

आयकर अपीलीय अधिकरण, “बी” न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL ‘B’ BENCH, CHENNAI
श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य एवं श्री एस जयरामन, लेखा सदस्य के समक्ष
Before Shri Duvvuru RL Reddy, Judicial Member &
Shri S. Jayaraman, Accountant Member

आयकर अपील सं./I.T.A. No. 765/Chny/2017
निर्धारण वर्ष/**Assessment Year:2013-14**

Presidency Kid Leather Pvt. Ltd.,
21, Spartan Nagar, 1st Floor,
Mogappair East, Chennai 600 037.
[PAN:AAACP1952D]

Vs. The Deputy Commissioner of
Income Tax,
Corporate Circle 5(2),
Chennai 34.

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by : Shri D. Anand, Advocate
प्रत्यर्थी की ओर से/Respondent by : Shri Abani Kanta Nayak, CIT
सुनवाई की तारीख/ Date of hearing : 16.03.2021
घोषणा की तारीख /Date of Pronouncement : 19.04.2021

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) 3, Chennai, dated 31.01.2017 relevant to the assessment year 2013-14 challenging the appellate order of confirming the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 [“Act” in short].

2. In the grounds of appeal, the assessee has challenged the show-cause notice issued under section 274 r.w.s. 271(1)(c) of the Act by stating that the Assessing Officer had not mentioned the exact charge as to the

whether there is concealment of income or furnishing of inaccurate particulars of income and as such the notice issued under section 274 of the Act itself is invalid.

3. Brief facts of the case are that the assessee filed the return of income on 18.09.2013 admitting a loss of ₹.59,43,63,543/-. The assessment was completed under section 143(3) of the Act, by assessing the loss at ₹.49,82,53,477/- after making various disallowances. Accordingly, the Assessing Officer initiated penalty proceedings by issuing notice under section 274 r.w.s. 271(1)(c) of the Act. After considering the submissions to the above notice, the Assessing Officer levied penalty of ₹.4,03,71,220/- under section 271(1)(c) of the Act. On appeal challenging the notice issued under section 274 r.w.s. 271(1)(c) of the Act, after considering the submissions of the assessee, the Id. CIT(A) confirming the penalty levied under section 271(1)(c) of the Act.

4. On being aggrieved, the assessee is in appeal before the Tribunal. The Id. Counsel for the assessee has submitted that the show cause notice issued under section 274 r.w.s. 271(1)(c) of the Act itself is invalid and heavily relied on the decision in the case of Babuji Jacob v. ITO (2021) 430 ITR 259 (Mad). On the other hand, the Id. DR vehemently argued that the above case law relied on by the Id. Counsel has no application since the

phraseology used in response to the penalty notice by the assessee is different and strongly supported the appellate order.

5. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below. Against the penalty notice under section 271(1)(c) of the Act dated 17.12.2015, vide letter dated 28.12.2015, the reply of the assessee runs to three pages and the first para is reproduced as under:

“We are in receipt of your notice u/s 271(1)(c) of the Income Tax Act 1961 dt. 17/12/2015 calling on us to show cause why an order u/s 271(1)(c) of the Income Tax Act 1961, should not be made. We hereby state that we have filed True and correct Return of Income. We have not concealed nor had given any in accurate particulars.”

6. At the first instance, while replying to the penalty show-cause notice dated 28.12.2015, the assessee has not protested that the show-cause notice issued by the Department was not proper as there was no basis for issuance of the notice under section 271(1)(c) of the Act and both limbs in the said provision do not get attracted in assessee's case. Whereas, in the case law relied on by the Id. Counsel in the case of Babuji Jacob v. ITO(supra), the assessee has raised a specific plea that there was no concealment of income that he had not furnished inaccurate particulars of income, and that the notice was not proper. Therefore, in that case, the Hon'ble Madras High Court has observed that the phraseology, which was adopted by the assessee, if read as a whole, would clearly shows that he

had objected to the issuance of the notice and as there was no basis for issuance of the notice under section 271(1)(c) of the Act, both limbs in the said provision do not get attracted. Thus, the above case law relied on by the Id. Counsel has no application to the facts of the present case since the assessee has not been objected to the issuance of the show-cause notice that the same was not proper. Accordingly, the ground raised by the assessee stands dismissed.

7. With regard to the levy of penalty, on merits, under section 271(1)(c) of the Act towards disallowance of interest provision, the assessee has claimed a sum of ₹.2,71,12,571/- towards provision for interest payable to Syndicate Bank under the head Financial Expenses which has not been paid by the assessee company before the due date for filing of return. On being asked the assessee company vide its letter dated 09.12.2015 had agreed for disallowance of the same. Thus, the above claim of interest provision of ₹.2,71,12,571/- was disallowed under section 43B of the Act and added to the total income of the assessee. During the course of penalty proceedings, the Assessing Officer observed that the assessee has furnished inaccurate particulars of income, which, if not questioned by the Assessing Officer would have escaped from the tax net. Since the assessee is very well aware of the provisions of the Act that the claim of expenses is not an allowable expense, the assessee has claimed the same in the profit and loss account,

the Assessing Officer was of the opinion that the assessee has furnished inaccurate particulars warranting penalty and levied the penalty under section 271(1)(c) of the Act, which was confirmed by the Id. CIT(A).

8. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below including paper book filed by the assessee. The interest payable to Syndicate Bank was not paid by the assessee before the due date for filing of return of income, but, in the profit and loss account, the assessee has claimed the same as expenses incurred by the assessee. Before us, the Id. Counsel for the assessee has submitted that the loan from the Syndicate Bank has become a non performing asset and that the interest outstanding was disclosed in the financial statements. It was further submission that the assessee has wrongly claimed the interest expenses, which ought to have been disallowed under section 43B of the Act, but, by oversight, it was not disallowed while filing of the income. Since the assessee has disclosed the above details in the balance sheet itself, it does not amount to concealment of income. It was further submission that based on the details furnished by the assessee, the Assessing Officer made the disallowance and therefore, it cannot be held as furnishing of inaccurate particulars of income. We find force in the arguments of the Id. Counsel. Admittedly, the assessee has furnished the details in its financial statements, but, the assessee ought to have been

disallowed the interest payable, which was not paid under section 43B of the Act, but, by oversight, it was not disallowed while filing of the return of income. The non-disallowance of expenses was not gathered by the Department from any source other than the details furnished by the assessee. Apart from this, against the notice under section 271(1)(c) of the Act dated 17.12.2015, in its reply dated 28.12.2015, wherein, in page No. 2, it is mentioned that *“We state that the company incurred heavy losses from 2012-13 assessment year and the assessed loss for the said assessment is ₹.23,25,69,316. There is no intention to conceal or offer inaccurate particulars to evade tax”*. It is clear that the assessee has no intention to conceal or furnish inaccurate particulars and the assessee has voluntarily mentioned about the outstanding liability in its financial statements. Therefore, we are of the firm opinion that it is only a bonafide mistake on the part of the assessee. The assessee company has incurred huge loss and the business operations were permanently closed by 2013. Therefore, it does not make any base even if shown in the return of income or not. A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee and thus, such a claim made in the return cannot amount to furnishing of inaccurate particulars. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not

acceptable to the Assessing Officer that by itself would not attract penalty under section 271(1)(c) of the Act. Thus, the penalty levied under section 271(1)(c) of the Act stands deleted.

9. With regard to other penalty levied towards disallowance of export product development expenses, on perusal of the schedules to profit and loss account, the Assessing Officer noticed that the assessee has claimed a sum of ₹.9,06,55,000/- towards export product development expenses as revenue expenditure. After considering the submissions of the assessee, the Assessing Officer disallowed the claim of the assessee treating the same as capital expenditure. During the course of penalty proceedings, since the assessee has claimed the capital expenses as revenue expenditure and moreover, the assessee has not filed any appeal against the assessment order, the Assessing Officer levied penalty under section 271(1)(c) of the Act, which was confirmed by the Id. CIT(A).

10. We have heard the rival contentions. It is not in dispute that the assessee has claimed the export product development expenses as revenue expenditure. Since the expenditure incurred by the assessee was in the nature of enduring benefit, the Assessing Officer treated the same as capital in nature and brought to tax. Before us, it was the submissions of the Id. Counsel for the assessee that the assessee has claimed the export product

development expenses as revenue expenditure only on the ground that the company's business operations were permanently closed since January, 2013. It was further submission that as there was no revival of business, the management of the assessee company decided to charge the same to the revenue account. It was further submission that once the condition of the assessee's business cannot revive anymore, there was no question of enjoying any enduring benefit for which the expenditure was incurred. However, the assessee has agreed for the disallowance. The Id. Counsel for the assessee has vehemently argued that it is not only an agreed disallowance, but also from businessman point of view, the assessee has furnished full particulars, which the Assessing Officer has not agreed and thereby levying penalty under section 271(1)(c) of the Act is illegal. The assessee relied on the decision in the case of CIT v. Reliance Petroproducts Pvt. Ltd. 322 ITR 158 and prayed for deleting the penalty.

11. The expenditure incurred by the assessee was not in dispute and the expenditure was claimed as revenue expenditure on the ground that the company's business operations were permanently closed since January, 2013 and there was no revival of business. As per the Income Tax Act, any expenditure incurred for the purpose of enduring benefit, that expenditure should be treated as capital in nature. However, the levy of penalty is not a necessary concomitant of assessment proceedings. Both the proceedings

are different in nature and the findings in assessment proceedings are not conclusive in penalty proceedings. Before the assessee is held liable for furnishing inaccurate particulars for claim of expenditure as revenue expenditure, it has to be independently found in penalty proceedings that the assessee has consciously furnished inaccurate particulars for claiming such expenditure as revenue expenditure with a malafide intention to evade tax. In this case, when there was no revival of assessee's business while the business was closed down permanently, the question of "enduring benefit" does not arise. Whether the expenditure is in the form of capital or revenue in nature are always debatable issue. Therefore, though the assessee has claimed the capital expenditure as revenue expenditure that itself is not sufficient to levy penalty. The non-acceptance of the claim of the assessee cannot tantamount to furnishing of inaccurate particulars warranting levy of penalty as has been held by the Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Pvt. Ltd.(supra). Even if the claim of expenditure by the assessee was taken to be wrong claim made, it does not amount to concealment of income or filing of inaccurate particulars and therefore, no penalty could have been imposed on the assessee.

12. The considerations for imposition of penalty under section 271(1)(c) of the Act are however entirely different. It requires existence of *mens rea* on the part of the assessee and either of the twin conditions of (i) concealment

of income or (ii) filing of inaccurate particulars by the assessee, are required to be satisfied and the burden of proving that lies upon the revenue authority and not on the assessee. Merely because the claim of expenditure made by the assessee was found to be a wrong claim and is disallowed, it does not *per se* attract imposition of penalty under section 271(1)(c) of the Act. Just because the assessee has not preferred further appeal before the appellate authority against the quantum addition that itself cannot attract imposition of penalty. Under the above facts and circumstances, the penalty levied under section 271(1)(c) of the Act towards disallowance of interest expenditure under section 43B of the Act as well as disallowance export product development expenses stand deleted.

13. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on the 19th April, 2021 in Chennai.

Sd/-
(S. JAYARAMAN)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, 19.04.2021

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.