

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE SHRI J.S. REDDY, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1922/Del./2014
(ASSESSMENT YEAR : 1990-91)**

M/s. Perfect Spray Pac Pvt.Ltd., 3 / 13B, Asaf Ali Road, Delhi – 110 002.	vs. ITO, Ward 14 (2), New Delhi.
---	--

(PAN : AAACP1692E)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Ms. Aruna Mittal, CA and
Shri Ajay Wadhwa, Advocate
REVENUE BY : Shri F.R. Meena, Senior DR

Date of Hearing : 03.08.2016

Date of Order : 08.08.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. Perfect Spray Pac Pvt. Ltd. (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned order dated 21.01.2014 passed by the Commissioner of Income-tax (Appeals)-XVII, New Delhi, affirming the penalty order dated 26.11.2012 passed u/s 271(1)(c) of the Income-tax Act, 1961 (for short 'the Act'), for the assessment year 1990-91 on the grounds inter alia that :-

“1. The order of the Ld. CIT(A) dated 05.02.2014 confirming the penalty levied u/s 272A(1)(c) is erroneous both on facts and in law.

2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in holding the penalty order passed u/s 271 (1)(c) of the Income Tax Act imposed on addition of gross profit on estimated sales which does not tantamount of concealment.

2.1 That on the facts and in the circumstances of the case, the Ld. CIT(A) has grossly erred in dismissing the appeal filed by the assessee against penalty order u/s 271(1)(c) of the Income Tax Act where no inaccurate particulars filed by appellant in return of income.

2.2 The Ld CIT(A) has erred in considering the judgment of Apex court CIT vs Reliance Petroproducts Pvt Ltd [2010] 322 ITR 158 (SC).

3. The appellant craves leave to add, alter, amend or modify any of the grounds of appeal before or at the time of hearing of the appeal.”

2. Briefly stated the facts of this case are : on the basis of assessment order dated 30.03.1993 completed under section 143 (3) of the Act making an addition of Rs.18,20,484/- on the basis of estimate gross profit @ 10%, the penalty proceedings were initiated on the ground that assessee has concealed income. Assessee contested the notice issued by the AO to initiate penalty proceedings u/s 271(1)(c) of the Act on the ground that since the AO made an addition by taking net profit at 10% which was reduced to 4% by the ITAT, it does not amount to concealment of income; and further disallowance of expenditure of Rs.32,658/-

claimed by the assessee also does not amount to concealment of income. Finding the contentions raised by assessee not tenable,

AO imposed the penalty by returning the following findings :-

“ Considering the facts of the case I hold that the assessee has concealed its taxable income and as a consequence of concealing its income, I am of the view that the assessee is noble for imposition of penalty u/s 271(l)(c) of the Income Tax Act, 1961. In this case, the assessee has willfully and knowingly filed concealed particulars of income to the extent of Rs.7,28,194/- in respect of profit on undisclosed sales as confirmed by, the Hon'ble IT AT in its order and as per the Explanation 1 to Section 271 (1) (c) the said amount is deemed to be the income on which tax was sought to be evaded.

In view of above discussion it is clear that penalty u/s 271 (1) (c) of the Income Tax Act, 1961 is attracted in the Assessee's case. Minimum and maximum penalty imposable in the case is computed as under:-

Concealed income	Rs, 7,28,194/-
Tax on amount of income concealed @ 55 %	Rs, 4,00,507/-
Minimum penalty u/s 271 (1) (c) @ 100%	Rs. 4,00,507/-
Maximum penalty u/s 271 (1) (c) @ 300%	Rs.12,01,521/-

I, therefore, impose a penalty of Rs.4,00,507/- being minimum penalty u/s 271 (1)(c) of the Income Tax Act of 1961.”

3. Assessee carried the matter before the Id. CIT (A) who has affirmed the penalty order by dismissing the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by challenging the penalty order passed u/s 271(1)(c) of the Act.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. At the very outset, assessee has come up with an application for admission of additional ground to the effect that :-

“That the order imposing penalty is bad in law and void ab initio since the same has been levied after expiry of limitation period as laid down under section 275(1)(a) of Income Tax Act, 1961.”

on the ground that this is a legal ground going into the roots of the case.

6. We are of the considered view that without prejudice to the merits of the case, legal ground now sought to be raised as additional ground by the assessee goes to the very roots of the case and necessary to completely and finally adjudicate the controversy at hand, so the same is allowed to be raised in addition to the grounds already raised by the assessee before the Tribunal.

7. Ld. AR for the assessee challenging the impugned order contended inter alia that passing of penalty order is barred by limitation, hence not sustainable; that merely disallowance of expenditure claimed by the assessee does not amount to concealment; that the entire assessment has been

made by the AO on the basis of estimation by taking net profit rate at 10% which also does not amount to concealment of taxable income. However, on the other hand, ld. DR relied upon the order passed by the ld. CIT (A).

8. In the backdrop of the facts and circumstances of the case and the arguments addressed by the authorized representatives of the parties, the first question arises for determination in this case is:-

“as to whether penalty order passed against the assessee on the basis of the assessment order dated 30.03.1993 is barred by limitation u/s 275(1)(a) as alleged by the assessee?”

9. To proceed further, we would like to reproduce the provisions contained u/s 275(1)(a) of the Act for facility of reference as under :-

“275. (1) No order imposing a penalty under this Chapter shall be passed—

- (a) in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the [Principal Chief Commissioner or] Chief

Commissioner or [Principal Commissioner or]
Commissioner, whichever period expires later :

Provided that in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A, and the Commissioner (Appeals) passes the order on or after the 1st day of June, 2003 disposing of such appeal, an order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner, whichever is later;”

10. Bare perusal of the provisions contained u/s 275(1)(a) of the Act goes to prove that penalty order is required to be passed by the revenue authorities within a period of six months from the receipt of order of Appellate Tribunal by the Commissioner. Undisputedly, in the instant case, assessment order was passed by the AO on 30.03.1993 and appeal against the said order before the CIT (A) was dismissed vide order dated 15.04.1996 but ITAT restored the appeal back to CIT (A) on 22.04.1999 and in pursuant thereto, the CIT (A) passed the order dated 29.10.2004 and appeal against the said order was disposed off by the Appellate Tribunal vide order dated 17.06.2011 which has since attained finality.

11. In the face of the fact that penalty order dated 26.11.2012 has been passed after about one year and five months from the date

of passing order by the Appellate Tribunal, the same is hopelessly time barred. Though date of receipt of order dated 17.06.2011 passed by ITAT by the Principal Chief Commissioner / Commissioner is not available on record but factual position as to passing the penalty order after expiry of the six months from the receipt of the order of the ITAT has not been disputed by the Id. DR. So, we hereby quash the penalty order having been passed beyond the period of limitation u/s 275(1)(a) of the Act.

12. Now, on merits, the next question arises for determination in this case is :-

“as to whether assessee has furnished inaccurate particulars of income or has concealed the particulars of income from the tax authorities.”

13. Bare perusal of the provisions contained u/s 271(1)(c) of the Act goes to prove that to impose penalty upon the assessee under the relevant provisions of the Act, two conditions are required to be fulfilled one: that the assessee must have furnished inaccurate particulars of income and two: the assessee must have concealed particulars of income from the tax authorities.

14. Adverting to the case at hand, addition has been made by the AO on two score :

- (i) that there were undisclosed sales made by the assessee and the AO after invoking provisions contained u/s

145 (2) of the Act applied the gross profit rate of 10%;

and

(ii) that the assessee has claimed expenditure of Rs.32,658/- which was disallowed by the AO.

15. First of all, so far as question of applying the gross profit rate of 10%, further reduced to 4% by the Appellate Tribunal, after rejecting the books of account by the AO on estimation basis is concerned, the same does not amount to concealment of income by the assessee because the assessee during the assessment proceedings put forth book results, audited balance sheets, etc. before the AO but the same has been rejected by AO by invoking the provisions contained u/s 145(2) of the Act. In case, books of account have been rejected, the AO has to assess the income on the basis of comparative study and not on the basis of guesswork and estimation. So, to our mind, this cannot be concealment of income by any stretch of imagination even.

16. Secondly, disallowance of expenditure of Rs.32,658/-, for argument sake even if assumed to be wrongly claimed by the assessee, does not amount to concealment of income in any manner, because allowability of expenditure claimed by the assessee is to be examined by the AO and mere claim of assessee is not concealment.

17. So, in view of what has been discussed above, penalty order dated 26.11.2012 affirmed by the Id. CIT (A) is not sustainable in the eyes of law, hence the present appeal is allowed and consequently penalty order stands quashed.

Order pronounced in open court on this 8th day of August, 2016.

**Sd/-
(J.S. REDDY)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 8th day of August, 2016
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-XVII, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**