No concealment penalty when assessee had shown non-compete fee as a capital receipt due to bona-fide belief

Summary – The Ahmedabad ITAT in a recent case of Piruz Areez Khambatta, (the Assessee) held that where assessee was under bonafide belief that receipt from non-compete agreement was capital receipt and had credited same to capital account and Capital account was furnished along with return of income, penalty for furnishing inaccurate particulars was not justified

Facts

- The assessee received a sum of Rs. 5.25 crores under an agreement with RPL. The agreement had been titled as 'Non-compete Trade mark Territorial Agreement'. The assessee filed its return claiming Rs. 5.25 crores as capital receipt. The return of income was processed under section 143(1).
- Later on, the assessment was reopened and the Assessing officer made the addition of Rs. 5.25 crores treating the receipt to be in the nature of revenue receipt.
- On appeal, the Commissioner (Appeals) held that in the absence of any taxing provision for non-compete fees, an addition was not tenable.
- On revenue's appeal, the Tribunal restored the order of the Assessing Officer. On appeal by the assessee, the High Court admitted the appeal for consideration and vide another order also granted stay for 50 per cent of the demand.
- Thereafter the Assessing Officer levied penalty of Rs. 1.61 crores being 100 per cent of the tax sought to be evaded on the ground of furnishing of inaccurate particulars of income by the assessee.
- On appeal, the Commissioner (Appeals) confirmed the levy of penalty.
- On appeal to the Tribunal, the Accountant Member in his proposed order deleted the penalty levied under section 271(1)(c). However, the Judicial Member did not agree with the proposed order of the Accountant Member and he was of the opinion that the penalty was liable to be sustained and the assessee's appeal should be dismissed.
- On reference to the third member

Held

- From the decision of the Delhi High Court in the case of *CIT* v. *Zoom Communications (P.) Ltd.* [2010] 327 ITR 510/191 Taxman 179, it is evident that the Delhi High Court has held that in the light of the decision of the Apex Court, the assessee would not be liable for penalty under section 271(1)(c) even if the claim made by him is unsustainable in law provided that he either substantiates the explanation offered by him or establishes that his claim is *bona fide*. Therefore, in the opinion of the Delhi High Court, if any claim made by the assessee is found to be unsustainable in law, the assessee would be absolved from the liability of the penalty if he is able to substantiate his claim or if it is not, he should be able to establish that the claim was *bona fide*. In view of above, it would be essential to

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examine whether the assessee has been able to substantiate his claim that the amount received from non-compete agreement with RPL was capital receipt or even if the assessee has not been able to substantiate the claim whether his claim was *bona fide*.

- In the instant case the Commissioner (Appeals), in his order, in the appeal filed by the assessee accepted the assessees claim and held that the compensation received by the assessee for transferring his rights in trade mark to RPL for the period of 5 years cannot be brought to tax even if it is a revenue receipt since the same could be brought under taxation only with effect from 1-4-2003. Since the assessee's case is for the assessment year 2002-03, the new provision of the Act is not applicable. Therefore, the addition made by the Assessing Officer on this count is deleted.
- Thus, the first appellate authority found merit in the assessee's claim that the receipt from RPL was capital receipt, though the Tribunal in the appeal by the revenue has reversed the above finding of the Commissioner (Appeals).
- From the above, it is evident that the Tribunal interpreted the agreement between the assessee and RPL and also considered certain judicial pronouncements relied upon by the assessee and they arrived at the conclusion that the Commissioner (Appeals) was not justified in accepting the receipt from non-compete agreement to be capital receipt. However, in the above finding of the Tribunal, it is nowhere mentioned that the assessee failed to furnish any details/particulars furnished by the assessee were found to be inaccurate, incorrect or false. It is the question of interpretation of the agreement between the assessee and the RPL. The genuineness of the agreement is not in doubt. The dispute is only with regard to the legal implication on the interpretation of the terms of the agreement. The High Court has admitted the appeal of the assessee and has also framed the substantial question of law for their Lordships' consideration.
- As per the High Court '*prima facie*, and even as per the Tribunal, the agreement was a composite agreement, a part of which at least provided for non-competition.' Thus, the High Court, after analyzing the decision of the Tribunal, held that even as per the Tribunal the agreement was a composite agreement. In view of the totality of the above facts, it is to be held that the claim of the assessee that the receipt from the non-compete agreement was *bona fide*. The genuineness of the agreement between the assessee and RPL is not in dispute. It is also not in dispute that the sum of Rs. 5.25 crores was received by the assessee as per this agreement. The receipt of the money is credited to the capital account with the narration 'non-compete territory rights'. Any of the details furnished by the assessee either in the return of income or during the assessment proceedings are not found to be incorrect, erroneous or false. On these facts, the decision of the Apex Court would be squarely applicable, because the additions have been made by the Assessing Officer by not accepting the assessee's claim that the receipt on account of non-compete fees is a capital receipt. Mere non-acceptance of the assessee's claim by the Assessing Officer would not amount to furnishing of inaccurate particulars of income. Considering the totality of the facts, the claim of the assessee that the receipt was in the nature of capital receipt was a *bona fide* claim. Whether the

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claim is accepted or not, it is a matter of opinion and the issue of taxability of Rs. 5.25 crores is still sub-judice before the High Court.

- The revenue has also contended that the assessee ought to have disclosed this receipt in the profit and loss account and then, the assessee could have claimed the amount as exempt in the computation of income; and by not carrying out this exercise, the assessee has furnished inaccurate particulars of income. In response to this contention of the revenue, the assessee rightly pointed out that neither in the Income-tax Act nor in the Accounting Principles the capital receipt is required to be credited to the profit and loss account. The capital receipt is required to be credited to the capital account which was already done by the assessee. It has been also pointed out that the accounts of the assessee are duly audited and the auditors have not pointed out any defect in the credit of receipt from non-compete agreement to the capital account and therefore, have not qualified the audit report. Thus, if the assessee *bona fide* believed that receipt from the non-compete agreement is capital receipt and has credited the same to the capital account with proper narration and the capital account is furnished along with return of income. The assessee has also relied upon various other decisions. Thus, the Commissioner (Appeals) was not justified in sustaining the penalty levied by the Assessing Officer under section 271(1)(c) amounting to Rs. 1.61 crores.
- Therefore, the Division Bench as per the majority view, deleted the impugned penalty of Rs. 1.61 crores imposed by the Assessing Officer and sustained in Commissioner (Appeals) order under challenge . The assessee's appeal was allowed.

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