

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 2175/Mum/2021

(Assessment Year 2011-12)

The ACIT
Circle 3(2)(1)
Room No. 674, 6th Floor,
Aayakar Bhavan,
M.K. Road,
Mumbai-400 020

Vs.

M/s SJR Commodities &
Consulting Pvt. Ltd.
73-C, Su-raj House,
Cross Road,
Mumbai-400 093

(Appellant)

(Respondent)

PAN No. AAACS9779H

Assessee by : Shri Vishal Shah, AR
Revenue by : Shri Harmesh Lal, DR

Date of hearing: 17.05.2022
Date of pronouncement : 23.05.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the learned Dy. Commissioner of Income-tax, 3(2)(1), Mumbai (the learned Assessing Officer) against the order passed by National Faceless Appeal Center (NFAC) [the learned Commissioner of Income-tax (Appeals)] for A.Y. 2011-12 vide din no. ITBA/NFAC/S/250/2021-22/1035677097(1) dated 17th September, 2021, wherein the penalty levied of ₹2,86,97,054/- levied under section 271(1)(c) of the Act passed by the learned Assessing Officer on 30th March, 2019 was deleted.

02. The learned Assessing Officer has raised the following grounds of appeal:-

"(i) Whether on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the penalty of Rs. 2,86,97,054/- levied u/s.271(1)(c) of the I.T. Act, 1961 without appreciating that the fact that the assessee had furnished inaccurate particulars of its income for the instant Assessment Year thereby concealing its true income.

(ii) Whether on the facts and the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the penalty of Rs. 2,86,97,054/- levied u/s.271(1)(c) of the I. T. Act, 1961 on the basis of the ITAT order dated 14.06.2019 without appreciating that on the issue of restriction of deduction claimed by assessee u/s. 10AA, the decision of ITAT has been challenged by the department in High Court.

(iii) Whether on the facts and the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the penalty of Rs. 2,86,97,054/- levied us.271(1)(c) of the I.T. Act, 1961 on the basis of the ITAT order dated 14.06.2019 without appreciating that the ITAT had restored the issue relating to the issue of allocation of loss option premium of Rs.85,98,116/- to SEZ unit to the Assessing Officer for denovo adjudication and had not deleted the addition of Rs.85,98,116/- made by the Assessing Officer.

(iv) The appellant prays that the order of CIT(A) on the above grounds be set aside and that of Assessing Officer be restored.

(v) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

03. Brief acts of the case shows that assessee is a company filed its return of income for impugned Assessment Year 2011-12 on 29.09.2011 declaring total income of ₹ nil claiming deduction under Section 10AA of the Act. The assessment order under Section 143(3) was passed on 27th March, 2014 at an assessed income of ₹8,78,96,816/- , where disallowance of deduction under Section 10A of the Act was made. There was also addition on account of loss on option premium buying and selling of USD allocated to Cochin Unit of ₹85,98,116/-. The assessee preferred the appeal before the learned CIT (A), who confirmed the disallowance under Section 10A of the Act of ₹5,92,02,308/- instead of claim of ₹13,69,95,563/-. He also confirmed the addition of ₹85,98,116/- on option premium loss allocated to SEZ unit. Based on this, the penalty proceedings originally initiated was put into action. The assessee submitted a letter dated 11th March, 2019 stating that disallowance under Section 10A of the Act was made on adhoc basis and there is no concealment of income. Meanwhile, the order of learned CIT (A) in quantum proceedings was challenged before the co-ordinate Bench in ITA no. 4548/Mum/2017. This appeal

was decided as per the order dated 14th June, 2019 wherein, the claim of deduction to the extent of ₹7,77,93,255/- under Section 10A of the Act was deleted and further, the issue of allocation of loss towards option premium of ₹85,98,116/- to Cochin Unit was set aside to the file of the learned Assessing Officer. Based on the above order of the co-ordinate Bench, the learned CIT (A) held vide Para 6.6 to 6.8 as under:-

"6.6 As evident from the above, it is pertinent to note that the penalty under consideration for concealment of income under section 271(1)(c) was levied on account of two additions. One, addition on account of estimated turnover of SEZ unit which was reduced from Rs. 13,69,95,563 to Rs. 5,92,02,308/- and second on the issue relating to allocation of loss of option premium of Rs. 85,98,116/- to SEZ unit. No penalty was levied on account of apportion of expenses amounting to Rs 17,70,848/- by the AO as the same was deleted by the CIT(A)-18, Mumbai.

6.7. As the matter under consideration of Appeal by the Appellant was on account of penalty levied for the additions made relating to additions of Rs. 85,98,116/- which has been restored to the AO for denovo examination and the addition of estimated turnover of SEZ unit to 3% from 6.52%, which has been set aside by the Hon'ble ITAT.

6.8 In view of the decision of Hon'ble ITAT(Supra), the Penalty levied to the extent of addition made on account of addition of Rs. 85,98,116/- and addition of

estimated turnover of SEZ unity to 3% from 6 52%, does not stand and directed to be deleted."

04. Thus, penalty was deleted by the learned CIT (A).
05. The learned Assessing Officer is aggrieved with that of the order is in appeal.
06. Supporting the order of the learned Assessing Officer, the Departmental Representative submitted that the decision of the ITAT has been challenged by the Revenue before the Hon'ble High court with respect to the deduction under Section 10AA of the Act. Further, with respect to the second disallowance on allocation of loss premium, it was submitted that ITAT has set aside the order to the file of the learned Assessing Officer for deciding afresh and therefore, the penalty could not have been deleted on the above sum.
07. The learned Authorized Representative submitted that the deduction under Section 10A of the Act of ₹7,77,93,255/- has been deleted by the co-ordinate Bench and therefore, merely preferring an appeal before the Hon'ble High Court by the Revenue cannot be used as excuse for levy of the penalty. With respect to the second addition, it has been remanded back to the learned Assessing Officer and therefore, the penalty may be reinitiated by the learned Assessing Officer, if the addition is sustained. Therefore, there is no error in order of learned CIT (A) in deleting the penalty.

08. We have carefully considered the rival contentions and perused the orders of the lower authorities. We have also perused the order of the co-ordinate Bench in the quantum proceedings. As the fact shows that penalty has been levied by the learned Assessing Officer on two additions/ disallowances made by the learned Assessing Officer. The first addition is with respect to the disallowance of deduction under Section 10AA of the Act. The co-ordinate Bench has deleted the above disallowance. Merely, because the same has been agitated before the Hon'ble High Court, the penalty cannot be levied. As on this date the above addition does not stand and it is decided in favour of the assessee, the penalty to that extent has been correctly deleted by the learned Commissioner of Income-tax (Appeals). With respect to second addition / disallowance of loss on option premium allocated to the SEZ unit of ₹85,98,116/-, the co-ordinate Bench has remanded the matter back to the file of the learned Assessing Officer. Therefore, when the particular addition has been restored back to the file of the learned Assessing Officer, the power of the learned Assessing Officer for initiation of penalty proceedings, if in set aside proceedings, the learned Assessing Officer is satisfied that there is concealment of income or furnishing of inaccurate particulars of income to initiate the penalty. However, at the present stage there is no infirmity in the order of the learned CIT (A). Hence, we uphold the order of the learned CIT (A) deleting the penalty under Section



271(1)(c) of the Act. Accordingly, the order of the learned Assessing Officer is dismissed.

09. In the result, the order of the learned Assessing Officer is dismissed.

Order pronounced in the open court on 23.05.2022.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 23.05.2022

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai