

## No concealment if an expense was disallowed as two possible views existed on its allowance

**Summary – The Delhi ITAT in a recent case of Millennium International., (the Assessee) held that where revenue authorities relying upon different set of evidences, took a different view in respect of assessee's claim of payment of certain expenses, having regard to existence of two possible views, penalty under section 271(1)(c) could not be imposed in respect of disallowance of aforesaid claim of assessee.**

### Facts

- The assessee was a partnership firm engaged in the business of consultancy to various foreign enterprises. It was also into the business of providing after sale services and for said services it was being paid.
- During assessment proceedings, the Assessing Officer noted that assessee had paid certain amount of commission to 'J' Ltd. for providing after sale services on its behalf.
- The Assessing Officer disallowed said payment on ground that no particulars regarding services rendered by payee company were provided and, secondly, the director of the said company had no experience in the field of rubber industry and particularly in the field of production or installation of marine hoses in which the assessee was operating and providing after sale services.
- The assessee filed appeal in respect of said additions and got the relief from Commissioner (Appeals).
- The Tribunal reversed the relief given by Commissioner (Appeals) and upheld the order of Assessing Officer.
- In the mean time, the Assessing Officer imposed penalty under section 271(1)(c).
- The Commissioner (Appeals) confirmed said penalty order.
- On second appeal:

### Held

- A bare perusal of section 271(1)(c) would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Commissioner (Appeals) during the course of any proceedings before them should be satisfied, that the assessee has concealed his income or furnished inaccurate particulars of income.
- The other important features of this section are deeming provisions regarding concealment of income. The section not only covers the situation in which the assessee has concealed the income or furnished inaccurate particulars, but also in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play.
- This deeming fiction, by way of *Explanation 1* to section 271(1)(c) postulates two situations; (a) where in respect of any facts material to the computation of the total income under the provisions

of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Commissioner (Appeals); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails to prove that such explanation is *bona fide* and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income.

- Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Commissioner (Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false.
- In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given *bona fide* and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee.
- These two situations provided in *Explanation 1* appended to section 271(1)(c) make it clear that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee, for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.
- The instant case is not a case where the assessee had not furnished explanation or had not substantiated the explanation. The assessee had produced even Director of the payee company who had agreed to have received payment.
- The Tribunal had reversed the order of the Commissioner (Appeals) on the basis that there was no evidence in the paper book about the complaints received by the assessee and communicated to the payee company. Further it held that there was no record of visits made by the engineers and employees of the payee company to the site of customer company.
- From the findings of the Tribunal's order, it is apparent that it reversed the decision of Commissioner (Appeals) on the basis of lack of evidence in the paper book. Therefore, it emerges that if assessee could produce such evidence, the findings of the Tribunal might have been different. The Commissioner (Appeals) had given relief by not considering this aspect.
- Therefore, it was a case where two appellate authorities had taken different view on the same subject by relying upon different evidences. It is well settled that where there are two views possible, section 271(1)(c) cannot be invoked. Therefore, it has to be held that penalty under section 271(1)(c) was not imposable. In the result, the appeal of the assessee is allowed.