

आयकर अपीलिय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE**

श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्यके समक्ष
**BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./ I.T.A. No.496/Ind/2015
निर्धारणवर्ष /Assessment Year: 2009-10

M/s. Krishna Soya Products Pvt.Ltd, 108, Kanchan Bagh, Indore (M.P) PAN: AACCK 2102L	v.	Dy. Commissioner of Income Tax, Circle 1(1), Indore
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

अपीलार्थीकीओरसे/Appellant by	Shri S.S. Deshpande, CA
प्रत्यर्थीकीओरसे/Respondent by	Shri Lalchand, CIT DR

सुनवाईकीतारीख/Date of hearing	26.09.2017
उद्घोषणाकीतारीख/Date of pronouncement	28.09.2017

ORDER

PER O.P. MEENA, AM.

This appeal filed by the Assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-1, Indore [in short referred to as the CIT (A)] dated 23.02.2015 pertaining to Assessment Year 2009-10.

2. Ground No.1 and 2 relates to levy of penalty of Rs.5,10,000/- u/s 271(1)(c) of the I.T. Act. Ignoring the fact that though the appeal was not preferred against the assessment order but there was difference of opinion due to interpretation of the provisions of Section 43(5) of the Act, hence these are being considered together.

3. Short facts of the case are that the assessee has filed return of income on 24.09.2009 disclosing total income of Rs.81,01,060/- which was assessed to Rs.98,05,880/- on 29.12.11 by disallowing the claim of loss of Rs.16,44,817/- on forward booking of oil contract which was in the nature of business loss. However, the AO was of the view that the assessee had entered into the contract of oil in the month of July, 2008 and March, 2009 and there was profit in such forward booking contract in July, 2008 whereas loss has occurred in March, 2009. The transactions of March, 2009 were inter sale transactions i.e. settled on the same day therefore the same were the outside purview of Section 43(5) of the Act and accordingly held to be treated as speculative transactions and therefore the loss so claimed was treated as speculative loss on which penalty proceedings u/s 271(1)(c) of the Act were separately initiated. Accordingly notice u/s 274 read with section 271(1)(c) was issued on 29.12.2011, further notice dated 30.05.2012 was served on the assessee on 06.06.2012 which was replied by the assessee on 28.06.2012. The submissions made by the assessee are reproduced in the penalty order by the AO and after considering the same the AO was of the view that the contention of the assessee that the transactions were of speculative nature is not correct

therefore the assessee has claimed wrong deduction on account of business loss which is not allowable u/s 43(5) of the Act, hence there cannot be two opinion as to the nature of transactions, therefore, the AO levied penalty of Rs.5,10,000/- u/s 271(1)(c) of the Act being minimum penalty.

4. Being aggrieved, the assessee went in the appeal before CIT(A) where same type of submissions were repeated as made before the AO. However, the CIT(A) was of the view the transactions took place in March, 2009 without actual delivery of oil were in the nature of speculative transactions against which no appeal has been filed by the assessee and assessment order has become final, therefore there was no question of any two views on such issue, hence the AO was correct in levy of penalty on account of false exemptions/deduction claimed in the computation of income.

5. Being aggrieved the assessee filed this appeal before us. The Ld. Counsel for the assessee submitted that the loss in respect of trading of commodity exchange was business loss but it was held to be speculative loss within the meaning of section 43(5) of the Income Tax Act by the AO, because some of the transactions were intra day transactions, however, while passing the assessment order the AO did not doubt the genuineness of the transactions but treated it to be a speculative transactions and allowed the carry forward of loss to be allowed in the subsequent year. He has

merely transferred the loss from one head to another. The appeal was not filed because of the fact that these loss would have been allowed in the subsequent year against the derivative profits. However, the AO has not verified whether the penalty levied on account of concealment or on furnishing of inaccurate particulars. The assessee has neither concealed any income nor have furnished any inaccurate particulars of income, the treatment of transactions which is a matter of interpretation of Section 43(5) of the Act and is debatable so far as applicability of provision of section 43(5) of the Act, there being difference of opinion, no penalty u/s 271(1)(c) of the Act could be levied, when there was full and true disclosure of entire facts and such a disclosure of entire facts and was also supported and explained by the documentary evidence. The Ld. Counsel has also placed reliance in the case of Jagadish R. Acharya v. ACIT, the ITAT, Ahmadabad in ITA No.160/Ahd/2013 wherein it was held that it cannot be said that the assessee's bonafide belief was misplaced that MCS was a recognized stock exchange within the meaning of clause (3) in sub section (5) of section 43, we further find that the Assessing Officer has treated the business loss claimed by the assessee as speculative loss and simply carry

forward it to be set off in future in view of its only change of income from one head to another head. Therefore the Tribunal has held that it would not be a fit case for levying penalty u/s 271(1)(c). The Ld.AR further relied in the case of CIT V Aurica Investment and Securities Ltd (2009) 310 ITR 121 (Del) wherein it was held that all the requisite information required by the AO were furnished by the assessee and there was nothing on record to show that in furnishing its return of income the assessee has not concealed his income or has furnished any particulars of income. The mere treatment of the business loss as a speculation loss by the AO does not automatically warrant any concealment of income and particulars. Similarly in the case of CIT V Navinchandra & Co. (2014) 42 Taxmann.com 28 (Guj) it was held that where the assessee treated the loss from derivative transactions as normal business loss, the AO treated it as speculative in nature and therefore disallowed the same. Penalty u/s 271(1)(c) could not be levied as there were diversion of rules of the Tribunal. Similarly the Ld. Counsel further relied in the case of CIT v Oscar Udyog Ltd (2014) 42 Taxmann.com 258 (Kar) wherein the claim made by the assessee u/s 80I was legal and valid. Subject to verification,

therefore, it cannot be said that the assessee deliberately claimed deduction and that there was dishonest and intention in the part of the assessee for claiming deduction and thus penalty could not be imposed for the same. At last the Ld. Counsel placed reliance on the decision of Hon'ble Supreme Court in the case of CIT v Reliance Petro Products Pvt. Ltd (2010) 322 ITR 158 (SC) wherein it was held that mere making of a claim which is not sustainable in law, will not amounting to furnishing inaccurate particulars of income.

6. On the other hand the Ld.CIT (DR) relied on the authorities below.

7. We have heard the rival submissions of both the parties and perused the material available on record. The perusal of the assessment order and the penalty order reveals that the AO has rejected the contention of the assessee that transactions entered into in respect of soya oil in the course of its business to guard against loss to future fluctuation in respect of its contract for actual delivery for holding of stock of goods manufactured by one more in the nature of speculative transaction. Therefore the business loss claimed was disallowed by the A.O and treating the same as speculative transaction u/s 43(5) of the Act. Thus, the perusal of the assessment order reveals that the AO has made disallowance of speculation loss on the basis of facts as disclosed by the assessee in

the return of income and also during the assessment proceedings. We find that the assessee has furnished all relevant facts and merely because the AO has changed the head of loss from business loss to speculative loss and allowed to carry forward of the same the penalty u/s 271(1)(c) could not be levied. Where the explanation is bonafide and all the facts relating to the same have been disclosed then there is no case of levy of penalty. The findings recorded in the assessment order is not conclusive for deciding the imposition of penalty as it has only a persuasive value and non filing of appeal against the said disallowance does not mean that the penalty has to be imposed automatically. It is trite law that penalty proceedings are distinct and separate proceedings from assessment proceedings. It is settled law that when the issue is debatable, then the provisions of penalty u/s 271(1)(c) is not attracted, because mensera is not established against the assessee. The Ld. Counsel has placed reliance on the decision in the case of CIT V Navichandra & Co (2014) 42 Taxmann.com 28 (Guj) wherein while submitting the return of income, the assessee treated loss from derivative transaction as normal business loss, whereas the AO during the assessment proceedings treated the same as speculative nature and disallowed the same and consequently initiated penalty proceedings u/s 271(1)(c) and the same was deleted by the CIT(A) on the ground that it was a bonafide claim on the part of the assessee, considering these facts, the Hon'ble High Court has held that since all relevant particulars in respect of loss were correct and law in respect of said items was not very clear

because there was divergent views of the Tribunals at relevant time and therefore no interference of impugned order was called for and the penalty is rightly deleted by the CIT(A) and confirmed by the ITAT. Since the facts of the present case are similar to that case, the ratio of the said decision is squarely applicable in the case of the assessee. Further, the assessee has relied in the case of Jagdish R. Acharya v CIT 160/(Ahd)/2013, Co-ordinate Bench of Ahmadabad Tribunal, wherein the explanation offered regarding speculation loss was found to be only the change of income from one head to another head and where the assessee has disclosed all the material fact and the penalty u/s 271(1)(C) of the Act was not to be levied. Similarly decisions of Hon'ble Delhi High Court in the case of CIT V Aurica Investment & Securities Ltd (supra) and CIT V Oscar Udyog Ltd of Hon'ble Court of Karnataka (supra) also supports the case of the assessee. The assessee has also relied in the case of CIT v SPIC Stech Pvt. Ltd (2004) 32 ITC 244 (MP) which also supports the case of the assessee. Therefore we are of the considered view that the penalty is not sustainable in the law in the light of ratio laid down by Supreme Court in the case of CIT V Reliance Petro Products Pvt. Ltd (2010) 322 ITR 158 (SC)/189 Taxmann 322 (SC) wherein it was held that merely because the assessee has claimed the expenditure, which claim was not accepted by the revenue, the penalty u/s 271(1) (c) of the Act cannot be attracted. Having considered the above facts and judicial pronouncements, the penalty levied at Rs.5,10,000/- u/s 271(1)(c)

of the Act is therefore **deleted**. The Ground No.1 & 2 of the appeal are therefore **allowed**.

In the result, the appeal of the assessee is **stand allowed**.

The order pronounced in the open court on 28.9.2017.

Sd/-

Sd/-

(C.M. GARG)

(O.P. MEENA)

JUDICIAL MEMBER

ACCOUNTANT MEMBER

दिनांक /**Dated : 28th September, 2017**

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore