IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. No. 2961/DEL/2017	
	A.Y. : 2012-13	
ACIT, CIRCLE-2, 13-A SUBHASH ROAD, DEHRADUN	VS.	M/S SLO AUTOMOBILES PVT. LTD., C/O HEMAND ARORA & CO., 1, TYAGI ROAD, DEHRADUN (PAN: AANCS8160M)
(APPELLANT)		(RESPONDENT)

Department by : Sh V.K. Jiwani, Sr. DR
Assessee by : Ms Shivani Gupta, Article

ORDER

This appeal by the Revenue is directed against the Order of the Ld. Commissioner of Income Tax (Appeals), Dehradun dated 09.2.2017 pertaining to assessment year 2012-13 on the following grounds:-

1. That the Ld. CIT(A) has erred in law and on facts while partly allowed the appeal of the assessee.
2. That the order of the Ld. CIT(A) be set aside and the order of the AO bed restored.

2. The brief facts of the case are that the assessee filed the return at an income of Rs.14,17,180/- after making adjusting for losses of earlier years. Subsequently, information was received from Commercial Tax Department that during the course of survey conducted by them on 07-08-2012 it had come to their notice that the assessee has suppressed sales and the figures of sales were passed on to the Income Tax Department. On perusal, the AO observed that there was a sizeable

amount of difference in the volume of sales discovered by the Commercial Tax Department and as declared by the assessee in his return of income. Therefore, the AO issued notice u/s 148 of the I.T. Act,1961 and in response, the assessee filed revised return on 29.09.2013 showing loss of RS.90,10,088/-. The AO observed that though the assessee had enhanced sales, it had also enhanced the expenses to declare the losses of Rs.90,10,088/- against the returned income of Rs.14,17,180/- declared in the original return of income. AO further observed that the gross profit rate in the revised return had declined to 4.55%, from the original G.P. rate of 6.45%. After the assessee was confronted, the AO recorded a finding that all the purchases were not accounted for by the assessee in the original books of accounts. Subsequently, the assessee re-casted its books of account and incorporated both the undisclosed sales and undisclosed purchases. Thus the AO came to conclusion that the assessee had concealed the sales to the extent of Rs.29,90,1 05/- in its original return. The AO held that the assessee had filed one set of documents with the original ITR and another set of accounts for revised ITR, accounts of the assessee could not be relied upon to give the true picture of the income of the assessee. He therefore rejected the books of account u/s 145(3) of the I.T. Act, 1961 holding them to be neither correct nor complete. Consequent y, he proceeded to estimate gross profit by taking it at 4.55% on the figure of sales received from the Commercial Tax Department which was Rs.44,10,59,498/- and worked out the profit at Rs.2,00,68,207/-. Thereafter, he worked out the total Income of the assessee. Subsequently, notice u/s 271 (1)(c) of the I.T. Act, 1961 was issued. In response the assessee submitted that the only disallowance was the disallowance of business expenditure amounting to Rs.32,34,533/- on adhoc basis. Further it was stated that during the filing of tax audit report, the assessee has disclosed the unpaid VAT liability and thus there was no concealment on the part of the assessee. The AO was not convinced. He held that the additions/disallowances made in the assessment were liable to be treated as furnishing of inaccurate of

particulars of income. He therefore, imposed a penalty of Rs.33,41,000/-upon the assessee uls 271(1)(c) of the I.T. Act, 1961.

3. Aggrieved with the penalty order the assessee preferred appeal before the Ld. CIT(A), who vide his impugned order dated 09.2.2017 has partly allowed the appeal of the assessee.

4. Aggrieved with the impugned order, the Revenue is in appeal before the Tribunal.

5. At the time of hearing, Ld. DR relied upon the order passed by the AO and reiterated the contentions raised by the Revenue in the grounds of appeal.

6. On the other hand, Ld. A.R. of the Assessee relied upon the order of the Ld. CIT(A) and reiterated the contentions made before the Ld. CIT(A). She further stated that since the Ld. CIT(A) has passed a well reasoned order, the same does not need any interference. Hence, she requested that the appeal of the Revenue may be dismissed.

7. I have heard both the parties and perused the relevant records available with us, especially the orders of the revenue authorities. I find that Ld. CIT(A) has discussed the issue in dispute elaborately at page no. 14 to 16 vide para no. 7 to 14. For the sake of convenience, I am reproducing herewith the relevant findings of the Ld. CIT(A) as under:-

> *"7. I have duly considered the facts and circumstances of the case. The first issue that needs to be address is whether the return filed by the assessee on 29.09.2013 was a revised return or was a return in response to the notice uls 148. As per law, the assessee having noticed any mistake or omission in his original return, if filed on time, was entitled to revise its return before the expiry of one year from the end of the relevant year or before*

the completion of assessment, whichever is later. Technically, speaking, the return filed by the assessee on 29.09.2013, fits into this timeline. However, section 139(5) assumes that this action of the assessee would be suo-mote voluntary action without prompting from the AO. In the case of the assessee it is seen that there was nothing voluntary about revision of the return. The original return was filed on 30.09.2012, i.e., after the date of search by the Commercial Tax Department which took place on 07.08.2012. Thus, the return was filed despite the detection of suppressed sales by the Commercial Tax Department, at the original figure of sales, which the assessee knew to be incorrect. Subsequently, on 04.01 2013, the Dy Commissioner of Commercial Taxes passed on this information of suppression of sales to the income tax department. It was only subsequent to the passing of such information that on 14.01.2013, the assessee made so called voluntary disclosure by filing a letter before the AO. However, at this stage also, the return was not revised. Consequently on 05.04.2013, the AO issue notice to the assessee u/s 147/148 of the I.T. Act, 1961. In response to this notice, the assessee filed several requests for adjournment and finally after getting its account audited on 28.03.2013. filed revised return of income on 29.09.2013 and on 08.10.2013 informed the AO that the return had been revised. Now, the sequence of evidences as outlined above quite clearly indicated that the action of the assessee was not a voluntary and suo-moto compliance but induced as a result of action of Commercial Tax Department and the subsequent notice by the AO u/s 148. The advisability of issuing notice u/s

148 at this stage, when notice u/s 143(2) was issuable on the original return is debatable. It is observed that the assessment has been finalized and the assessee had not filed any appeal against the said assessment, so as on date the assessment subsists. In the circumstances, there is no occasion to revisit the issue in this proceeding. However, even for argument sake, if we are to consider the return filed on 29.09.2013 as revised return rather than a return in response to notice u/s 148, even than it can only absolve the "assessee from the rigours of penalty only if the assessee declared income over and above what was already declared in the original return of income As he facts emerge, it is seen that the assessee did not declare any income over and above what it had declared in the original income filed on 30.09.2012. As a matter of fact, the return of income filed on 30 09.20'12 which showed the positive income was revised with the return that showed a loss. So in effect, the assessee reduced its income in the revised return. Accordingly, many of the case laws which their counsel has stated in support of the fact that no penalty should be levied in a case where the assessee voluntarily and in good faith offers a higher income in response to notice u/s 148 also, have no significance with the facts of the present case.

8. The next question is whether the penalty u/s 271 (1)(c) could be levied on account of addition made to the returned income in the so called revised return on 29.09.2013. It is observed from the assessment order that even thought the assessee disclosed the VAT liability of Rs. 22,38,981/- as payable, it did not offer

the same for taxation. The AO added the same back u/s 43B of the I.T. Act, 1961 while citing the decision of Hon'ble High court in the case of Mis Chaurangi Sales Bureau P. Ltd. vs CIT 87 ITR 542 (SC). In my order in appeal no. 140/CIT(A)/DDN/2014-15 for the A.Y. 2011-12 passed on 28.03.2016, I have held that the addition could not have made uls 43B as the same had not been claimed as a deductible expenses. However, this was because assessee had not shown a receipt from its customers on this account as a credit in its P & Laic but attempted to manipulate its actual income by carrying this figure directly to the balance sheet. Therefore, I have held in that case, that the amount was taxable in the hands of the assessee as a trade receipt in accordance with the decision of the Hon'ble Supreme Court in the case of M/s Chaurangi Sales Bureau P Ltd vs CIT (supra) In the instant assessment year, the matter has been disallowed u/s 43B again citing. the case of Chaurangi Sales Bureau P Ltd (supra). Once again, the appeal has not been filed against the said addition so it stands confirmed in the hands of the assessee.

9. In considering the matter, it is observed that the same principle would govern the confirmation of the addition in A.Y. 2011-12, applies in this matter also. The assessee quite clearly attempted to resort to intelligent accounting in order to nullify the adverse effect of the Commercial Tax survey, which showed that it has collected VAT but not deposited it with the Commercial Tax Department. Thus, it carried out the amount of its balance sheet directly without taking it to its P& Laic

and in trying to set it off against the advance to partners. Infact, it was obliged to disclose this receipt as its credit in P&L a/c which it did not, thereby, it attempted to suppress its taxable profits. It quite clearly amounts to furnishing of incorrect particulars of income. The case laws cited by the assessee have no relevance to the case of the assessee because they were on account of inadvertent mistake while the case of the assessee have been found to be a deliberate attempt to evade Commercial Taxes and also Income Tax. Therefore, penalty clearly is leviable on this addition of Rs. 22,38,981/-. The assessee has also objected to the levy of penalty on the estimated addition made by the AO amounting to Rs. 2,00,68,207/-. It is observed that the assessee had declared gross profit of Rs. 1,80,41,805/- in the revised return filed by it on 29.09.2013. Thus, the addition on this account is only Rs. 20,26,402/-. It is further observed that this addition is only on account of difference in figures as received from Commercial Tax Department and as disclosed by the assessee in the revised return for the assessment year in question. It appears that during the course of assessment the AO asked the assessee to produce the copy of the dealer account of M/s SLO Automobiles in the books of Volkswagen Group India Sale. It appears that the same was filed with the copy of the account of Volkswagen Group India Sales in the books of the assessee. The AO writes in the assessment order that he obtained the details of purchases directly from the Volkswagen Company and tallied the same with the total purchases made by the assessee. It is also seen that he has adopted the gross profit disclosed by the

assessee for the purpose of computation. Now that the figures of purchase are accepted and .the figures of gross profit are also accepted, there does not appear to be any reason to adopt the figures of sales as given by the Commercial Tax Department, in place of the figures of sales as emerging from the invoice of the assessee because the AO has himself pointed out that the VAT assessment had not been completed till the date of his order. Therefore, final figure of sales had not emerged from the Commercial Tax Department. In the circumstances, while the addition has not been questioned by the assessee, it cannot be said that the assessee either concealed any income on this account or1urnished any incorre t particulars on this account at this stage and therefore no penalty would be leviable on the estimated addition on account of adopting gross profit on the sales figure as profit by the Commercial Tax Department, in its initial communication.

10. The third set of addition is related to disallowance of a portion of expenses under the head disallowance of expenses on account of travelling expenses, conveyance expense and staff welfare amounting in total to Rs. 22,55,402/-. The assessee has contested the levying of penalty on account of this adhoc disallowance. The AO has justified the addition on account of the fact that these expenses were not properly documented. Perusal of the assessrnent order shows that while filling the so called revised return, the assessee also increased its claim of expenses against the suppressed sales to reduce its actual income before the Income Tax Authority. The AO records that the AR

of the assessee could not explain how the GP declared in the original return had decreased in the revised return. The AO subsequently required the assessee to justify the claim of fresh expenses claimed in the revised return but it is seen from his order that the assessee was unable to justify the claim and the disallowance was therefore made on account of failure to furnish documentary evidence. Thus infact what has been described by the assessee as an adhoc disallowance was actually the disallowance on account of failure of the assessee to prove the additional expenses claimed by it in the revised return of income with a view of suppressing ts profits and lowering its tax liability. These evidences, if they existed, would surely have been produced before the auditors at the time of fresh audit but they were not produced at the time of assessment in order to justify the excessive claim. The claims made are therefore held to have been made without any basis and only with a view of filing inaccurate particulars of income. The assessee is not saved by the judgment of the Hon'ble Supreme Court in the case of Reliance Petro Products (supra) because in that case the Hon'ble Supreme Court stated that only because the assessee had made claim which was not allowed, it could not be held to have filed inaccurate particulars of income. In the instant case, the assessee has claimed more expenses than what it couid prove. Hence, it has made unproved claim and not inadmissible claim and when we consider that this claim has the effect of reducing its taxable profit. it quite clearly amounts to furnishing of inaccurate particulars of income. Of course, it could be argued that the addition

ought to have been restricted or made according to the extent of unproved claim and not on an adhoc basis. However, the assessment order since been passed, which was not contested in appeal and therefore, the addition stands crystallized. In the circumstances, the disallowance made cannot be held to be ad hoc disallowance but rather partakes the character of unproved claims with the view of reducing the income of the assessee. It is therefore held that the penalty is leviable in respect of these additions.

11. It is seen that certain amount have been disallowed on account of their being inadmissible such as donation, repair & maintenance(being capital in nature) and professional and legal expenses (being capital in nature & for no deduction of TDS). None of this amounts to concealment or furnishing of inaccurate particulars of income and therefore, penalty would not be leviable on these amounts

12. As far as other income disclosed by the assessee is concerned, it is noticed on comparison of the original return and the return dated 29.09.2013 that the total difference by way of other income in the first return and the second return is in fact only Rs. 1,17,621/-, the two sums that have been shown in the return being Rs. 74,69,771/- and Rs. 73,52,150/- respectively. Thus, penalty could only be leviable on this amount.

13. Therefore, in summation, while the penalty u/s 271(1)(c) is found to be leviable upon the assessee, not all the sum on which the addition has been made and not contested in appeal, can be classified as

furnishing of inaccurate particulars of income and therefore, the penalty on some items as spelt out in the above order may not be leviable. The AO is therefore directed to recompute the penalty keeping in mind the aforesaid observations.

14. In the result, the appeal is partly allowed."

8. After perusing the aforesaid finding, I am of the considered view that there is no infirmity in the finding of the Ld. CIT(A) and therefore, the same does not need any interference on my part, hence I uphold the same and reject the grounds raised by the Revenue

9. In the result, the Appeal filed by the Revenue stands dismissed.

Order pronounced on 12/03/2018.

Sd/-
[H.S. SIDHU]
JUDICIAL MEMBER

Date: 12/03/2018

"SRBHATNAGAR"
Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY By Order,

Assistant Registrar,
ITAT, Delhi Benches