

आयकर अपीलीय अधिकरण, 'बी' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL, MUMBAI "B" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं शक्तिजीत डे, न्यायिक सदस्य
Before S/Sh. Rajendra, Accountant Member & Saktijit Dey, Judicial Member
आयकर अपील सं./ITA No.5648 & 49/Mum/2008, & 5650/Mum/08,
निर्धारण वर्ष/Assessment Year-1998-99, 2000-01 & 2002-03

Nationwide Pharmassist Distribution Private Limited (Now merged with Bigdeal Mercantile Pvt. Ltd.) Nicholas Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400 013. PAN: AAACN 3346 F	Vs	Income tax Officer Ward 7(1)(1) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri J.D. Mistry & Shri Neeraj Seth

राजस्व की ओर से/ Revenue by : Shri Samir Tekriwal-DR

सुनवाई की तारीख/ Date of Hearing : 08.10.2015

घोषणा की तारीख / Date of Pronouncement : 14-10-2015

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

खंडपीठ के अनुसार Per Bench-

Challenging the order dated 06.06.2008 of CIT(A)-VII, Mumbai, the Assessee has filed appeals for the above mentioned three Assessment years.

ITA No.5648/Mum/2006(AY 1998-99):

Assessee-company, filed its return of income on 30.11.1998, declaring total income of Rs.6.06 lacs. under the provisions of section 115JA of the Act. The return of income was processed u/s. 143(1) on 8.11.99 accepting the returned income.

2. During the course of assessment proceedings, for the AY.2001-02, it was observed that the Memorandum of Association and the Articles stated that the main object of the assessee was to carry on business in the field of pharmaceutical products, that advancing money to earn interest was listed in the objects incidental or ancillary to the attainment of the main objects, that no purchase and sale /distribution of pharmaceutical products had taken place during that AY. Referring to the judgment of Glmpex (Pvt.) Ltd. (176 CTR 112) and Tuticorin Alkalies and Chemicals Pvt. Ltd. (227 ITR 172) the AO held that the interest income of Rs.50.43 lacs was assessable under the head 'income from other sources', that the expenditure laid out wholly and exclusively for earning the interest income would be allowable u/s. 57(iii) of the Act.

The AO observed that the income chargeable to tax for the year under appeal had escaped assessment. Accordingly, a notice u/s. 148 of the Act was issued to the assessee on 7.2. 2005. During the reassessment proceedings, the AO held that the interest income received by the assessee -company had to be taxed under the head 'income from other sources', that the expenses claimed by it were not allowable, that the business of the assessee had not commenced, that in response to notice issue u/s.148 the assessee had chosen to show the interest income under the head 'income from other sources'. Determining the income of the assessee u/s. 143(3) r.w.s 147 of the Act at Rs.50.43 lacs on 20.9.2005. The AO initiated penalty proceedings u/s. 271(1)(c) of the Act. In response to the penalty notice the assessee filed its

reply on 18.12.2005.after considering the submission of the assessee the AO levied the penalty of Rs.17.65 lacs for furnishing of inaccurate particulars of income vide his order dated 8.3.2006.

3.Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority(FAA).Before him,it was contended that the revised return was filed under protest, that out of abundant caution the interest income was shown under the head income from other sources, that the quantum appeal was confirmed by the FAA, that no further appeal to the Tribunal was filed to avoid unnecessary litigation, that the revised return was filed without making any addition,that there was no concealment or furnishing of inaccurate particulars.

After considering the submission of the assessee and the penalty order,the FAA held that right from the very first AY.the AO had held that interest income was to be taxed under the head income from other sources as the assessee did not carry on any business, that the assessee changed his opinion,that initially it treated the interest income as business income, that later on he filed revised return treating the same as income from other sources, that the FAA had confirmed the addition made by the AO for AY.s 1996-97 and 97-98 on 19.6.2003, that even after the decision of the FAA the assessee did not file the return suo motu, that he filed revised return only after notice u/s. 148 was issued, that the revised return was filed out of compulsion. He further held that but for the notice issued u/s. 148 of the Act the assessee would not have filed revised return of income, that because of the revised income and assessed income being the same the assessee was not absolved of penalty u/s. 271(1) (c). Finally,she confirmed the order of the AO.

The FAA gave the details of filing of return, date of issue of 148 notices and penalty levied for concealment for all the three years as under :

Particulars	A.Y.1998-99	A.Y.2000-01	A.Y.2002-03
Original Return of income filed on	30.11.1998	29.11.2000	31.10.2002
Returned income as per original return	Rs.6,06,201/-	-5,91,088/-	-38,75,934
CIT(A) Order for A.Y. 1996-97 and 97-98	19.06.2003	19.06.2003	19.06.2003
Notice u/s. 148 issued on	07.02.2005	25.08.2005	25.08.2005
Return of income in response to 148 notice filed on	01.07.2005	30.01.2006	30.01.2006
Income as per revised return of Income filed as above	Rs.50,43,524/-	Rs.57,31,959/-	Rs.6,30,347/-
Income assessed as per Order u/s. 143(3) r.w.s. 147	Rs.50,43,524/-	Rs.57,31,959/-	Rs.6,30,347/-
Penalty levied	Rs.17,65,233/-	Rs.22,06,805/-	Rs.2,25,034/-

4.During the course of hearing before us,Authorised Representative (AR) stated that the assessee could not file return of income of the year under appeal without getting notice u/s.148 of theAct,that the stipulated time for filing of return as per provisions of section 139 was over, that the order for the AY 01-02 was passed on 30.1.2004.He referred to pg-21 of the paper book and stated that reasons for re-opening of the assessment were not supplied to the assessee.He relied upon the cases of Bennet Coleman & Co. (33 Taxmann.com 227), Amit Jain(33 Taxmann.com 178) and Procter and Gamble Hygiene Heath Care Ltd. (Income tax Appeal (L)No.946 of 2012 dt.12.3.2013).Departmental Representative(DR)supported the order of the FAA and relied upon the cases of Zoom Communication and PSP Industries.He contended that it was not a case of change of head of income,that the income has increased

substantially to Rs.50.43 lacs from Rs.6.06 lacs,that it kept silence for two years and changed the head only after notice u/s. 148 was issued, it could not be termed as revised return.

5.We have heard the rival submissions and perused the material before us.We find that the assessment for the year under consideration was re-opened on the basis of the assessment proceedings completed for the AY 2001-02, that the only dispute between the AO and the assessee was the head of income under which the interest income was to be offered, that the notice u/s.148 of the Act was issued to the assessee in February 2005, that in response to the notice it filed a letter dt.30th June 2005 requesting for the reasons for the reopening,that it filed a revised return of income on 1.7.2005,that it had offered interest income under the head income from other sources, that the FAA had upheld the order of the AO for the AY 2001-02, that he had held that interest income could not be assessed as business income, that the assessee did not prefer any appeal before the Tribunal, that while filing the return in response to section 148 the assessee suo moto offered the interest under the head 'income from other sources',that a note in that regard was filed along with the return.We find that the reassessment proceedings were initiated by the AO considering the assessment order passed for 2001-02, that the assessee came to know about the order of the FAA for that year once it received the order of the FAA,that in response to the notice u/s. 148 it decided to offer the interest income under the head income from other sources'.The assessee decided not to agitate the matter before the Tribunal and offered the income under a particular head.This in itself cannot be termed furnishing of inaccurate particulars.Basic facts about the income were available on the file from the day one.Considering these peculiar facts and circumstances of the case for the year under appeal, we are of the opinion that it had not furnished inaccurate particulars of the income or had concealed the particulars of income.We have gone through the cases relied upon by the assessee.We find that in the case of Procter & Gamble Hygiene and Healthcare Ltd.(supra), one of the issue was framed as under :

“j. Whether on the facts and the circumstances of the case and in law, the Tribunal is justified in deleting the penalty imposed without appreciating the fact that the Tribunal itself confirmed the disallowance of depreciation and further directed the AO to treat the same as income from other sources?”

Deciding the issue the Hon'ble Court observed as under :

*“10. So far as Question (j) is concerned, the Tribunal deleted the penalty levied under Section 271(1)(c) of the said Act. The grievance of the Revenue is that penalty ought not to have been deleted as Respondent-Assessee claimed rental income received by it as business income and had also claimed depreciation on the same. However, the same was disallowed by the Assessing Officer. In these circumstances, it is urged that penalty should not have been deleted. The Tribunal by the impugned order has recorded a finding of fact that there was a complete disclosure of all facts on the part of the Respondent-Assessee. The Respondent-Assessee claimed rental income to be chargeable to tax under the head "business income". The Assessing Officer came to the conclusion that it is to be taxed under the head "Income from house property". The Tribunal in the quantum proceedings concluded that the rental income is to be charged under the head "Income from the other sources".Therefore, there was scope for difference of opinion.Moreover, this court by order dated 26th February, 2013 in Income Tax Appeal(L) No.2117 of 2012 in the matter of CIT vs. M/s. bennet Coleman & Co., Ltd. has taken a view **that where all the facts are disclosed and there is only a change of head of income under which the income is to be taxed then penalty under Section 271(1)(c) of the said act is not justified.** This is particularly so in the absence of the revenue pointing out any facts to show/establish that the claim of the Assessee to tax the rental income under the head "Business Income" and the claim for depreciation was not bonafide. Therefore, we see no reason to entertain Question (j).”*

Considering the above case and the fact that the disputed amount was part of the return filed by the assessee, we reverse the order of the FAA and decide effective ground of appeal in favour of the assessee.

ITA Nos.5649/Mum/2008,& 5650/Mum/08, Assessment Year-2000-01 & 2002-03:

Following our order for the AY 1998-99 we decide the effective Ground of appeal in favour of the assessee, as the facts and circumstances are identical to the facts of that AY.

As a result, all the appeals filed by the assessee stand allowed.

फलतः निर्धारित द्वारा दाखिल की गई सभी अपीलें मंजूर की जाती हैं.

Order pronounced in the open court on 14th October, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक 14 अक्टूबर, 2015 को की गई।

Sd/-

(शक्तिजीत डे / Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Date: 14.10. 2015

व.नि.स./V.Sr.PS.

Sd/-

(राजेन्द्र / RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, ए खंडपीठ, आ.अ.न्यायालय मुंबई

6.Guard File/गार्ड फाइल

सत्यपित प्रति //True Copy//

आदेशमुस/ BY ORDER,

उप/सहायक पंजीक Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.