

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं/ I.TA No.1458/Mum/2018

(निर्धारण वर्ष / Assessment Year:2012-13

Assistant Commissioner of
Income Tax, Circle-1,
Thane.

Vs. M/s.Everest Industries Ltd.,
D-206,Sector-63,
Noida,Uttar Pradesh 201 307.

(Appellant)

PAN: AAACE 7550 N

(Respondent)

अपीलार्थी ओर से/ Appellant by : Shri R.Manjunatha Swamy,CIT D.R
Shri Rajesh Kumar Mishra,DR

प्रत्यर्थी की ओर से/Respondent by: Shri Ajit Kumar Jain A.R
सुनवाई की तारीख / Date of Hearing : 28.08.2019
घोषणा की तारीख /Date of Pronouncement : 25.11.2019

आदेश / O R D E R

PER RAJESH KUMAR ACCOUNTANT MEMBER

The only issue raised by the Revenue in various grounds of appeal is against the action of Id.CIT(A) in deleting the penalty of Rs.6,74,44,736/- levied u/s.271(1)(c) of the Act by the AO.

2. The facts in brief are that the assessment in this case was framed vide order dated 26.03.2015 passed u/s.143(3) of the Act assessed the total income at Rs.22,78,74,050/- wherein the additions /disallowances to the tune of Rs.45,43,88,101/- were made by the AO and the book profit u/s.115JB of the Act was calculated at Rs.62,91,47,716/- . The tax as per book profit u/s.115JB of the Act was more than the tax as per the normal provisions of the Act. The AO vide order dated 30.09.2015 imposed the penalty of Rs.15,44,46,515/- u/s.271(1)(c) of the Act being 100% of the tax evaded on the basis additions made under the normal provisions of the Act. The said order of the AO was challenged before the Id.CIT(A), who deleted the penalty as imposed by the AO by relying on the decision of the

Hon'ble Delhi High Court in the case of Nawla Sons Investment reported in [2010] 194 Taxman 387 (Delhi) and CBDT Circular No.25/2015 dated 31.12.2015 and also the decision of the predecessor in A.Y. 2008-09 in assessee own case. The relevant portion of the Id.CIT(A)'s order is extracted below:-

"7. I have carefully considered the appellant's submissions, observations of the AO in the assessment order and the penalty order and the facts of the case. The AO has imposed penalty in this case u/s.271(1)(c) of the Act amounting to Rs.15,44,46,515/- with respect to additions made in the assessment order under the normal provisions of the Act amounting to Rs.45,43,88,101/-. The submissions of the appellant on various grounds of appeal have already been summarized above. Ground No.6 of the appellant's appeal is being taken up first and is discussed as under:-

7.1. In this ground the appellant has submitted that the returned income for the year under consideration was Nil. Therefore the appellant had paid tax on book profit u/s.115JB of the Act. In the order u/s.143(3), the AO has disallowed various claims of appellant and computed total income under normal provisions of s.115JB at RS.62,91,47,716/-. Even after disallowances being made by the AO in the assessment order, tax continued to be paid as per section 115JB of the Act. Therefore, according to the appellant there was no tax sought to be evaded and hence no penalty u/s.271(1)(c) of the Act could be levied in its case. In this regard, it is seen that the CBDT has issued Circular No.25/2015 which reads as under:-

"Subject: Penalty u/s.271(1)(c) wherein additions/disallowances made under normal provisions of the Income Tax Act,1961 bu tax levied under MAT provisions u/s.115JB /115JC for cases prior to A.Y 2016-17-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, the Hon'ble Delhi High Court in its judgement dated 26.08.2010 in ITA No.1420 of 2009 (2010) 194 taxman 387 (Delhi) in the case of Nalwa Sons Investment Ltd. (available in NRJS as 2010-LL-0826-2), held that when the tax payable on income computed under normal procedure is less than the tax payable under the deeming provisions of section 115HB of the Act, then penalty u/s.271(1)(c) of the Act could not be imposed with reference to additions/disallowance made under normal provisions. The judgement has attained finality.

4. Subsequently, the provisions of Explanation 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.1.4.2016.

5. Accordingly, in view of the Delhi High Court judgement 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 u/s.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 115JC 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 courts/Tribunals may be withdrawn/not pressed upon. This may be brought to the notice of all concerned."

7.2 In the appellant's case as the income tax payable on the total income as computed under normal provisions of the Act after taking into account the disallowances made by the AO in order u/s.143(3) is less than the tax payable on the book profits u/s.115JB of the Act, therefore, in view of the above Circular no penalty u/s.271(1)(c) of the Act, can be imposed with reference to additions/disallowances made under normal provision of the Act.

7.3 Further, similar issue was decided by my predecessor in penalty appeal for A.Y. 2008-09, in favour of the appellant, by holding as under:-

"In the appellant's case as the income tax payable on the total income as computed under the normal provisions of the Act after taking into account the disallowances of additional depreciation made by the AO in order u/s.143(3) and confirmed by Id.CIT(A), is less than the tax payable on the book profits u/s.115JB of the Act, therefore, in view of the above circular no penalty u/s.271(1)(c) of the Act can be imposed with reference to additions/disallowances made under normal provisions of the Act. The AO is therefore directed to delete the penalty u/s.271(1)(c) imposed in this case amounting to Rs.2,42,91,160/-."

7.4. Since the facts and circumstances, in this year, are also identical, therefore by placing reliance on the Apex court judgement in the case of Nalwa Sons Investment, CBDT Circular No.25/2015 dated 31.12.2015 and the decision of my predecessor in A.Y 2008-09, I hereby direct the AO to delete the penalty u/s.271(1)(c) imposed in this case."

3. After hearing both the parties and perusing the material on record, we find that the AO has imposed the penalty on the basis of additions made to the income of the assessee under the normal provisions of the Act whereas the tax has in fact been paid by the assessee as per provisions of MAT . In the assessment order the tax as per MAT provisions was more than the tax as per the normal provisions of the Act. Ld.CIT(A) has given a very clear cut findings that in case, the tax payable on the 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 u/s.271(1)(c) of the Act, would not be imposed with reference to the additions/disallowances made under normal provisions of the Act. Further, we find that Ld.CIT(A) relied on the CBDT Circular No.25/2015 dated 31.12.2015, which also provided for non-levy of penalty where the income tax payable under the normal provisions of the Act is less than the income tax payable under MAT u/s.115JB of the Act. We further find that the

Finance Act, 2015 has inserted Explanation-4 to sub-section (1) of Section 271 of the Act, which provides for the method of calculating the amount of tax sought to be evaded 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 with effect from 01.04.2016. The Id.CIT(A) has also followed the order of the predecessor in A.Y. 2008-09 in assessee's own case . In view of these facts cited supra, we are inclined to uphold the order of the Id.CIT(A) by dismissing the appeal filed by the Revenue.

4. In the result, the appeal of Revenue is dismissed.

Sd/-

(MAHAVIR SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 25th November, 2019

KSS , Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai