

IN THE INCOME TAX APPELLATE TRIBUNAL
“G” Bench, Mumbai
Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.458/Mum/2015
(Assessment Year: 2010-11)

Shri Gagan Ashok Khemka
101 Kapadia Apartment,
S.V. Road, Vile Parle West,
Mumbai – 400 056

Asst. CIT, Circle-21(1)
C-10, 6th Floor,
Bandra Kurla Complex
Bandra East,
Mumbai – 400 051

PAN – ADTPK4224E

(Appellant)

(Respondent)

Appellant by: Shri Narayan Atal, A.R
Respondent by: Shri V. Vinod Kumar, D.R

Date of Hearing: 03.03.2020
Date of Pronouncement: 04.03.2020

ORDER

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-32, Mumbai, dated 20.10.2014, which in turn arises from the order passed by the A.O under Sec. 271(1)(c) of the Income Tax Act, 1961 (for short ‘Act’), dated 27.09.2013 for A.Y. 2010-11. The assessee has assailed the impugned order on the following grounds of appeal before us:

- “1. The learned Commissioner of Income tax (Appeals) -32, Mumbai (hereafter referred to as CIT(A) erred in confirming the penalty of Rs. 17,57,840/- levied by the Asst. CIT u/s. 271(1)(C) of the Income-tax Act, 1961
Your appellant submits that on the facts and circumstances of the case and in law, the penalty u/s. 271(1)(C)of the Act is not warranted and ought to be cancelled
2. The CIT(A) erred not appreciating the fact that the claim of set off of brought forward loss on derivatives for the A.Y. 2009-10 has been made in the return filed for A.Y. 2010-11 much before the same was disallowed by the A.O in the assessment order for the A.Y. 2009-10.

3. The CIT(A) failed to appreciate that the appeal for A.Y. 2009-10 is still pending before the CIT(A) and in any case if the disallowance is confirmed in the said appeal, the penalty u/s 271(1)(c) in respect of said disallowance can only be levied in A.Y. 2009-10 only and not in the A.Y. 2010-11.

Your appellant craves leave to add to, alter or amend the aforestated ground of appeal.”

2. Briefly stated, the assessee who is engaged in the business of trading and investment in shares etc. had filed its return of income for A.Y 2010-11 on 15.10.2010, declaring a total income of Rs.1,61,14,677/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee in his return of income had brought forward loss on derivatives from the immediately preceding year i.e A.Y 2009-10, and had claimed 'set off' of the same against the current years business income of Rs.56,65,321/-. Observing that the aforesaid loss on derivatives was disallowed by the A.O while framing the assessment for the immediately preceding year viz. A.Y. 2009-10, the A.O disallowed the assessee's claim for 'set off' of the said loss against the income for the year under consideration. At the time of culmination of the assessment, the A.O had inter alia initiated penalty proceedings under Sec. 271(1)(c) of the Act, for furnishing of inaccurate particulars of income by the assessee on the aforesaid count.

4. On the basis of a 'show cause' notice, dated 26.03.2013 issued under Sec. 274 r.w.s 271(1)(c) of the Act, the A.O called upon the assessee to explain as to why penalty under Sec. 271(1)(c) may not be imposed on him for raising of a wrong claim of 'set off' of brought forward loss on derivatives of Rs.56,65,321/-, against his income for the year under consideration. As the reply filed by the assessee did not find favour with the A.O, therefore, he imposed penalty under Sec. 271(1)(c) on him for raising of a wrong claim in his return of income for the year under consideration.

5. Aggrieved, the assessee assailed the order passed by the A.O under Sec. 271(1)(c) in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the penalty imposed by the A.O under Sec. 271(1)(c) of the Act, and dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. On a perusal of the grounds of appeal, we find, that the assessee has

assailed the imposition of penalty to the extent the same pertains to the disallowance of his claim for 'set off' of the brought forward loss on derivatives of A.Y 2009-10 amounting to Rs.56,65,321/-, against his income for the year under consideration i.e A.Y 2010-11. On a specific query by the bench as regards the status of the appeal filed against the quantum assessment, it was submitted by the Id. A.R that the same was pending before the CIT(A). The Id. A.R took us through the facts of the case. It was averred by the Id. A.R that a simpliciter disallowance of the assessee's claim for 'set off' of the brought forward loss on derivatives of A.Y. 2009-10, as against his income for the year under consideration would not justify levy of penalty under Sec. 271(1)(c) of the Act. It was submitted by the Id. A.R, that his claim of loss on derivatives was disallowed in A.Y. 2009-10 only for the reason that the same could not be substantiated on the basis of supporting documentary evidence viz. certificate from broker etc. Accordingly, it was submitted by the Id. A.R, that it was not the case of the revenue that the assessee had raised a bogus claim of loss on derivatives in the immediately preceding year, which thereafter was brought forward to the year under consideration and sought to be 'set off' against the current year's income. In sum and substance, it was averred by the Id. A.R that the loss on derivatives in A.Y. 2009-10 was disallowed for the reason that the same had remained unproved on the basis of supporting documentary evidence. Apart from that, it was submitted by the Id. A.R that as the return of income for the year under consideration i.e A.Y 2010-11 was filed much prior to the framing of the assessment for the immediately preceding year i.e A.Y. 2009-10, therefore, there was no occasion for the assessee to have anticipated that his claim of loss on derivatives would be disallowed, therein disentitling him from carrying forward such unabsorbed loss for 'set off' against the income for the succeeding year. It was submitted by the Id. A.R, that penalty under Sec. 271(1)(c) was to be imposed on account of commission of a wrongful act, and the same was to be determined as per the law operating on the date on which such wrongful act was committed. It was thus submitted by the Id. A.R, that as the levy of penalty under Sec. 271(1)(c) has to be related to the date of filing of the return of income by the assessee, therefore, keeping in view the fact that as on the date of filing of the return of income for the year under consideration viz. A.Y. 2010-11, there was no basis for disentitling the assessee from 'setting off' the brought forward loss on derivatives of A.Y. 2009-10, against his income for the current year, therefore, the levy of penalty under the aforesaid statutory provision could not have been imposed. In support of his aforesaid contention the Id. A.R had

relied on the judgment of the Hon'ble Supreme Court in the case of Brij Mohan Vs. CIT (1979) 120 ITR 1 (SC).

7. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. It was submitted by the Id. D.R, that as the assessee had raised a wrong claim of 'set off' of the brought forward loss on derivatives of the preceding year i.e A.Y 2009-10, therefore, he had rightly been visited with penalty under Sec. 271(1)(c) of the Act.

8. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. On a perusal of the records, we find that the assessee's claim of loss on derivatives of Rs. 78,70,950/- was disallowed by the A.O while framing the assessment for A.Y 2009-10, vide his order passed under Sec. 143(3) of the Act, dated 08.12.2011. As is discernible from the records, the aforesaid loss was disallowed, for the reason, that the assessee could not substantiate the genuineness of the same on the basis of supporting documentary evidence viz. certificate from broker etc. Insofar the return of income for the year under consideration i.e A.Y. 2010-11 is concerned, we find, that the same was filed by the assessee on 15.10.2010. As observed by us hereinabove, the assessee had claimed 'set off' of the brought forward loss on derivatives of Rs. 56,65,321/- against his 'business income' for the year under consideration. In the backdrop of the aforesaid facts, we shall now deliberate upon the bonafides of the assessee as regards his claim for 'set off' of the brought forward unabsorbed loss of A.Y. 2009-10, against the income for the year under consideration. We are in agreement with the contention of the Id. A.R, that penalty under Sec. 271(1)(c) has to be on the basis of the claims raised by an assessee in his return of income. Now, in the case before us, the assessee at the time of filing of his return of income for A.Y 2010-11 on 15.10.2010 could not have anticipated that his claim of loss on derivatives of Rs. 78,70,950/- for A.Y 2009-10, would on a future date be disallowed by the A.O while framing of the assessment for the said preceding year. In sum and substance, as the assessee's claim for loss on derivatives for A.Y. 2009-10 was disallowed by the A.O vide his order passed under Sec. 143(3), dated 08.12.2012 i.e much subsequent to the filing of the return of income for A.Y 2010-11 on 15.10.2010, therefore, any malafide on the part of the assessee in raising a wrong claim for 'set off' of brought forward loss of A.Y 2009-10 is clearly ruled out. On the basis of our

aforesaid observations, we are of the considered view that the bonafides of the assessee as regards raising of a claim for 'set off' of the brought forward loss on derivatives, against his income for the year under consideration stands clearly established. Apart from that, we find, that the assessee's claim for loss on derivatives was disallowed while framing of the assessment for the preceding year i.e A.Y 2009-10, only for the reason, that the assessee had failed to substantiate the genuineness of the said claim on the basis of supporting documents i.e certificate from broker etc. In the backdrop of the aforesaid facts, we are of a strong conviction, that though an unproved claim of an assessee would lead to a consequential addition/disallowance, however, the same on such standalone basis cannot justify imposition of penalty under Sec. 271(1)(c) of the Act. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Upendra V. Mithani (ITA (L) No. 1860 of 2009)**, dated **05.08.2009**, wherein the Hon'ble High Court had observed that unless the claim of the assessee is disproved, no penalty under Sec. 271(1)(c) could be imposed, and had held as under:

"The issue involved in the appeal revolves around deletion of penalty under Section 271(1)(c) of the I.T. Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs."

Also, we are of a strong conviction, that a simpliciter disallowance of a claim of the assessee in the course of the assessment proceedings, cannot on such standalone basis automatically lead to levy of penalty under Sec.271(1)(c). Our aforesaid view is fortified by the judgment of the **Hon'ble Supreme Court** in the case of **Shri T. Ashok Pai Vs. CIT Bangalore (2007) 7 SCC 162 (SC)**. In the aforesaid case, it was observed by the Hon'ble Apex Court that unless and until there is some evidence to show or some circumstances found from where it can be gathered that there was an intention or desire on the part of the assessee to hide or conceal the income so as to avoid imposition of tax thereon, penalty under Sec.271(1)(c) cannot be imposed. In fact, it was observed by the Hon'ble Apex Court that in order that a penalty under Sec.271(1)(iii) may be imposed, it has to be proved that the assessee had consciously made

the concealment or furnished inaccurate particulars of his income. Accordingly, on the basis of our aforesaid observations, we are of the considered view, that the disallowance of the assessee's claim for 'set off' of the brought forward loss pertaining to A.Y. 2009-10, in the totality of the facts of the case could not have justified levy of penalty under Sec. 271(1)(c) of the Act. We thus not being persuaded to subscribe to the view taken by the CIT(A), therefore, 'set aside' his order, and quash the penalty imposed by the A.O as regards the disallowance of the assessee's claim for 'setting off' of the brought forward loss on derivatives of A.Y 2009-10, against his income for the year under consideration.

9. Resultantly, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 04.03.2020

Sd/-

(G. Manjunatha)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 04.03.2020
P.S Rohit

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

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.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai