

IN THE INCOME TAX APPELLATE TRIBUNAL “C”, BENCH MUMBAI

BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

&

SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.2313/Mum/2018

(Assessment Year: 2010-11)

POSCO Maharashtra Steel Pvt.Ltd. 1 st Floor, Head Office Plot No.C-1 Vile Bhagad Industrial Area Mangaon, Raigad Maharashtra-412 107	Vs.	DCIT, Panvel Circle Aaykar Bhawan Mumbai-400 020
PAN/GIR No.AAEC9855H		
Appellant)	..	Respondent)

Assessee by	Neelkanth Khandelwal
Revenue by	Abi Rama Kartikeyan
Date of Hearing	15/07/2019
Date of Pronouncement	11/10/2019

आदेश / ORDER

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-2, Mumbai, dated 30/01/2018 and it pertains to the Assessment Year 2010-11.

2. The assessee has raised the following grounds of appeal:-

1. On the facts and in the circumstances of the case and in law the CIT(A) ought to have held that the assessing officer had not complied with the provisions of section 274(1) of the Act by not granting assessee reasonable opportunity of being heard and hence the penalty levied under section 271(1)(c) of the Act is bad in law.

2. *On the facts and in the circumstances of the case and in law, the CIT(A) ought to have held that the assessing officer had not complied with the provisions of section 274 of the Act r.w.s. 271(1)(c) since the assessing officer erred in levying penalty without explicitly mentioning in the penalty notice the reason for initiating penalty proceedings.*

It is humbly submitted that the initiation of proceedings u/s 271(1)(C) of the Income-tax Act, is not valid as the assessing officer erred in not striking off the inappropriate portion of the notice. The assessing officer ought to have struck off the inappropriate portion and indicated to the assesses the applicable portion in the notice.

Therefore, as the Notice u/s 271(1) (c) is bad in law, the penalty levied needs to be cancelled.

3. *On the facts and in the circumstances of the case and in law the CIT(A) has erred in upholding the penalty levied u/s 271(1)(c) irrespective of the fact that the assessee did not conceal the income and did not submit inaccurate particulars of income and also the interest received by the assessee is to be treated as capital receipt in the hands of the assesses and also overlooked the judicial decisions.*

The above grounds are independent and without prejudice to one another.

Your appellant craves to add, alter, amend or delete any of the grounds of appeal.

3. The brief facts of the case are that the assessee company was in the process of setting up a manufacturing project at Vile Bhagad in the state of Maharashtra for manufacturing galvanized and galvanneled coils. The company was expected that the project would be setting up by the end of financial year 2011-12. In order to effectuate the purpose, M/s POSCO Co. Ltd, Korea ("the parent company") contributed share capital of Rs. 252.17 crores. The funds are used primarily for purchase of acquisition of land and development for infrastructure, however the company could not utilize the funds for the stated purpose and hence, deposited surplus

funds in a fixed deposits in HDC Bank and Shinhan Bak and earned interest income of Rs. 1,21,63,944/-. The assessee has treated interest earned from fixed deposits as capital receipt and set up against pre-operative expenses and arrived at net loss of Rs. 2,73,64,272/-. During the course of assessment proceedings, the Ld. AO called upon the assessee explain as to why interest income earned from fixed deposits shall not be treated as income from other sources. The AO, after considering explanation of the assessee, observed that there was no nexus between interest earned from fixed deposits and business activity of the assessee and accordingly, assessed interest income amounting to Rs. 1,21,63,944/- under the head income from other sources. The assessee has filed an appeal before the first appellate authority, however could not succeed. The Ld.CIT(A) dismissed appeal filed by the assessee and affirmed additions made by the AO towards interest income. Thereafter, penalty proceedings u/s 271(1)(c) of the I.T.Act,1961 was initiated and accordingly, a show- cause notice, dated 19/02/2016 was issued u/s 274 r.w.s. 271(1)(c) of the I.T.Act, 1961. In response, the Ld. AR of the assessee filed a letter and requested for short adjournment, however could not file any explanation. The Ld. AO after considering relevant submissions of the assessee and also taken note of provisions of Explanation-1 to section 271(1)(c) held

that without any sufficient reasonable cause, the assessee has committed default by furnishing inaccurate particulars of its income and accordingly, opined that it is a fit case for levy of penalty u/s 271(1)(c) and hence, levied penalty of Rs. 41,63,924/-, which is 100% of tax sought to be evaded. The relevant findings of the Ld. AO are as under:-

4. The proposition laid down by the appellate authorities is that interest received by a company which carries on business, from bank deposits and loans could only be taxable as "income from other sources" and not as "business income. The income derived by an assessee has to be fitted under one or other head having regard to the source from which that Income is derived. It is the manner in which the Income is derived that is relevant and not merely the fact that the persons are engaged in a business or in a profession. Moreover, the assessee had not deposited money by way of money lending business therefore the Interest earned on fixed deposits added under the head of Income from other sources. It was clear intention of the assessee to set off the expenses debited into P&L A/c against the interest income. Such Interest income was deliberately routed through P&L A/c so that the expenses could be claimed. The assessee had earned interest income which is chargeable to tax under the head income from other sources instead of the head income from business. Had the case was not selected for scrutiny, the income earned by way of Interest would have been escaped. The said discrepancy came into light only when the AO asked about the said Income during assessment proceedings. This laid to form a belief that the assessee has consciously or deliberately shown the interest on fixed deposit under the head income from business. The entirety of circumstances reasonably point to the conclusion that the amount added represents income derived from other sources and that the assessee has consciously or deliberately shown Income from business thereby furnished inaccurate particulars of Income. Thus the assessee has committed default under section 271(l)(c) r,w,s, 274 of the I.T Act 1961, as per the View held by the Hon. Supreme Court too in various decisions.

5. In view of the above, the assessee has committed a default within the meaning of Section 271(1)(c) of the I.T.Act, 1961 read with Explanation-1. The same is applicable in the assessee's case as reproduced below:

*"Explanation-1 - Where In respect of any facts material to the computation of the total income of any person under this Act -
 (A) such person fails to offer any explanation or offers an explanation which is found by the (Assessing) Officer or the (Commissioner of Appeals) (or the Commissioner) To be false or;
 (B) such person offers an explanation which he is not able to substantiate (and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him*

Then the amount, added, or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed".

6. The facts fall under above clause 'A' as the assessee failed to offer an explanation in respect of facts which are material to the computation of its total Income. I am satisfied that without any sufficient and reasonable cause the assessee has committed default by furnishing inaccurate particulars of its Income as defined u/s 271(1) (c) of the I.T Act. Considering the facts of the case and provisions of explanation-1 to Section 271(1)(c), I am satisfied that the assessee has furnished inaccurate particulars leading concealment of income. The minimum and maximum penalty leviable is at 100% being Rs, 41,37,199/- and at 300% being Rs. 1,24,11,597/- respectively. Keeping in view of the facts of the case, I, therefore, levy a minimum penalty of Rs 41,37,200/- (Forty one Lakh Thirty Seven Hundred Only) being 100% of the tax sought to be evaded.

Working of penalty:-

(i) Assessed Income including concealed Income: Rs.1,22,50,436/-

(ii) Tax on assessed Income including concealed Income: Rs. 41,63,924/-

(iii) Assessed Income excluding concealed Income: Rs. 86,49,000/-

(iv) Tax on assessed Income excluding concealed Income; Rs. 26,72,500/-

Difference between (ii) and (iv) above: Rs. 41,37,199/-

Minimum penalty 100% .. Rs. 41,37,199/-

Maximum penalty 300%.. Rs. 1,24,11,597

4. Aggrieved by the penalty order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee has filed elaborate written submissions on the issue, which has been reproduced at Para 4 on pages 4 to 9 of the Ld.CIT(A) order. The sum and substance of arguments of the assessee before the

Ld.CIT(A) are that a claim, which was not substantiated *per se* cannot leads to conclusion that the assessee has furnished inaccurate particulars of income. The Ld.CIT(A) after considering relevant submission of the assessee and also by relied upon various judicial precedents rejected legal arguments taken by the assessee, in light of certain judicial precedents and held that the assessee has furnished inaccurate particulars of income by not offering interest income for tax, thereby committed default within the meaning of section 271(1)(c) of the I.T.Act 1961 r.w.s. Explanation-1 and accordingly, confirmed penalty levied u/s 271(1)(c) of the I.T.Act, 1961. The relevant findings of Ld.CIT(A) are as under:-

5. I have carefully considered the facts of the case, findings of the A.O., provisions of section, submissions of the appellant, the observations of the AO in the penalty order, case laws relied upon and material placed on record. As regards the request for admission of additional ground-that the penalty levied is bad in law as the AO had failed to mention in the penalty notice-whether the penalty notice was issued for concealment of income or for filing of inaccurate particulars of income is concerned it is held that the same is not admissible in view of the decision of the Hon'ble ITAT in the case of Earthmoving equipment services Corporation vs. DCIT 22(2) Mumbai (ITA No.6617/u/2014) where the Hon'ble ITAT Mumbai Bench 'E' vide order dated 02.05.2017 in which the above claim was dismissed by holding that in the assessment order as well as in penalty order the AO had specifically brought out the facts for which the penalty was initiated and levied. In this case also in the assessment order as well as in the penalty order the AO has clearly brought out on record the fact that the penalty was initiated and levied for filing of inaccurate particulars of income. It is further noticed that the appellant has never raised this issue before the AO therefore, the same cannot be entertained at this stage. In this regard I would like to place my reliance on the ratio laid down in the case of M/s Nokia India (P) Ltd. Vs DCIT (2015) 59 Taxann.co 2012. Accordingly, the additional ground raised by the appellant is not admissible, therefore, dismissed.

5.1 During assessment proceedings the AO noticed that this is a first year of the appellant's business and the business activities could not be started due to delay in acquiring the land and other infrastructure. In view of these facts the appellant had parked its surplus share capital/funds in the bank, in the form of FDRs. Against these FDRs the appellant had earned interest income of Rs. 1,22,50440/- and capitalized with a plea that the same had been earned out of share capital. After considering the contention of the appellant, the AO, assessed the interest income of Rs. 122,50440/- under the head "income from other sources." By holding that interest on Fixed Deposits are not incidental to the business of the appellant, as the appellant is engaged in business of manufacturing of galvanized steel.

5.2 The AO also initiated penalty proceedings u/s 271(1)(c) of the Act, for furnished inaccurate particulars of income. The appellant preferred first appeal before the CIT(A) 4 Mumbai, against the order passed u/s 143(3) of the Act. The Ld.CIT(A)-4, Mumbai, vide order dated 11.11.2014 dismissed the appeal of the appellant by giving detailed finding. On receipt of the order of the CIT(A) the AO issued a show-cause on 19.06.2016, which was duly served upon the appellant. In compliance the Ld. AR requested for short adjournment and the same was allowed. On given date the appellant, however, did not file any explanation thereafter, till the date of finalization of penalty order. Accordingly, the AO levied minimum penalty of Rs. 4137200/-, being 100% tax sought to be evaded, for furnishing inaccurate particular of income.

5.3 During the appellate proceedings it was claimed that the funds were acquired primarily for purchase of land and development of infrastructure however, due to legal entanglements with respect to acquisition of land and other set-up activities the same was parked with the bank in the form of fixed deposit, on which interest of Rs. 1,21,63,944/- was earned. It is claimed that the funds were placed in fixed deposit so that liquidity was ensured and money would remain available whenever required for purchase of land, infrastructure and other set-up activities, therefore, the same was treated as capital receipts and set off against pre-operative expenses. As regards levy of penalty is concerned it was claimed that mere making of a claim which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars. The appellant placed reliance on the ruling in the case of T Ashok Pai Vs CIT 161 Taxman 340 292 ITR 11(SC), Supreme Court in the case of CIT vs Reliance Petro Products Pvt.Ltd. and so on.

5.4 From the above facts it is seen that the appellant had parked its surplus share capital in the banks, in the form of fixed deposits and earned interest income there from. The same was not offered for tax with the plea that it had been earned against share capital and would be used for capital investment. As per rulings of the various courts, including Supreme Court in the usual course, the interest received against surplus deposits, required to be taxed under the head "Income from Other sources" u/s 56 of the Act. In this regard I would like to place my reliance

on the ruling of the Hon'ble ITAT in the case of Thermal Powertech Corpn. India Vs DCIT (2017) taxmann.com 168 (Hyderabad Trib.) (2017)/164 ITD 449, wherein it is inter-alia, held that-"where assessee-company formed to build own and operate a power plant deposited unutilized borrowed funds in short term fixed deposits during the construction of power plant interest earned on those deposits would be taxed as income from other sources".

5.5 The fact that a person/entity carried on business does not lead to inference that all the income received by such person/entity is business income. It is the manner in which income is derived that is relevant and not merely the fact that the person/entity are engaged in the business. In light of above discussion, the contention of the appellant to treat the income earned against fixed deposits, as capital asset, as it had not started the business, is not tenable. The case laws cited by the appellant are distinguishable, as in appellant's case it had surplus fund which was parked with the bank, thereby earned the interest income which is liable to be assessed as income from other sources, hence not applicable to the fact of the present appeal. Had this case not been picked up for scrutiny, then the taxable income, to this extent would have escaped the assessment.

5.6 In view of the above discussions and having regard to the facts and circumstances of the case, I am of the considered view that the appellant has furnished inaccurate particulars of income by not offering the above income for tax thereby committed default within the meaning of section 271(1)(c) of the Act r.w. Explanation 1. Accordingly, this is a fit case for imposition of penalty u/s 271(1)(c) of the Act and the AO has rightly levied minimum penalty of Rs. 4137200/-, as per provisions of Sec 271(1)(c) of the Act, therefore, the same is upheld and all the above grounds of appeal are dismissed.

5. The Ld. AR for the assessee submitted that the Ld.CIT(A) was erred in confirmed penalty levied u/s 271(1)(c) of the I.T.Act, 1961 without appreciating the facts in right perspective and also, various judicial precedents cited by the assessee that in absence of proper satisfaction and also, notice no penalty can be levied u/s 271(1)(c) of the I.T.Act, 1961. The Ld. AR, further submitted that the Ld.CIT(A) has failed to appreciate the fact that the Ld. AO had not complied

with the provision of section 274 r.w..s. 271(1)(c) of the I.T.Act, 1961 since the Ld. AO erred in levying penalty without explicitly mentioning in the penalty notice, the reasons for initiating penalty proceedings. The Ld. AR, further submitted that even on merits, the Ld.CIT(A) was erred in upholding the penalty irrespective of the fact that the assessee did not conceal income and did not submit inaccurate particulars of income and also, the interest received by the assessee is to be treated as capital receipt in the hands of the assessee ignoring certain judicial decisions. In this regard, he relied upon the following judicial decisions:-

- i) Meherjee Cassinath Holdings Vs ACIT in ITA No. 2555/Mum/2012
- ii) Rekha Bhupendra Dalal vs DCIT in ITA No. 3363/Mum/2016.

6. The Ld. DR, on the other hand strongly supported order of the Ld.CIT(A).

7. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. As regards, preliminary objections of the assessee, in light of show cause notice issued by the AO u/s 274 r.w.s. 271(1)(C) of the

I.T.Act, 1961, dated 30/01/2014, we find that although, the assessee has challenged the validity of penalty proceedings, in light of non striking of irrelevant portion in the notice u/s 274, but, fact remains that the Ld. AO had issued further show-cause notice, dated 19/02/2016, for which the assessee neither filed any explanation nor justified its case in light of Explanation-1 to section 271(1)(c) of the I.T.Act 1961. We, further noted that the Ld. AO has arrived at proper satisfaction, in respect of additions made towards interest income on fixed deposits at the time of assessment proceedings, where he had initiated penalty proceedings u/s 271(1)(c) for furnishing inaccurate particulars of income leading to concealment of income. We, further noted that the Ld. AO had levied penalty u/s 271(1)(c) for furnishing inaccurate particulars of income leading to concealment of income. Therefore, once a proper satisfaction has been arrived at before initiation of penalty proceedings or any time during proceedings, then subsequent issue of show-cause notice is a formality to communicate the assessee about initiation of penalty proceeding. Further, in this case, the Ld. AO had issued one more show-cause notice and also, called upon the assessee to explain why penalty proceedings shall not be initiated for furnishing inaccurate particulars of income, for which no compliance from the assessee. Therefore, we are of the considered view that once, a proper

satisfaction has been arrived at before initiation of penalty proceedings, and then a defect in notice including mere non-striking of irrelevant portion in the notice does not invalidate the penalty proceedings. Although, the assessee has cited certain judicial precedents, including the decision of ITAT Mumbai 'B' Bench, in the case of Mehrjee Cassinath Holdings Pvt.Ltd. vs ACIT(supra), we find that facts of the present case are entirely different from the case laws relied upon by the assessee and hence, are not considered as applicable to the case of the assessee. We, further noted that the ITAT, Mumbai in the case of M/s. Earthmoving Equipment Services Corporation vs DCIT in ITA No.6617/Mum/2014 had considered an identical issue and held that when, proper satisfaction has been recorded in the assessment order, as well as in the penalty order then mere non striking of notice or vague notice does not invalidate penalty proceedings. Therefore, we are of the considered view that there is no merit in legal arguments taken by the assessee and hence, ground no. 1 and 2 are rejected.

8. Coming to penalty levied in respect of additions made towards interest income earned from fixed deposits. The fact that a person/entity carried on business does not lead to inference that all the income received from such persons/entity is assessable under

the head income from business. It is the manner in which income is derived is relevant to decide the head of income, but not merely the fact that persons/entity are engaged in the business. In light of the above legal position, if you examine the case of the assessee, it is abundantly clear that the assessee has parked its surplus funds in the banks in form of fixed deposits and earned interest income. Further, although interest income from fixed deposits is assessable under the head income from other sources, the assessee has treated said interest income as capital receipts and set up against pre-operative expenses without offering interest income for tax. Therefore, we are of the considered view that the assessee has furnished inaccurate particulars of income, in respect of interest income earned from fixed deposits, which warrants levy of penalty u/s 271(1)(c) of the I.T.Act, 1961. Further, the assessee has also failed to offer any explanation in response to a show cause notice thereby committed default within the meaning of Explanation-1 to section 271(1)(C) of the I.T.Act, 1961. Therefore, we are of the considered view that there is no error in penalty levied u/s 271(1)(c) and accordingly, the Ld.CIT(A) was right in affirmed penalty levied by the Ld. AO. Hence, we are inclined to uphold the findings of the Ld.CIT(A) and reject ground taken by the assessee.

9. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on this 11 /10/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Mumbai; Dated 11 /10/2019
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai