

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.2731 to 2733/PUN/2016
निर्धारण वर्ष / Assessment Years : 2008-09, 2010-11 & 2012-13

ACIT, Circle-2,
Kolhapur.

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. RDS Construction Co.,
233/3, Malati Towers,
Tarabai Park, Kolhapur-416003.

PAN : AABFR4457M

.....प्रत्यर्थी / Respondent

Revenue by : Shri Sanjeev Ghai
Assessee by : Shri Nikhil Pathak

सुनवाई की तारीख / Date of Hearing : 11.03.2019

घोषणा की तारीख / Date of Pronouncement : 08.05.2019

आदेश / ORDER

PER D. KARUNAKARA RAO, AM:

There are three appeals under consideration. ITA Nos.2731 & 2732/PUN/2016 filed by the Revenue are against the common orders of CIT(A)-2, Kolhapur dated 26.09.2016 u/s 271(1)(c) of the Act for the assessment years 2008-09 and 2010-11 respectively. ITA No.2733/PUN/2016 filed by the Revenue is against the order of CIT(A)-2, Kolhapur u/s 143(3) of the Act for the assessment year 2012-13.

ITA Nos.2731 & 2732/PUN/2016 (A.Ys. 2008-09 & 2010-11)

2. First, we shall take up the appeals for the assessment years 2008-09 and 2010-11. In both the appeals, the Revenue raised the identical

grounds. For the sake of completeness, the grounds in ITA No.2731/PUN/2016 are extracted hereunder :-

“1. On the facts and in the circumstances of the case and in law, the CIT(A) was not justified in deleting the penalty u/s. 271(1)(c) levied by the Assessing Officer, ignoring the fact that assessee had filed its return of income including additional income declared during the survey u/s. 133A after issue of notice u/s. 148 of the IT Act, 1961.

2. On the facts and in the circumstances of the case and in law, the CIT(A) was not justified in deleting the penalty u/s. 271 (1)(c) levied by the AO, following the decision of ITAT, Pune Bench in the case of Dilip Yeshwant Oak (2011) 010 taxman.com 264, by not considering the fact that the facts of both the cases are distinguished.

3. The appellant prays that the order of the CIT(A) be vacated and that order of the Assessing Officer may be restored.

4. The appellant craves leave to add, alter, amend or modify the above grounds raised, any other grounds at the time of proceedings before the Hon'ble Tribunal which may kindly be granted.”

3. Ground nos.3 and 4 raised by the Revenue in the appeals for the assessment years 2008-09 and 2010-11 are general. Therefore, the ground nos.3 and 4 are dismissed in both the appeals.

4. The effective ground nos.1 and 2 raised by the Revenue in both the appeals for the assessment years 2008-09 and 2010-11 relating to the penalty u/s 271(1)(c) of the Act which was deleted by the CIT(A).

5. The background facts of the case include that the assessee is engaged in trading in AC Sheets. There was a survey action u/s 133A of the Act on 04.01.2013. The survey action resulted in discovery of booking of bogus purchases. The assessee offered Rs.2,22,00,712/- as additional income for the assessment year 2008-09 and Rs.1,61,93,716/- for the assessment year 2010-11. During the assessment years under consideration, the assessee complied with the

said declaration. Accordingly, the reassessment was completed accepting the revised income filed by the assessee. Thus, the reassessment has become final without further addition. However, the Assessing Officer initiated the penalty proceedings u/s 271(1)(c) of the Act giving the following satisfaction :-

“6. There is concealment on the part of the assessee in view of survey u/s 133A of the Act..... Therefore, penalty proceedings u/s 274 r.w.s. 271(1)(c) is being initiated separately.”

The satisfaction is common in both the years.

6. In the penalty order for both the years, the Assessing Officer levied the penalty of Rs.68,60,020/- for the assessment year 2008-09 and Rs.50,03,858/- for the assessment year 2010-11. In this regard, we examined para 8 of the penalty order where the Assessing Officer levying the penalty for concealment of particulars of its income. For the sake of completeness, the relevant lines from the said para 8 of the penalty order is extracted hereunder :-

“8. the assessee has concealed the particulars of its income thereby making him liable for levy of penalty within the meaning of section 271(1)(c) of the Act on Rs.2,22,00,712 being unexplained purchases.”

Similar lines mentioned by the Assessing Officer in para 8 of the penalty order for the assessment year 2010-11.

7. The CIT(A) deleted the said penalty in both the appeals of the Revenue relying on the decision of Pune Bench of the Tribunal in the case of Dilip Yeshwant Oak (2011) 010 taxmann.com 264.

8. Aggrieved with the above decision of the CIT(A), the Revenue is in appeals before the Tribunal with the above extracted grounds.

9. Explaining the above facts of the case deviating from the said ground (supra), ld. Counsel for the assessee submitted that this a case of bogus purchases made from the suppliers whose names are appeared in the Website maintained by the Sales Tax Department of Maharashtra Government. During the survey action, the assessee offered the said purchases as additional income of the assessee and the same became final in the reassessment itself. It is undisputed fact that the assessee paid relevant taxes and the entries obviously apparent on the face of the books of account of the assessee and the return of income is evidenced in this regard. Further, mentioning that the entries are apparent out of the books of account/returns of income and in that case the Assessing Officer cannot initiate the penalty proceedings for the default of concealment of income as no income is concealed. The fact of claim of bogus purchases is evident on the face of the books of account/bank statements/returns of income of the assessee is right limb that could have been invoked in this case should be the furnishing of inaccurate particulars of income and not concealment of income. The onus uses by the Assessing Officer in the reassessment order as well as in the penalty order is fully objectionable and there is no consistency as evident from the relevant paragraphs extracted above. Further ld. Counsel submitted that in the case of bogus purchases the correct limb should have been mentioned for furnishing of inaccurate particulars. The ld. Counsel relied heavily on the Co-ordinate Benches decision in the case of M/s. Oriental Clearing Agencies vs. DCIT vide ITA Nos.356 to 359/PUN/2015

for the assessment years 2005-06 to 2007-08 & 2010-11 dated 10.11.2017. Narrating the commonality of the facts, ld. Counsel read out the contents of para 2.2, para 7, para 8 and para 12 of the said decision of the Tribunal (supra). The ld. counsel mentioned that this is also the case where bogus purchase was offered as income of the assessee and the penalties were initiated for concealment of income. On these facts, the Tribunal held in this case stating that the penalty u/s 271(1)(c) of the Act initiated and levied under the wrong charge and the same is unsustainable. The Tribunal relied heavily on the Hon'ble Gujarat High Court judgement in the case of Nayan C. Shah vs. ITO, 69 taxmann.com 256 (Gujarat) and the decision of the Co-ordinate Bench of the Tribunal in the case of Anand Vipin Sanghavi vs. DCIT in ITA Nos.2183 to 2185/PUN/2014 for the assessment years 2007-08 to 2009-10 dated 31.10.2017. For the sake of the completeness, we proceed to extract the relevant para 12 of the said order of the Tribunal in the case of M/s. Oriental Clearing Agencies (supra) and the same are extracted hereunder :-

"12. Where the assessee has completely withheld information about the income generated and there is no mention of such income either in the books or the return of income, such suppression of income would fall within the expression „concealment of income“. It is not so in the present case. The assessee has made wrongful claim of bogus expenditure, therefore, it would be a case of furnishing of inaccurate particulars of income. Thus, in our considered view the Assessing Officer while recording satisfaction for levying penalty has erred in invoking wrong limb of section 271(1)(c). Consequently, the penalty has been levied under wrong charge for concealment of income. It is a case of furnishing of inaccurate particulars of income and not concealment of income. Since, the penalty u/s. 271(1)(c) has been levied on wrong charge, the same is unsustainable. Accordingly, the impugned order is set aside and the appeal of assessee is allowed.

10. From the above ratio of the decision of the Tribunal (supra), it is evident that the issue is very much identical to the issue of the present appeals, which is for adjudication before us. In the case of bogus purchase, the correct charge/correct limb should have been the one relating to the default of furnishing of inaccurate particulars of income and not the concealment of income as the bogus purchases are very much recorded in the books of account.

10.1 Considering the above, we are of the opinion, the penalty levied by the Assessing Officer in both the appeals are unsustainable on legal issue. Therefore, we find the orders of the CIT(A) in both the years are fair and reasonable and they do not call for any interference. Accordingly, the grounds raised by the Revenue for both the assessment years i.e. A.Y. 2008-09 and 2010-11 stands dismissed on technical ground. Considering the relief, we find it inappropriate to adjudicate the issue on the merits of the penalty. Accordingly, the grounds are dismissed as academic.

11. In the result, both the appeals of the Revenue in ITA Nos.2731 & 2732/PUN/2016 are dismissed.

ITA No.2733/PUN/2016 (A.Y. 2012-13)

12. The grounds raised by the Revenue in this appeal are as under :-

*“1. On the facts and in the circumstances of the case and in law, was the CIT(A) correct in holding that assessee is **eligible for deduction u/s. 80IA(4)(iv)** on his business profit **without setting off** his earlier years’ business losses / unabsorbed depreciation which have already been set off against income from other business / sources and provisions of sec. 80IA(5) are applicable only for initial assessment year ?*

2. *The appellant prays that the order of the CIT(A) be vacated and that order of the Assessing Officer may be restored.*

3. *The appellant craves leave to add, alter, amend or modify the above grounds raised, any other grounds at the time of proceedings before the Hon'ble Tribunal which may kindly be granted."*

13. Briefly stated the relevant facts include that the assessee is a firm engaged in the business of civil engineering, contractors and electricity generation through windmill. The assessee filed the return of income declaring total income of Rs.12,66,41,326/-. The assessment was completed u/s 143(3) of the Act on 11.03.2015. In the assessment order, the Assessing Officer denied the claim of deduction u/s 80IA(4)(iv)(a) of the Act as per the discussion given in para 4 to 4.3 of the assessment order. The assessee claimed the set off of loss pertaining to the 'windmill unit' against the profits of 'other undertaking' of the assessee. The same is not in tune with the provisions of section 80IA(5) of the Act.

The CIT(A) granted relief to the assessee as per the discussion given in para 6 of his order. While granting relief to the assessee, the CIT(A) relied heavily on the order of the Pune Bench of the Tribunal in **assessee's own case** in ITA Nos.377 to 383/PN/2013 for the assessment years 2004-05 to 2010-11 dated 06.11.2015. The CIT(A) also extracted para 135 and 136 of the said order of the Tribunal for the assessment year 2010-11 (supra). In-fact, the Tribunal followed the precedent in the case of Poonawal Estate Stud & Agro Farm Pvt. Ltd., 48 DTR 210 (Pune). The contents of para 8 of the CIT(A)'s order are relevant in this regard.

14. Bringing our attention to another order of the Tribunal in assessee's own case for assessment year 2011-12 vide ITA

No.135/PUN/2016 dated 09.04.2018, ld. Counsel for the assessee submitted that the above referred precedents were followed while giving the relief to the assessee in this year also and the appeal of the Revenue was dismissed by the Tribunal rejecting the arguments of the ld. DR in that case. The contents of para 10 and 11 are relevant in this regard. For the sake of completeness of this order, the said para 10 and 11 are extracted hereunder :-

*“10. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is the allowability of deduction under section 80IA(4)(iv)(a) r.w.s. 80IA(5) of the Act. The assessee had set up first windmill in assessment year 2006-07 and the second windmill in assessment year 2007-08. In the initial years, there were losses from windmill activity. The assessee was simultaneously carrying on business of civil construction, from which the assessee was making profits. The said losses were adjusted against the income arising from other business activity of the assessee. For the first time, the windmill activity had shown profit in assessment year 2010-11 and the assessee claimed deduction under section 80IA(4) of the Act. The said year i.e. assessment year 2010-11 was the initial assessment year for claim of deduction under section 80IA(4) of the Act. The CIT(A) at page 22 has given a finding that there **were no brought forward losses in the hands of assessee** and the same **were adjusted upto assessment year 2009-10**. The Assessing Officer for assessment year 2010-11 had not allowed the claim of deduction on account of windmill activity. However, the CIT(A) and the Tribunal thereafter, allowed the claim of deduction.*

*11. The issue which is raised in the present appeal is the aforesaid claim of deduction under section 80IA(4)(iv)(a) of the Act in respect of windmill business. The Tribunal in assessee's own case (supra) in assessment year **2010-11 had already allowed the claim of assessee**. The case of Revenue is that the losses of earlier years if have not been absorbed, then the same have to be adjusted against the undertaking before allowing deduction under section 80IA(4)(iv)(a) of the Act. **The CIT(A) in the present case has given a finding that there were no brought forward losses in the hands of assessee, which in any case were adjusted upto assessment year 2009-10**. The said findings of CIT(A) have not been controverted by learned Departmental Representative for the Revenue except to stress that the same needs verification. We find no merit in the plea of learned Departmental Representative for the Revenue in this regard, especially where in assessment year 2010-11 which was the preceding year to the instant assessment year, the claim of deduction has been allowed in the hands of assessee. It may also be pointed out herein itself that the assessee was running civil construction activity from which it was showing profits from year to year and the losses arising from windmill in the earlier years have already been set off against the said income and the balance income had been assessed in the hands of assessee. It is not case of Revenue that after adjustment of losses in the respective years the assessee had shown any losses. There is no*

merit in the order of Assessing Officer in holding that deemed losses have to be adjusted against profits of undertaking. In view thereof, we hold that the assessee was entitled to the claim of deduction under section 80IA(4)(iv)(a) of the Act. The grounds of appeal raised by the Revenue are thus, dismissed.”

15. Considering the above, we find it is obviously settled issue that the assessee is entitled to claim deduction u/s 80IA(4)(iv)(a) of the Act. Accordingly, the grounds raised by the Revenue are dismissed. Thus, the order of the CIT(A) is fair and reasonable. No interference is called for. Accordingly, the grounds raised by the Revenue are dismissed.

16. In the result, the appeal of the Revenue in ITA No.2733/PUN/2016 for the assessment year 2012-13 is dismissed.

17. Resultantly, all the three appeals of the Revenue are dismissed.

Order pronounced on 08th day of May, 2019.

Sd/-
(विकास अवस्थी /VIKAS AWASTHY)
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-
(डी. करुणाकरा राव/D. KARUNAKARA RAO)
लेखा सदस्य/ACCOUNTANT MEMBER

पुणे / Pune; दिनांक / Dated : 08th May, 2019.

Sujeet

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Kolhapur.
4. The CCIT, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, “ए” बेंच, पुणे / DR, ITAT, “A” Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.