

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.12.2014

CORAM

THE HONOURABLE MR.JUSTICE R.SUDHAKAR

AND

THE HONOURABLE MR.JUSTICE R.KARUPPIAH

Tax Case (Appeal) No.927 of 2014

M/s Lanxess India Pvt.Ltd.,
(Successor of Bayer Indian Syntans Ltd.)
No.749, Anna Salai
Chennai 600 002
PAN: AAACB3581G

.. Appellant

-VS-

Assistant Commissioner of Income Tax
Company Circle-I(2)
Aayakar Bhavan
121, Nungambakkam High Road
Chennai 600 034

.. Respondent

Memorandum of Grounds of Tax Case Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench dated 30.5.2014 made in I.T.A.No.1714/Mds/2013 for the assessment year 2002-03.

For Appellant : Mr.B.Ramana Kumar

For Respondent : Mr.T.Ravikumar

JUDGMENT

(Judgment of the Court was delivered by R.SUDHAKAR, J.)

The issue raised in this appeal relates to imposition of penalty under Section 271(1)(c) of the Income Tax Act on the appellant-assessee for furnishing inaccurate particulars of income. The assessee, being engaged in the business of leather chemical manufacture and trading, filed its return of income on

30.10.2002 admitting a total loss of Rs.1,47,72,551/- for the assessment year 2002-03. It was processed under Section 143(1). Subsequently, the case was selected for scrutiny under Section 143(3) and a notice under Section 143(2) was issued to the assessee. On scrutiny and discussion in respect of various issues like disallowance under Section 43B, bad debts, prior period expenditure, disallowance of commission payment, royalty payment claimed in computation, compensation paid for premature termination of job work contract, non-competence fee and note on the claim of depreciation on non-compete fees, the revised total income was computed on 28.3.2005. Since the issue in this appeal is specific only to the disallowance of the claim of royalty and not on other issues, we propose to extract the relevant portions of both the explanation of the assessee dated 14.3.2005 and the scrutiny assessment order dated 28.3.2005 of the original authority, for better clarity on the said issue, as follows:-

"Explanation dated 14.3.2005 of the assessee

3. With respect to Royalty, in AY 2002-03 an amount of Rs.1,12,29,927 was inadvertently claimed in computation as a deduction of income.

Order of the original authority dated 28.3.2005

7. Royalty payment claimed in computation

It is seen from the computation of income that the assessee in the computation of income has claimed deduction of royalty of Rs.3,14,45,154/-. It was explained to me that the royalty is paid to M/s Bayer AG Germany under the agreement. In case no TDS is paid during the year the same is added back at first instance and in the computation it is claimed as

deduction on the basis of TDS payments. The same is done as per the provisions of section 40(a)(i) of the IT Act, 1961. The assessee was asked to file full details of TDS payments made in respect of this royalty payments. After verifying these details it was noticed that some of the TDS certificates pertain to the earlier year and the part of the royalty payment attributable to these certificates has already been claimed and allowed as deduction to the assessee in the earlier years. When asked about this the assessee vide their letter dt. 14th March 2005 admitted the error and stated that in AY 2002/03 a sum of Rs.1,12,29,927/- which has been already claimed in earlier year was again inadvertently claimed as deduction in the computation of income. In view of the above fact and on the basis of admission made by the assessee a sum of Rs.1,12,29,927/- is added to the assessee's total income. As the assessee has made a false claim of deduction penalty u/s 271(1)(c) is separately initiated."

2. Thereafter, on the same day, a notice was issued under Section 271(1)(c) read with Section 274 of the Act for initiation of penalty proceedings. However, after completion of the appeal proceedings on merit before the Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal vide the order of the Tribunal dated 14.3.2008, the assessee was heard by letter dated 30.7.2008 to show cause as to why penalty should not be levied for furnishing inaccurate particulars of income and the assessee filed a reply dated 1.8.2008 and the relevant portion of the pleading reads as follows:-

"2. Royalty payment wrongly claimed. The amount was claimed inadvertently and a letter to this effect was given to the department during the assessment proceedings without being prompted or asked by the department. This was an inadvertent error which was voluntarily withdrawn.

Further it is submitted that explanation 4 to 271(1)(c) stating that reduction of loss would also amount to concealment of income was brought into the statute with effect from AY 2003-04 and hence even as per law no penalty under section 271(1)(c) can be levied for AY 2002-03."

After hearing the submissions of the assessee on the above pleas, the original authority completed the penalty proceedings under Section 271(1)(c), by order dated 23.10.2008, holding as follows:-

"5.As regards disallowance of Royalty payment of Rs.1,12,29,927/-, the assessee's submission that it had withdrawn the wrong claim voluntarily is not correct. It was the Assessing Officer who had called for the TDS details vide this office letter dated 10.3.2005 which was received by the assessee's AR on the same day. Only upon receiving this letter, the assessee vide its letter dated 14.3.2005 admitted the mistake and agreed for the addition. Hence, it was not voluntary as claimed by the assessee.

6. Thirdly, the Supreme Court while dealing with provisions of explanation 4 to Section 271(1)(c), in the case of Virtual Soft Systems Ltd vs CIT has held that there should be a positive income to levy penalty u/s 271(1)(c) prior to 1.4.2003 in view of the amendment brought in by the Finance Act, 2002. However, in its

subsequent decision, the Supreme Court in the case of CIT vs Gold Coin Health Food Pvt Ltd (304 ITR 308) has overruled its own decision in the case of Virtual Soft System Ltd vs CIT referred supra. In the referred case, the SC has observed that "even during the period between April, 1976 and April 1, 2003, the position was that penalty was leviable even in a case where addition of concealed income reduces the returned loss", and held that the said amendment is only clarificatory in nature and therefore applicable for the Assessment years prior to 1.4.2003 also. Hence, the assessee's submission is not acceptable.

7. It is, therefore, clear that the assessee had made a wrong claim of Rs.1,12,29,927/- towards Royalty payment which it knew, is not correct and thereby furnished inaccurate particulars of income. It is upheld by the Supreme Court in the case of CIT Vs Gold Coin Health Food Pvt Ltd (304 ITR 308) that the penalty is leviable even in a case where addition of concealed income reduced the returned loss even in a case of assessment prior to 1.4.2003.

8. I, therefore, hold that the assessee has suppressed the income by making a wrong claim of Royalty payment of Rs.1,12,29,927/- which actually pertained to earlier assessment years which was claimed and allowed. Hence, it is a fit case to levy penalty u/s 271(1)(c) of the IT Act, 1961 for furnishing inaccurate particulars of income and tax on the same works out to Rs.40,09,083/- and accordingly, I levy a minimum penalty of Rs.40,09,083/- being 100% of tax on the concealed income of Rs.1,12,29,927/-."

3. Aggrieved by the above order, the assessee preferred an appeal to the

Commissioner of Income Tax (Appeals) and by a cryptic order, the Commissioner of Income Tax (Appeals) allowed the appeal holding that it was a bona fide mistake and that the assessee had admitted his mistake, there was no scope for levying penalty. Challenging the said order, the department went before the Tribunal and the Tribunal, after a detailed analysis of the facts of the present case and by taking note of the decision of the Supreme Court in **MAK Data (P) Ltd v. CIT (2013) 358 ITR 593 (SC)**, came to the clear conclusion that the possibility of an inadvertent mistake of this nature was remote and the scope of passing entries in the books of accounts twice was also remote, as the assessee had claimed deduction for royalty expenses paid to M/s Bayer AG Germany under an agreement taking into account the provisions of Section 40(a)(ia) of the Act. It also held that the assessee had claimed the deduction twice while filing the return of income and the error was unearthed during the course of assessment proceedings under Section 143(3) of the Act on a scrutiny by the assessing officer, failing which the error would not have surfaced leading to loss of revenue. It further held that since the assessee did not take proper care to furnish accurate particulars of income, the decision of the Supreme Court relied upon by the Revenue clearly justified the levy of penalty and taking a lenient view would encourage the assessee to perpetuate such mistakes and therefore the levy of penalty amounting to Rs.40,09,083/- being 100% of tax on Rs.1,12,29,927/- for claiming deduction twice on the ground of payment of royalty, was absolutely justified. Hence, the present appeal has been filed by the assessee.

4. Heard the learned counsel for the appellant and the learned standing

counsel for the respondent.

5. The learned counsel for the appellant was at pains to point out that even at the first instance the assessing officer, under the guise of scrutiny and assessment, called for certain details in letter dated 10.3.2005, for which a reply was given on 14.3.2005 admitting the mistake as inadvertent and when there was no mala fide intention on the part of the assessee to claim the deduction twice for payment of royalty, there is no scope for levy of penalty under Section 271(1)(c) of the Act. In support of his submissions, the learned counsel also relied upon the decision of a Division Bench of this Court in **Commissioner of Income Tax, Chennai-IV v. Gem Granites (Karnataka), (2014) 42 Taxmann.com 493 (Mad)** and the decision of the Supreme Court in **Price Waterhouse Coopers Pvt Ltd., v. Commissioner of Income Tax, (2012) 348 ITR 306 (SC)**.

6. We have considered the above submissions. So far as the facts of the present case are concerned, it is to be noticed that the penalty has been imposed on account of disallowance of royalty payment, as the same was claimed and allowed during the preceding assessment year in respect of the assessee. The Tribunal, however, placed much reliance on the decision of the Supreme Court in *Mak Data (P) Ltd.*, case reported in (2013) 358 ITR 593, where the assessee in that case offered to surrender certain amount received as share application money as its income from undisclosed source in the assessment proceedings pursuant to survey operations and when penalty was sought to be imposed under

Section 271(1)(c) of the Act, the Supreme Court decided the issue in favour of the Revenue holding as follows, which has been extracted by the Tribunal in paragraph 8.1 of its order, and we are inclined to reproduce the same in this order:-

- The Assessing Officer, shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc., to explain away its conduct.
- The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income.
- The burden is then on the assessee to show otherwise, by cogent and reliable evidence.
- When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise. [para 7]
- Assessee has only stated that he had surrendered the additional sum with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department.
- Statute does not recognize those types of defences under the Explanation 1 to section 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings under section 271(1)(c). The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty. [para 7]
- The surrender of income on this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be

said that the surrender of income was voluntary.

- The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings.
- Consequently, it is clear that the assessee had no intention to declare its true income. It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year.
- The AO, has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings under section 271(1)(c) r.w.s. 274. [para 9]
- The AO has to satisfy whether the penalty proceedings be initiated or not during the course of assessment proceedings and the AO is not required to record his satisfaction in particular manner or reduce it into writing. [para 10]
- In view of above, impugned penalty order passed by the High Court deserved to be confirmed. [para 11]"

7. Since the issue relates to imposition of penalty under Section 271(1)(c) of the Act, the said section reads as follows:-

"271.(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person--
 (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,...
 he may direct that such person shall pay by way of penalty,--
 (iii) in the cases referred to in clause (c) in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income.... or the furnishing of inaccurate particulars of such income"

8. Here is a case where the appellant-assessee had claimed the deduction for the royalty payment for the second time, when it was in fact claimed in the preceding assessment year and allowed, and the said error of computation was unearthed during the course of assessment proceedings under Section 143(3) by the original authority, for which a notice was issued under Section 143(2) and the order of the original authority dated 28.3.2005, as extracted in the earlier portion of this order, clearly shows that when the TDS certificates in respect of the royalty paid to M/s Bayer AG Germany was asked to be furnished, after verifying the details, it was noticed that some of the TDS certificates pertained to the earlier year and part of the royalty payment attributed to these certificates had already been claimed and allowed as deduction to the assessee in the earlier years. Thereafter, when the assessee was further questioned, with a cryptic reply by way of the letter dated 14.3.2005, no cogent and reliable evidence were shown by the assessee, as such a huge amount could not have been claimed as deduction by inadvertence for the second time. The said plea has also been repelled by the Supreme Court in *MAK Data (P) Ltd case (supra)*, as the assessee should first show by cogent and reliable evidence that there was neither concealment of particulars of income nor furnished inaccurate particulars of income. We find that the plea taken by the assessee in the letter dated 14.3.2005 is only cursory and does not give any acceptable explanation for the wrong computation, as the error was detected by the original authority only during the proceedings under Section 143(3) and she has also recorded a categorical finding that the assessee suppressed the income by making a wrong

claim of royalty payment, which actually pertained to earlier assessment years, which was claimed and allowed and therefore thought it fit to levy penalty under Section 271(1)(c) of the Act.

9. The decision of the Supreme Court in *Price Waterhouse Coopers Private Limited case* (supra) is distinguishable on the facts of the present case, as we find that the Supreme Court in that case held that the tax audit report did not suggest concealment of income and on that basis a finding was given that the assessee did not furnish inaccurate particulars, because, in the tax audit report filed along with the return, it was unequivocally stated that the provision for payment was not allowable under Section 40A(7) of the Act. The Supreme Court also held that neither the assessee in that case noticed the error nor it was noticed by the assessing officer who framed the assessment order. Therefore they came to hold that when the contents of the tax audit report were overlooked by all the persons concerned, it was a clear case of bona fide and inadvertent error and in that circumstance, the penalty order was set aside. Hence, the said decision is of no avail to the assessee in this case.

10. The decision of a Division Bench of this Court in *Gem Granites case* (supra) will also not enure to the benefit of the assessee in this case, as we find in that case that when the explanation on the differential amount was given by the assessee therein that the entries were made in the account and that the Accountant did not make the correct entry, the said explanation was accepted by the fact finding authority and therefore the Court thought it fit not to interfere. It

merely went on the premise that some explanation was offered and since the initial onus had been discharged, the Revenue had to show that there was concealment of the particulars of income or must have furnished inaccurate particulars of income. For such a conclusion, the Division Bench, however, while placing reliance on the decisions of the Supreme Court in **Union of India v. Rajasthan Spinning & Weaving Mills, (2009) 13 SCC 448**, **Union of India v. Dharmendra Textile Processors, (2008) 306 ITR 277** and in **CIT v. Reliance Petroproducts (P) Ltd., (2010) 322 ITR 158**, did not distinguish the facts of either of the cases to hold that it was not a case of concealment of particulars of income or the assessee did not furnish inaccurate particulars of income. The Division Bench did not choose to go into the merits of that issue, because the explanation given by the assessee therein was accepted by the Tribunal.

11. We are not inclined to be guided by the decision in Gem Granites case, as the facts in the present case are clearly distinguishable, because huge amount had been claimed during the preceding assessment year based on TDS certificates and when such of those documents were sought to be verified by the original authority in the scrutiny assessment in respect of various issues, the one relating to royalty payment was also verified on the basis of TDS certificates and the wrong computation was unearthed as has been pointed out by us in the earlier portion of this order. In our view, the department was justified in imposing the penalty under Section 271(1)(c) of the Act, as the explanation offered by the assessee is no explanation at all in the eye of law. We also find that the facts of

the present case have been thoroughly examined by the Tribunal and has rightly held against the assessee. Therefore, we find no question of law, muchless a substantial question of law arising for consideration on merits in this appeal. Accordingly, the tax case appeal fails and it is dismissed. No costs.

Index : yes
Internet: yes

(R.S.J.) (R.K.,J.)
02.12.2014

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To

1. The Income Tax Appellate Tribunal
Chennai 'B' Bench
Chennai
2. The Assistant Commissioner of Income Tax
Company Circle-I(2)
Aayakar Bhavan
121, Nungambakkam High Road
Chennai 600 034

R.SUDHAKAR, J.
and
R.KARUPPIAH,J.

SS

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