

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI B.R.R. KUMAR, ACCOUNTANT MEMBER**

Through Video Conferencing

I.T.A. No.2412/DEL/2011
Assessment Year: 2002-2003

GE Capital Services India, AIFACS Building, 1, Rafi Marg, New Delhi.	vs.	ACIT, Circle-12(1), New Delhi.
TAN/PAN: AAACG0239L		
(Appellant)		(Respondent)

Appellant by:	Shri Sachit Jolly, Adv. & Shri Siddharth Joshi, Adv.		
Respondent by:	Shri Sunit Singh, CIT-DR		
Date of hearing:	31	08	2020
Date of pronouncement:	31	08	2020

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeal has been filed by the assessee against the impugned order dated 24.12.2010, passed by Ld. Commissioner of Income Tax (Appeals)-IX, New Delhi in relation to the penalty proceedings u/s. 271(1)(c) for the Assessment Year 2002-03. In the grounds of appeal, the assessee has mainly challenged the levy of penalty u/s. 271(1)(c).

- Firstly, on the ground of disallowance towards cost of raising of loan, amounting to Rs.9,34,93,091/- treated as Deferred Revenue expenditure; and
- Secondly; disallowance of provision of Non-performing assets amounting to Rs.73,46,160/-.

2. At the outset, ld. counsel for the assessee submitted that the Tribunal in the quantum proceedings vide order dated 18.02.2020 has deleted the addition on account of Revenue expenditure incurred in respect of raising loan funds. Thus, no penalty can be levied on such disallowance. Regarding disallowance of provision for Non-performing asset, ld. counsel submitted that though this issue has been confirmed by the Tribunal by following the judgment of Hon'ble Supreme Court in the case of **Southern Technologies Ltd., 320 ITR 577**, however, he submitted that similar penalty was levied in the immediately preceding year on identical grounds, wherein the Tribunal has deleted the penalty after detailed discussion.

3. On the other hand, ld. CIT-DR on the issue of disallowance of provision of Non-performing assets of Rs.73,46,160/- submitted that as per the provision of the Act u/s.36(1)(vii), the provision of bad and doubtful debt is prohibited from being allowed, and therefore, the claim itself made in the return of income was bad in law. Further, law pronounced by the Hon'ble Supreme Court itself goes to show that the claim made by the assessee was wrong and therefore penalty on such disallowance is leviable.

4. Ld. Counsel for the assessee on the other hand submitted that, at the time filing of return of income, there was a decision of ITAT Special Bench in the case of **Overseas Sanmar Financial Ltd. in ITA No. 260 & 1522/MDS/1999**, wherein such a provision for Non-performing asset was held to be allowable as bad debt. Such return of income was filed on 31.10.2002 and at that time there were favourable judgments. The decision of Hon'ble Supreme Court is dated 11.01.2010 wherein the said view has been reversed, but the claim of the assessee cannot be held to be wrong or not substantiated. He also pointed out the following notes appearing in the balance sheet filed alongwith the return of income:-

“3. Provision for doubtful assets made during the year includes Rs. 73,46,160/- as per Non-Banking Financial Companies Prudential Norms (RB) Directives, 1998 which has been considered as allowable under section 28 and / or section 37 and \ or any other applicable provisions of the Income-tax Act, 1961, In view of the decision of the Hon'ble Madras Tribunal In the case of Overseas Sanmar Financial Ltd. ITA No. 280 & 1522 \ Mds. \ 1999, wherein it has been held that provision against bad and doubtful debts by an NBFC as per the norms of the RBI is deductible against the income of the company. The Hon'ble Tribunal has further held that,

“Provision for doubtful advances made following the directive of RBI which according to RBI would give a near true picture of the assets end liabilities of NBFC has to be made by NBFC if it has continuously got the patronage of RBI and remain in business by avoiding unscrupulous methods RBI's directive to account for the income on cash basis is an appreciation of the fact that it does not make any

sense to account the income on accrual basis giving no credence to actual recovery and later allowing deduction for irrecoverable debts including debts that could not be recovered in full from the security provided because of erosion in the value of the security....., notwithstanding the fact that section 38 of the Act does not contain any specific sub-section or sub-clause covering the contingency as in the case of NBC, It could be allowed as write off because there are authorities that state that provision is equal to write off because the debit is given to P & L account'.

Reliance is else placed on the injunction order received by the Association of Leasing and Financial Service Cos. ('ALPS') from the Hon'ble Madras High Court in June 2002 restraining the Central Board of Direct Taxes, Its agents and all assessing officers from assessing receivables as income where such amounts have not been recognised as income in the books of accounts of ALFS and its members and further allowing deduction for provision for doubtful assets while arriving at the taxable Income of an NBFC.”

5. Thus, the claim of the assessee was based on judgment of Hon'ble Special Bench and then law prevailing; therefore, the claim was *bona fide* and cannot be held that it tantamount to furnishing of inaccurate particulars of income.

6. After considering the rival submissions and on perusal of the impugned orders and the decision of the Tribunal in assessee's own case in the quantum proceedings, we find that in so far as the disallowance of expenditure in respect of raising loan is concerned, the Tribunal has deleted the said addition after observing and holding as under:

1. Ground No. 3 of the appeal is against disallowance of Rs.18,72,22,842/- on account of revenue expenditure incurred in respect of raising loan funds by treating the same as deferred revenue expenditure. The fact shows that in the computation of total income the assessee has added back deferred revenue expenditure of Rs.9,37,29,751/- and claimed a deduction of Rs.18,72,22,842/- in the computation of income u/s 37(1) of the act. The assessee has incurred an expenditure of Rs.47,13,80,476/- out of which Rs.28,41,57,625/- is debited to the profit and loss account and the balance sum of Rs.18,72,22,842/- was claimed as deduction in the computation of total income. The assessee submitted that this expenditure was incurred on debentures issued and discount thereon. The above issue firstly arose in Assessment Year 2000-01. According to the Assessing Officer the debentures expenditure was spread over the tenure of debentures, with respect to the interest expenditure only portion relating to the previous year is allowable. The other expenditure was also required to be spread over. Therefore, the net disallowance of Rs.9,34,93,091/- was made. The above issue reached before the learned CIT (Appeals) who vide para No. 3 upheld the order of the Assessing Officer. Therefore, assessee is in appeal.

2. The learned Authorized Representative submitted that the above issue is squarely covered in favour of the assessee by the order of the co-ordinate bench for Assessment Year 2000-01 dated 21.05.2015. The learned Departmental Representative supported the orders of the lower authorities.

3. We have carefully considered the rival contentions. We found that identical issue arose in case of the assessee for Assessment Year 2000-01 wherein vide para Nos. 15-18 the order of co-ordinate bench it has deleted the above addition. No contrary decision was produced before us. The co-ordinate bench after discussion of the facts in para Nos. 15-16 has discussed the facts of the case in para

No. 17 and then relying upon the decided in the case of group company , decided the issue in favour of the assessee. Further, in para No. 18 the co-ordinate bench also discussed the decision relied upon by the Assessing Officer. In view of this fact, respectfully following the decision of the co-ordinate bench we allow ground No. 3 of the appeal and direct the Assessing Officer to delete the disallowance of Rs.18,72,22,842/-.”

7. Thus, penalty on such disallowance is directed to be deleted.

8. In so far as disallowance of Rs.73,46,160/- being provision for bad and doubtful debt created under the norms of Non-banking Financial Companies prudential Norms (RBI) Directives, 1998 issued by Reserve Bank of India in provision of RBI Act; the Assessing Officer noted that the assessee has debited Rs.8,34,22,265/- in its P&L Account and has only added back amount of Rs.7,60,76,105/-. In the notes to the account attached to the balance sheet, as noted above, the assessee has claimed it to be allowable. The Assessing Officer though noted that there was a decision of Special Bench in the case of **M/s. Overseas Sanmar Financial Ltd. (supra)**, however, he stated that there is a specific provision u/s 36(1)(vii) under the Act, and therefore, such a decision is not applicable and he proceeded to make a disallowance. Later on, the Hon'ble Supreme Court in the case of **Southern Technologies Ltd. (supra)** has reversed the findings of Special Bench and for this reason the matter was decided against the assessee by the Tribunal in the quantum proceedings.

9. Here in this case, the return of income was filed on 31.10.2002 and at that time, assessee has made a claim on the basis of ITAT Special Bench decision and also disclosed the reason for making such a claim in the return of income. Hence, it cannot be said that at that point of time, assessee's claim was not *bona fide* or was not substantiated. It was in the year January, 2010 that the Hon'ble Supreme Court has clarified that such a provision for bad and doubtful debts even as per RBI guidelines cannot be allowed in terms of the provision of the Act. Thus, it cannot be held that the assessee has furnished any inaccurate particulars of income at the time of filing of return of income or has not substantiated its claim. Thus, it cannot be held that penalty is leviable on such a claim.

10. Moreover, this Tribunal in assessee's own case in immediately preceding year, i.e., Assessment Year 2001-02 has deleted the penalty exactly on similar grounds after observing and holding as under:

8. Although the assessee has raised as many as 7 grounds of appeal, except Ground No. 1, all the other grounds are argumentative and supportive of the main Ground No. 1 which reads as under:

"1. On the facts and circumstances of the case and in law, the order passed by the Hon'ble CIT(A) is erroneous and bad in law and the Hon'ble CIT(A) has erred in confirming the penalty of Rs. 5,22,61,554/- levied u/s 271(1)(c) of the Act."

9. The ld. Sr. Counsel of the assessee submitted that the CIT(A) has erred in upholding the levy of penalty u/s 271(1)(c) of the Act on the disallowance of provision for NPA made as per Reserve Bank of India [RBI] norms. The ld. AR further pointed out that the first appellate authority has grossly erred in ignoring the fact that complete disclosure in respect of the above claim was made by the assessee in the return of income and also during the course of assessment proceedings for A.Y 2001-02 and that the claim of the assessee in respect of liability of provision for NPA was based on bonafide belief and favourable judicial precedent in favour of the assessee in this regard available at the time of furnishing of return of income on 31.10.2001.

10. The ld. AR further submitted that the CIT(A) has erred while confirming the penalty in alleging that the claim of assessee in respect of liability of provision for NPA, which was made as per RBI norms is contrary to the ratio of the decision of Hon'ble Supreme Court in the case of Southern Technologies Ltd Vs. JCIT reported as 320 ITR 577 [SC] which was delivered on 11.1.2010. The return was filed much prior on 31.10.2001 and decision of Hon'ble Supreme Court was not existing at that point of time when claim was made in the return, therefore, penalty on this issue could not be levied. The ld. AR also pointed out that the assessee made provision for NPA as per RBI norms under bonafide belief that the assessee is duty bound to follow RBI

norms and it was debatable issue that whether the provision of the Act would prevail over the provision of RBI Act, 1934. Therefore, the assessee cannot be alleged to have concealed particulars of income or furnishing of inaccurate particulars of income and therefore, the penalty u/s 271(1)(c) of the Act cannot be imposed against the assessee. The ld. AR placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs Reliance Petroproducts Pvt. Ltd, 322 ITR 158 [SC], submitted that merely because the claim of the assessee was not allowed due to subsequent decision of Hon'ble Supreme Court in the case of Southern Technologies [supra] which was rendered after nine years from the date of filing of return, penalty cannot be levied on the assessee u/s 271(1)(c) of the Act.

11. Replying to the above, the ld. DR supporting the penalty order as well as the first appellate order on this point submitted that the assessee for making claim towards provisions for NPA relied and took a base on the ITAT Chennai Bench in the case of Overseas Sanmar Financial Ltd [2003] 86 ITD 602 [Chennai] whereas the decision of the Southern Technologies Ltd Vs. JCIT [supra] was rendered by the Hon'ble Madras High Court on 23.1.2002 which was reported in 296 ITR 514 [Mad]. The ld. DR vehemently contended that out of these two decisions, the assessee made a claim by relying on the decision of the ITAT Chennai Bench in the case of Overseas Sanmar Financial Ltd [supra] and ignored the decision of the Hon'ble High Court of Madras in the case of Southern Technologies [supra]

which was upheld by the Hon'ble Supreme Court. The ld. DR pointed out that the assessee made claim of provision for NPA by picking up the decision of ITAT Chennai in the case of Overseas Sanmar Financial Ltd [supra] which was not reported on the date of filing of return i.e. 31.10.2001 and the assessee ignored the decision of the Hon'ble High Court of Madras in the case of Southern Technologies [supra] which was in favour of the Revenue on the same issue which shows malafide intention on the part of the assessee. Therefore, penalty was rightly levied on the assessee. The ld. DR further contended that even at the appellate stage on 22.4.2004, when the appeal was filed before the Tribunal, the assessee again agitated the claim and in the statement of facts before the Tribunal for A.Y 2002-03 and in Ground No. 7 of quantum appeal, for the same A.Y, the assessee again raised the same claim on same facts and circumstances which was not allowable as earlier decision of Madras High Court in the case of Southern Technologies [supra] which was rendered on 23.1.2002.

12. The ld. DR strenuously contended that the intention of the assessee is clear that it wanted to get the claim by hook or crook and in this situation, ratio of the decision in the case of Zoom Communication Pvt Ltd [2010-TIOL-361-High Court-DEL-IT] comes in favour of the Revenue to support the penalty levied u/s 271(1)(c) of the Act against the assessee. The ld. DR placing reliance on the decision of the Hon'ble Jurisdictional High Court of Delhi in the case of CIT Vs. HCIL Kalindee

Arsspl [2013] 37 Taxmann.com 347 [Del] submitted that initial burden of proof is upon the assessee to prove that his explanation was bonafide. The High Court further held that this burden can only be discharged by producing cogent material and that penalty provisions are not criminal and do not require culpable mens rea. The High Court emphasised that whether or not the assessee had acted malafidely is not the relevant question to be asked and answered and went on to hold that the relevant question to be asked and answered is whether the assessee had discharged the onus and satisfied the conditions mentioned in Explanation 1 to Section 271(1)(c) of the Act.

13. *The ld. DR also pointed out that the benefit of ratio of decision in the case of Reliance Petroproducts Pvt Ltd. [supra] as relied by the assessee is not applicable to the present case as in that case issue was debatable and in the present case the issue that claim regarding provision of NPA is not allowable was settled by the Madras High Court at the time when assessment proceedings were going on and at the time when the assessee filed appeal on the same issue before the Tribunal. The ld. DR lastly submitted that as per the decision of the ITAT Mumbai in the case of M/s Development Credit Bank Ltd Vs. DCIT [2012]-TIOL-722-ITAT-MUM that if the assessee was managed by the body of expert professionals, then it was the duty of the assessee to make a legal and sustainable claim and failing which, definitely attracts penalty u/s 271(1)(c) of the Act, which is also the position in the present case*

that despite support of a battery of tax experts and professionals, the assessee made a claim which was prohibited by the decision of the Hon'ble Madras High Court in the case of Southern Technologies Ltd [supra]. Thus, penalty was rightly upheld by the CIT(A).

14. Placing rejoinder to the above submissions, the ld. AR submitted that the return was filed on 31.10.2001 by following the earlier decision of ITAT Chennai in the case of Overseas Sanmar Financial Ltd [supra] which was rendered prior to filing of return on 5.2.2001 which was clearly favouring the claim of the assessee on the decision of Southern Technologies [supra] rendered subsequently on 23.1.2002 by Hon'ble High Court and return had already been filed much prior on 31.10.2001, thus, the allegation of malafide intention of the assessee while making claim in the return on the issue, which was debatable at the time of filing of return, cannot validly levelled and sustained against the assessee. The ld. Sr. Counsel again placing reliance on the decision of Hon'ble Supreme Court in the case of Reliance Petro Products [supra] submitted that once the assessee offered an explanation, the onus would shift on the Revenue to prove that the explanation offered by the assessee was false, that bonafides of the assessee in submitting explanation is clearly established and proved and no material or evidence was brought on record or pointed out by the ld. DR substantiating that that the Revenue had discharged its onus for proving falseness of explanation of the assessee. While the assessee is making a claim

of debatable issue in the return by adopting precedent rendered by Chennai ITAT which was not settled by any competent court at the time of filing of return would not attract penalty especially when the assessee has not violated any specific provision of the Act and thus there was no concealment or furnishing of inaccurate particulars of income. No other argument was furnished by the assessee.

15. On careful consideration of the above rival submissions, the following undisputed facts emerges from record:

i) Decision of ITAT Chennai in the case of Overseas Sanmar Financial Ltd [supra] was rendered on 5.2.2001 which was favouring the claim of the assessee pertaining to the provision for NPA made as per RBI norms.

ii) The assessee filed return for A.Y 2001-02 on 31.10.2001.

iii) Hon'ble Chennai High Court rendered decision in the case of Southern Technologies Vs. JCIT on 23.1.2002 favouring the Revenue that the claim of provision for NPA have made as per RBI norms is not allowable.

iv) Meanwhile, ITAT Delhi 'B' Bench in the case of TEDCO Vs DCIT held that the addition made by the AO by ignoring the provision of Chapter IIIB of RBI Act and direction issued by the RBI of prudent claim sustain

v) The assessee filed appeal before the Tribunal on 22.4.2004 for A.Y 2002-03 and again made same claim

in the statement of facts and Ground No. 7 raised before the Tribunal.

16. Before we consider the factual matrix of this case to ascertain as to whether in the eyes of the provisions of the Act as explained by numerous judicial pronouncements, penalty can be levied in this case or not, we would like to discuss in nut shell the relevant legal position regarding levy of penalty u/s 271(1)(c) of the Act and as to how and when such penalty can be levied under this section. There are no two opinions about the settled position of law that regular assessment proceedings and penalty proceedings are two entirely different subjects which operate in distinct and separate spheres so much so that entirely different parameters are applicable for making quantum addition and for levying penalty under section 271(1)(c) of the Act. There can be no dispute with regard to the position of law that under section 271(1)(c) penalty can be levied only if either the act of "concealment of particulars of income" or "furnishing of inaccurate particulars of income" is found to have been committed by the assessee. These are two different omissions or defaults albeit they refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of either suppressio veri or suggestio falsy. By the mere reason of such concealment or of furnishing of inaccurate particulars alone, the assessee does not, ipso facto, become liable to a penalty u/s 271(1)(c) of the Act. Imposition of penalty is not at all automatic. Meaning thereby, any addition in quantum would not lead to automatic levy of penalty and this is also true in respect of furnishing of inaccurate particulars of income. Not only is the levy of penalty discretionary in nature but the discretion has to be exercised judiciously keeping the

relevant factors in mind and the approach of the taxman must be fair and objective. This subject has been a matter of great controversy. Finally, after referring to the decisions in the case of *Dilip N. Shroff vs JCIT & Another*, 291 ITR 519, *Union of India vs. Dharmendra Textile Processors* [2008] 13 SCC 369, as well as *Union of India vs Rajasthan Spg. & Wvg. Mills* [2009] 13 SCC 448, the Hon'ble Supreme Court in the case of *CIT vs Reliance Petroproducts Pvt. Ltd*, 322 ITR 158, has recently held as under:

“A glance at the provisions of section 271(1)(c) of the Income-tax Act, 1961, suggests that in order to be covered by it, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, because that is the only document where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous.

Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271 (1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.”

17. When an assessee makes a claim and discloses full material facts of one issue or claim made, this cannot be treated

as concealment under Section 271(1)(c) of the Act, in view of the above stated legal position.

18. The Hon'ble Supreme Court in the case of *Southern Technologies [supra]* rendered decision on 11.1.2010 and upheld the decision of Hon'ble High Court favouring the Revenue and controversy was finally settled in favour of the Revenue by this decision of the Hon'ble Apex Court by holding that RBI directions of 1998 are merely RBI norms regarding presentation of NPA, provision for balance sheet and they do not touch upon the nature of any assessment proceedings under the Act. Finally, rendering decision in favour of the Revenue, speaking for the Hon'ble Apex Court of India, their Lordships held that a non-banking financial company while making provision for NPA which was debited to PLA and which was made under RBI norms can be treated as income and not expenditure u/s 36(viia) of the Act. Their Lordships settling the issue in favour of the Revenue categorically held that the Reserve bank disclosure norms has nothing to do on the taxation of income under the provision of Income-tax Act, 1961 and the issue attained finality against this assessee by this decision.

19. In view of the above, it is clear that the assessee made claim of provision for NPA on 31.1.2001 in the return of income filed for 2001-02 and at that point of time, the issue was debatable and the assessee placing reliance on the decision of the ITAT Chennai in the case of *Overseas Sanmar Financial Ltd [supra]* made the said claim in the return of income. However, we may

point out that subsequently, after filing return the Hon'ble Madras High Court rendered decision on 23.1.2002 against the assessee in the case of Southern Technologies [supra] but the assessee of that case filed SLP before the Hon'ble Supreme Court. Thus, the issue could not attain finality at that point of time while the assessee filed first appeal making same claim before the Tribunal for A.Y 2002-03 and the issue was also debatable.

11. Thus respectfully following the aforesaid precedent which is applicable on the facts of the present case also, we delete the penalty.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 31st August, 2020

Sd/-
[B.R.R. KUMAR]
[ACCOUNTANT MEMBER]

DATED: 31/08/2020

PKK:

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER