IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DELHI

BEFORE SHRI G.D. AGRAWAL, HON'BLE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 2647/Del/2016
AY: 2010-11

M/s Halcrow Consulting India Pvt. Ltd., Revenue-27, 2nd Floor, Pratap Market, Jangpura B, New Delhi-110014 (PAN: AABCH3579B)	**vs**	**DCIT, Circle 11(1), New Delhi.**

Appellant by:	**Shri Salil Kapoor, Ms Ananya Kapoor, Advocates**
Respondent by:	**Shri Atiq Ahmad, Sr. DR**

Date of Hearing	**13.10.2017**
Date of pronouncement	**31.10.2017**

ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

This appeal has been filed by the assessee against the order of the Ld. CIT(A)-44, New Delhi wherein vide order dated 20.01.2016, the Ld. CIT(A) has upheld the penalty of Rs. 1,14,76,281/- imposed u/s 271(1)(c) of the Income Tax Act, 1961 pertaining to assessment year 2010-11.

2. Brief facts of the case are that the assessee company is engaged in providing planning, design and management services in the area of infrastructure consultancy. The return of income was filed declaring loss of Rs. 1,53,16,395/-. The case was

selected for scrutiny and reference was made to the transfer Pricing Officer (TPO). The TPO proposed a disallowance of Rs. 3,31,83,409/- in respect of international transactions undertaken by the assessee with respect of arm's length price of business support services. The disallowances were also made in respect of balances written off, advances written off and miscellaneous expenses. Subsequently, penalty proceedings u/s 271(1)(c) of the Act were also initiated and penalty was imposed for furnishing inaccurate particulars leading to concealment of income. On the assessee approaching the Ld. CIT (A), no relief was allowed to the assessee and the assessee's appeal was dismissed. Now, the assessee has approached the ITAT challenging the confirmation of imposition of penalty and has raised the following grounds of appeal:-

> *"1. That The notice issued u/s 271 (1) (c) and order imposing penalty under said section are illegal, bad in law, and without jurisdiction.*
>
> *2. That the AO has failed to appreciate that no satisfaction was recorded before initiation of penalty proceedings u/s 271 (1) (c) and as such the notice issued u/s 271 (1) (c) and the penalty order passed under said section are without jurisdiction and are liable to be quashed.*
>
> *3. That the information filed and the material available on record are not properly considered and as such the order imposing penalty u/s 271 (1) (c) is illegal and bad in law.*

4. The Assessing Officer has, in view of the facts and circumstances of the case, grossly erred in law and on facts in initiating and imposing penalty proceedings u/s 271(l)(c) without any specific charge. The AO has erred in law and on facts in issuing notice and levying penalty on the both the charges.

5. That AO has, in view of the facts and circumstances of the case, grossly erred in law and on facts in imposing penalty in haste and without giving any opportunity of being heard on the charges on which penalty were imposed.

6. That the disallowance of claim of the appellant proposed by the TPO of Rs. 3,31,83,409/- were due to different interpretation adopted by him. The assessee has computed ALP in good faith and application of a different basis by the TPO in computing ALP higher than assessee does not amount to concealment of particulars by the assessee or furnishing of inaccurate particulars of Income.

7. That the addition on account of disallowance of balance written off of Rs. 2,81,738 & addition on account of disallowance of advances written off of Rs. 3,47,022/- are not called for and complete disclosure of the same has been made by the assessee.

8. That the addition on account of disallowance of Misc. Expenses of Rs.2,33,267/- should not be considered as no opportunity was given to the assessee to explain his position for this disallowance. The expenses incurred were for business purposes and are allowable expenses. The AO has failed to establish any concealment of income or furnishing of inaccurate income on behalf of the Appellant.

9. That the Addition/disallowance should not be considered at par with concealment of income or furnishing inaccurate particulars of income.

10. That the Addition/Disallowance made by the AO were not legally sustainable under the Income Tax Act, 1961.

11. That in any case the penalty imposed is unjust, arbitrary and highly excessive."

3. Ld. AR submitted that the initiation of penalty proceedings was illegal and bad in law as no satisfaction had been recorded by the Assessing Officer while completing the assessment and, therefore, the notice u/s 274 of the Act and the subsequent order passed u/s 271(1)(c) were illegal, bad in law and without jurisdiction. It was further submitted that the penalty had been initiated and imposed without there being any specific charge of concealment or furnishing of inaccurate particulars of income. It was also submitted that the notice issued u/s 274 did not specifically mention the charge for which the penalty was being initiated and, therefore, since the notice itself was defective, no penalty could be imposed. It was also submitted that Explanation 1 to section 271(1)(c) had been wrongly invoked as the case of the assessee was not covered by the Explanation 1 to section 271(1)(c). It was further submitted that both the lower authorities had erred in not considering the conditions mentioned in Explanation 7 to section 271(1)(c) before invoking the same as the Assessing Officer had not been able to establish that 'good faith' and 'due diligence' was not exercised by the assessee. It was further submitted that the Assessing Officer had failed to discharge the onus cast upon him and both the lower

authorities had also ignored the binding judicial precedents following which the penalty could not have been imposed. It was also submitted that merely because the TPO was of the view that a different method should have been adopted for determining the Arm's Length Price (ALP) than that adopted by the assessee, it could not, *ipso facto* lead to the conclusion that this was a case of concealment or furnishing inaccurate particulars of income. It was also submitted that the determination of Arm's Length Price was a debatable issue. Penalty u/s 271(1)(c) could not be imposed on debatable issues. It was also submitted that both the lower authorities did not follow the settled judicial principle that penalty cannot be imposed automatically merely because there was a transfer pricing adjustment and the assessee had not appealed against it.

3.1 On the penalty imposed on corporate tax addition, the Ld. AR submitted that the additions pertained to writing off of advances and disallowances of miscellaneous expenses without the Assessing Officer recording any basis of a case of concealment or furnishing inaccurate particulars of income. It was also submitted that the evidences and details regarding corporate tax additions were filed before both the lower

authorities but the same were not considered. The Ld. AR also placed reliance on the following judicial precedents:-

i) Tristar Intech (P) Ltd. vs ACIT in ITA No. 1457/D/2010 of ITAT Delhi

ii) DCIT vs RBS Equities India Ltd. in ITA No. 2570/MUM/2010 of ITAT Mumbai

iii) ACIT vs Boston Scientific India Pvt. Ltd. in ITA No. 1062/D/2013 of ITAT Delhi

iv) CIT vs Manjunatha Cotton & Ginning Factory reported in 359 ITR 565 (Karnataka) of the Hon'ble Karnataka High Court

v) Chintels India Ltd. vs ACIT in ITA No.3791-93/Del/2016 of ITAT Delhi

vi) Mitsui Prime Advanced Composites India Pvt. Ltd. vs DCIT in ITA No. 550/Del/2016 of ITAT Delhi

vii) Pr. Commissioner of Income Tax vs Verizon India Pvt. Ltd. in ITA No. 460/2016 of the Hon'ble Delhi High Court

viii) Pr. Commissioner of Income Tax vs Mitsui Prime Advanced Composites India Pvt. Ltd. in ITA No. 91/2016 of the Hon'ble Delhi High Court

ix) M.s Mindmill Software Ltd. vs ITO in ITA No. 242/Del/2016 of ITAT Delhi

3.2 It was submitted that the penalty imposed be deleted in light of the facts and circumstances of the case as well as the settled judicial precedents referred to above.

4. In response, the Ld. Sr. DR while placing heavy reliance on the order of the Ld. CIT (A) vehemently argued that the penalty imposed was justified on the facts and circumstances of the case. Ld. Sr. DR read out extensively from orders of both the authorities to support the case of the department that the penalty had been correctly imposed.

5. We have heard the rival submissions and perused the material available on record. As far as the penalty levied on transfer pricing adjustment is concerned, it is seen that during the year under consideration, the assessee had entered into following international transactions:-

1. Provisions of technical services (receivables from Associated Enterprises)
2. Availing of technical services (payable to Associated Enterprises)

The assessee selected Cost Plus Method for both these transactions. Further, there was also apportionment of expenses towards business support services payable to the Associated Enterprises (AE), foreign currency component of salary of expatriate employees payable to the foreign AE and reimbursement of various expenses receivable from the AE. All these three were at cost. It was the assessee's view that no benchmarking was required in respect if these three transactions. However, during the transfer pricing proceedings, the TPO was of the view that while computing Profit Level Indicator (PLI) using Cost Plus Method, the assessee had claimed idle capacity adjustment of Rs. 2,46,46,065/- which was reduced from the direct cost was not to be included and, accordingly, the TPO excluded the same. The TPO also required the assessee to show cause as to why Cost Plus Method should not be rejected and TNMM should not be applied as the Most Appropriate Method. The TPO also asked the assessee to show cause as to why the intra group services payable to the assessee should not be treated as nil by applying CUP method. Thereafter, the TPO proceeded to make adjustment with respect to idle capacity amounting to Rs. 2,46,46,065/- and of Rs. 1,56,32,267/- with

respect to intra group services by taking the ALP of intra group services at nil.

5.1 It is seen that the Assessing Officer, while imposing the penalty, simply relied on the addition/adjustment made by the TPO and did not examine in detail as to whether penalty was imposable on such adjustments or not. On appeal, the Ld. CIT (A) also noted that the assessee had not acted in good faith while computing the ALP. The Ld. CIT (A) also took note of the fact that the assessee had not preferred any appeal against the ALP adjustment and, therefore, the assessee had accepted that the ALP had not been computed correctly by him and as such, the penalty was imposable.

5.2 The main argument of the Ld. AR against the levy of penalty on the difference in determination of ALP is that it is a debatable issue and, therefore, the penalty cannot be sustained. The scheme of Explanation 7 to section 271(1)(c) of the Act makes it clear that the onus on the assessee is only to show that the ALP was computed by the assessee in accordance with the scheme of section 92 C of the Act in good faith and due diligence. It is not in dispute here that the ALP was computed in accordance with the scheme of section 92C inasmuch as Cost Plus Method was

used. The TPO only substituted Cost Plus Method with TNMM and also computed the ALP of intra group services by taking the ALP as nil by applying the CUP Method. Whatever may be the merits in the action of the TPO changing the method of computation of ALP, the same cannot be a fit case for imposition of penalty inasmuch as it cannot be said that the ALP had not been computed by the assessee under the scheme of section 92C. The scope of connotations of expressed 'in good faith' and appearing in Explanation 7 can be found from section 3(22) of the General Clauses Act which states that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly. Therefore, it is not even necessary whether in doing that thing the assessee has been negligent or not. Thus, there is no way that the assessee can prove his honesty, because honesty, in practical terms, only implies lack of dishonesty, and proving not being dishonest is essentially proving a negative, which as the Hon'ble Supreme Court has observed in the case of K.P. Verghese vs ITO reported in 131 ITR 597 is almost impossible. However, as the expression 'good faith' is used along with 'due diligence' which refers to 'proper care'. It is also essential that not only the action of the assessee should be in

good faith but also with proper care. An act done with due diligence would mean the act done with as much as care as a prudent person would take in such circumstances. Thus, as long as no dishonesty is found in the conduct of the assessee, as long as he has done what a reasonable man would have done in his circumstances, to ensure that the ALP was determined in accordance with the scheme of section 92C, deeming fiction under Explanation 7 to section 271(1)(c) cannot be invoked.

5.3 It is seen that the grounds on which the ALP determined by the assessee has been rejected are reasonably debatable. The assessee had obtained a transfer pricing study from an outside expert and the objectivity of the same was not called into question. Therefore, lack of due diligence in determining the ALP is neither indicated nor can be inferred. In such a situation, it cannot be said that the assessee had not determined the ALP in accordance with the scheme of section 92C in good faith and with due diligence and accordingly, the conditions precedent for invoking Explanation 7 to section 271(1)(c) did not exist on the facts of the instant case. We also find that the assessee's case is covered by the order of the ITAT Mumbai Bench in the case of DCIT vs RBS Equities India Ltd. in ITA No. 2570/MUM/2010 in

which the penalty u/s 271(1)(c) had been deleted in a somewhat similar circumstance. If we accept the contentions of the department that addition on account of transfer pricing adjustment invariably means absence of good faith and due diligence, then each and every case involving transfer pricing adjustment would call for imposition of penalty us/ 271(1)(c) of the Act. ITAT Delhi had also taken a similar view on identical facts in case of Mitsui Prime Advanced Composites India Pvt. Ltd. in ITA No. 550/Del/2016 and had deleted the penalty imposed u/s 271(1)(c) of the Act. The Hon'ble High Court of Delhi has also upheld this order of the ITAT on the appeal of the department in ITA No. 913/2016 vide order dated 17.01.2017. Further, the Hon'ble High Court of Delhi has held in the case of Principal Commissioner of Income Tax vs Verizon India Ltd. in ITA No. 4602/2016 that in absence of any overt act, which indicates conscious and material suppression, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. The Hon'ble Delhi High Court further observed that it might lead to a rather peculiar situation where the assessee who might otherwise accept such

determination may be forced to litigate further to escape the clutches of Explanation 7. Therefore, in view of the factual circumstances and respectfully following the ratio of the decisions of the various judicial authorities, we are of the opinion that the assessee cannot be visited with penalty u/s 271(1)(c) of the Act on this issue and accordingly, the impugned order is set aside and penalty is deleted.

5.4 As far as the second which on which the penalty has been imposed, it is seen that penalty has been imposed on disallowance of advances/balances written off and disallowance out of miscellaneous expenses. The Ld. CIT (A) has confirmed the penalty on these additions on the ground that the assessee had accepted these additions and that the assessee did not furnish any evidence in support of the write off of advances. The penalty on miscellaneous expenses has been confirmed on the ground that some personal element in the expenditure could not be ruled out. However, it is clear that in the instant case it cannot be said that the assessee had withheld any relevant information regarding miscellaneous expenses or advances/balances written off. The assessee has duly disclosed these amounts in its profit/loss account and has also submitted details thereof during

the assessment proceedings. The only reason the penalty was imposed was that the lower authorities did not accept the explanation of the assessee and imposed penalty for concealment of income. Thus, the *bona fides* of the assesssee cannot be doubted in such circumstances. With regard to the provisions of section 271(1)(c) of the Act pertaining to penalty, the Hon'ble Apex Court has authoritatively laid down that making of a claim by the assessee which is not sustainable will not tantamount to furnishing inaccurate particulars. In CIT vs. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 (SC), the Hon'ble Apex Court has held as follows:

> *"A glance at this provision would suggest that in order to be covered, there has to be concealment of particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The present is not a case of concealment of income. That is not the case of the Revenue either. However, the Ld. Counsel for the revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the section 271 (1) (c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee*

cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that "submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income." We do not think that such can be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars."

5.5 Although both the lower authorities have held that the assessee has concealed particulars of income, on a consideration on the facts, such a view is not tenable is the present appeal. Therefore, respectfully following the judgment of the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. (Supra) we set aside the order of the Ld. CIT (Appeals) and direct the AO to delete the penalty.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 31st October, 2017.

Sd/- Sd/-

(G.D. AGRAWAL) **(SUDHANSHU SRIVASTAVA)**
PRESIDENT **JUDICIAL MEMBER**

DT. 31st OCTOBER 2017
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Asstt. Registrar