)(c) of the Act, the assessee has stated that he had surrendered the amount as per the statement without retracting from the same. It was further stated that, if any adverse view is sought to be taken of the conditional offer including in initiating penalty proceedings, the assessee should be provided with all the material on the basis of such adverse inference is sought to be made, including-but not limiting- the following:-

- (a) Copy of statement taken of the Mr. Sandeep Sitlani of M/s Nishchal corporate services Pvt Ltd.
- (b) Copy of the Report of Inspector of Addl. DDI, Kolkatta
- (c) Any other material relied upon by the AO.

9. Thus, we notice that the case of the assessee is that the impugned commission payments were genuine. Further they have been paid along with service tax by way of cheque and the assessee had also deducted tax at source. The assessee has also specified the projects for which the commission payments have been made. It is not the case of the assessing officer that the assessee did not get the projects for which the impugned commission payments were made. It is also not the case of the assessing officer that such kind of commission payments are not the trade practice. The professional income declared by the assessee for AY 2007-08 was Rs.47.30 crores and for AY 2008-09 was Rs.69.56 crores. This shows the level of operation of the assessee. We notice that the assessee has been repeatedly claiming before the search officials that the commission payments were genuine and further, if had been accommodation bills, he should have received corresponding amount by way of cash. He has repeatedly submitted that he did not receive any cash and the said submission is also corroborated by the fact that the revenue did not unearth huge amount of cash during the course of search.

10. Further, we notice that the assessee had surrendered the commission expenses at the conclusion of the sworn statement and he has clearly stated therein that he is surrendering in view of his inability to produce the concerned persons at that stage. At the time of penalty proceedings, the assessee has sought the copy of statement given by the director of M/s Nishchal corporate services Pvt Ltd and also the copy of the report of the Inspector who inspected the office of M/s Twinkle Vanijya Pvt Ltd. The assessee has also sought any other materials on the basis of which adverse inference was drawn by the AO. However, we notice that the assessee was not provided with all the above said documents. Accordingly, we are of the view that the surrender of commission

expenditure would not automatically lead to the malafides of the assessee as presumed by the assessing officer, since the assessing officer has not afforded an opportunity to the assessee to contradict the documents that were relied upon by the AO. Accordingly, we are of the view that assessment of commission income does not result in concealment of particulars of income, in the facts and circumstances of the case.

11. If we examine the explanations furnished by the assessee in terms of Explanation 1 to sec. 271 of the Act, we notice that the assessee has offered an explanation and the same has not been found to be false. It is pertinent to note that the revenue was having only suspicion about the genuineness of the payments at the time of search proceedings on the basis of enquiries conducted by them. However, the assessee has all through maintained that the payments were genuine. In support of the same, the assessee has stated that the payments were made by way of cheque, TDS were deducted and the service tax was also paid. Hence, in our view, it cannot be said that the explanation of the assessee was found to be false. Though the AO has expressed the view that the admission of the assessee proves malafides, we are of the view that the explanation of the assessee was not proved to be not bonafide one. It is not the case of the assessing officer that the assessee has failed to furnish all facts and material relating to computation of income. Accordingly, we are of the view the deeming provisions of Explanation-1 shall also not apply to the assessee.

12. The Ld A.R invited our attention to the copy of notices issued by the AO u/s 274 read with section 271 of the Act at the time of initiation of penalty proceedings. He submitted that the above said notice issued for "concealment of particulars of income or furnishing of inaccurate particulars of income". He submitted that the assessing officer has not

specified that as to which limb the notice was issued, i.e., whether it is issued for concealment of particulars of income or furnishing of inaccurate particulars of income. The Ld A.R contended that the assessing officer should be clear about the charge at the time of issuing the notice and the assessee should be made aware of the charge. He submitted that the penalty order is liable to be quashed, if the AO has not correctly specified the charge. In this regard, he placed reliance on the decision dated 11.10.2013 passed by the co-ordinate bench of Tribunal in the case of Shri Samson Perinchery in ITA No.4625 to 4630/M/2013, wherein the Tribunal followed the decision rendered by the Hon'ble Karnataka High Court in the case of CIT Vs. Manjunatha Cotton & Ginning Factory (2013)(35 Taxmann.com 250)(kar dated 13.12.2012) and held as under:-

"13. From the above, it is clear that the penalty should be clear as to the limb for which it is levied and the position being unclear here the penalty is not sustainable. Therefore, considering the same, we are of the opinion that the ground raised by the assessee should be allowed on technical grounds. Accordingly, adjudication of the penalties on merits become an academic exercise. Therefore, the grounds raised in all the six assessment years are allowed."

In the case considered by the co-ordinate bench also, the assessing officer issued the penalty notice without specifying the charge under which the notice was issued. Before us, the Ld D.R could not distinguish the above said decision. Hence, on this legal ground also, the assessee's appeal is required to be allowed.

13. In view of the foregoing discussions, we set aside the orders passed by Ld CIT(A) for both the years under consideration and direct the assessing officer to delete the penalty levied u/s 271(1)(c) of the Act in both the years.

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

Pronounced accordingly on 2nd Sept, 2015.

घोषणा खुले न्यायालय में दिनांक: 2nd Sept, 2015 को की गई ।

Sd

(जोगिन्दर सिंह/JOGINDER SINGH)

न्यायिक सदस्य / **Judicial Member**

मुंबई Mumbai: 2nd Sept, 2015.

व.नि.स./ SRL , Sr. PS

sd

(बी.आर. बास्करन,/ **B.R. BASKARAN**)

लेखा सदस्य/**Accountant Member**

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)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

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