

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'H' NEW DELHI**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER  
&  
SMT. BEENA PILLAI, JUDICIAL MEMBER**

**I.T.A .No. 1457/Del/2010  
(ASSESSMENT YEAR-2006-07)**

Tristar Intech (P) Ltd., (Now known as Tristar Global Infrastructure (P) Ltd.), C-207, Ground Floor, Soami Nagar, New Delhi. <b>AAOPG6268N</b>	vs	ACIT, Circle 16(1), New Delhi.
<b>Appellant by</b>	<b>Sh. Salil Kapoor, Adv. Sh. Sanat Kapoor, Adv.</b>	
<b>Respondent by</b>	<b>Sh. J.P. Chandrekar, Sr. DR</b>	

<b>Date of Hearing</b>	<b>02.09.2015</b>
<b>Date of Pronouncement</b>	<b>07.09.2015</b>

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER:**

This is an appeal filed by the assessee against the order of ld. CIT(A)-XIX, New Delhi dated 10.02.2010 for A.Y. 2006-07 on the following ground:

*“That in the facts and circumstances of the case, the ld. CIT(A) has grossly erred by sustaining levy of penalty amounting to Rs. 11,49,000/- u/s 271(1)(c) without appreciating the facts of the case.”*

2. Brief facts of the case are that the assessee company is engaged in the business of contractors of waterproofing projects,

construction related to infrastructure projects, dismantling of existing buildings etc.

3. The assessee filed its return of income on 30.11.2006 declaring total income of Rs. 10,28,830/-. The same was processed u/s 143(1). Statutory Notice u/s 143(2) was duly issued and the representative of the assessee attended from time to time, to file necessary details and evidences and produced books of account. The assessing office concluded the assessment on 30.12.2008, by making the following additions to the returned income:

1. Excess depreciation on Plant & Machinery	Rs. 24,56,003
2. <u>Non-capitalization of expenditure</u>	
a) Custom duty	Rs. 3,50,021
b) Shipping expenses	Rs. 98,766
3. Unpaid statutory liabilities u/s 43B	Rs. 3,14,215
4. Late deposit of employees' share of PF & ESI	Rs. <u>1,94,244</u>
	<b>Rs. <u>34,13,249</u></b>

4. There was no appeal against that was preferred by the assessee before the first appellate authority against the assessment order passed. Hence, the AO initiated the penalty proceedings u/s. 271(1)(c) and finalized the penalty proceedings by levying penalty of Rs. 11,49,000/- by giving following reasons:

*“5. In the light of above observations, it is concluded that in all of the above issues the assessee furnished inaccurate particulars of income to reduce the taxable income and did not substantiate its claim of expenses. Therefore, by virtue of Explanation – 1 of Section 271(1)(c) penalty is levied. In this year, normal tax rate is 30% and surcharge is 10% and educational cess is 2% therefore, tax sought to be evaded is computed at Rs. 11,48,900/- on the disallowance/additions of Rs. 34,13,249/-. And therefore, penalty of Rs. 11,49,000/- (which is not less than 11,48,900/-, which is amount of*

*tax sought to be evaded and not exceeding three time to this) is levied after approval of the Addl. CIT, Range-16, New Delhi.”*

5. Aggrieved by the penalty order the assessee went into appeal before ld. CIT(A). The ld. CIT(A) confirmed the order of ld. AO.

6. The ld. AR submitted in respect of each addition made by the Assessing Officer under section 143(3) proceedings. It is submitted that the assessment order was passed on 30.12.2008 by making following additions:

1. Excess depreciation on Plant & Machinery	Rs. 24,56,003
2. <u>Non-capitalization of expenditure</u>	
c) Custom duty	Rs. 3,50,021
d) Shipping expenses	Rs. 98,766
3. Unpaid statutory liabilities u/s 43B	Rs. 3,14,215
4. Late deposit of employees' share of PF & ESI	Rs. 1,94,244

7. The Ld. A.R dealt with each addition on merits in the following manner;

1) Addition in respect of Excess depreciation on Plant & Machinery:

The ld. AO made addition to an extent of Rs. 24,56,003/- under the head “plant and machinery”. At the time of assessment the ld. AO pointed out certain discrepancies in the calculation arrived at by the assessee (**PB pg. 36, 37**). To which the ld. AR submitted vide letter dated 12.12.2008 and conceded the discrepancies. As a mistake in recording the figure. The assessee immediately revised the claim of depreciation to Rs. 47,60,903/- against the original claim of Rs. 72,16,906/-. It was submitted that due to the mistake, the value of Plant and Machinery was taken at Rs. 1,85,56,622/- instead of Rs. 18,55,862/-.

2) Addition in respect of custom duty and shipping expenses:

The assessee in the revised return had added excess claim of custom duty amounting to Rs. 3,50,021/- and shipping expenses amounting to Rs. 98,766/-. The assessee did not capitalize the expenses, and treated the same to be revenue in nature. The AO did not allow the claim of the assessee and added the same to the income.

3) Addition in respect of Unpaid statutory liabilities u/s 43B:

The assessee had revised the statutory liabilities paid u/s 43B to an extent of Rs. 3,14,215/-. In the audit report annexed to the paper book at **page 58**, it was pointed out that the same has been paid before the due date for furnishing the return of income of the previous year u/s 139(1). However, the AO included the said amount while computing the income for the year under consideration being in violation of sec.43B of the Act.

4) Addition on the basis of late deposit of employees contribution towards PF & ESI

The AO added an amount of Rs. 1,94,244/- on the ground that the amount was not paid within the due date prescribed under the Act. It is brought to the notice that there is a delay in depositing the employees contribution and it is submitted by the ld. AR that the same has been deposited beyond the due date which is 15<sup>th</sup> day of subsequent month. However the Ld. AR submitted that the same was deposited before the filing of the return.

8. The ld. AR also made his submissions that in the assessment order passed u/s.143(3) by the ld. AO, the satisfaction has been recorded for concealment of income u/s 271(1)(c) of the Act.

Accordingly, the penalty proceedings were initiated by the AO as the assessee did not prefer any appeal against the quantum assessment. The ld. AR further pointed out that the penalty has been levied by the ld. AO for furnishing of inaccurate particulars of income and the ld. AO by virtue of Explanation 1 to Section 271(1)(c) has levied penalty. It is argued by ld. A.R that the AO has recorded the satisfaction for concealment of income and the penalty has been levied for furnishing of inaccurate particulars of income by considering Explanation 1 to Section 271(1)(c). Ld. AR further submitted that Explanation 1 to Section 271(1)(c) cannot be applied if the charge is for filing inaccurate particulars. The deeming fiction is that the Explanation 1 could be invoked only if there is a concealment of income.

9. Without prejudice to the above arguments the ld. AR submitted that, to the facts and circumstances of the case, Explanation 1 to Section 271(1)(c) of the Act could not be invoked for the following reasons;

- (i) that the assessee has offered explanation to the AO at the time of assessment;
- (ii) that the explanation so offered by the assessee has not been found to be false by the Ld.A.O;
- (iii) that the assessee in bonafide belief has filed all the details and records in respect of the additions made were placed before the AO.

10. For the above submission, the ld. AR placed reliance on the judgment passed by the Hon'ble Apex Court in the case of CIT vs. Reliance Petro Products reported in 322 ITR 158. The ld. AR also

placed reliance on the judgment passed by the Indore Tribunal in the case of DCIT vs. Nepa Limited reported in (2015) 58 taxmann.com 137, wherein an identical issue was addressed.

11. On the contrary, the ld. DR argued that there was a willful attempt on behalf of the assessee to evade tax.

12. The ld. DR placed reliance on the judgment of Hon'ble jurisdictional High Court in the case of CIT vs. Arcotech Ltd. in ITA No. 71/2013. The ld. DR further argued that the assessee had filed inaccurate particulars, which was brought to the notice of the assessee at the time of assessment proceedings and, therefore, there was a willful attempt to evade tax.

13. We have considered the rival submissions of both the parties, perused the material available on the record and the judgments relied upon by them. On merits it is observed that mistake of the assessee was bonafide which has been corrected by filing revised return before completion of assessment. Merely because there were some discrepancies, it cannot be held that the assessee intended to evade tax. The assessee had rectified the same and had accepted the mistake before the AO. The assessee also chose not to prefer appeal before the first appellate authority, itself shows that the mistakes were not wilfull. For this act of assessee penalty u/s 271(1)(c) may not be levied in respect of the addition made u/s 43B, the assessee had declared in the audit report the bonafide error which do not find place in the return filed by the assessee (**PB page 58**). The delayed payment in respect of employees' contribution to PF & ESI needs to be given liberal approach in view of the ratio laid down by the

Hon'ble Delhi High Court in the case of CIT v. P.M. Electronics Ltd., 220 CTR 635 (Delhi) while relying upon the decision of Hon'ble Apex Court in the case of CIT Vs. Vinay Cement Ltd., 213 CTR (SC) 268 , concurred with the view taken by the Hon'ble Madras High Court in Nexus Computer (P) Ltd., 219 CTR(Mad) 54 that employer/employees' contribution towards provident fund payments made after the due date prescribed under the Employees' Provident Fund Act and Rules made there under but before the due date for furnishing the return of income under sub sec. 1 of sec. 139 of the Act, are allowable under s.36(1)(va) read with sec. 2(24)(x) and sec. 43B of the Act. Moreover, Hon'ble Apex Court in the case of CIT vs Alom Extrusions Ltd., 319 ITR 306 (SC) held that the omission of the first proviso to section 43B of the Act by the Finance Act, 2003, operated, retrospectively, with effect from, April 1, 1988 and not prospectively from April 1, 2004.

14. The decision relied on by the DR of the jurisdictional High Court in the case of Arcotech (supra) are distinguishable on the facts because in the said case, the assessee had not substantiated the claims and thus had not discharged the onus and even the audit report was silent in respect of the facts which was not disclosed. The assessee therein claimed the ignorance of law for substantiating the wrong claims. Whereas the facts before us the assessee has demonstrated the manner in which the mistake has been corrected, thereby discharging the onus.

15. Furthermore, the AO in the assessment order passed u/s.143(3), had initiated penalty for concealing the particulars of income, however, at the time of passing penalty order the AO levied the

penalty for filing of inaccurate particulars of income under the virtue of Explanation 1 to Section 271(1)(c) of the Act.

16. For dealing with the above observation let us analyze the relevant provision u/s. 271(1)(c) Explanation 1, which is reproduced herein below:

***Failure to furnish returns, comply with notices, concealment of income, etc.***

***“271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or 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, or*

*Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—*

- (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or*

- (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,*

*then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.”*

17. From the said provision, it is apparent that, if the Id.AO in the course of assessment proceedings is satisfied that, any person has concealed the particulars of income or furnished inaccurate



particulars of such income, then he may levy penalty on the assessee. Thus, there are two different charges i.e. concealment of particulars of income or furnishing of inaccurate particulars of income. The penalty can be imposed only for a specific charge. Furnishing inaccurate particulars of income means, when the assessee has not disclosed the particulars correctly or the particulars disclosed by the assessee are found to be incorrect whereas, concealment of particulars of income means, when the assessee has concealed the income and has not shown the income in its return or in its books of accounts. Explanation 1 is a deeming provision and is applicable when an amount is added or disallowed in computation of total income which is deemed to represent the income in respect of which particulars have been concealed. Explanation 1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income.

18. In the present case, we observe that the ld.AO has initiated penalty proceeding u/s 271(1)(c) on the basis that the assessee has concealed the particulars of income and the penalty ultimately levied on the assessee has been for furnishing inaccurate particulars by observing that the case of the assessee is covered by the Explanation 1 to Section 271(1)(c).

19. On the above findings and reasoning, we hold that this is not a fit case for levy of penalty u/s 271(1)(c) as there has been no concealment on behalf of the assessee. The error that was brought to the notice in respect of depreciation was a bonafide error, which was corrected by the assessee by filing revised return during the

assessment proceedings. The remaining additions made by the AO do not call for levy of penalty under this provision because these are mere disallowances made by the AO but not conclusive evidence of concealment. We, therefore, by keeping in view the ratio laid down in the judgment of Reliance Petro Products (supra) and Price Water House Coopers Pvt. Ltd. vs. CIT reported in (2012) 348 ITR 306 passed by the Hon'ble Supreme Court and jurisdictional High court in the case of of DCIT vs. Nepa Limited reported in (2015) 58 taxmann.com 137, delete the penalty u/s 271(1)(c) of the Act levied by the AO and confirmed by the ld. CIT(A).

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

**The order is pronounced in the open court on 07/09/2015**

**Sd/-**

**(N.K. SAINI)**

**ACCOUNTANT MEMBER**

Dated: 07/09/2015

*\*Kavita, P.S.*

**Sd/-**

**(BEENA PILLAI)**

**JUDICIAL MEMBER**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

		Date
1.	Draft dictated on	02.09.2015
2.	Draft placed before author	03.09.2015
3.	Draft proposed & placed before the second member	07.09.2015
4.	Draft discussed/approved by Second Member.	07.09.2015
5.	Approved Draft comes to the Sr.PS/PS	07.09.2015
6.	Kept for pronouncement on	07.09.2015
7.	File sent to the Bench Clerk	07.09.2015
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	