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Non-deduction of tax at source in accordance with the provisions of the Income-tax Act, 1961 (the Act), should not result in imposition of penalty under section 271(1)(c) of the Act

In brief

The Mumbai Income-tax Appellate Tribunal (Tribunal) in its recent ruling in the case of **HDFC Asset Management Company Limited**¹ held that the penalty under section 271(1)(c) of the Act could not be imposed for not complying with Tax Deduction at Source (TDS) provisions, especially when the taxpayer had a reasonable belief that payments were not taxable, and had acted in a *bona fide* manner by disclosing all facts to the Tax Officer (TO).

Furthermore, the Tribunal held that the penalty could not be levied merely because there was a difference of opinion between the taxpayer and the TO about the taxability of payments made to associated enterprises (AEs).

¹ HDFC Asset Management Company Ltd. v. ITO [TS-212-ITAT-2014(Mum)]

Facts

Assessment Year (AY) 2002-03

- The taxpayer, HDFC Asset Management Company Ltd, filed its Return of Income (ROI) for AY 2002-03 declaring its total taxable income at INR Nil.
- During the course of assessment proceedings under section 143(3) read with section 147 of the Act, the TO disallowed the following payments, which were confirmed by the Commissioner of Income-tax (Appeal) [CIT(A)] as well
 - a) Payments to AEs under section 40(a)/40A (2)(b) of the Act:
 - Network and Excess Charges,

- Regional Management Cost and
- Training Charges

b) Disallowance of expenses under section 37(1) of the Act

- The TO also levied penalty under section 271(1)(c) of the Act in respect of the above additions, holding that the taxpayer had furnished inaccurate particulars of income. On further appeal, the penalty order was upheld by the CIT(A).

AY 2003-04

- The taxpayer had filed its ROI declaring income at INR Nil.
- During the course of assessment proceedings under section 143(3) read with section 147 of the Act, the TO disallowed, amongst other items, the following payments to AEs under section 40(a)/40A (2)(b) of the Act:
 - Interconnection, Network and Excess Charges; and
 - Regional Management Cost
- The TO also levied a penalty under section 271(1)(c) of the Act for concealing the particulars of income and furnishing inaccurate particulars. On further appeal, the CIT(A) confirmed the TO's orders on the same lines as adopted for AY 2002-03.

The taxpayer took up the matter for both AYs before the Mumbai Tribunal.

Issues for consideration before the Tribunal

- Whether disallowance of claim of expenditure was tantamount to concealment of income.
- Whether non-deduction of tax in accordance with the provisions of the Act, should result in imposition of penalty under section 271(1)(c) of the Act.

Taxpayer's contentions

AY 2002-03

- The taxpayer was under a *bona fide* belief that TDS was not applicable on payments to foreign AEs, as the same were in the nature of reimbursement.
- The taxpayer had disclosed all material facts and complied with the provisions of the Act and Foreign Exchange Management Act for these remittances to AEs. For example, the payments were supported by vouchers along with CA certificate and the same were produced during the course of assessment proceedings. Accordingly, there was no intention to conceal particulars of income or furnish inaccurate details to the revenue authorities.

AY 2003-04

- The taxpayer was liable to pay tax under Minimum Alternate Tax (MAT) provisions of the Act, in view of brought forward unabsorbed depreciation. Accordingly, despite the additions to the total income, it was liable to pay tax under the MAT provisions.
- The taxpayer placed reliance on Delhi High Court decision in the case of *Nalwa Sons Investments Limited*², where it had been held that no penalty could be levied under section 271(1)(c) of the Act where the taxpayer was subject to tax under MAT.

Revenue's contentions

- The Revenue mentioned that the payments were in the nature of fees for technical services and argued that the taxpayer made incorrect submissions by stating that payments to AEs were in the nature of reimbursement, and accordingly made an attempt to claim inadmissible expenditure under the law.
- Accordingly, penalty was leviable for furnishing inaccurate particulars of income.

² CIT v. Nalwa Sons Investments Ltd. [2010] 327 ITR 543 (Delhi-HC)

Tribunal ruling

The Tribunal laid down general principles governing imposition of penalty, which are summarised below:

- To levy penalty under section 271(1)(c) of the Act, the alleged amount should be part and parcel of the taxpayer's income, and the taxpayer should have filed inaccurate/concealed particulars of such income.
- Evidence produced/ issues decided during assessment proceedings are not final or binding in penalty proceedings.
- There is a difference between a false claim (e.g. fact of incurring expenditure is missing) and a genuine claim (e.g. there is no dispute regarding the expenditure, but only regarding its allowability, e.g. revenue or capital).
- A penalty cannot be imposed on treatment of expenditure as capital or revenue; there has to be a false claim to justify levy of a penalty.
- Non-deduction of tax can result in other consequences under the Act, but imposition of concealment penalty is impermissible.
- Merely because the revenue authorities do not agree with the legal position adopted by a taxpayer, it cannot be held that the taxpayer is guilty of concealment of income or of furnishing inaccurate details. In this regard, the Tribunal placed reliance on the judgment of Delhi High Court (HC) in Karan Raghav Exports Private Limited³.

The Tribunal thereafter ruled as follows:

AY 2002-03

- Mere non-compliance with TDS provisions could not justify imposition of a penalty under section 271(1)(c) of the Act.

- There was a difference of opinion between the taxpayer and the TO with regard to the payments made to AEs. The Tribunal held that even if the taxpayer was incorrect in its legal position, action against it should have been taken under Chapter XVII (i.e. Collection & Recovery of Tax) for non-deduction, and not in accordance with the provisions of Chapter XXI (i.e. Penalties Imposable).
- Penalty under section 271(1)(c) of the Act was not leviable, considering the following two peculiar facts:
 - The basis for imposing the penalty was violation of section 195 of the Act; and
 - Entire reporting of the payments had been done by the taxpayer to the TO by way of CA certificates.

AY 2003-04

The Tribunal, relying on the Delhi HCs ruling in Nalwa Sons Investments Limited², held that penalty under section 271(1)(c) of the Act was not leviable, as the taxpayer was liable to pay tax as per provisions of section 115JB of the Act.

PwC Observations

This recent ruling of the Mumbai Tribunal reiterates the law that in cases where the taxpayer has made a claim under a *bona fide* belief, with complete disclosure of facts, no penalty can be imposed on mere difference of opinion between the revenue authorities and the taxpayer.

³ Karan Raghav Exports P.Ltd. v. CIT [2012] 349 ITR112 (Delhi-HC)

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