IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri R.C. Sharma (AM)
&
Shri Pawan Singh (JM)

I.T.A. No. 2702/Mum/2012
(Assessment Year 2002-03)

I.T.A. No. 2703/Mum/2012
(Assessment Year 2003-04)

I.T.A. No. 2704/Mum/2012
(Assessment Year 2004-05)

Panther Investrade Ltd. Radha Bhavan 1st Floor, 121 Nagindas Master Road Mumbai-400 023.	Vs.	ACIT CC-40 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN No.AAACP3259R

Assessee by	Shri Neelkant Khandelwal
Department by	Dr. P. Daniel
Date of Hearing	11.8.2016
Date of Pronouncement	30.9.2016

O R D E R

Per R.C. Sharma (AM) :-

These are appeals filed by the assessee against the order of learned CIT(A) for A.Y. 2002-03 and 2003-04, in the matter of imposition of penalty u/s. 271(1)(c) of the Income Tax Act.

2. At the outset, learned AR placed on record order of the Tribunal in assessee's own case for A.Y. 2001-02 dated 17.4.2013, and for A.Y. 2002-03 to 2004-05 dated 19.4.2013 and contended that the additions with respect to disallowance from share trading loss and interest liability not provided in

P & L for which penalty have been levied, had been deleted by the Tribunal in respective orders. The Tribunal in its order dated 19.4.2013 observed as under :-

"These three separate appeals by the assessee are preferred against three separate orders of the Ld. CIT(A) pertaining to three different assessment years 2002-03, 2003-04 & 2004-05. As common issues are involved in all these appeals, they were heard together and disposed of by this common order for the sake of convenience and brevity.

2. In ground No. 1, the assessee has shown its grievance against the order of the Ld. CIT(A) who did not allow loss of Rs. 37,90,55,189/- on transactions backed by delivery holding that the transactions are not genuine in nature.

3. During the course of the assessment proceedings, the Assessing Officer observed that the assessee has shown a loss of Rs. 37,90,55,189!- on account of share trading. The assessee was asked to furnish necessary details vide questionnaire dt. 24.12.2004. On receiving no compliance, the AO further issued notice dt. 18.32005. The assessee vide letter dt.22.3.2005 furnished the details of share traded during the year. However, the AO observed that the assessee has not furnished supporting documents. As per the AO, the shares traded by the assessee are the same which are mentioned by the JPC in its report. The AO observed the period under consideration is just an extension of the scam period, details of which have been considered and discussed in the assessment order for A.Y. 2001-02. Since the losses of the assessment year 2001-02 were disallowed and since the circumstances for the year under consideration have not changed, the AO went on to disallow the entire loss claimed by the assessee to the tune of Rs. 37,90,55,189/-.

4. The assessee carried the matter before the Ld. CIT(A) but without any success. The Ld. CIT(A) confirmed the findings of the AO which were based on the findings of A.Y. 2001-02. The Ld. CIT(A) further drew support from the decision of his predecessor in the case of another group entity i.e. Sal Mangal Investrade Ltd. in the appeal No. IT-56/0405 dt. 4.5.2007. The Ld. CIT(A) concluded that the AO is fully justified in holding that the whole series of transactions are required to be considered in a consolidatory form rather than individual and fragmentary form as the analysis of the whole event lead to the only conclusion that the same are circuitous method of tax avoidance and accordingly confirmed the order of the AO.

5. Aggrieved by this finding, the assessee is before us. The Ld. Counsel for the assessee submitted that though the AO has based his finding by drawing support from the assessment of 2001-02 but failed to

appreciate that in the said assessment year, the AO has accepted loss based on delivery based transaction. It is the say of the Counsel that the loss during the year under consideration relates to transactions which are backed by delivery and therefore the same should be allowed as have allowed in A.Y. 2001-02 and also in A.Y. 2003-04. The Ld. counsel drew our attention to page 22 of the Paper book which contain details of shares invoked by Global Trust Bank Ltd. Further drawing our attention at page-37 of the Paper Book, which is statement of bank amonts. The Ld. Counsel submitted that the sale consideration on the shares sold by G1·13L have been credited in this bank account. Similar transaction is reflected at page-39 of the Paper book which again is a statement of bank accounts. The Ld. Counsel further drew our attention at page-23 & 24 of the Paper Book which contains analysis of loss on delivery based transaction and pointed out that in the case of the shares of M/s. DSQ Industries, the loss is due to diminution in value and in the case of shares of Global Tele Systems and Mascon Global, the loss is due to sale by invoking the shares by the Global Trust Bank Ltd. It is the say of the Counsel that all these shares were purchased in A.Y. 2000-01.

6. Per contra, the Ld. Departmental Representative strongly supported the orders of the lower authorities.

7. We have considered the rival submissions and perused the orders of the lower authorities and the material evidence brought on record in the form of a Paper book. It is not in dispute that the AO has drawn support from the findings of A.Y. 2001-02. We have the benefit of perusing the assessment order for A.Y. 2001-02 as exhibited from pages 52 to 61 of the paper book. The issue relating to non delivery based transaction has been discussed by the AO at page-16, para 23 of his order and after discussing the facts and circumstances, the AO concluded that the resulted losses in the speculation transactions are held to be non genuine and is not allowed to be set off during the year and is not allowed to be carried forward being non-genuine. It is also not in dispute that during the year under consideration, the loss has arisen out of delivery based transaction. This means that the AO has accepted the losses resulting from delivery based transaction in AY 2001 -02. Therefore, the same view should have been adopted for the year under consideration.

7.1. A perusal of exhibit 23 and 24 which contain analysis of losses show that the shares are brought forward from earlier years which means that the assessee has not done any purchases during the year under consideration. We further find that the loss claimed by the assessee is out of diminution in the value of stock as on the last day of the accounting year as the assessee follows cost price or market price whichever is lower as its method of valuation stock. Another factor

resulted into loss is due to the fact that Global Trust bank invoked the shares pledged with it and sold the same which has resulted into losses to the assessee. This also means that the shares were pledged and brought forward from earlier years. The Ld. CIT(A) has drawn support from the decision of his predecessor in the case of Sai Mangal Investrade Ltd. We find that the said case travelled upto the Tribunal and the Tribunal has decided the issue in favour of the assessee in ITA No. 4229/M107. The Tribunal in its order at page-12, para-12 has held as under:

"We have also seen various other case laws on which reliance has been placed by the Ld. Counsel for the assessee, which are placed on record and found that directly or indirectly, the ratio of those decisions are in favour of the assessee. Therefore, in view of these facts and circumstances and in view of various case laws discussed above, we hold that the loss suffered by the assessee is on account of delivery basis transactions and on account of execution of trades totaling to Rs. 21.40 crores or so is allowable. Accordingly, we direct the AO to allow the claim of loss as claimed by the assessee.

After considering the entire facts on record and also the assessment for A.Y. 2001-02 and the decision of the Tribunal in the case of Sai al Investrade Ltd (supra), in our considerate view, the loss on account of delivery based transaction is genuine loss and the AO is accordingly directed to treat the loss as genuine. This ground of the assessee is accordingly allowed.

8. Ground No. 2 relates to addition of a sum of Rs. 2.40 crores being pro rata interest on the ground that the funds have not been used for the purpose of business.

9. Ground No. 3 relates to disallowance of a sum of Rs. 8,21,95,785/- being interest on secured loan from a bank.

10. We propose to decide the issue raised by ground No. 3. As similar issue came before us in the case of MIs. Panther Fincap & Management Services Ltd., in ITA Nos. 193/M/07 & 7278 & 369/M/08 wherein we have decided the issue in favour of the assessee drawing support from the decision of the Tribunal in the case of MIs. Chat Computer Pvt. Ltd. Vs DCIT in ITA No. 481 81Mum12007. As the facts and circumstances are identical, we have no hesitation in following our order in the case of /s. Panther Fincap & Management Services Ltd.(supra). We, accordingly direct the AO to allow interest of Rs. 8,21,95,785/-.

11. Coming back to the grievance raised in ground No.2, the claim of interest is part of the interest related to Madhavpura Mercantile Co-Op. Ltd., which is the issue arised in ground No. 3. As we have decided

issue raised vide ground No. 3 in favour of the assessee, grievance of assessee raised vide ground No. 2 become otiose and is accordingly missed. This ground of the assessee is dismissed.

11.1 In the result, this appeal filed by the assessee is partly allowed.

ITA No. 603/Mum/2008- A.Y. 2003-04

12. Ground No. 1 is identical to ground No. 2 of ITA No. 192/M/2008. However, during this year there is no disallowance of interest relating to Madhavpura Mercantile Co-Op. Bank Ltd. But we find that the interest debited during the year to the tune of Rs. 17,09,20,551/- is on account of loans obtained from Madhavpura Mercantile Co-Op. Bank Ltd and Global Trust Bank during the earlier years. No interest bearing loans have been taken during the year under consideration. Since we have allowed the interest in earlier years, following the same, we direct the Assessing Officer to allow the interest for the year under consideration also. This ground of the assessee is allowed.

13. Ground No. 2 relates to not allowing set off of a sum of Rs. 13,747/- by treating the said business loss as speculation loss.

14. At the very outset, the Ld. Counsel for the assessee submitted that the issue is covered by the decision of the Tribunal in the case of Sai Mangal Investrade Ltd. in ITA No. 975 & 976/M108 wherein the Tribunal had the occasion to decide on a similar issue vide ground No. 4 at para-10 page-5 of its order which is as under:

> *"Ground No. 4 relates to invoking of the provisions of Explanation to Sec. 73. The AO assessed the business loss of the assessee at Rs. 8.73,0561-. He refused to set off dividend income of Rs. 1,00,9401- against this business loss by invoking Explanation below Sec. 73. The assessee argues that the issue is covered in its favour by the following decisions:*
>
> *Plaza Investments (P) Ltd. 108 lTD 239 (Mum) Starline Ispat &*
>
> *Alloys Ltd. Vs DCIT 108 TTJ 321 (Mum)*

He submits that dividend income, though assessable under the head "income from other sources", is nothing but business income and has to be set off against business loss and Explanation to Section 73 cannot be applied."

Facts and circumstances being identical, respectfully following the decision of the Tribunal(supra), we direct the AG to allow the set off of loss as claimed by the assessee. This ground of the assessee is allowed.

15. Ground No. 3 relates to charging of interest u/s. 234B of the Act. As charging of interest is consequential and mandatory, this ground is accordingly dismissed.

16. In the result, this appeal filed by the assessee is partly allowed.

ITA No. 604/Mu m/2008 - A.Y. 2004-05

17. Ground No. I is identical to ground No. 1 in ITA No. 192/M/08, therefore it is allowed.

18. Ground No. 2 is identical to ground No. 2 of ITA No. 603/M/08, therefore it is allowed.

19. Ground No 3 is identical to ground No 3 of ITA No 603 /M/08, this ground of the assessee is dismissed

20. In the result, the appeals filed by the assessee are partly.

3. We have considered rival contentions and found that both the issues under consideration with regard to disallowance of share trading loss and interest liability not provided in P&L account have been deleted by the Tribunal in the quantum appeal. Since quantum itself has been deleted, the penalty so imposed has no legs to stand with respect to these additions. Accordingly we direct to delete the penalty with respect to these two additions.

4. Now coming to the additions made by AO on account of interest bearing funds diverted for non-business use on which, AO has levied the penalty under Section 271 (1)(C) by observing that assessee has furnished inaccurate particulars of income. In the Assessment Year 2003-2004, AO has observed as under:-

In the light of the above, the Assessing Officer in order to accord a final opportunity of being heard, issued show cause notice under Section 271(1)(c) Of the Income-Tax Act, 1961, vide letter dated 17/03/2009 and the date of compliance was fixed on 23/03/2009 which was duly served on 19/03/2009.

There is no compliance to the notices issued till date. Hence, it is concluded that the assessee is completely devoid of material to rebut the findings observed by the Assessing Officer & upheld by the Ld. CIT(A).

Hence, the order of penalty is passed on the basis of material on record available with this office.

As per explanation 4 to section 271(1)(c), the penalty is to be levied on the tax sought to be evaded. That means if there is an attempt to reduce the income to some extent by an action of any adjustment in the accounts other than which is permissible under the Act, it can be concluded that there was an element of tax which the assessee sought to avoid. The only requirement to levy a penalty is to prove that the attempt was deliberate. In the instant case, the assessing officer has already established this aspect in his assessment order which was upheld by the appellate authorities.

In the instant case, there is total absence of material to rebut the presumption raised by Explanation 1 to section 271(1) (c).

If a devise of accounting adopted by the assessee has the effect of keeping off a certain portion of income either directly or indirectly, then, the essence of the above context is present and it is the starting point of the offence of concealment. The penal action is not for concealment of facts but for not paying the tax on certain income by any method adopted by the assessee in the manner which could have been possible normally by concealment. In this case there is a direct attempt to reduce a portion income from the knowledge of income-tax authorities.

In furnishing the return of income, an assessee is required to furnish particulars and accounts on which such returned income has been arrived at. These may be the particulars as per his books of accounts, if he has so maintained or on any other basis upon which he had arrived at the returned figure of income. Any adjustments made in such books of accounts or other wise which resulted in keeping off or hiding a portion of his income is publishable as furnishing inaccurate particulars of his income or concealment of income if the whole transaction was deliberately colored with attempt of any nature ultimately resulted in avoidance of the tax payment.

From the above, it is clear that the expression used in clause (c) of section 271(1) is both in cases of concealment and inaccuracy, the phrase particulars of income is used. It will be noted that as regards concealment the expression in that clause (c) is 'has concealed the particulars of his Income and not has concealed his income. It is obvious that the penal provisions would operate if there is a failure of duty to disclose fully and truly the particulars of income, imposed under the act and the rules there under. Having regard to the above, I am satisfied that the assessee company has furnished inaccurate particulars of its income to the extent of Rs.2,40,00,007/- leading to concealment and sought to avoid payment of notional tax & tax on positive income as specified under explanation 4 to section 271(1)(c) and thus committed default within the meaning of section 271(1)(c) read with explanation 1 to that section for which a penalty is leviable."

5. By the impugned order CIT(A) has confirmed the penalty.

6. It was argued by the learned AR that similar penalty was imposed in the Assessment Year 2001-2002 against which Assessee was in appeal before the tribunal and the tribunal vide its order dated 17/04/2013 in ITA No.8688/Mum/2010, have deleted the penalty, therefore, issue is covered by the order of the Tribunal in Assessee's own case. Accordingly it was pleaded that similar penalty so imposed in the Assessment Years 2002-2003, 2003-2004 and 2004-2005 should also be deleted.

7. On the other hand, contention of the learned DR was as under:-

> *Addition Nos. 1 & 3, I fully rely on the order of the A.O. & CIT(A). However, in r/o interest on non-interest bearing funds it is submitted that the assessee agreed for the addition only after thorough Scrutiny of the file and issue of Show cause notice.*
>
> *Hence it cannot be stated that the assessee agreed the addition to buy peace. In this connection it is submitted that the Hon'ble Supreme Court in the case of Mak Data Pvt. Ltd. v. C.LT (2013) 358 ITR 593 (SC) held that the surrender of income - No automatic immunity from Penalty. It also held that voluntary disclosure does not release from the mischief of penal proceedings. The Law does not provide when an assessee makes a voluntary disclosure of his concealed income, he has to be absolved from penalty. The A.O. should not be carried away by the plea of the assessee such as "Voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income".*
>
> *It is respectfully submitted no reason whatsoever has been shown by the assessee for concealing the particulars of income to the extent of Rs.2,40,00,000/-. It is prayed that the penalty on this account may kindly be confirmed.*

8. Only contention of learned A.R. was that issue with regard to penalty levied for disallowance of interest is squarely covered by the order of Tribunal in assessee's own case for Assessment Year 2001-2002 dated 17-04-2013

9. We have considered the rival contentions and carefully gone through the orders of the authorities below as well as the order of the Tribunal in assessee's own case dated 17/04/2013 for the Assessment Year 2001-2002 where in the tribunal have deleted the penalty levied for diversion of interest bearing funds after having the following observation:-

"A perusal of the assessment order show that the money has been given for a period of 1 to 5 days and the maximum repayment period was 18th and 19th day. These facts clearly emerged from the findings of the AO during the course of the assessment proceedings. Thus, it is not a case where the assessee has given funds on perpetual basis even the Assessing Officer has calculated the disallowable interest by calculating interest on Daily basis."

10. It is very clear from the observation of the tribunal that money was given for a period of 1 to 5 days and maximum repayment period was 18 to 19 days. The tribunal has also recorded a finding to the effect that these facts of money having advanced only for a period of 1 to 5 days and maximum repayment period was 18 to 19 days are clearly emerged from the findings of the AO during the course of the Assessment proceedings. On the basis of these findings/observation the Tribunal has based their conclusion of deleting the penalty so imposed for diverting interest bearing funds for non business purposes. Tribunal while deleting the penalty also observed that it is not a case where Assessee has given funds on perpetual basis even the AO himself has calculated the disallowance of interest by calculating interest on daily basis. On the basis of these findings the Tribunal has concluded that it is not a fit case for levy of penalty u/s 271(1)(c). However, in all the three years under consideration the facts are entirely different, wherein diversion of interest bearing funds for non business purposes was not for 1 to 5 days or 18 to 19 days but for the entire year i.e., 365 days. The assessee also kept on diverting the interest bearing funds not only during the entire assessment year 2002-03, even this thing continued in the next two assessment years also i.e., 2003-2004 and 2004-2005. Thus, in all the three years under consideration, the assessee has diverted the interest bearing funds for non-business purposes. Under these facts and circumstances, the issue under consideration cannot be said to be covered by the facts recorded in the order of the tribunal dated 17/04/2013. As the facts are entirely different in all the

three years under consideration, conclusion drawn by Tribunal in the Assessment Year 2001-2002 based on the finding that diversion of funds was only for 1 to 5 days and maximum repayment period was 18 to 19 days, cannot be followed during the years where in default in diverting the interest bearing funds was for the entire period of 365 days in all the three assessment years under consideration. The Tribunal in the assessment year 2001-02 have precisely observed that assessee had not given funds on perpetual basis. However, in all the three years under consideration the funds were diverted by assessee perpetually i.e., for the full year i.e., 365 days in the Assessment Year 2002-2003. Moreover this diversion of interest bearing fund continued for another two years i.e. A.Y.2003-04 & 2004-05 for which AO had levied the penalty and CIT(A) has also confirmed the same after recording the findings.

11. Under these circumstances, it is not correct to say that facts and circumstances of all the three years under consideration are same as considered by the tribunal in the Assessment year 2001-2002. In the interest of justice and fair play, we restore the issue back to the file of the AO in all the three years for deciding afresh levy in penalty u/s. 271(1)(C) of the IT Act in the light of our above observations. We direct accordingly.

12. In the assessment year 2004-05 assessee was in respect of interest on IT Refund of Rs.11,38,158/-, which was not offered for tax. Accordingly, the AO levied penalty on the same. By the impugned order the CIT(A) confirmed the penalty by observing that there is no compliance to the notices issued till date, hence, it was concluded that assessee was completely devoid of material to rebut the findings recorded by the AO. However, nothing was brought to our notice by ld. AR so as to persuade us to deviate from the finding recorded by lower authorities. Accordingly, we confirm the penalty with respect to addition of Rs.11,38,158/- on account of interest received on IT Refund, which was added by AO under the head income from other sources.

12. In the result appeal of the assessee in all the three years are allowed in part in terms indicated hereinabove.

Order has been pronounced in the Court on 30.9.2016

Sd/-	sd/-
(**PAWAN SINGH)**	**(R.C. SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated : 30/9/2016

Copy of the Order forwarded to :

The Appellant

1. The Respondent
2. The CIT(A)
3. CIT
4. DR, ITAT, Mumbai
5. Guard File.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

Karuna, Sr.P.S.