

आयकर अपीलीय अधिकरण सूरत न्यायपीठ, सूरत
IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT
BENCH, SURAT

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

आयकर अपील सं. / ITA No's.2658 to 2660/Ahd/2014/SRT
निर्धारण वर्ष / Assessment Years: 2006-07 to 2008-09

Gujarat Chemical Port Terminal Company Ltd., P.o.Lakhigam, Via Dahej, Tal. Vagra, Bharuch – 392 130. [PAN: AAACG 6861 A]	Vs.	The Deputy Commissioner of Income Tax, Circle-1(1), Vadodara – 390 007.
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)
अपीलार्थी की ओर से/ Assessee by	:	Shri Bhavin J.Marfatia – CA
प्रत्यर्थी की ओर से /Revenue by	:	Mrs. Smitha V.Nair – Sr.DR
सुनवाई की तारीख/Date of Hearing	:	20-08-2018
घोषणा की तारीख /Date of Pronouncement	:	23-08-2018

आदेश /ORDER

PER Shri C.M.GARG, JM:

These three appeals filed by the Assessee against the separate orders of learned Commissioner of Income Tax(Appeals)-I, Baroda ('CIT(A)' for short) all dated 15.04.2013 for the assessment years 2006-07 to 2008-09.

ITA No.2658/Ahd/2014/SRT for A.Y.2006-07

2. Grounds Raised by the assessee read as under :

"1. The learned Commissioner of Income tax (Appeals)-I, Baroda ["the CT(A)"] erred in fact and in law in confirming the action of the Deputy Commissioner of Income Tax, Circle 1(1), Baroda ("the AO") in levying penalty of Rs.38,95,000/- u/s.271(1)(c) of the Income Tax Act, 1961 on following additions :-

- (i) Disallowance of repairs to plant & machinery amounting to Rs.67,50,558/- treating it as capital expense.
- (ii) Prior period expenses of Rs.10,89,135/-
- (iii) Depreciation on foreign exchange loss of Rs.2,22,282/-
- (iv) Restructuring expenses of Rs.35,00,000/-

2. The penalty order passed by AO u/s.271(1)(c) is ultra virus, void and bad in law for the following reasons "

- a. The penalty is levied without reaching satisfaction in the course of assessment proceeding.
- b. There is neither any concealment of income nor furnishing of any inaccurate particulars of such income.
- c. The Appellant has discharged his onus by furnishing explanation concerning addition / disallowance made by the Assessing Officer.
- d. The DCIT has erred in discharging the primary onus of proving the concealment of income or furnishing of an inaccurate particular of such income."

3. We have heard arguments of both the sides and carefully perused the material placed on the record of the Tribunal.

4. The learned Authorised Representative (AR) submitted that the penalty has been imposed on the assessee on 4 counts, viz., i) addition

made by treating expenses of repairs to plant and machinery as capital instead of revenue expenditure ; ii) on account of prior period expenses; iii) on account of disallowance of depreciation or foreign exchange loss on capital asset and iv) on account of disallowance of restructuring expenses.

5. The learned Authorised Representative submitted that as per order of the ITAT Ahmedabad, 'D' Bench in assessee's own quantum appeal for A.Y. 2004-05 to 2006-07 dated 13.11.2017 paras 20 & 22 it is clear that the addition that the first addition made on account of disallowance of expenses on repairs to plant and machinery treating the same as capital expenditure instead of revenue expenditure has been deleted by the Tribunal Order. Therefore, penalty on the first addition is not sustainable. On being asked by the Bench, the Id.Departmental Representative (DR), in all fairness, accepted that the Tribunal has deleted first addition and to the best of his knowledge there is no further appeal by the Department. Therefore, we hold that when the quantum addition has been deleted by the Tribunal, then penalty on this first addition cannot be held as sustainable and we direct the Assessing Officer to delete the same.

6. On the addition, on account of prior period expenses the Id.Authorised Representative submitted that in the Tribunal order for A.Y. 2006-07 (supra) as per para 24 on page 12 the issue has been restored to the file of the AO. Therefore, penalty on this count is not sustainable. Alternatively, the Id.AR submitted that this that the issue of imposing penalty on this count may be restored to the file of AO for fresh adjudication as per outcome of the appeal effect order passed in pursuant to the Tribunal directions in para 24 of the Tribunal Order (supra).

7. The Id.Departmental Representative (DR) strongly opposed to the deletion of penalty and submitted that even if the issue has been restored to the file of AO for fresh adjudication, but in case, if addition is again sustained wholly or partly, then the AO may not be prevented from imposing penalty again.

8. On careful consideration of above submissions, we are of the view that since the addition, on the strength of which, the penalty was imposed on account of disallowance of prior period expenses has been restored to the file of AO and there is no addition in existence, thus, penalty of second count cannot be held as sustainable and we direct the AO to delete the same. However, we make it clear that in case after

passing appeal effect order in pursuant to the Tribunal order for A.Y.2006-07 (supra) then, the AO would be entitled and at liberty to initiate and impose penalty u/s.271(1)(c) of the Act, if it is found necessary, as per relevant provisions of the Act and facts and circumstances of the case.

9. The Id.Authorised Representative (AR) on the penalty on account of addition of Rs.2,28,282/- by disallowing depreciation on foreign exchange loss submitted that the provisions of section 43A is not applicable to the present case as for applicability of the same provisions the asset has to be acquired from outside of India. In the present case, the assets were constructed in India under indigenous conditions thus requirement of section 43A are not fulfilled. The Id.AR vehemently pointed out that during the course of assessment proceedings, it was submitted before the AO that section 43A does not apply to the present case as the assets were constructed in India and the AO made addition by rejecting the said contention of the assessee. The Id.AR submitted that there is no dispute with regard to the claim of depreciation. It was only the timing which has been altered from accrual to the actual payment and it is not the case of the AO reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Amtek

Auto Ltd. 352 ITR 394 (P & H) the Id.AR submitted that the penalty cannot be levied on the addition made on difference of opinion.

10. Replying to the above, the Id.DR supported the penalty as well as first appellate order and submitted that after amendment in the section 43A with effect from 01.04.2003, decrease or increase in allowability on notional basis as per AS-11 cannot be added to the cost of underlying assets in violation of section 43A of the Act. He further submitted that the claim of assessee that section 43A of the Act and such unsustainable claim is nothing but furnishing of inaccurate particulars of income and penalty was rightly imposed. The Id.DR vehemently pointed out that the claim of assessee was clearly not tenable and same was not debatable in nature as the law position of this issue is very clear.

11. On careful consideration above rival submissions, we are of the view that the provision of section 43A has been amended with effect from 01.04.2003, therefore decrease or increase in allowability of notional basis cannot be added to the cost of underlying asset and the assessee claimed depreciation in violation of section 43A of the Act which was not found to be sustainable during quantum proceedings. In our humble understanding, such a claim of assessee is clearly a act

furnishing inaccurate particulars of income which attracts penalty u/s.271(1)(c) of the Act. Therefore, we hold the Id.CIT(A) was right in imposing penalty u/s.271(1)(c) on this count and thus be uphold the first appellate order of this count.

12. The Id.AR submitted that the fourth addition in quantum proceedings has been deleted by the ITAT Order for A.Y. 2006-07 (supra), therefore, penalty may kindly be deleted. On being asked by the Bench, the Id.DR in all fairness, submitted that the addition made by the AO and confirmed by the Id.CIT(A) has been deleted by the Tribunal by passing order dated 13.11.2017 (supra) for A.Y. 2006-07.

13. In view of the above submissions, we hold that when the addition on account of restructuring expenses has been deleted by the Tribunal in allowing quantum appeal then the penalty imposed on the strength of such addition, which it is not in existence, now, cannot be held as sustainable and thus we direct the AO to delete the same.

14. In the result, appeal of the assessee is partly allowed for A.Y. 2006-07.

ITA No.2659/Ahd/2014/SRT for A.Y.2007-08

15. Grounds raised by the assessee read as under :

"1. The learned Commissioner of the Income Tax (Appeals)-I, Baroda ["the CIT(A)"] erred in fact and in law in confirming the action of the Deputy Commissioner of Income Tax, Circle 1(1), Baroda ("the AO") in levying penalty of Rs.25,40,000/- u/s.271(1)(c) of the Income Tax Act, 1961 on following additions :-

- (i) Disallowance of repairs to plant and machinery amounting to Rs.73,42,870/- treating it as capital expenditure.
- (ii) Disallowance of provision for fringe benefit taxes of Rs.1,99,545/-.

2. The penalty order passed by AO u/s.271(1)(c) is ultra virus, void and bad in law for the following reasons :

- a. The penalty is levied without reaching satisfaction in the course of assessment proceeding.
- b. There is neither any concealment of income nor furnishing of any inaccurate particulars of such income.
- c. The Appellant has discharged his onus by furnishing explanation concerning addition / disallowance made by the Assessing Officer.
- d. The DCIT has erred in discharging the primary onus of proving the concealment of income or furnishing of an inaccurate particular of such income."

16. We have heard arguments of both the parties and perused the material available on record of the Tribunal. The Id.DR in all fairness agreed to the submission of the Id.AR that on the addition made by the AO and confirmed by the Id.CIT(A) has been deleted by the Tribunal Order (supra). In this situation, we are compelled to hold that the penalty u/s.271(1)(c) of the Act on the addition, which is not in existence, after order of the Tribunal allowing the quantum appeal of

assessee on this count. Therefore, we direct the AO to delete the penalty imposed on the basis of addition made by the AO treating repairs to plant and machinery as capital in nature instead of revenue expenditure.

17. On the last and second issue of penalty imposed on the addition made by the AO by disallowing provision for Fringe Benefit Tax (FBT) of Rs.1,88,545/-. The Id.AR submitted that inadvertently the provision of FBT was not disallowed while computing the total income and this mistake was accepted by the assessee immediately when the same was pointed during the course of assessment proceedings. Placing reliance on the Hon'ble Supreme Court in the case of Price Water House Coopers Vs. CIT 253 CTR 1 (SC). The Id.AR submitted that the assessee has shown in the return of income huge loss of Rs.596 crores, therefore, there was no intention of making such mistake for negligible amount, therefore, penalty may kindly be deleted.

18. Replying to the above, the Id.DR supported the penalty as well as first appellate order by contending that the wrong claim of deduction of provision of FBT was detected by the AO in the scrutiny proceedings. The Id.DR further submitted that if the case of the appellant was not scrutinized the wrong claim of deduction of FBT amount would have

gone undetected. Therefore, the AO was right in imposing penalty and the same was correctly confirmed by the Id.CIT(A).

19. On careful consideration of above rival submissions, first of all, we may point out that the assessee made a claim for provision of FBT which was not tenable and sustainable as per provisions of the Act. The factum of wrong claim was detected by the AO during scrutiny assessment proceedings and the AO imposed penalty by observing that the disallowance of provision for FBT is an conscious act of inaccurate particulars of income and thus concealment of income within the meaning of Explanation 1 to 271(1)(c) of the Act. The penalty was confirmed by the Id.CIT(A). In our humble understanding if the assessee is making a claim which is not sustainable and allowable as per provisions of the Act and then it can safely be presumed that the assessee has furnished inaccurate particulars of its income and thus concealed the particulars of income within the meaning of section 271(1)(c) of the Act and penalty is inevitable.

20. So far as benefit of ration of decision of Hon'ble Supreme Court in the case of Price Water House Cooper (supra) is concerned. In the present case the assessee has made provisions for FBT it was not allowable. Therefore, it is not a case of making wrong claim under

inadvertent mistake, but it is a clear case of making a claim which was not allowable tenable as per provisions of the Act. Therefore, the wrong claim fact could not be detected if the case was not selected for scrutiny. Finally on consideration of entire facts and circumstances of the case, we are of the view that the penalty was rightly imposed by the AO and the same was confirmed by the Id.CIT(A) on justified and reasonable grounds. Therefore, we respectfully find that the benefit of the ratio of the decision of Hon'ble Supreme Court in the case of PWC(supra) is not available for the assessee.

21. In the result, appeal of the assessee is partly allowed.

ITA No.2660/Ahd/2014/SRT for A.Y.2008-09

22. Grounds raised by the assessee read as under :

1. *The learned Commissioner of Income Tax (Appeals)-I, Baroda ["the CIT(A)"] erred in fact and in law in confirming the action of the Deputy Commissioner of Income Tax, Circle 1(1), Baroda ("the AO") in levying penalty u/s.271(1)(c) of the Income Tax Act, 1961 on disallowance of tank insulation charges amounting to Rs.10,49,024/- treating it as capital expenditure.*
2. *The penalty order passed by AO u/s.271(1)(c) is ultra virus, void and bad in law for the following reasons:*
 - a. *The penalty is levied without reaching satisfaction in the course of assessment proceedings*
 - b. *There is neither any concealment of income nor furnishing of any inaccurate particulars of such income.*

- c. *The Appellant has discharged his onus by furnishing explanation concerning addition / disallowance made by the Assessing Officer.*
- d. *The DCIT has erred in discharging the primary onus of proving the concealment of income or furnishing of an inaccurate particular of such income."*

23. We have heard arguments of both the sides and carefully perused the material placed on record of the Tribunal. The Id.DR in all fairness, agreed to the contention of the Id.AR that the addition on account of treating the tank installation charges as capital in nature instead of revenue expenditure has been deleted by the ITAT, Ahmedabad 'D' Bench order dated 19.01.2018 in assessee's appeal for A.Y. 2008-09 in ITA No.3081/Ahd/2011. Therefore, penalty imposed on this count is also not sustainable.

24. On careful consideration of above submissions from appellate of the Tribunal order dated 19.01.20185 in ITA No.3081/Ahd/2011 for A.Y. 2008-09 it is apparent that the Tribunal has accepted the stand/contention of the assessee that the expenditure on tank installation expenses etc., is business expenditure of revenue in nature and the addition has been deleted. When the addition, on the strength on which penalty was imposed, has been deleted by the Tribunal then the penalty on the same ground cannot be held as sustainable. Hence,

sole ground of assessee is allowed and AO is directed to delete the penalty.

25. In the result, appeal for A.Y. 2006-07 and A.Y. 2007-08 are partly allowed and appeal for the A.Y. 2008-09 is allowed.

Order pronounced in the open court on this day of 23rd August, 2018.

Sd/-
(ओ पी मीना)
(O.P.MEENA)

Sd/-
(सी एम गर्ग)
(C.M.GARG)

लेखा सदस्य/Accountant Member

न्यायिक सदस्य/Judicial Member

सूरत / Surat; दिनांक Dated : 23rd August, 2018/ S.Gangadhara Rao, Sr.PS

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

1. अपीलार्थी/The Appellant; 2. प्रत्यर्थी /The Respondent; 3. आयकर आयुक्त(अपील) /The CIT(A)-1, Surat; 4. Prl. CIT, Surat; 5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, सूरत / DR, ITAT, Surat; 6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक पन्जीकर / **Assistant Registrar**
आयकर अपीलीय अधिकरण, सूरत / ITAT, Surat