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Penalty not leviable where assessee provides a *bona fide* explanation or where assessee made error under a *bona fide* belief

In brief

The Pune bench of Income-tax Appellate Tribunal (Tribunal) in its recent ruling in the case of Emilio Ruiz Berdejo¹ (the assessee) has held that penalty is not an automatic consequence of addition of income. Penalty under section 271(1)(c) of the Income-tax Act, 1961 (the Act) can come into play only when the conditions laid down under that section are satisfied; concealment of income cannot be a passive situation and it implies that the person concealing the income is hiding, covering up or camouflaging an income; penalty is not leviable in case where

assessee is able to provide a '*bona fide*' explanation; and penalty is not leviable in cases where assessee made errors, under *bona fide* belief.

Facts

- Tetra Pak International S.A. (Tetra Pak SA) deputed certain assignees to Tetra Pak India Ltd (Tetra Pak India).
- The assessees were employees of Tetra Pak SA who were deputed to Tetra Pak India on an assignment, received salaries from both Tetra Pak SA and Tetra Pak India.

¹ Emilio Ruiz Berdejo, C/o Tetra Pak India Ltd v DCIT [TS-547-ITAT-2012 (PUN)]

- The assessee had received salary net of taxes and India taxes of the assessee were borne by Tetra Pak SA.
- During the course of internal review carried out with the help of tax consultants, it was found by Tetra Pak India that the all taxable components of the overseas compensation of the assessee were not reported in the Indian income tax returns submitted of the assessee.
- In light of the above, Tetra Pak SA *suo moto* and voluntarily re-computed salary income of the assessee taxable in India for each of the assessment year's (AY) and taxes and interest thereon were deposited by it through withholding tax route. Tetra Pak SA furthermore, revised the Form-16 previously issued to the assessee for the concerned AYs and re-issued the Form-16 to the assessee.
- Tetra Pak communicated the above facts to the concerned Revenue authorities.
- Accordingly, in the original return of income submitted by the assessee the salary received from Tetra Pak SA was not disclosed.
- Since the salary received from Tetra Pak SA was not offered to tax in the original return of income for the concerned AY 2000-01, the assessing officer (AO) was of the view that income chargeable to tax had escaped assessment within the meaning of section 147 of the Act. Accordingly notice under section 148 was served on the assessee.
- In response to the notice under section 148, the assessee submitted return of income showing total income including that received from Tetra Pak SA which was not reported in the original return of income with respect to which the taxes have been already deposited by Tetra Pak SA.

- The assessment was completed by the AO at the revised income. The AO also levied penalty under section 271(1)(c) of the Act, which, in appeal was upheld by the Commissioner of Income-tax (Appeals) (CIT(A)).
- The assessee submitted an appeal with the Tribunal challenging the order of the CIT(A) and were granted relief.
- The Revenue submitted an appeal before the jurisdictional High Court (HC). The HC restored the issue to the Tribunal for reconsideration based on the decision of the Supreme Court in the case of Dharmendra Textile Processors²

Issue

Whether the AO was correct in law in levying penalty against the assessee for not disclosing the foreign salary in the original return submitted, based on a *bona fide* belief, especially in light of the decision of the Supreme Court in the case of Dharmendra Textile Processors (*above*).

Assessee's contentions

- Position taken by the company and consequently by the assessee in the original return of income was *bona fide* and was based on judicial precedents. Accordingly, it did not amount to concealment of income.
- At the relevant point of time, two views were possible regarding the liability to Indian taxation of the additional income in question.
- Penalty was not leviable as declaration made by tax payer was voluntary and was not compelled, was made without detection by the Revenue authorities and there was no *mens rea* on the part of the assessee.

² UOI v. Dharmendra Textile Processors [2008] 306 ITR 277 (SC)

- Reliance was placed by the assessee on the decision by the Pune Bench “B” of the Tribunal in the case of Hans Christian Gass³ wherein a similar issue was decided by the Tribunal in favour of assessee. In the aforesaid decision penalty levied by the AO was deleted by the Tribunal and deletion of the penalty has also been confirmed by the HC *vide* its order dated 22 June, 2011.
- In similar set of facts, the Pune Tribunal has decided this issue in favour of the assessee in another judicial precedent in the case of Alaxender Reuss and others⁴

Revenue’s contentions

- Additional income had been disclosed by the assessee in the return submitted in response to notice issued under section 148 of the Act.
- The additional income was not offered to tax in the original return of income submitted, while the assessee was well aware of this addition and income in terms of conditions for deputation to India. Thus, the intention of the assessee was to conceal income received from Tetra Pak SA.

Tribunal’s observations and rulings

- Nothing contrary was brought to the knowledge of the Tribunal on behalf of the Revenue on the decisions relied by the assessee (discussed **above**).
- The fact that taxes and interest for all the relevant AY for each of the assesseees, after considering the income received from Tetra Pak SA outside India, have been claimed to be deposited, along with interest thereon, and also that revised Form-16 has been issued to the assesseees, have not been disputed by the Revenue.

- Tetra Pak SA communicated the fact of payment of taxes to the concerned Revenue authorities, *inter alia* requesting that penalty proceedings should not be initiated because of voluntary disclosure by Tetra Pak SA. Thus, facts emerged that AO has levied penalty despite the fact that payment of tax and filing of revised computation of income was done.
- It is not necessary that *bona fide* belief should be substantiated with documentary evidence.

As regards the applicability of Supreme Court decision in the case of Dharmendra Textile Processors (above), the principles laid down therein needs to be examined based on the facts of each case and conditions specified in the law in this regard. Reference was also made in this regard to the case of Rajasthan Spinning & Weaving Mills⁵ and Reliance Petro Products Pvt Ltd⁶ wherein it was held that the observations of the Supreme Court imply that it is only on the point of ‘*mens rea*’ that the judgment in case of Dilip N Shroff⁷ has been overruled. The meaning of term ‘conceal’ as explained in the said judgment still holds good.

- Furthermore, the Tribunal while pronouncing the judgement in favour of the assessee referred to the judgment of the Hon’ble Punjab & Haryana HC in the case of Siddhartha Enterprises⁸ wherein it was held that penalty is imposed only when there is some element of deliberate default and not a mere mistake.
- The Tribunal has also referred to the judgment of the Mumbai bench of the Tribunal in the case of Glorious Realty P. Ltd⁹ wherein it was held that if *bona fide* explanation of the assessee has not been found false, then penalty will not be leviable.

⁵ UOI v. Rajasthan Spinning & Weaving [2009] 23 DTR 154 (SC)

⁶ CIT(A) v. Reliance Petro Products P. LTD [2010] 322 ITR 158 (SC)

⁷ Dilip N Shroff v. JCIT [2007] 291 ITR 519 (SC)

⁸ CIT v Siddhartha Enterprises [TS-4-HC-2009]

⁹ Glorious Realty P.Ltd v.ITO [2009] 29 SOT 292 (Mum)

³ Hans Christian Gass v, DCIT [ITA. No. 1583/PN/2008 and others]

⁴ ACIT v. Alaxender Reuss and others [ITA. No. 662/PN/ 2010]

Conclusion

The Pune Tribunal, while pronouncing the judgement in favour of the assessee, has reiterated the principle that penalty under section 271(1)(c) of the Act is not leviable where an assessee has been able to establish its *bona fide* explanation and where the assessee has made errors, *inter alia* under a *bona fide* belief.

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