



IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.2158/Mum./2016
(Assessment Year : 2011-12)

M/s. Wadhwa Estate & Developers
India Pvt. Ltd., 301, 3rd Floor
Platina, Plot C-59, "G" Block
Bandra Kurla Complex
Bandra (E), Mumbai 400 051
PAN - AAACW5096K

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-37, Mumbai

..... Respondent

Assessee by : Shri Jitendra Jain
Revenue by : Ms. Pooja Swaroop

Date of Hearing - 22.02.2017

Date of Order - 24.02.2017

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against order dated 30th December 2015, passed by the learned Commissioner (Appeals)-53, Mumbai, confirming penalty imposed of ₹ 2,57,246, under section 271(1)(c) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2011-12.

2. Brief facts are, the assessee a company filed its return of income on 30th September 2011, for the impugned assessment year, declaring

loss of ₹ 2,49,493, under the normal provisions. In the course of assessment proceedings, on the basis of AIR information available on record, the Assessing Officer finding mismatch in the interest received on fixed deposit as per books of account and as per Form-26AS called upon the assessee to reconcile the same. In response, it was submitted by the assessee that due to over sight the assessee has offered interest income on fixed deposit at ₹ 18,90,833, as against actual interest received of ₹ 24,83,019. It was submitted by the assessee that the aforesaid figure of ₹ 18,90,833 was considered on the basis of audited account. The assessee, however, offered the differential amount of ₹ 5,92,186 to tax. Further, an Assessing Officer noticed that the assessee has debited the amount of ₹ 1,82,242 on account of fixed asset written-off. According to the Assessing Officer, since the loss arising out of writing-off of fixed asset is capital in nature the same is not allowable under section 37(1) of the Act and the assessee should have added back the same while computing his total income. As it appears, assessee accepted the aforesaid decision of the Assessing Officer and did not contest the addition. On the basis of these two additions, the Assessing Officer initiated proceedings for imposition of penalty under section 271(1)(c). In reply, to the show cause notice issued under section 274 r/w section 271(1)(c), though, the assessee objected to the initiation of proceeding for imposition of

penalty under section 271(1)(c) by explaining that the non-disclosure of income resulting in addition was on account of oversight, however, the Assessing Officer rejecting the explanation of the assessee proceeded to impose penalty under section 271(1)(c) alleging filing of inaccurate particulars of income. Though, the assessee challenged the imposition of penalty under section 271(1)(c) before the first appellate authority, however, the learned Commissioner (Appeals) confirmed the imposition of penalty.

3. Learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted that the assessee though, was having a number of fixed deposit in different banks, however, he has offered to tax interest received from all fixed deposits except one. He submitted, the lapse in offering the interest earned on fixed deposit was due to oversight on the part of the accountant because of the fact that though assessee's accounts are subject to tax audit as well as statutory audit, however, the mistake in not offering the interest income on fixed deposit was not pointed out by either of the auditors. Therefore, he submitted, it is a genuine mistake due to oversight and once it came to the notice of the assessee the income was offered to tax. The learned Authorised Representative submitted, the same is the case with the claim of loss on account of write-off of

fixed asset amounting to ₹ 1,82,242. Learned Authorised Representative submitted, as the non-disclosure of income was due to bonafide mistake, imposition of penalty under section 271(1)(c) is improper. For such proposition, he relied upon the following decisions:-

- i) Price Water House Coopers Pvt. Ltd. v/s CIT, 348 ITR 306;*
- ii) DCIT v/s Kodak India Pvt. Ltd., ITA no.1533/Mum./2014 dated 05.12.2016; and*
- iii) CIT v/s Dalmiya Diechem Industries Ltd., ITA no.1396/Mum./2013, dated 06.07.2015.*

4. The learned Authorised Representative drawing our attention to assessment order submitted, the Assessing Officer has not recorded his satisfaction whether the assessee has concealed the particulars of its income or has furnished inaccurate particulars of income. He submitted, in the notice issued under section 274 r/w 271(1)(c) also the Assessing Officer has not specified which limb of section 271(1)(c) is attracted by striking-off one of them. Therefore, he submitted, the imposition of penalty is bad-in-law. In this context, he relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Samson Perinchery, ITA no.1154/2014 dated 5th January 2017.

5. Learned Departmental Representative relying upon the observations of the Assessing Officer and the learned Commissioner

(Appeals) submitted, as the assessee has deliberately not offered to tax income and which came to the notice of the Assessing Officer only because of the scrutiny assessment proceedings the imposition of penalty under section 271(1)(c) is justified.

6. We have considered the submissions of the parties and perused the material available on record. Undisputedly, in the return of income assessee has failed to offer interest on fixed deposit amounting to ₹ 5,92,186 and loss claimed on account of fixed asset written-off amounting to ₹ 1,82,242. It is also a fact on record that in the course of assessment proceedings, the assessee accepted the taxability of these items of income and offered them to tax. The assessee has explained that non-disclosure of aforesaid two items of income is due to oversight and due to the fact that neither in the tax audit nor in the statutory audit such omission was pointed out. We find merit in the aforesaid explanation of the assessee. In fact, in Para-4.3.2 of his order, the learned Commissioner (Appeals) has observed that the explanation offered by the assessee with regard to imposition of penalty has not been found to be false. On a perusal of the audit report, we have also noted that the auditors have not pointed out the omission. Thus, assessee's explanation that non-disclosure of two items of income is on account of omission due to oversight is

believable since the auditors have also failed to detect such omission in the audit report. Therefore, in our opinion, the ratio laid down by the Hon'ble Supreme Court in PricewaterhouseCoopers Pvt. Ltd. (supra), clearly applies to the facts of the present case as, in our opinion, it is a bonafide mistake committed by the assessee. The other decision relied upon by the learned Authorised Representative also support such view. That being the case, in our opinion, imposition of penalty under section 271(1)(c) in the present case is not justified. Even otherwise also, the penalty imposed under section 271(1)(c) is not sustainable due to the following reasons:-

7. Perusal of the assessment order clearly demonstrate that the Assessing Officer has not recorded any satisfaction whether the facts of the case necessitate initiation of proceeding for imposition of penalty under section 271(1)(c) either for concealing particulars of income or for furnishing inaccurate particulars of income or for both. The Assessing Officer has simply initiated the proceedings for penalty under section 271(1)(c) without mentioning the offence committed by the assessee with reference to the provisions contained under section 271(1)(c). Further, on a reference to the notice issued under section 274 r/w section 271, which is in a standard printed format, a copy of which is placed at Page-17 of the paper book, we have found that the

Assessing Officer has not specified which limb of the provision contained under section 271(1)(c) is attracted to the assessee. The Hon'ble Supreme Court in Dilip N. Shroff v/s JCIT, [2007] 291 ITR 519 (SC), has observed that while issuing the notice under section 274 r/w section 271, in the standard format, the Assessing Officer should delete the inappropriate words or paragraphs, otherwise, it may indicate that the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income. This, according to the Hon'ble Supreme Court, deprives the assessee of a fair opportunity to explain its stand, thereby, violates the principles of natural justice. As held by the Hon'ble Supreme Court in CIT v/s Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC), the aforesaid principle laid in Dilip N. Shroff (supra) still holds good in spite of the decision of the Hon'ble Supreme Court in UOI v/s Dharmendra Textile Processors (2008) 306 ITR 277 (SC). The Hon'ble Jurisdictional High Court in CIT v/s Smt. Kaushalya & Ors., [1995] 216 ITR 660 (Bom), observed that notice issued under section 274 must reveal application of mind by the Assessing Officer and the assessee must be made aware of the exact charge on which he had to file his explanation. The Court observed, vagueness and ambiguity in the notice deprives the assessee of reasonable opportunity as he is

unaware of the exact charge he has to face. The Hon'ble Jurisdictional High Court in Samson Perinchery (supra), following the decision of Hon'ble Karnataka High Court in CIT v/s Manjunatha Cotton & Ginning Factory, [2013] 359 ITR 565 (Kar.), held, order imposing penalty has to be made only on the ground on which the penalty proceedings has been initiated. In the present case, neither the assessment order nor the notice issued under section 274 indicate the exact charge on the basis of which the Assessing Officer intends to impose penalty under section 271(1)(c). Therefore, viewed in the light of the principles laid down in the judicial precedents discussed herein above, we are of the opinion that the Assessing Officer having failed to record his satisfaction while initiating proceedings for imposition of penalty under section 271(1)(c) as to which limb of the provisions of section 271(1)(c) is attracted, the order imposing penalty is invalid. In view of the aforesaid, we hold that the imposition of penalty u/s 271(1)(c) in the present case is not justified. Accordingly, we delete the same.

8. In the result, assessee's appeal is allowed.

Order pronounced in the open Court on 24.02.2017

**Sd/-
RAJESH KUMAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 24.02.2017

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai