

**IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH, JM AND SHRI RAJESH KUMAR,AM**

आयकर अपील सं./I.T.A. No4772/Mum/2013
(निर्धारण वर्ष / Assessment Year:1999-2000)

M/s Mehta Sulfites (India) Ltd. C/o Atul S. Desai. A-302, GoldenOak, Hiranandani Gardens, Powai, Mumbai-400 076	बनाम/ Vs.	Asst. Commissioner of Income Tax Circle 10 (2) R. No.474, Aayakar Bhavan, Mumbai -400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACM3109R		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri M. Subramanian
प्रत्यर्थी की ओर से/Respondent by	:	Shri Vijay Kumar Soni

सुनवाई की तारीख / Date of Hearing	:	27/10/2015
घोषणा की तारीख / Date of Pronouncement	:	20/11/2015

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This appeal by the assessee is directed against the order dated 08-04-2013 of Commissioner of Income Tax (Appeals)22 , Mumbai (Hereinafter called as the CIT(A)) for assessment year 1999-2000. The assessee has raised the following grounds of appeal as per form 35 and also additional ground as per application filed on 26.10.2015:

1. *On the facts and in the circumstances of the case and in law, Order U/S 271(1)(c) dated 30-03-2012 is invalid and bad in law.*
2. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in Confirming the penalty levied by AO of Rs.1103657/- without considering our Submission Properly.*
3. *On the facts and in the circumstances of the case and in law, the learned C.I.T.(A) erred in Confirming the penalty on Forfeiture of shares and premium amounting to Rs.1440000/- and disallowance of Depreciation 1105512/- without considering our submission properly.*

Additional Ground:

On the facts and in the circumstances of the case and in law, the learned A.O. erred in levying a penalty of Rs.11,03,657/- u/s 271(1)(c) of the act and the learned C.I.T.(A) erred in confirming the same although the tax effect is nil as the final tax has been computed as per the provisions of section 115JB of the act and the disallowances made in the normal computation do not have effect on the tax liability.

2. At the outset the ld.AR drew our attention to the additional ground filed vide application dated 26/10/2015 raising the issue that penalty u/s 271(1)(c) of the act of Rs.11,03,657/- was wrongly levied by AO and confirmed by CIT(A) in view of the fact that final tax had been computed as per the provisions of 115JB of the Income Tax Act and that disallowances made in the normal computation did not have any effect on the tax liability of the assessee. The ld. Counsel further submitted that the issue sought to be raised through the additional grounds is of legal nature and would go to the root of the matter in appeal and therefore prayed for the admission of the same by relying on the decision of Hon'ble Supreme Court in the case National Thermal Power Ltd v/s CIT 229 ITR(383) (SC). On the other hand ld. DR opposed the admission of the additional ground.

3. We have considered the application for the additional ground and after perusing the issue raised in the ground, we are of the view the additional ground is of legal nature and also go to the roots of the case and in view of the ratio laid down by Hon'ble Supreme Court National Thermal Power Ltd. (supra) the additional ground is allowed.

4 The facts of the case are that the tribunal set aside the original assessment framed u/s 144 vide order dated 28/02/2002 by directing the AO to make the assessment afresh by admitting the additional evidence after giving fresh opportunity to the Assessee. Assessment was framed by AO u/s 143(3) r.w.s. 250 of the Act vide order dated 24/12/2009. Income under the normal provisions of the Act was computed at a loss of Rs.34,04,686/- by making interalia various disallowances while making the assessment on the book profits u/s 115JB of the Act. The quantum appeal was also dismissed by CIT(A). The Id.AO levied the penalty of Rs.11,03,657 u/s 271(1)(c) of the Act on the ground that various disallowances made by him in the assessment order were upheld by CIT(A) and thus the assessee had furnished inaccurate particulars of income. The Id. CIT(A) dismissed the appeal by confirming the penalty imposed by the AO by holding that the additions made in the quantum order were confirmed vide order dated 16.07.2010 and the explanation offered by the appellant had not been accepted as it was covered by 1(B) of the u/s 271(1)(c) which specifically says that if the explanation offered by the assessee is not substantiated by the assessee, penalty is imposable.

5 The Id. AR vehemently submitted that penalty u/s271(1)(c) cannot be imposed if the income of the assessee is brought to tax under the provisions of 115 JB of the Act and tax was charged on book profits pursuant to these provisions and the disallowances made by the AO under the normal provisions of the act did not have

any effect on tax liability by the assessee. The Id.Counsel relied on the decision of Delhi High Court in the case of CIT(A) vs. M/s Nalwa Sons Investment Ltd. 327 ITR 543 and the decision of Gujrat High Court in the case CIT(A) Vs City Tiles Ltd. 370 ITR 127. Ld. Counsel further submitted that SLP filed by the department in the case of M/s Nalwa Sons Investment Ltd. stands dismissed on 04/05/2012 . Id. DR , on the other hand, relied on the orders authorities below.

6 We have heard the rival submission and perused the matter on record. We note that the assessment in the case of assessee was framed u/s 143(3) rws 250 of the act wide order dated 24/12/2009 wherein the income of the assessee was assessed at 30% of the book profits in terms of the provision of section 115JB of the Act while simultaneously make various additions to the profit as per profit and loss account under normal provisions of the Act thereby working out the loss as per normal provisions of the act at Rs.34,04,686/- We however, note that the quantum appeal was dismissed by CIT(A) confirming the made by the Id AO. Also the appeal against the penalty order was dismissed on the ground that assessee filed inaccurate particulars of income qua the additions made in the the assessment order. The appellatant had been assessed u/s115JB Act and the various disallowances made in the assesment order did not have any impact on the tax liability of the assessee. In other words the income computed under the normal provisions of the act is less than the book profits of the assessee. Under these circumstances, we are of the considered opinion that the penalty u/s271(1)(c) of the act cannot be levied . The case of the assessee is fortified by the decision of the Delhi High Court v/s Nalwa Sons Ltd. Supra)wherein the income was computed in accordance with normal procedure is less than the income determined special provisions u/s 115JB of the Act and thus the income of the assessee was assessed u/s 115JB and not under the normal provisions and the tax was paid accordingly on the income as computed u/s 115JB of the Act.

Once the tax is levied on the income of the assessee u/s 115JB of the Act , then the case the concealed of income have no role to play and would not lead to tax evasion and therefore, penalty cannot be imposed on the basis of disallowances or additions made under regular provisions. Further in the case of CIT v/s City Tiles (Supra), the Hon'ble Gujrat High Court has held that where the addition to the income of the assessee did not change the tax liability of the assessee as the assessment was made u/s115JB of the book profits penalty could not be imposed. The facts of the assessee are squarely covered by the above decisions and we therefore, respectfully following the decisions of the High Court , we delete the penalty imposed u/s 271(1)(C) by allowing the appeal of the assessee.

6. The ground 1,2 and 3 raised by the assessee are not adjudicated in view of our decision on the additional ground and they become of academic nature in view of our decision.

In the result, the assessee's appeal is allowed.

परिणामतः निर्धारिती स्वीकृत की जाती है ।

Order pronounced in the open court on 20th Nov, 2015

Sd/-

(Joginder Singh)

न्यायिक सदस्य / Judicial Member

Sd/-

(Rajesh Kumar)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 20.11.2015

Ashwini Gajakosh

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai