

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "E", MUMBAI**

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

**ITA No.7945/MUM/2019
Assessment Year: 2013-14**

DCIT Circle – 2 (3) (2), Room No. 552, 5 th Floor, Aayakar Bhawan, M.K. Road, Churchgate, Mumbai - 400020	Vs.	M/s Solarfield Energy Pvt. Ltd., 21, 3 rd Floor, Sethi Mansion, Kumtha Street, Ballard Estate, Mumbai - 400038 PAN: AAOCS4380A
(Appellant)		(Respondent)

Revenue by : Mrs. Padmaja Siripurapu (CIT DR)

Assessee by : None

Date of Hearing: 01/06/2021

Date of Pronouncement: 28/06/2021

ORDER

PER SAKTIJIT DEY, JM

This is an appeal by the revenue against order dated 24.10.2019 of learned Commissioner of Income Tax (Appeals)34, Mumbai deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 for the assessment year 2013-14.

2. When the appeal was called for hearing, no one was present on behalf of the assessee to represent the case. However, considering the nature of dispute, we proceed to dispose of the appeals ex-parte qua the assessee after hearing the learned Departmental Representative and based on material on record. Before we deal with the substantive issue raised in the appeal, it must be put on record that the registry has pointed out delay of 669 days in filing the appeal. After hearing the submissions of learned Departmental Representative, we are convinced that actually there is no delay in filing the appeal. The confusion regarding delay in filing the appeal has arisen because of wrong

mentioning of date of communication of order appealed against in column no. 3(c) of the memorandum of appeal in Form no. 36. Instead of mentioning the date of communication of order passed by learned Commissioner (Appeals), the date of communication of penalty order has been wrongly mentioned. Thus, there being no delay, the appeal is taken up for adjudication on merits.

3. We have considered the submissions of Smt. Padmaja Siripurapu, learned CIT DR and perused the material on record. Undisputedly, the revenue is aggrieved with the deletion of penalty imposed under section 271(1)(c) of the Act. As could be seen from the facts on record, assessment in case of the assessee was originally completed under section 143(3) of the Act on 09.03.2016. The assessment order so passed was revised by the learned Principal Commissioner of Income Tax (PCIT) in exercise of power conferred under section 263 of the Act. While doing so, he set aside the assessment order to the AO with certain directions. In pursuance to the directions of learned PCIT, the AO passed a fresh assessment order under section 143(3) r.w.s. 263 of the Act on 09.11.2017 adding an amount of Rs. 14,86,04,756/- towards revenue earned through sale of electricity during testing period. Based on such addition, the AO initiated proceedings for imposition of penalty under section 271(1)(c) of the Act and ultimately passed an order imposing penalty of Rs.9,18,37,740/-, being 200% of the tax allegedly sought to be evaded. Against the penalty order so passed, the assessee preferred an appeal before learned First Appellate Authority. Learned Commissioner (Appeals) having found that the order passed under section 263 of the Act was quashed by the Tribunal while deciding the assessee's appeal, deleted the penalty imposed with the following observations:

"5. 3 I have carefully considered facts of the case, oral contention and written submission of the assesses, discussion of the AO in the impugned order and material available on record. The appellant in their submission have mentioned that in the appeal filed against the order passed u/s. 263 of the Act by Ld. PCIT-2, Mumbai, the Hon'ble IT AT have decided the issue in favour of the appellant in 1TA No. 7209/Mum/2017 dated 14.10.2019 The appellant accordingly has contended that no penalty is ought to be levied when the disallowance

on which penalty is sought to be levied itself has been allowed The appellant has placed reliance on the decision of the Hon'ble Supreme Court in the case of K. C. Builders v. ACIT (supra) wherein it has been held that where an order of assessment or reassessment on the basis of which penalty has been levied on the assesses has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled. It is seen from the last sentence of para 4 of the order of Hon'ble ITAT in ITA No. 7209/Mum/2017 dated 14.10.2019 which was the order passed in the appeal filed by the assesses against the order passed by the Ld. PCIT-2, Mumbai, u/s 263, it has been directed asunder:

“..... Therefore, on the given set of facts, the bench formed an opinion that the issue of revisional jurisdiction u/s. 263 would go back to Ld PCIT to reconsider the directions given in the impugned order in the light of subsequent decision rendered by the Tribunal, as cited above. We order so.”

It can be seen from the aforesaid directions of the Hon'ble Tribunal (hat the order passed u/s. 263 by the PCIT, Mumbai dated 30.10.2017 which formed the basis for passing the order u/s, 143(3) r.w.s. 263 by the AO, consequent initiation of penalty u/s, 271(1)(c) and passing the impugned order by the AO u/s. 271(1)(c) dated 26.12.2017. itself has been set aside and therefore, in view of the decision of Hon'ble Supreme Court in the case of K. C, Builders v. ACIT (supra) and other decisions relied upon by the appellant in this regard, the penalty levied through the impugned order cannot survive. In view of the facts and circumstances of the case and discussion hereinabove the penalty so levied is directed To be cancelled and accordingly the only issue raised in this appeal is allowed.”

4. The observations of learned First Appellate Authority reproduced above are self explanatory. Undisputedly, the penalty imposed under section 271(1)(c) of the Act was based on the addition made in the fresh assessment order passed in pursuance to the directions of learned PCIT under section 263 of the Act. As observed by learned Commissioner (Appeals), the order passed under section 263 of the Act, in the meanwhile, has been set aside by the Tribunal vide order passed in ITA No. 7209/Mum/2017 dated 14.10.2019. The aforesaid factual position has not been disputed by the learned Departmental Representative. Her submission is, against the order passed by the Tribunal, the department might have preferred an appeal to the Hon'ble High Court. Be

that as it may, as on date the order passed by the Tribunal setting aside the order passed under section 263 of the Act is still in force. That being the case, the assessment order as well as the penalty order passed consequent upon the order passed under section 263 of the Act cannot have any independent existence in absence of the order passed under section 263 of the Act. Even otherwise also, it is evident from the aforesaid order of the Tribunal, while setting aside the order passed under section 263 of the Act, the Tribunal has taken note of the fact that issue has been decided in favour of the assessee on merits in assessment year 2012-13. In view of the aforesaid, we fully agree with the decision of learned Commissioner (Appeals) in deleting the penalty imposed under section 271(1)(c) of the Act.

5. In the result, appeal is allowed.

Order pronounced in the open court on 28th June, 2021.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/06/2021

Alindra, PS

आदेश 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