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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 1095/Mum/2020
(Assessment Year 2016-17)

M/s G.M. Fabrics P. Ltd. Ground Floor, Dhana Singh Compound, Andheri Kurla Road, JB Nagar, Mumbai-400 058	Vs.	Dy. CIT -9(3)(2) Room No. 418, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
(Appellant)		**(Respondent)**

PAN No. AAACH 2821 F

Assessee by	:	Ms Ritika Agarwal, AR
Revenue by	:	Shri Hoshang B. Irani, DR

Date of hearing:	02.06.2022
Date of pronouncement :	07.07.2022

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by G.M. Fabrics Private Limited (Assessee/ Appellant) against the order passed by the Commissioner of Income tax (Appeals)-16, Mumbai [The LD CIT (A)] on 31 January 2020. By this order penalty levied under Section 221(1) of the Income-tax Act, 1961 (The Act) by the order dated 14th May, 2018 passed by the Dy. Commissioner of

Income Tax-9(3)(2), Mumbai (The Learned Assessing Officer) was confirmed.

02. Assessee has raised following grounds of appeal:-

> *"1. BECAUSE, the ld. CIT (A) has erred in law and on facts while upholding the penalty of Rs. 1, 84, 60,000/- u/s 221(1) of the Act on alleged default in payment of self-assessment tax.*
>
> *2. BECAUSE, the ld. CIT(A) has erred in law and on facts in failing to appreciate that the appellant was not an 'assessee in default' u/s 140A so as to be liable for impugned penalty.*
>
> *3. BECAUSE, the ld. CIT(A) has erred in law in failing to consider that even an "assessee in default u/s 140A was not liable to penalty u/s 221 after the amendment w.e.f. 01.04.1989.*
>
> *4. BECAUSE, the ld. CIT(A) has erred in law in failing to consider that the issue stood covered in appellant's favour by order of jurisdictional ITAT.*
>
> *5. BECAUSE, the ld. CIT(A) has erred in law in failing to adjudicate the erroneous calculation of interest u/s 234B amounting to Rs. 71,28,911/-."*

03. Brief fact of the case shows that assessee is a private limited company engaged in the business of manufacturing of textiles. It filed its return of income on 17th October, 2016, declaring income of ₹24,79,36,350/-. Total tax Liability was computed at Rs 85805812/-, MAT credit was claimed at Rs 49558162/- , total advance tax paid was shown at Rs 37051371 and refund due was claimed at Rs 803721/-.

04. On 10 February 2017, notice was issued to the assessee holding that the return of income filed on 17 October 2016 is defective under Section 139(9) of the Act for the reason that the income appearing in the profit and loss account did not match with relevant schedule of the return and same schedules are not filed. The defect was to be removed within 15 days of notice.

05. Assessee did not remove the defect and therefore, the return was declared as invalid on 8 July 2017.

06. The assessee after consultation found that the credit of MAT claimed was not correctly computed and therefore revise return was to be filed.

07. On 19/01/2018, assessee filed return under Section 139(4) of the Act at the same total income, however, claimed MAT credit of ₹1,18,34,786/- and balance tax liability was worked out at ₹7,39,71,026/-. Thus, the additional tax liability of ₹3,69,29,000/- was paid on 5th July, 2017 of ₹2,70,00,000/- and on 15th December, 2017, ₹99,20,000/-.

08. However, on 23rd March, 2018, the learned Assessing Officer issued notice under Section 221 read with section 140A of the Act, asking the assessee as to why the penalty should not be levied for default of non-payment of taxes on due date.

09. On 24.04.2018, assessee submitted that there is no default as the self-assessment tax as determined in the return of income under Section 139(4) of the Act has been paid.

010. The learned Assessing Officer rejected the contention of the assessee and on 14 May 2018 passed an order under Section 221(1) of the Act. The learned Assessing Officer held that

assessee filed its belated return of income only after invalidation of Return of income by the Central Processing Centre, Bangalore. The learned Assessing Officer was of the view that filing of belated return is a subsequent event cannot exonerate the assessee from its earlier default. He held that at the time of filing of original return, the assessee has claimed excess MAT credit, which is not available to the assessee, and it is intentionally wrong claim. Thus, according to him, there is a clear violation of Section 140A of the Act, in not paying the admitted tax liability at the time of filing of original return. He further noted that assessee has paid self assessment tax of ₹2,70,000/- on 5th July, 2017 and ₹99,20,000/- on 15th December, 2017. Further, the return was filed under Section 139(4) of the Act on 19 January 2018. It is concluded that assessee has behaved in an irresponsible manner and resorted to outride falsehoods. The errors claimed by the assessee are not bonafide. Therefore, he held that assessee is 'assessee in default' under Section 221(1) of the Act. He also relied on the decision of Hon'ble Bombay High Court in case of Reliance Industries Limited vs. CIT 377 ITR 74, wherein it has been held that the penalty would be imposable even if tax has been deposited before initiation of penalty proceedings. He further held that the facts in the case of the assessee are identical to the issue decided by Special Bench in case of Claris Life sciences Limited vs. DCIT in ITA No. 498/AHD/2011 dated 26 September 2017. Accordingly, he levied the penalty of ₹1,84,60,000/- being 50% of ₹3,69,20,000/- by passing an order under Section 221(1) of the Act on 14th May, 2018.

011. Assessee aggrieved with that order preferred an appeal before the learned CIT (A), who confirmed the same by order dated 31 January 2020 and therefore, assessee is in appeal before us.

012. The learned Authorized Representative submitted paper book containing 69 pages placing on record the factum of filing of original return of income as well as return filed under Section 139(4) of the Act. It is specifically referred to page no. 64 of the Paper Book, which is a screen shot of the information available on the income tax portal wherein the return filed by the assessee on 17 October 2016 was held to be invalid. She submitted ITR was filed on 17 October 2016, on 13 February 2017 The ITR filed was found to be defective. On 6 March 2017 and on 4 April 2017 two reminders were issued and subsequently, on 8 July 2017, the return of income was found to be invalid. The learned Authorized Representative further relied upon the copy of the reply of show cause notice dated 2nd April, 2018 placed at page no. 67 and 69 Paper Book as well as return submission filed before the learned CIT (A) at page no. 59 to 63A of the Paper Book. She also referred to show cause notice dated 23rd March, 2018, placed at page no. 65 to 66 of the Paper Book. The learned Authorised Representative claimed that when the return of income is held to be invalid return, the penalty based on invalid return could not be levied. She further referred to the chronology of the events. The learned Authorized Representative further referred to the provisions of Section 221 and Section 140A of the Act. She submitted that the penalty could be levied only if the return is filed under Section 139 of the Act and assessee has not paid any tax due thereon. It was stated that when the return of income itself has been held as invalid, on such invalid return self assessment tax is not required to be paid and on that return assessee cannot be held to be an 'assessee in default' and therefore, the penalty levied by learned Assessing Officer and confirmed by learned CIT (A) is not correct. She submitted that the return filed by the assessee under Section 139(4) of

the Act does not have any default of the payment of tax. No penalty has been initiated based on return filed under Section 139(4) of the Act. Accordingly, penalty is required to be deleted.

013. The learned Departmental Representative supported the orders of the lower authorities. He submitted that originally the assessee has filed return of income claiming wrong minimum alternative tax credit, wherein it was found by the Department that such credit is erroneous, and certain columns were not filled, the notice was given to it as defective return. Assessee did not comply with the same. Subsequently assessee filed different return u/s 139 (4) of the act. It did not pay tax due in the original return. Several notices were issued to the assessee pointing out the defect in return. It was not cured, therefore penalty was levied. He specifically referred to the order of the learned AO where several judicial precedents are considered. Accordingly, he submitted that there is no infirmity in the orders of the lower authorities.

014. We have carefully considered the rival contention and perused the orders of the lower authorities. The facts show that assessee filed original return of income on 17/10/2016. As per that return admittedly assessee claimed incorrect mat credit. In the return, assessee did not completely fill up particular schedules. Therefore, on 13/2/2017 at the time of processing the return filed by the assessee was found to be defective/incomplete. Assessee was given first reminder on 6/3/2017 to cure the defect and subsequent reminder on 4/4/2017. However, both this reminders to rectify the defect were not responded to by the assessee. Subsequently on 8/7/ 2017, this income tax return was invalidated by filing portal.

According to provisions of Section 139 (9) of the act provides that where the AO considers that the return of income furnished by the assessee is defective, such defects may be intimated to the assessee and given an opportunity to rectify the defect within a specified time limit. If the defect is not rectified then such return shall be treated as an invalid return and the provisions of this act shall apply as if the assessee has failed to furnish the return. If before the assessment is made, assessee rectified the defect, the AO may condone the delay and treat the return is a valid return. In case of the assessee, assessee did not rectify that defect of incorrect claim or filing of proper schedules, therefore, the original return filed by the assessee on 17/10/2016 is deemed never to have been filed. The fact also shows that assessee subsequently filed the return of income u/s 139 (4) of the act which is a valid return. In the acknowledgement of return produced before us placed at page number 54 of the paper book shows that it is an original return. However, it did not have any defect and is accepted by the revenue. However the AO initiated penalty proceedings by issue of show cause notice stating that

> "Return of income filed on 17/10/2016 the tax liability was shown at ₹ 36,247,650/– which was incorrect. Thereupon return was revised on 19/1/2018 without any change in the total income however total tax and interest calculated at ₹ 73,971,026/–."

We first find that assertion of the learned assessing officer that the return was revised on 19/1/2018 is a revised return is devoid of any merit. This is so because in the acknowledgement of return filed in 19/1/2018

assessee says it is still an original return. Based on that return i.e. filed on 17/10/2016, he proposes to levy the penalty u/s 221 of the income tax act holding assessee to be an 'assessee in default'. We find that when the return filed on 17/10/2016 was held to be an invalid return, thus, deemed never to have been filed by the assessee or as if the assessee has failed to furnish the return, we failed to understand that how the penalty can be initiated stating that assessee has failed to pay tax according to the invalid return filed by the assessee. When a return of income is held to be invalid, it cannot be considered that such return has ever been filed u/s 139 of the act. Provisions of Section 140A (3) can apply only when there is a self-assessment tax payable with respect to the return filed u/s 139 of the act. Further, if there is a failure u/s 140 A (3) of the act then only assessee can be held to be "assessee in default". As in the present case there is no return of income filed u/s 139 of the income tax act, therefore any penalty based on that return, does not survive. There is one more aspect to the issue, on one hand Act treats defective return as ' Failure to furnish' the return of income and on the other hand, ld AO initiates penalty based on that defective return for non payment of taxes. Thus , there is an apparent dichotomy in the action of the ld AO.

015. Accordingly we find that the penalty levied by the learned assessing officer as per order dated 14/05/2018 u/s 221 (1) of the income tax act of ₹ 1,84,60,000/– is not

sustainable. Hence, orders of lower authorities are reversed. Ground no 1 to 4 are allowed.

016. No arguments were advanced on Ground no 5 , hence dismissed.

017. Appeal is partly allowed.

Order pronounced in the open court on 07.07.2022.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 07.07.2022
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