IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH, CHANDIGARH

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER AND
MS. ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.18 & 19/Chd/2017
Assessment Year: 2009-10 & 2010-11

Sh. Jaskaran Singh H.No. 114, Sector-8 Chandigarh PAN No. AXTPS3137L (Appellant)	Vs.	The ITO Ward1(3), Chandigarh (Respondent)

Appellant By : Shri Parikshit Aggarwal
Respondent By : Shri Manjit Singh, DR

Date of hearing : 30.05.2017
Date of Pronouncement : 28.08.2017

O R D E R

PER ANNAPURNA GUPTA A.M.

Both these appeals have been filed by the same assessee against separate orders of the Ld. CIT(Appeals)-1, Chandigarh both dated 06.10.2016 relating to assessment years 2009-10 and 2010-11 respectively, confirming the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 (in short 'the Act').

2. It was common ground between both the parties that the facts and circumstances leading to levy of penalty in both the cases were identical, being penalty levied on account of addition made of deemed dividend as per section 2(22)(e) of the Income Tax Act,1961. Therefore, both the appeals were heard together and are being disposed off by this common order. For the sake of convenience we shall be dealing with the facts in the case of ITA No.18/Chd/2017 relating to assessment year 2009-10.

ITA No.18/Chd/2017:

3. Briefly stated, the assessee during the impugned year had received advances amounting to Rs.12,87,115/- from M/s Emdis Healthcare Pvt. Ltd. ,a company in which he had a shareholding of 49.95%. On being confronted during assessment proceedings as to why the said amount be not treated as deemed dividend as per section 2(22)(e) of the Act, the assessee submitted that the aforesaid advances had been given by the company for purchase of land on its behalf in Himachal Pradesh for setting up a resort. The assessee further explained that since the deal could not materialize the entire amount was refunded back to the company during the year itself. The Assessing Officer rejected the assessee's contention and treated the impugned advance as deemed dividend and added the same to the income of the assessee.

4. The Ld.CIT(Appeals) restricted the addition made to the peak of the advance given, which worked out to Rs.10,99,518/-. The I.T.A.T. in its turn upheld the addition confirmed by the Ld.CIT(Appeals). On this addition, the Assessing Officer initiated and levied penalty u/s 271(1)(c) of the Act, holding that the explanation given by the assessee was false and not bonafide and thus resulted in the assessee having concealed particulars of his income and also deliberately furnished inaccurate particulars of income to the extent of Rs.10,99,518/-. The Ld.CIT(Appeals) upheld the levy of penalty holding that the treatment of the

impugned advances as dividend was unambiguous and not debatable at all and assessee having not disclosed the same penalty u/s 271(1)(c) of the Act had been rightly levied. The relevant findings of the Ld.CIT(Appeals) at paras 4.6 to 4.9 of the order are as under:

> *"4.6 I have carefully considered the arguments of the appellant and perused the various orders on this issue. If the progress of the case is traced then it is seen that the appellant did not disclosed in his return the fact of having taken advance/loan from its company wherein it had substantial interest and the company had accumulated profits. The case was processed u/s 143(1)(a) of the Act addition return income was accepted. At the time of detail scrutiny the Assessing Officer observed the personal account of the appellant and posed question about the receipt of money only then did the issue got highlighted and added to the income of the assessee. Subsequently, the addition was confirmed by the Ld. CIT(A) and Hon'ble ITAT, Chandigarh. All this while the appellant ha been trying to explain that the advance was taken to undertake transaction on behalf of the company, but this was not considered material for applicability of section 2(22)(e) while confirming the addition by the appellate authorities. Section 2(22)(e) is very forthright and old section which clearly spells out the conditions almost mathematical in precision. There is no ambiguity in the section. The section does not give any reason to any person to make it a debatable section. However, dispute can be raised on any issue to make it appear debatable. The appellant is a substantial holder having more than 10% share holding in the company. He has taken advance during the year and the company has huge accumulated profits. All conditions of section 2(22)(e) are applicable. If appellant is not aware of these provisions then it does not make him less liable and that argument is not tenable.*
>
> *4.7 As regard the applicability of the judgement of the Hon'ble Supreme Court in the case of Reliance Petro Products (supra), it would be worthwhile to ponder on this judgement because it discusses and carries forward the logic of two very important judgements of the Hon'ble Apex Court on this issue, namely, M/s Dharmendra Textile Processors (295 ITR 244) and Dilip N. Shroff (291 ITR 519). The most important terms relevant for the present case are "incorrect claim" and "inaccurate particulars". The judgement concludes that "incorrect claim in law cannot tantamount to furnishing of inaccurate particulars". It refers to a point that "everything would depend upon the return filed because that is the only document where the assessee can furnish the particulars of his income; when such particulars are found inaccurate, the liability would arise" It was held in the case of Dilip N. Shroff*

(supra) that "the explanation (with respect to inaccurate particulars) must be preceded by a finding as to how and in what manner the assessee had furnished the particulars of his income".

4.8 In the present case, it cannot be stated with certainty, whether the default was willful, but was is not debatable. Being a civil liability, mensrea is not a requirement to impose penalty, however, when the appellant has filed inaccurate particulars with respect to its claim which is not debatable in law then penalty u/s 271(1)(c) is definitely leviable. It is not easy to find out from the return, the facts which are required to invoke the provisions of section 2(22)(e). It is not something which stares out as a prime facie conclusion. It is only on the basis of detailed investigation and scrutiny that an Assessing Authority is able to detect a default of this nature. Therefore, to conclude that everything was disclosed in the Income Tax Return and particulars were accurate is not correct. The facts in the case of M/s Reliance Petro Products were with respect to claim of expenditure attributable to exempt income which cannot be compared with the issue of section 2(22)(e) of the Act.

In the case of M/s Inderson Leather (P) Ltd., of Hon'ble Punjab & Haryana High Court, the issue was debatable as whether a particular income belonged to the head business income or house property income and debate could have swung either way, therefore, penalty was rightly deleted by the Hon'ble Court.

In the case of M/s Raj Overseas (supra) the controversy was regarding inclusion of duty drawback income as income from industrial undertaking. This is very debatable subject on which debate has been continuing for long and therefore cannot be a subject of penalty.

In the case of Bharat Lal Dagar, again it is an issue regarding chargeability of interest on enhanced compensation which again is a highly debatable point and was rightly held as not to be subject to section 271(1)(c) penalty.

4.9 In view of the arguments discussed above, penalty levied u/s 271(1)(c) of the Act is confirmed and grounds of appeal Nos. 2 and 3 are dismissed.

5. Aggrieved by the same, the assessee has filed the present appeal before us challenging levy of penalty raising following grounds of appeal:

"1. On the facts and in the circumstances of the case and in law, the Worthy CIT(A) in Appeal No. 145/14-15 dated 06.10.2016 has erred in passing that order in

contravention of the provisions of Section 250(6) of the Income Tax Act, 1961.

2. *That on the facts, legal position and circumstances of the case, the Worthy CIT(A) was not justified in confirming action of Ld. AO, wherein the Ld. AO levied penalty u/s 271(l)(c) on the sustained addition of Rs.10,99,518/-, which was added due to holding the receipt of amount from the Company as taxable deemed dividend u/s 2(22) (e) in the hands of the appellant.*

3. *That the appellant craves leave for any addition, deletion or amendment in the grounds of appeal on or before the disposal of the same."*

6. During the course of hearing before us, the Ld. Counsel for the assessee vehemently contested the levy of penalty stating that the assessee had harboured a bonafide belief that the impugned advance received was not his income since it had been advanced for acquiring land for the company which had given the said advance and since the deal could not fructify the same amount had been returned during the year also. The Ld. counsel for assessee argued that the addition in the present case had been made by invoking deeming provisions u/s 2(22)(e) of the Act and no penalty in such circumstances was leviable. The Ld. counsel for assessee relied upon the following case laws in support of its contention:

1) *CIT Vs. Fortune Hotels and Estates Pvt. Ltd. (2015) 232 Taxman 481 (Bom HC)*

2) *CIT Vs. Madan Teatres Ltd. (2013) 260 CTR 75 (Kol HC)*

3) *CIT Vs. Baroda Tin Works (1996) 135 CTR 126 (Guj HC)*

4) *ITO Vs.M/s Quixotic Healthcare*

ITA No.163/Chd/2015 dt. 06/08/2015

5) *ITO Vs. (Late) Dr.Shamsher, Director of M/s Medimark Consultants(India) Pvt. Ltd. ITA No. 564/Mds/2011 dt. 31/01/2013*

6) *Gitanjali Ghate Vsa. DCIT ITA No.6560/Mum/2010 dt. 23/05/2012*

7) *ITO Vs. Shri Prakash Narain Singh ITA No. 2691/Del/2013 dt. 22/11/2013*

8) *ACIT Vs. Sri Ganta Srinivasa Rao ITA No. 243/Vizag/2013 dt. 19/02/2016*

9) *Principal CIT-I Vs. M/s Torque Pharmaceuticals Pvt. Ltd. ITA No. 417 of 2015 dt. 16/03/2016 (P&H HC)*

7. The Ld. DR, on the other hand, relied heavily on the findings of the Ld.CIT(Appeals) and stated that the explanation of the assessee had been found to be false and incorrect and, therefore, it cannot be said that the belief of the assessee was bonafide. The Ld. DR further distinguished the case laws relied upon by the assessee.

8. We have heard the contentions of both the parties and perused the orders of authorities below. The penalty in the present case has been levied on account of addition made u/s 2(22)(e) of the Act treating the advances received by the assessee from the company in which the assessee has substantial interest as deemed dividend. The explanation of the assessee for harbouring the belief that the said sum was not in the nature of income was that the sum had been advanced to purchase the land on behalf of the company in Himachal Pradesh for setting up the resort and also that since the deal did not mature the said amount was refunded to the company. Ld.Counsel for the assessee

contended that it was a bonfide belief of the assessee and thus no penalty u/s 271(1)© was leviable .

9. The Revenue, on the other hand, has contended that the provisions of section 2(22)(e) of the Act are clear and unambiguous and the aforesaid explanation of the assessee is of no assistance to harbour a belief that the impugned sum could not be treated as his income. The contention of the Revenue was that the assessee was unable to substantiate his explanation and since there was no doubt that the amount was in the nature of deemed dividend as per section 2(22)(e) of the Act, the bonafides of the assessee's explanation were not genuine. The Revenue has also contended that the assessee during quantum proceedings before the I.T.A.T. had offered an alternative explanation also that the said sum was advanced in the case of money lending business of company which was found by the I.T.A.T. to be false.

10. Having heard both the parties, we find merit in the contention of the assessee. The explanation of the assessee, that the sum was advanced for purchasing land for the company, we find was not accepted since the assessee had failed to substantiate the same. The relevant findings of the I.T.A.T. in this regard in its order 10.9.2014 in ITA Nos.1030 & 1031/Chd2013 for assessment years 2009-10 and 2010-11 at para 9 are as under:

> *"9. The plain reading of the above clearly shows that if a person who is a substantial share holder takes a loan or advance from a company in which he is substantial share*

holder i.e. more than 10% share holder then such advance has to be treated as deemed dividend income upto the extent of accumulated reserves of the said company. It is not disputed that assessee is a substantial share holder and the company which has given the advance possessed substantial accumulated profits. The dispute has been raised on two counts. Firstly, it was a business transaction. We do not find any force in these submissions. There is no evidence to show that company where the assessee was director wanted to set up a resort in the State of Himachal Pradesh. Even if such company wanted to set up a resort, the company itself could have invested the money directly in its own name and that would have been permissible in the State of Himachal Pradesh because land can be purchased in the State of Himachal Pradesh for business purposes. Therefore, clearly this explanation is not acceptable. As far as the decision of Hon'ble Madhya Pradesh High Court in the case of CIT v Om Parkash Suri is concerned, the same is clearly distinguishable because in that case the assessee had received the amount as advance against sale of his land. An agreement to that effect was also entered and the said amount of loan was duly mentioned in the agreement to sell. In the case before us, there is no such agreement and it is nowhere shown that assessee was owning any land, therefore, clearly the provisions of section 2(22)(e) are applicable."

11. It is clear from the above that the said explanation of the assessee was rejected since it remained unsubstantiated. Further undisputedly, the said advance was refunded by the assessee also during the impugned year. Also all facts material to the said transaction were truly and fully disclosed by the assessee during the quantum proceedings and no incorrect particular or detail was furnished by the assessee. In such circumstances where the true nature of the amount received is not income but is treated to be so only on account of the deeming provisions of section 2(22)(e) of the Act, coupled with the explanation of the assessee that the sum was advanced for business purpose which explanation has not been found to be false and also the fact that the said amount was

refunded during the year, the assessee's belief that it was not in the nature of income appears to be bonafide.

12. The Hon'ble Gujarat High court ,in the case of Sarabhai Chemicals Pvt. Ltd. vs CIT 257 ITR 355 has held that where the assessee is under a bonafide belief that no income has actually accrued, no penalty is leviable. The relevant extract of the order is as under:

> *"19.2 The satisfaction in the course of assessment proceedings that any person has concealed the particulars of his income or furnished inaccurate particulars of his income may give rise to a liability to pay penalty as provided by s. 271(1)(c)(iii) of the Act. Accordingly, in addition to any tax payable by him, a sum 'which shall not be less than, but which shall not exceed twice 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'. Expln. 1 to s. 271(1)(c)(iii) raises a presumption in cases where such person (a) fails to offer an explanation or offers an explanation which is found by the ITO or the AAC or CIT(A) to be false, or (b) offers an explanation which he is not able to substantiate, in respect of any facts material to the computation of the total income of such person. This presumption is to the effect that the amount added or disallowed in computing the total income by the ITO, AAC or CIT(A) in the quantum proceedings shall be deemed to represent the income in respect of which particulars have been concealed. By its very nature, the expression 'fails to offer an explanation' or 'offers an explanation which is found by the ITO or AAC or the CIT(A) to be false' occurring in sub-cl. (A) of Expln. 1 to cl. (iii) of s. 271(1)(c) refers to the quantum proceedings. Therefore, the cases where no explanation was given in respect of any facts material to the computation of total income in respect of the amount added or disallowed therein or the explanation given in respect thereof was already found in such assessment proceedings to be false, there would arise a presumption that particulars of such added or disallowed income were concealed. In such cases falling under sub-cl. (A) of Expln. 1, there can arise no question allowing the assessee to urge that he bona fide believe in the explanation which was proved to be false or which never was given, for, one cannot be said to have a reasonable bona fide belief in an explanation which never was given or an explanation proved to be false.*
>
> ***19.3.*** *However, in cases where the explanation offered by such person in the quantum proceedings could not be substantiated by him in those proceedings, as a result of which, the amount was added or disallowed in computing the*

total income of such person by the ITO, AAC or the CIT(A) before whom the explanation given could not be substantiated as contemplated by sub-cl. (B) to Expln. 1. The deeming fiction that the added/disallowed amounts represent the income in respect of which particulars have been concealed contained in Expln. 1 will not apply if the explanation that was given by the assessee in the quantum proceedings which he could not substantiate in those proceedings was (i) bona fide and, (ii) if he had disclosed all the facts relating to the same and material to the computation of his total income.

19.4. *Penalty proceedings which are an aftermath of the quantum proceedings are not devised to undo the findings reached in the quantum proceedings. They, are in continuity of the outcome of the quantum proceedings. If the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income, which is added or allowed in the quantum proceedings, there still would remain to be considered the question as to the nature and circumstances of concealment and the penalty that may be imposed on him when the requisite satisfaction is reached by the ITO, AAC or CIT(A), and that is why, the show-cause notice for the penalty proceedings comes to be issued under s. 271(1) after reaching the requisite satisfaction. In a large number of cases where the assessee was not able to substantiate the explanation in respect of the income and by rejecting his explanation, the ITO, AAC and/or CIT(A) added or disallowed the amount in computing the total income and it is not a case of 'no explanation' or an explanation already found to be false by the ITO, AAC or the CIT as contemplated by cl. (B) of Expln. 1, then there still remains a scope to examine the bona fides of the explanation already given by the assessee in the quantum proceedings. The rationale behind not giving similar consideration to cases falling in sub-cl. (A) of Expln. 1 to a person who 'fails to offer a explanation before the ITO during the proceedings' appears to be the legal assumption underlying the provision that in fact, there existed no explanation which could have been offered and to rule out any possibility of bringing into existence, explanations which in fact were not there. In cases where explanation was offered, but was rejected as it could not be substantiated by the assessee, there would arise no presumption of concealment of the particulars of income that was added or disallowed and such assessee can show that the said explanation offered by him was a bona fide one and that he had disclosed all facts relating to such explanation and material to the computation of his total income during the quantum proceedings."*

In view of the above therefore there was no case for levy of penalty u/s 271(1)© of the Act.

13. We further place reliance on the decision of the Hon'ble Apex Court in the case of Hindustan Steels Ltd. Vs. State of Orissa (1972) 83 ITR 26(SC) wherein it was held that:

> *"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings, and penalty will not ordinarily be imposed unless the 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. 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 a 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, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute."*

14. In view of the above, it is our considered opinion that the assessee should not be visited with the rigors of penalty u/s 271(1)(c) of the Act as the assessee's contention that no material was suppressed and, therefore, there was no malafide intention on the part of the assessee to evade the tax has sufficient cogency. Accordingly, we direct that the order of the Ld.CIT(Appeals) be set aside and penalty imposed amounting to Rs.10,99,518/- be deleted.

15. The grounds of appeal raised by the assesse are allowed.

In effect the appeal of the assessee is allowed.

ITA No.19/Chd/2017 (A.Y. 2010-11):

14. It is relevant to observe here that the facts and

circumstances of this appeal are similar to the facts and circumstances in ITA No.18/Chd/2017 and the findings given in ITA No.18/Chd/2017 shall apply to this appeal also with equal force. The appeal of the assessee is allowed for statistical purposes.

15. In the result, both the appeals of the assessee are allowed.

Sd/-	Sd/-
(BHAVNESH SAINI)	**(ANNAPURNAGUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated : 28th August, 2017

Rati

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh