Income Tax Appellate Tribunal - Delhi
Deputy Commissioner Of Income Tax vs Saraya Industries Ltd. on 8 August, 2006
Equivalent citations: (2006) 104 TTJ Delhi 213
Bench: D Singh, R Sharma
ORDER R.C. Sharma, A.M.

1. This is an appeal filed by the Revenue against the order of the CIT(A), dt. 13th Jan., 2003 for the asst. yr. 1990-91 in the matter of imposition of penalty under Section 271(1)(c) of the Act.

2. The only grievance of the Revenue relates to the action of the CIT(A) for deleting the penalty of Rs. 88,40,715 imposed by the AO under Section 271(1)(c).

3. Rival contentions have been heard and record perused. In respect of assessee's claim for depreciation, which was not found to be allowable, the AO imposed penalty of Rs. 80,37,014 under Section 271(1)(c) which was enhanced to Rs. 88,40,715 by passing order under Section 154. The facts in brief are that the assessee claimed 100 per cent depreciation amounting to Rs. 1,48,83,369 on the biogas plant, which was disallowed by the AO on the ground that this plant has not started giving the end product, i.e., biogas during the year. Since the plant started giving biogas only from the subsequent year, i.e., 1991-92, 100 per cent depreciation was allowed in the subsequent year. The order of the AO for asst. yr. 1990-91, disallowing the depreciation in the instant year was confirmed by the CIT(A) and in second appeal by the Tribunal. The AO accordingly, on receipt of the order from Tribunal, imposed penalty under Section 271(1)(c) on account of the above disallowance of depreciation holding that the appellant has reduced its tax liability by furnishing inaccurate particulars of income.

4. By the impugned order, the CIT(A) deleted the penalty after having made the following observation:

In the instant case, the appellant has claimed depreciation as according to the appellant it was put to use once the effluent starts collecting in the reactor for production of biogas. However, the AO denied depreciation in the year under consideration on the ground that there was no commercial production of biogas during the year but allowed the same in the next year when the actual commercial production of biogas started. The facts on record clearly establish that there was no furnishing of inaccurate particulars on the part of the assessee to merit imposition of a penalty. At best it was case of rejection of the assessee's explanation offered for a claim of depreciation and a rejection of appellant's claim under a bona fide impression. The case would be covered by the proviso to Expln. 1 to Section 271(1)(c). But since the claim was a bona fide one made in the wrong assessment year under an erroneous impression of the legal position, it could not be said that the assessee had consciously concealed particulars of its income or facts. In my view, it is only a case of difference of opinion and not of any concealment or filing of inaccurate particulars of income. Under the circumstances and in view of the various judicial decisions relied on by the appellant as also on other decisions quoted above, I am of the opinion that, in the instant case, the appellant has proved beyond doubt that the claim of depreciation made during the year on biogas plant was bona fide and not with any mala fide intention and has thus discharged the onus cast on it under Expln. 1 to

Section 271(1)(c). On the other hand, AO has not brought on record any material which would establish that the claim was mala fide. There is no finding to this effect. Under the circumstance, imposition of penalty in this case, is not justified and is hereby cancelled.

5. We have considered the rival contentions, gone through the orders of the authorities below and also deliberated on the case laws cited by learned Authorised Representative in the context of factual matrix of the case. From the record, we found that the assessee-company has a distillery unit at village and post office, Sardarnagar, Distt. Gorakhpur, U.P. As per the provisions of Water (Prevention and Control of Pollution) Act, 1974, it is mandatory for the distillery to treat its effluent before discharging the same on ground or drain/rivers. The assessee-company found that a Swiss technology was available for treatment of distillery effluent. Side by side the Swiss technology also helps in producing biogas which is useful as fuel for the boiler used for the process of main product of distillery.

According to the assessee, the physical possession of this plant was handed over by the contractors to the assessee on 20th March, 1990 and the plant was immediately put to use on 21st March, 1990 by filling the main reactor with water, thus providing media to injecting seeds material and development of biocell for methane gas generation. Side by side, the required quantity of sludge, i.e., industrial waste was also added from time to time. Being a biological and highly technical process, it took time to stabilize the biological reactions. The ratio of seed material to the volume of liquid plays an important role. As such the rate of feed had to be regulated accordingly and kept limited to only about 5 per cent spent wash initially so that the system could be stabilized in steps. During these operations different parameters like PH and temperature of the feed as well as that of the reactor had to be monitored carefully and optimized at various loads of feed.

6. Biogas plant so installed was having dual purpose, first to treat the water effluent of the assessee's distillery and the second was to produce biogas out of such treatment of effluent. To produce biogas a minimum level of sludge/effluent/water is required in the reactor. Industrial waste and water started pouring into the reactor tank w.e.f. 21st March, 1990 but as the reactor tank was huge, it took time to fill upto the minimum level required for production of biogas during the year, which has been achieved only in the subsequent year, i.e., asst. yr. 1991-92. Therefore, the actual commercial production of biogas started from the asst. yr. 1991-92. The assessee has claimed depreciation on the ground that since the effluent started collecting in the tank the plant has been put to use for the business purposes irrespective of the time taken for actual production of biogas. According to the appellant the plant was put to use w.e.f. 21st March, 1990. According to the AO depreciation can be allowed only when the biogas is produced. This was a mere difference of opinion. Even though the disallowance of depreciation during the year was confirmed by the CIT(A) and Tribunal, the facts remained the same that the assessee's explanation was not found to be false or not bona fide during the course of penalty proceedings. There is no dispute to the well-settled legal proposition that the penalty proceedings are distinct and different from assessment proceedings. Findings in the assessment proceedings are not conclusive. The entire material available should be considered afresh by the authorities before imposing penalty under Section 271(1)(c). The Explanation to Section 271(1)(c) provides a rule of evidence raising a rebuttable presumption in certain circumstances. No substantive right is created or annulled thereby. The

substantive law relating to levy of the penalty is preserved. The initial burden of proof is cast on the assessee to establish the presumption arising in certain cases. The assessee can discharge the onus either by direct evidence or circumstantial evidence or by both. The cumulative effect of all facts should be taken into consideration. During the course of penalty proceedings, the assessee is entitled to show and establish by the material and relevant facts, which may go to affect and having direct bearing on the liability for penalty. Whether there is a concealment to make the penalty exigible is normally a question of fact. Where the burden of proof in a given case has been discharged on a set of facts, is also a question of fact. The burden is cast on the assessee to offer a bona fide explanation. There are also plethora of judgments to the effect that findings recorded or conclusion drawn in deciding the quantum appeal, are neither conclusive nor binding. For this proposition reliance may be placed on the judgment of Hon'ble Kerala High Court in the case of CIT v. Pawan Kumar Dalmia and the judgment of the Hon'ble Allahabad High Court in the case of Banams Textorium v. CIT (1988) 67 CTR (All) 191 : (1988) 169 ITR 782 (All) and also the judgment of the Hon'ble Delhi High Court in the case of CIT v. Chetan Dass Lachhman Dass .

7. The considerations in penalty proceedings are different from those in quantum proceedings. It is trite law that merely because an addition has been made and confirmed in the appeal, levy of penalty is not automatic. In National Textiles v. CIT (2000) 164 CTR (Guj) 209 : (2001) 249 ITR 125 (Guj), the Gujarat High Court held that it is not enough for the purpose of penalty that the amount has been assessed as income, the circumstances must show that there was animus, i.e., conscious concealment or act of furnishing inaccurate particulars on the part of the assessee. In the present case, the appellant's conduct and the explanation offered by it shows that there was no conscious or intentional act of appellant to conceal or furnish inaccurate particulars of income.

8. In order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income. It is not enough for the purpose of penalty that the amount has been assessed as income, and (ii) the circumstances must show that there was animus, i.e., conscious concealment or act of furnishing of inaccurate particulars on the part of the assessee. The Explanation has no bearing on factor No. 1 but it has bearing only on factor No. 2. The Explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee. No penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If an assessee gives an explanation which is unproved but not disproved, i.e., it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee. Alternatively, treating the Explanation as dealing with both the ingredients (i) and (ii) above, where the circumstances do not lead to the reasonable and positive inference that the assessee's explanation is false, the assessee must be held to have proved that there was no metis rea or guilty mind on his part. Absence of proof acceptable to the Department cannot be equated with fraud or willful default.

9. Now we examine the legal position as to whether the assessee has been able to escape from the Explanation contained below Section 271(1)(c)(iii). Explanation 1(A) clearly requires the AO to

prove the explanation given by the assessee to be false, where the assessee concerned offers explanation. Explanation 1(B) talks about the situation, where the assessee offers explanation, which he is not able to substantiate. In the instant case, the explanation offered by the assessee-company before the AO was clearly substantiated by various documents, and the explanation and the same was not found to be false by the AO. Thus, we find that this is not a case falling under Expln. 1(A) to Section 271(1)(c). We also find that the assessee has also not fallen under Expln. 1(B) to Section 271(1)(c), insofar as Expln. 1(B) requires the assessee to substantiate its explanation with evidence to prove the bona fide thereof and also to disclose all the relevant facts in relation thereto.

10. The Department itself allowed the assessee's claim in the very next year when the production of biogas started. Under these circumstances the assessee-company cannot be alleged with the charge of concealment or furnishing of inaccurate particulars of income. Undisputedly, the action of the assessee was bona fide, even though its claim was not allowed during the year under consideration but was allowed in the very next year. Deeming fiction contained in Expln. 1 to Section 271(1)(c) that the addition/disallowed amount represent income in respect of which particulars have been concealed will not apply if the explanation that was given by the assessee for the quantum proceedings, which he could not substantiate in those proceedings, was bona fide and if he had disclosed all the facts relating to the same and material to the computation of his total income. When the explanation was offered but was rejected by the AO, as it could not be substantiated by the assessee, there would arise no presumption for concealment of particulars of income that was added or expenses disallowed and such assessee can show that the said explanation offered by him was bona fide and that he had disclosed all the facts relating to such explanation and material to the computation of his total income. In the instant case, undisputedly, the assessee has offered the explanation that the plant was treated as put to use since the effluent started collecting in the tank, and which was not found to be untrue by the lower authorities by bringing any positive material on record. Therefore, as per our considered view, no penalty was imposable by invoking Explanation to Section 271(1)(c). Furthermore, provisions of the Act with regard to levy of penalty should not be construed in a manner to make them an instrument of oppression. The levy of penalty is to be seen in the backdrop of the nature and reason for which penalty is imposed. Thus, we do not find any infirmity in the order of the CIT(A) for deleting penalty of Rs. 88,40,715.

11. In view of the above discussion, we are persuaded to agree with learned senior Authorised Representative, Shri K. Sampath that as per findings recorded by the CIT(A) which is as per material on record, the explanation offered by the assessee with respect to claim of depreciation during the year under consideration was neither found to be false nor untrue, therefore no interference is required in the order of the CIT(A).

12. In the result, the appeal of the Revenue is dismissed.