

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH, RAIPUR**

**(BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
& SHRI RAM LAL NEGI, JUDICIAL MEMBER)**

**ITA. No: 53/Raipur/2017
(Assessment Year: 2006-07)**

Sarda Energy & Minerals Ltd. (Formerly known as Chhattisgarh Electricity Co Ltd, Merged with Raipur Alloys & Steel Ltd.), Industrial Growth Centre, Siltara, Raipur(CG)	V/S	Assistant Commissioner of Income Tax, Central Circle-1, Raipur
(Appellant)		(Respondent)

PAN: AAACR6149L

**Appellant by : Shri N.C. Begani, C.A.
Respondent by : Shri P.K. Mishra, D.R.**

(आदेश)/ORDER

Date of hearing : 05 -03-2018
Date of Pronouncement : 07 -03-2018

PER N.K. BILLAIYA, ACCOUNTANT MEMBER

1. This appeal by the Assessee is directed against the order of the Ld. CIT(A), Vilaspur dated 08.12.2016 pertaining to A.Y. 2006-07.

2. The sum and substance of the grievance of the assessee is that the Id. CIT(A) erred in confirming the penalty levied by the A.O. u/s. 271(1)(c) of the Act and further erred in enhancing the penalty so levied.
3. The roots for the levy of penalty lie in the assessment order dated 29.12.2008 framed u/s. 143(3) of the Act. The returned income under the normal provisions of the Act was assessed at the book profit u/s. 115JB of the Act as the tax payable as per the normal provisions of the Act was less than the tax chargeable u/s. 115JB of the Act on the book profit.
4. However, penalty proceedings were separately initiated for the additions made for determining the income under the normal provisions of the Act.
5. Vide order dated 28.11.2011 framed u/s. 271(1)(c) of the Act, the A.O. levied penalty of Rs. 4402600/-.
6. Assessee carried the matter before the Id. CIT(A) and brought to the notice of the Id. CIT(A), the CBDT Circular No. 25/2015 dated 31.12.2015 by which the board has directed the A.O. not to levy penalty where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s. 115JB of the Act.
7. The First Appellate Authority in his wisdom not only discarded the CBDT Circular but also enhanced the penalty by Rs. 9597422/-. The relevant observations of the CIT(A) read as under:-

“The book profit since includes in the accounts of the assessee also the short term capital gain is to be reduced so as arrive at book profit to Rs. 1,99,32,588/- and if the interest is not added back by the department and also the travelling expenditure of Rs. 64,358/- is not added then book profit is reduced to Rs. 79,000/- in place of Rs. 3,24,66,017/-. In this factual position the

concealment of income has to be computed and the AO has not appreciated the fact of manipulation of books of account. The interest which is disallowed by the AO and travelling expenses disallowed by the AO amount to Rs. 1,21,35,516/-, thus, the deduction which could be availed by the assessee is reduced to Rs. 3,20,68,104/- only. The AO has allowed deduction to the extent of Rs. 8,52,60,429/- which is against the law, thus, the false claim u/s 80IA amounts to Rs. 5,31,92,325/- which include the capital gain of Rs. 1,25,33,429/- and only false claim is Rs. 4,06,58,896/-. The learned AO has also left the profit which is not derived from industrial undertaking by Rs. 9,44,040/-, thus, the total concealment is worked out Rs. 4,16,02,936/-. The assessing officer has imposed penalty on quantum of concealment only on disallowed interest of Rs. 1,20,71,158/- + 9,44,040/- + 64358/- amounting to Rs. 1,30,79,556/- and ignored the figure of incorrect claim of Rs. 4,16,02,936/- as worked out hereinabove. The learned AR during appellate proceedings has been specifically asked that MAT has been wrongly arrived and it had included the short term capital gain. He maintained that the case of MAT only and Hon'ble CBDT has issued circular that MAT should not be subjected to penalty u/s 271(l)(c). The Tax on Rs. 4,16,02,936/- is worked out Rs. 1,40,00,000/-. The penalty is varied upward by Rs. 95,97,422/- apart from confirming the penalty imposed by the AO. "

8. Aggrieved by this, the assessee is before us. The ld. Counsel for the assessee reiterated that the issue is squarely covered in favour of the assessee and against the revenue by the order of Circular of the CBDT. The ld. Counsel further stated that the ld. CIT(A) not only erred in confirming the penalty levied by the A.O. but further erred in enhancing the penalty without notice. Per contra, the ld. D.R. strongly supported the findings of the A.O.
9. We have given a thoughtful consideration to the orders of the authorities below. It is an undisputed fact that the tax has been levied on the book profit as per the provisions of Section 115JB of the Act. The CBDT Circular is on this issue and the same read as under:-

CIRCULAR NO. 25/2015, DATED;; 31-12-2015

31-12-2015

PENALTY U/S 271(1)(C) WHEREIN ADDITIONS/ DISALLOWANCES MADE UNDER NORMAL PROVISIONS OF THE INCOME TAX ACT, 1961 BUT TAX LEVIED UNDER MAT PROVISIONS U/S 115JB/115JC, FOR CASES PRIOR TO A.Y. 016-17-REG.-

Section 115JB of the Act is a special provision for levy of Minimum Alternate Tax on Companies, inserted by Finance Act 2000 with effect from 1-4-2001.

2. Under clause (iii) of sub-section (1) of section 271 of the Act, penalty for concealment of income or furnishing inaccurate particulars of income is determined based on the "amount of tax sought to be evaded" which has been defined inter-alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income or income in respect of which inaccurate particulars had been filed.

3. In this context, Hon'ble Delhi High Court in its judgment dated 26.8.2010 in ITA No. 1420 of 2009 in the case of Nalwa Sons Investment Ltd. = 2010-TIOL-890-HC-DEL-IT held that when the tax payable on income computed under normal procedure is less than the tax payable" under the deeming provisions of Section 115JB of the Act, then penalty under section 271(1)(c) of the Act could not be imposed with reference to additions /disallowances made under normal provisions. The judgment has attained finality.

4. Subsequently, the provisions of Explanation 4 to sub-section (1) of section 271 of the Act have been substituted by Finance Act, 2015, which provide for the method of calculating the amount of tax sought to be evaded for situations even where the income determined under the general provisions is less than the income declared for the purpose of MAT u/s 115JB of the Act. The substituted Explanation 4 is applicable prospectively w.e.f. 01.04.2016.

5. Accordingly, in view of the Delhi High Court judgment and substitution of Explanation 4 of section 271 of the Act with prospective effect, it is now a settled position that prior to 1/4/2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under 271 (1)(c) of the Act, is not attracted with reference to additions /disallowances made under normal provisions. It is further clarified that in cases prior to 1.4.2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 271 (1)(c) of the Act, will depend on the nature of adjustment.

6. The above settled position is to be followed in respect of section 115 JC of the Act also.

7. Accordingly, the Board hereby directs that no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Court/s Tribunals may be withdrawn/not pressed upon. This may be brought to the notice of all concerned.

10. A perusal of the findings of the ld. CIT(A) clearly shows that he not only discarded the CBDT Circular but has made enhancement without notice. Section 251(2) of the Act clearly provides that the First Appellate Authority shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had reasonable opportunity of showing cause against such enhancement or reduction. Enhancement made by the ld. CIT(A) is in violation of the provisions of the Act thereby making his order erroneous.

11. Considering the facts of the case in the light of the CBDT Circular (supra) and the provisions of Section 251(2) of the Act, we have not hesitation in setting aside the order of the ld. CIT(A). The A.O. is directed to delete the penalty levied by him and also to delete the penalty as enhanced by the ld. CIT(A). Appeal filed by the Assessee is allowed.

Order pronounced in Open Court on 07 - 03- 2018

Sd/-

(RAM LAL NEGI)
JUDICIAL MEMBER True Copy
RAIPUR: Dated 07/03/2018

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Sr. P.S.
ITAT, Raipur