

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'F', New Delhi**

**Before : Shri Bhavnesh Saini, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA No. 6140/Del./2015
Assessment Year: 2006-07**

ALP Overseas Pvt. Ltd., 25/31, East Patel Nagar, New Delhi. PAN : AAACG6366L (Appellant)	vs.	DCIT, Circle 1(1), New Delhi. (Respondent)
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Revenue by	Shri Baljit Singh, CA
Assessee by	Shri S.R. Senapati, Sr DR

Date of Hearing	20.07.2018
Date of Pronouncement	30.07.2018

ORDER

Per L.P. Sahu, A.M.:

This is an appeal filed by the assessee against the order of Id. CIT(A)-I, New Delhi dated 07.09.2015 for the assessment year 2006-07 on the following effective ground:

"1. On the facts and circumstances of the case, Ld. CIT(A) has erred in confirming the action of the ld. A.O. in imposing a penalty of Rs.1,77,000/- u/s.271(1)(c) of the Act on account of failure to voluntarily add back provision of gratuity in the computation of income, holding this mistake as mala fide even though all facts were disclosed.

2. The brief facts of the case are that the assessment u/s. 143(3) of the IT Act was completed on 13.12.2008 at an income of Rs.55,43,990/-. Subsequently, assessment was reopened u/s. 147 of the IT Act and assessment was done on 28.02.2014 determining total income at Rs.61,16,360/-, thereby making an addition of Rs.5,72,369/- on account of provision of gratuity which the assessee had surrendered vide his letter dated 09.12.2013. In the reassessment

proceedings, penalty u/s 271(1)(c) of the IT Act was initiated and same was levied by the Assessing Officer of Rs.1,77,000/- vide order dated 29.08.2014. Before the Id. CIT(A), the assessee made written submissions and relied upon some cases laws. The Id. CIT(A) after considering the submissions of the assessee, dismissed the appeal filed by him vide impugned order. The Id. CIT(A) in support of his decision also relied upon some case laws. Aggrieved by the impugned order, the assessee is in appeal before the Tribunal.

3. The Id. AR of the assessee has submitted a paper book containing 23 pages including the written submissions. The submissions placed before us read as under :

5.1 The Assessee's Chartered Accountant while computing the computation of income inadvertently made an error and failed to add the amount of Rs.5,72,3697- to the taxable income. This was an inadvertent mistake and there was no intention on the part of the Chartered Accountant or the company to conceal income or declare inaccurate particulars of income. Therefore, on this mere mistake no penalty can be imposed.

No Tax

Further there was a loss in the computation of Income (please refer Page No. 14 to __ of the Paper book) and therefore there was no additional tax which the assessee would have to pay if it had added back the gratuity.

Penalty can be imposed only when there is some intention to file inaccurate particulars and in this case the assessee had no intention to file any inaccurate particulars.

5.2 The provision for gratuity has been clearly disclosed in the balance sheet and there was no failure of any part of the assessee to disclose the fact of provisions of gratuity and Ld. A.O. has picked up this figure from the balance sheet itself. Further, the case of AY 2006-07 was carried out in scrutiny and all particulars were disclosed.

5.3 Except Assessment Year 2006-07 where the Gratuity was not added by mistake the Assessee has in the past year 2005-06 and 2007-08, 2008-09 and 2009-10 i.e. all future years added the amount of Gratuity to the taxable income. A copy of the computations is attached herein at Page 15 to 20 of the Paper Book. This clearly shows that it was only in the Assessment Year 2006-07 that the Assessee by a mistake of the Chartered Accountant, did not add the provision for Gratuity to the taxable income.

Loss in Computation of Income

Further there was a loss in the Assessment Year 2006-07 and adding back the Gratuity amount to the taxable income would not have entailed any additional tax burden on the assessee and therefore the assessee could not have any mal intention.

5.4 Further it may be stated that it was only from Financial Year 2004-05 (AY 2005-06) that Gratuity was to be provided compulsorily as AS-15 was introduced.

Note on Gratuity

The Accounting Standard 15: Employee Benefit (earlier called as accounting for retirement benefits before revision in 2005) was made mandatory from financial year 2006-07. Before that it was recommendatory. The company had made the provision for gratuity first time in the assessment year 2005-06 (previous year 2004-05), wherein it had added back the provision for gratuity in the total income. In the Assessment year 2006-07 the same was missed out for addition due to an inadvertent mistake of the Chartered Accountant.

5.5 Penalty is not Exigible

The Matter is completely disclosed

The assessee had clearly disclosed the provision in the Balance sheet and has only failed to add it back to income in the computation of income. This is borne by the fact that the Id. A.O. has detected this from the Balance sheet.

Disclosure in Balance sheet is disclosure

- Supreme court in *CIT v Corporation bank Ltd 254 ITR791 (2002) SC*
- Needle Industries (I) Ltd v CIT (1990) 183 ITR 393

Thus there is no failure on the part of the assessee to disclose the provision of Gratuity and it was only due to a mistake on the part of the Chartered Accountant, that in the computation of income the assessee did not add back the gratuity to the taxable income.

HUMAN ERROR

A mistake is a human error and can be committed by any one and that does not warrant a penalty. The following case laws state the same ratio:

CASE LAWS

[2012] 25 taxmann.com 400 (SC) SUPREME COURT OF INDIA

Price Waterhouse Coopers (P.) Ltd. v. Commissioner of Income-tax, Kolkata-I*

S.H. KAPADIA, CJ. AND MADAN B. LOKUR, J. CIVIL APPEAL NO. 6924 OF 2011 f
SEPTEMBER 25, 2012

Section 271(1)(c), read with section 37(1), of the Income-tax Act, 1961 - Penalty - For concealment of income - Bona fide mistake - Assessment year 2000-01 - Assessee firm filed its return of income along with tax audit report - In its tax audit report it was indicated that provision towards payment of gratuity was not allowable but it failed to add provision for gratuity to its total income - Whether it was a bona fide and inadvertent error - Held, yes - Whether assessee was not guilty of either furnishing inaccurate particulars or attempting to conceal its income - Held, yes - Whether imposition of penalty was unjustified - Held, yes [Para 20] [In favour of assessee

Fault of Chartered Accountants cannot be visited on the assessee.-

*Where the assessee had claimed relief under section 80-1 on a certificate filed by a Chartered Accountant and the Chartered Accountant disowned the certificate and even had stated that he was not competent to certify, the bona fide claim of the assessee based upon such certificate, penalty could not be levied, if such certificate was wrong. It was pointed out that the Assessing Officer could not have acted on it without putting the communication from the Chartered Accountant to the assessee. Deletion of penalty by the Tribunal in such circumstances on the ground of alleged wrong claim was upheld in **CIT v Rice Mills (S.D.). (2005) 275ITR 206 (P&H)***

6.3 S. 271 - Erroneous deduction u/s. SOL did not amount to concealment of income -

Where deduction u/s 80L was erroneously claimed and granted to the partner of a firm, it was held that the assessee had honestly disclosed the income and had not concealed anything deliberately and his action did not suffer from any mens rea. Therefore, the penalty proceedings u/s 271(1)(c) were not warranted. The proposal in the assessment order for initiating penalty proceedings against the assessee after re-opening was liable to be quashed.

Mahendra Kumar v. Union of India, (1997) 94 Taxman 3: (1997) 140 CTR 331: (1997) 226 ITR 718 (MP)

6.4 S. 271 - Penalty for accidental and inadvertent mistake in disclosing correct income -

The assessee, a film distributor, declared an income of Rs.24,760 after deducting Rs.21,907 for amortisation of five films from a profit of Rs.46,667 and submitted both a profit and loss account and a separate statement of amortisation for 1969-70. On scrutiny, the ITO discovered that amortization in respect of two films had already been considered in drawing up the profit and loss account. The assessee admitted this error and agreed to the addition of the two amounts. †Penalty for concealment was imposed:

Held, that it was a case of accidental and inadvertent mistake. Since the assessee had disclosed the basic facts by submitting the profit and loss account and the amortization account there was no attempt at concealment. The penalty levied was, consequently, illegal.

Mahadeswara Movies v. CIT, (1983) 144 ITR 127 (Karn)

6.5 A wrong claim with disclosure of full facts, -

Where the assessee, while disclosing extra interest charged over and above the limit fixed under Kerala Money Lenders Act, 1958, had wrongly claimed the excess as not liable to tax having realized the same due to misconception of law, since there was no concealment of the fact of receipt, but only a claim that it was not taxable, though such claim was misconceived, penalty is not leviable.

CIT v Santosh Financiers (2001) 247 ITR 742 (Ker) following the rationale of the decision of the Supreme Court in ***CIT (Addl) v Jeevan Lal Sah*** (1994) 205 ITR 244 (SC) and ***Sir Shadilal Sugar & General Mills Ltd. v C/T***(1987) 168 ITR 705 (SC).

CIT v Seeds India Ltd. (P.H.I) (2008) 301 ITR 13 (Del).

Where there was a solitary mistake in debiting cost of wires to consumable stores account and there was no suggestion from the Income-tax Department, that the mistake was not bona fide, penalty is not leviable.

CIT v Union Electric Corporation (2006) 281 ITR 266 (Guj)

[2012] 24 taxmann.com 3Q9 (Delhi)

HIGH COURT OF DELHI Commissioner of Income-tax v. Societex*

S. RAVINDRA BHATAND R.V. EASWAR, JJ. IT APPEAL NO. 1190 OF 2011

JULY 19,2012

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 1997-98 - Assessee was engaged inter alia in rendering consultancy services - It had, for assessment year 1997-98, claimed depreciation in respect of properties one at Bangalore and other at Delhi - In first round when matter came for determination before Commissioner (Appeals), he concluded that depreciation was allowable only to extent of 2/3rd claim in respect of Bangalore property and that for Delhi property such deduction could not be claimed at all - He made addition - Assessing Officer levied penalty - Assessee contended that it was evident that Commissioner (Appeals) had partially accepted assessee's claims for depreciation - It was further submitted that Delhi property was let out for first time in latter part of concerned assessment year i.e., in August, 1996 and, thus, only an inadvertent claim was made - Similarly, with regard to provision of taxation, -assessee submitted that it was inadvertent error as such a claim had been made for first time during assessment year - This was clear from relevant record -Tribunal upheld said submission and concluded that there was no history of furnishing of inaccurate particulars by assessee for previous years and, accordingly, deleted penalty - Whether Tribunal was justified in deleting penalty - Held, yes [In favour of assessee]

[2013] 36 taxmann.com 533 (Guj a rat)

HIGH COURT OF GUJARAT Commissioner of Income-tax-I

v. Gujarat State Fertilizers & Chemicals Ltd.*

M.R. SHAH AND MS. SONIA GOKANI, JJ.

TAX APPEAL NO. 127 OF 20131

JUNE 25,2013

Section 271(1)(c), read with section 115JB, of the Income-tax Act, 1961 - Penalty - For concealment of income [Wrong claim, effect of] - Assessee's claim with respect to depreciation and capital loss was found erroneous- When said fact was brought to assessee's notice, it offered amount of difference for taxation -Assessing Officer, however, levied penalty under section 271(1)(c) - Commissioner (Appeals) deleted penalty holding that it was bona fide inadvertent mistake - .Admittedly, even after making some disallowance on both counts, tax required to be paid as per section 115JB remained same - Whether in absence of any material to hold that assessee had either concealed particulars

of his income or furnished inaccurate particulars, penalty under section 271(1)(c) was rightly cancelled - Held, yes [Paras 4,5 & 6] [In favour of assessee]

**[2013] 40 taxmann.com 17 (Andhra Pradesh) HIGH COURT OF ANDHRA PRADESH
Commissioner of Income-tax v. Ms. Sania Mirza***

MADAN B. LOKUR, CJ. AND SANJAY KUMAR, J.

ITTA NO. 526 OF 20111

FEBRUARY 9,2012

Section 271(1)(c), read with section 4, of the Income-tax Act, 1961 - Penalty - For concealment of income [Disallowance of claim, effect of] - Assessment year 2004-05 - Assessee, a tennis player, did not offer to tax amount received as awards from Government and from other institution - However when assessment was reopened, assessee voluntarily offered said amount for tax - Whether since amount in question was shown by assessee in her return, there being no concealment of income or furnishing of inaccurate particulars of income, it was not fit case for imposition of penalty under section 271(1)(c) - Held, yes [Paras 8 & 9] [In favour of assessee]

[2010] 232 CTR 78 (PUNJ. & HAR.) HIGH COURT OF PUNJAB & HARYANA

Commissioner of Income tax v. Deepak Kumar

M.M. KUMAR & JITENDRA CHAUHAN, JJ.

IT APPEAL NO. 191 OF 2009

MARCH 8, 2010

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 2004-05

Where penalty was levied on assessee on ground that assessee had wrongly claimed deduction under section 10(36) but Tribunal found that assessee had acted upon advice of his counsel, who was dealing with his tax matters for last so many years, as it was a case of bona fide mistake, levy of penalty on assessee was not justified [In favour of assessee]

Further it needs to be appreciated that this was disclosed and not concealed. A mere error or mistake would not create inaccurate particulars.

7.1 Legal submission:

The assessee had submitted all the required details and nothing was concealed. It is not that the Ld A.O had blown out any undisclosed income. All facts were available on record.

Section 271 (1)(c).

U/s 271(1)(c), penalty is imposed if the assessee "has concealed the particulars of his income or furnished inaccurate particulars of such income".

Extracts:

Explanation 1. - Extract

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 Ld. AO or the Commissioner (A) or Commissioner to be false,

OR

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 purpose of clause (c) of the sub section, be deemed to represent the income in respect of which particulars have been concealed.

The most important aspects of the Section 271(1)(c) are concealed and inaccurate.

7.1.1 Concealed

The first part of the section clearly states that the assessee should have concealed his income which basically mean to hide.

It is humbly submitted

- a) The subject matter of addition i.e. Gratuity was only a mistake.
- b) that everything was disclosed in the income tax returns and the accompanying documents such as balance sheet etc. and once an item is disclosed it cannot be taken as undisclosed or concealed. as both these are diagonally opposite to each other.

7.1.2 Our submission on**Explanation 1**

- A) With reference to the above matters, the assessee had offered a cogent explanation for the failure to add back Gratuity and a plain reading of the orders of the Ld. AO clearly show that the assessee had submitted valid explanation and the Ld. AO had not found the explanation to be false. The interpretation of the section as explained above may fall under the parameters wrong or right but definitely not true or false, therefore, this part of the explanation fails to attract the penalty.

B. In this case, by submitting the computations of Income of the past and future years and thus the assessee has offered an explanation and was also able to substantiate it Neither has the bona fide of the assessee's submission been questioned by the Ld. AO. Further all facts related and material to the computation of the total income have been disclosed. Thus, the provisions of Section 271(1)(c) are not attracted.

7.1.3 The Company's case

Concealment has to be deliberate act. The word 'concealment', as found in Shorter Oxford dictionary is as follows "intentional suppression of truth or facts".

Conceal

The word conceal is derived from the Latin word 'con celare' which implies "to hide" Websters Dictionary equates its meaning 'to hide' or withdraw from observation, to cover or keep from sight, to prevent the discovery of, to withhold knowledge of.

Therefore, there must be an intention to conceal. Merely making a mistake, such as non-addition of gratuity, does not lead to concealment.

7.1.4 A mistake or error - Does not attract penal provisions.**7.1.5 Penalty on Concealment**

Penalty can be levied only if it is proved beyond doubt that the assessee has concealed income or furnished inaccurate particulars of his income. It is necessary for the authority levying penalty to prove that,

- a) there was a concealment of income.
- b) the assessee was conscious of having concealed or furnished inaccurate particulars of his income.

A mere mistake will not be sufficient to hold that there is a concealment of income which merits levy of penalty. Even if the amount omitted was large and substantial, it will not be sufficient to draw an inference that the mistake was deliberate and due to lack of bona fides on the part of the assessee.

The following case laws prove our point:

In *Beerbal Khan Chandan Khan V. Asst CIT* [1995] 52 ITD476(JP) it was held.

Mens rea may or may not be ingredient of a default or offence, but it always has relevance in those actions, which are intended to be visited with penal consequences.

irrespective of whose burden it is to prove its presence or absence in such actions.

The assessee has only made an error or mistake and not with any mal-intention. Therefore, penalty should not be levied.

7.1.6 As stated by **Salmond on jurisprudence**", if a person commits a forbidden act without wrongful intention or negligence and did his best as a reasonable man to avoid it, no useful purpose can be served in holding such a person liable for it and its consequences. Thus, an accused should not be found guilty of an offence against the criminal law unless he has a guilty mind.

The Hon'ble Supreme Court in ***Anantharam Verrasinghasu & Co. V. CIT. (1980) 123 ITR 457 (SO)*** has concluded that.

"Before a penalty can be imposed it, the entirety of the circumstances must be taken into account and must point to the conclusion that the disputed amount represents income and that the assessee has Consciously concealed particulars of his income or deliberately furnished inaccurate particulars. The mere falsity of the explanation given by the assessee is insufficient without there being in addition cogent material or evidence from the necessary conclusion attracting a penalty could be drawn".

7.1.7 IMPOSING OF PENALTY IS NOT MANDATORY

It is humbly prayed before your honor that liability to penalty is incurred whenever there is a breach or contravention of a statutory provision or there is a default or an omission to perform a statutory duty for which provisions for levy of penalty exist in the relevant enactment. The imposing of penalty in every such case is however not mandatory and the authority empowered to impose such a penalty may in his discretion choose not to levy a penalty in appropriate cases notwithstanding existence of such a default, contravention, breach or omission. This general principle was stated by the **Supreme Court in *Hindustan Steel v. State of Orissa* [1992] 83 ITR 26** in the following words:

Penalty will not also be imposed merely because it is lawful to do so. Whether, penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the -offender is not liable to act in the manner prescribed in the statute.

The Patna High Court in **Jagannath Singh v. CWT [1980] 122 ITR 114**, after quoting the observations of the Supreme Court (supra) in the case of **Hindustan Steel v. State of Orissa [1972] 83 ITR 26** observed.

"From what I have quoted above it follows-

- a) that a proceeding for imposing a penalty for failure to carry out a statutory obligation is a quasi-criminal proceeding;*
- b) penalty will not ordinarily be imposed unless a party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation; and*
- c) when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by statute., it would be justified in refusing to impose penalty."*

PRAYER TO DELETE PENALTY

Sir, it is a well settled law that penalties are not to be imposed merely because there is a provision for imposing them. Penalties are a harsh punishment and should be imposed only if there is a willful contravention of any law and not where the law may have been contravened by misinterpretations or inadvertently or by mistake, especially where the person is not aware of the circumstances leading to the mistake.

In Prof. C. Das Gupta V. Asst CIT [1997] 611 ITD 1 (Cal.) It was held that Imposition of penalty is purely discretionary

Penalty proceedings are quasi-criminal proceedings in nature and hence penalty need not ordinary be levied unless the assessee either acted in defiance of law or acted in conscious disregard of its obligation.

We pray before your honor to kindly drop the penalty proceeding in this matter."

4. On the other hand, the ld. DR relied on the orders of the lower authorities and submitted that the authorities below are justified in imposing penalty u/s. 271(1)(c) of the IT Act for filing inaccurate particulars of income. It is submitted that if reassessment proceedings had not been taken up, the assessee would have

escaped levy of tax. The case laws relied by the assessee are not applicable being distinguishable on facts.

5. After hearing both the sides and perusing the entire material available on record and also going through the detailed submissions of the assessee including various case laws, we find no justification to sustain the penalty imposed in the instant case. It is notable that though the provision for gratuity was not added back while computing the income of the assessee, but in the balance sheet, the assessee had disclosed it, as provision for gratuity. While preparing the IT return of the assessee, the Chartered Accountant did not add back it as income due to bona fide mistake. We further observe from the computation of income submitted by the assessee for preceding and subsequent assessment years that the assessee has correctly added back the provision for gratuity and it was offered as income. Therefore, it appears that there was no malafide intention of the assessee for filing inaccurate particulars of income. It is observed that the case was originally assessed u/s. 143(3) of the IT Act and all the information including the provision for gratuity were available with the Assessing Officer, as the provision for gratuity stood added back as income of the assessee in the balance sheet filed with the return of income. The disclosure of provision for gratuity as income in the balance sheet of the current year filed with the return of income and offering such provision for gratuity as income in preceding year's computation of income, inspire confidence on the submission of the assessee that it was due to the mistake of Chartered Accountant not to add back such provision in the computation of income of the year under consideration. Therefore, in view of the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Rice Mills (SD) (2205) 275 ITR 206, where it has been held that the fault of Chartered Accountant cannot be visited on the assessee, in our considered opinion, no adverse inference can be drawn against the assessee. Various decisions relied by

the assessee also make out the case of the assessee. This being a bona fide mistake, the assessee did not challenge the quantum addition made by the Assessing Officer. This, however, would not be proper in the interest of justice to saddle penalty against the assessee in the peculiar facts and circumstances of the case and the circumstantial evidences available to prove the bona fide mistake with no ulterior motive on the part of assessee, as assessment proceedings and penalty proceedings are two separate and distinct proceedings. Accordingly, the penalty imposed by the assessee and confirmed by Id. CIT(A) deserve to be cancelled.

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

Order pronounced in the open court on 30th July, 2018.

Sd/-
(Bhavnes Saini)
Judicial member

Sd/-
(L.P. Sahu)
Accountant Member

Dated: 30th July, 2018

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Copy of order forwarded to:

<i>(1) The appellant</i>	<i>(2) The respondent</i>
<i>(3) Commissioner</i>	<i>(4) CIT(A)</i>
<i>(5) Departmental Representative</i>	<i>(6) Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi