

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 2267/Mum/2021
(A.Y: 2004-05)

DCIT, CC-7(2) Room No. 655, Aayakar Bhavan, MK Road, Mumbai – 400020.	Vs.	M/s Anik Industries Ltd 3 rd Floor, 610, Tulsiani Chamber, Nariman Point Mumbai – 400021.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACM2696K		
Appellant	..	Respondent

Appellant by :	Smt Shailja Rai.DR
Respondent by :	Shri.Bhupendra Shah.AR

Date of Hearing	26.07.2022
Date of Pronouncement	28.07.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE, JM:

The revenue has filed the appeal against the order passed by the Commissioner of Income Tax (Appeals) u/s 271(1)(c) and 250 of the Act. The revenue has raised the following grounds of appeal:

- 1. Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in deciding that the addition made by the AO in respect of waiver of loan treating the same as taxable does not tantamount to concealment of income/ filing of inaccurate particulars of*

income ignoring the fact that the assessee has failed to give explanation which is bonafide in nature.

2. Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in deciding that the addition made by the AO in respect of waiver of loan treating the same as taxable does not tantamount to concealment of income/filing of inaccurate particulars of income ignoring the fact that the waiver of loan being income of the assessee could have been unearthed in the absence of scrutiny assessment.

3. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the penalty levied u/s 271(1)(c) of the I.T. Act, 1961 by ignoring the facts that the Ld. CIT(A) had already confirm the quantum addition made by the AO in this regard by stating that the facts of the case is identical to the case of the decision by Hon"ble Bombay High Court in the Solid containers Pvt. Ltd. case and thus, the waiver of loan is taxable in the hands of the assessee.

The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary,

2. The Brief facts of the case are that the assessee company is engaged in the business of manufacturing of diary and nutritional products. The assessee has filed the return of income for the A.Y 2004-05 on 01.11.2004 disclosing a total loss of Rs. 4,91,39,250/-. Subsequently the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act was issued. In

compliance to the notice the Ld. AR of the assessee appeared from time to time and the case was discussed. On perusal of the financial statements, the Assessing Officer (A.O) found that the assessee has received waiver of unsecured loan of Rs. 10,23,88,000/- from its holding company M/s Nutricia International B.V. and was transferred to capital reserve account in the Balance Sheet. The assessee was asked to explain, why the waiver of loan should not be considered as income U/sec41(1) of the Act . The assessee has filed the explanations that the waiver of Loan is in the nature of capital receipt and credited to capital reserve account. The A.O. was not satisfied with the explanations and distinguished the judicial decisions and treated the waiver of loan is taxable U/sec28(iv) of the Act. Further, the A.O. made disallowances of expenses and after set off of carry forward of unabsorbed depreciation of Rs. 8,57,83,800/- has assessed the total income of Rs.Nil and passed the order u/sec143(3) of the Act dated 22-12-2006. Aggrieved by the order, the assessee has filed an appeal before the CIT(A). The appellate authority has confirmed the addition of waiver of Loan and

granted relief in other grounds of appeal and partly allowed the appeal. On further appeal, the addition was confirmed by the Honble Tribunal and the assessee has filed an appeal before the Hon'ble Jurisdictional High Court of Bombay and the appeal was admitted and is pending for hearing.

3. Subsequently the A.O. has initiated penalty proceedings and issued show cause notice for levying penalty u/s 271(1)(c) of the Act. Whereas the assessee has filed the written submissions dated 12.12.2017 referred at page 2 of the penalty order supported with the facts, and judicial decisions. Whereas the AO has dealt on the explanations furnished by the assessee and vis-à-vis the provisions of Sec. 271(1)(c) of the Act. The contentions of the assessee that the waiver of loan was added as income of the assessee. Whereas on further appeal, the CIT(A) and Hon'ble Tribunal has dismissed the assessee appeal. The A.O. was not satisfied with the explanations and applied the provisions of Sec. 271(1)(c) r.w explanation 1 of the Act and has levied penalty of Rs.3,07,01,400/- for furnishing in accurate particulars of income and

passed order u/s 271(1)(c) of the Act dated 25.01.2018.

4. Aggrieved by the penalty order, the assessee has filed an appeal before the CIT(A). The CIT(A) considered the grounds of appeal, findings of the A.O. and dealt elaborately on the submissions of the assessee at Para 6.1 of the order read as under:

6.1 The submissions made by the assessee as to the aforesaid grounds are as below:

1) That the assessee company was filed its return of total income on 1/11/2004 declaring the loss of R\$ 4,91,39,200/- and the assessment was completed on a total income of Rs.NIL after considering the set off of carried forward loss of Rs.8,57,83,800/-and thus make the disallowances of Rs. 10,23,88,000/- by waiver of loan treated income as against the assessee shown capital receipts and credited to capital reserve account.

2) That the Hon'ble CIT (A) and ITAT confirm the addition and the Hon'ble High Court of Bombay admitted the appeal of the company which is being pending for hearing

3) That the tax payable on assessed income Rs. NIL and there was no intention to avoid the payment of Tax and default is not at all intentional

4) That the assessee company while filing the return of total income SUO MOTO Put a note 5 in the computation of total income "The assessee company has received waiver of Unsecured Loan From Nutricia International

B.V. amounting to Rs.10,23,88,000/-which has been transferred to capital reserve account .

5) That the penalty for concealment is applicable only when an assessee willfully under report the tax base for any financial year .In the instant case the assessed income is Rs..NIL after considering the set off of loss and no tax to payable on assessed income and hence the burden of proof will be on the department that the assessee has wilfully under reported the tax base If the Explanation offered even though not substantiated by the assessee but is found to be bonafide and all facts relating to the same and material to the computation of his total income have been disclosed by him no penalty could be imposed .In the instant case what had been treated as furnishing of inaccurate particulars was making of a claim which was not admitted by the Assessing officer. The admission or rejection of a claim is a subjective exercise. Whether a claim is accepted or rejected has nothing to do with furnishing of inaccurate particulars of Income The Assessing Officer has treated the appellant 's making an incorrect claim of income as furnishing of inaccurate particulars .What is a correct claim and what is an incorrect claim is a matter of perfection rising a legal claim even if it is ultimately found to be legally unacceptable cannot amount to furnishing of inaccurate particulars of Income "inaccurate is something factually incorrect and interpretation of law never be factual aspects "Just because the assessing officer does not accept an interpretation ,such an interpretation is not rendered incorrect

6) The Hon'ble Supreme Court in the following case Held - on a plain reading of section 28(iv) of the Act, Prima facie ,it appears that for the applicability of the said provision, the income which can be taxed shall assess

from the business or profession .Also, in order to invoke the provision of section 28(iv) of the Act, The benefit which is received has to be in some other form rather than in the shape of money .In the instant case it is matter of record that the amount of Rs.57,74,064/-is having received as cash receipt due to the waiver of loan. Therefore the very first condition of section 28(iv) of the Act, which say any benefit or perquisites arising from the business shall be in the form of benefit or perquisites other than in the shape of money ,is not satisfied in the present case Hence in our view ,in no circumstances it can be said that the amount of Rs.57,74,064/-can be taxed under the provisions of section 28(iv) of the income tax Act.

Commissioner of Income Tax Vs Mahendra & Mahendra Ltd (2018) 33 ITJ 398 (SC)

Siemens Public Communication Network Pt Ltd Vs Commissioner of Income Tax (2017) 30 ITJ 117 (SC)

CIT Vs Handicraft and Handlooms Exports Corp.of India Ltd (2014) 360 ITR 130 (Delhi HC).....

5. Finally, the CIT(A) dealt on the facts and relied on the catena of judicial decisions and directed the Assessing officer to delete penalty and allowed the assessee appeal. Aggrieved by the CIT(A) order, the revenue has filed an appeal before the Honble Tribunal.

6. At the time of hearing, the Ld. DR submitted that the CIT(A) erred in deleting the penalty irrespective of

the facts that the quantum addition of the A.O. is confirmed by the Hon'ble Tribunal. The CIT(A) has overlooked the provisions of section 271(1)C of the Act r.w explanation 1 and unilaterally deleted the penalty and action of the CIT(A) is not as per the provisions of law and supported the penalty order of the Assessing Officer.

7. Contra, the Ld. AR submitted that the CIT(A) has considered the facts and catena of judicial decisions and decisions on the waiver of loan by the parent company and granted the relief and supported the submissions with the judicial decisions and factual paper book and prayed for dismissal of the revenue appeal.

8. We heard the rival submissions and perused the material on record. Prima-facie the sole grievance of the Ld. DR that the CIT(A) has erred in deleting the penalty levied u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income. The Ld. AR's contentions are that the A.O has not accepted the facts of waiver of loan by the parent company and was added in the assessment order and the CIT(A) has confirmed

the addition and on further appeal to the Hon'ble Tribunal the ITAT has upheld the CIT(A) order. The Ld. AR submitted that the assessee has filed an appeal against the ITAT order with the Hon'ble High Court of Bombay and the same is pending for hearing. Whereas the CIT(A) having knowledge of these facts has considered the catena of judicial decisions. At this juncture, we consider it appropriate to refer to the findings of the CIT(A) in deleting the penalty dealt at Para 6.2 to 6.2.44 of the order which is read as under:

DECISION;

6.2 I have considered the facts and have perused the assessment order, the order of the Ld. CIT(A) and the order of the ITAT and have gone through the submissions of the assessee as to the claim that penalty was not leviable in this case.

6.2.1. The Assessee company has previously received unsecured loan from its holding company Nutricia Internation B.V. amounting to Rs.10,23,88,000/-, which was waived during the assessment year under reference and the same was taken to capital reserve account. The receipt on account of waiver of loan was, however, held by the AO as taxable in the hands of the assessed sidl") of the Act us 28 (iv) of the Act and the Ld. CIT(A) and Honible ITAT has uphold the taxbility of this amount as income in the hands of the assessee uls 28(iv) of the Act The assessee submitted that it has filed an appeal against the order of the ITAT before Honible High Court

and the delay in filing of appeal was condoned and it was accepted for admission, which is pending.

6.2.2. The primary contention of the assessee is that the said amount, received as waiver of loan from the holding company, was, as per the considered view of the assessee, not taxable in its hands and that the assessee suo motu put a note 5 in the computation of total income wherein it was clearly mentioned that the assessee company had received waiver of unsecured loan from its holding company Nutricia International B.V. amounting to Rs.10,23,88,000/-, which has been transferred to capital reserve account. The claim of the assessee in this regard is that the assessee has not wilfully underreported any income, which was taxable, and hence, there was no case for levy of penalty.

6.2.3 The assessee further claimed that all the necessary facts in this regard have been disclosed in the return of income and therefore there could be no case of wilful concealment or filing of inaccurate particulars of income. The assessee placed reliance on the decision of Hon'ble Supreme Court in the case of Mahindra and Mahindra Ltd. (2018) 33 ITJ 398(SC) to support its view that the provisions of Section 28(iv) of the Act prima facie does not appear to be applicable. The assessee also placed reliance on the decision of the Hon'ble Supreme Court in the case of Siemens Public Communication Network Pvt. Ltd. v/s. CIT(2017) 30 ITJ 117(SC) and the decision of Hon'ble Delhi High Court in the case of CIT v/s. Handicraft and Handlooms Exports Corp. of India Ltd. (2014) 360 IT 130 (Delhi HC) to support its contention that the said receipt was reasonably considered as not taxable in the hands of the assessee.

6.2.4 The assessee further submitted that even if it has made a purported wrong claim in the return of income

but the same is properly disclosed therein, the penalty could not be levied as held by the Hon'ble Bombay High Court in the case of CIT v/s. Nalin P. Shah (HUF) 40 taxmann.com 86. The assessee has further placed reliance on another decision of Hon'ble Jurisdictional High Court in the case of Sesa Resources Ltd. v/s. ACIT, 219 Taxman 92, wherein it was held that whether there was no dispute that the appellant disclosed all the facts and the appellant did not conceal any facts and further that based on the disclosed material the appellant saw the deduction which was denied on the ground that it was not entitled to the same as matter of law, the Hon'ble Tribunal was in error in holding that merely because the placed reliance on several other judicial pronouncements as appearing in its submissions. The claim of the assessee in this regard was that the assessee has made this claim under a bona fide belief that the waiver of loan was on account of capital receipt and not taxable and it has disclosed all material facts in the return of income as well as computation of income and that the issue is debatable on which two views are possible and, therefore, the assessee cannot be subjected to penalty for filing of return of income in this manner and taking a view on this issue which was favourable to it.

6.2.5 In the assessment order dated 22.12.2006, the Ld. AO has discussed this issue in para 4 of the assessment order. It is evident from the perusal of the findings of the Ld. AO that the issue had come to the knowledge of the Ld. AO on perusal of notes to the computation of income. The observations of Ld. AO in this regard is as below:-

"4. During the course of assessment proceedings, it was seen from the notes to the computation of income that the assessee had received waiver of unsecured loan from

Nutricia International B.V amounting to Rs.10,23,88,000/-. The same had been transferred to the capital reserve account by the assessee. The assessee was asked to explain why the same should not be considered as income of the assessee us. 41(1) of the IT Act. In response to the query, the assessee has submitted that the waiver of loan is in the nature of capital receipt and has been correctly credited to capital reserve. It has also been stated that section 41(1) of the Act will not apply as the section is applicable only in case of cessation of trading liabilities in respect of which deductions have been claimed and allowed to the assessee in the earlier assessment year. The assessee has relied on the decision of the Bombay High Court in the case of Mahindra & Mahindra Ltd. reported in 261 ITR 501."

6.2.6 The Ld. AO has noted that the assessee has based its arguments relying on the decision of Hon'ble Bombay High Court in the case Mahindra & Mahindra Ltd(supra) to support its contention that the waiver of loan was not taxable in its hands. The AO has further noted that by waiver of loan the assessee company has become richer by the amount which automatically becomes its own and that this asset arises out of an ordinary trade transaction. The AO has noted that the amount was to be held as taxable in the hands of the assessee in view of the decision of Hon'ble Supreme Court in the case of Sundaram Iyengar (T.V) and Sons Ltd. (1996), 222 ITR 344, 353. The Ld. A has also noted that in the case of Mahindra & Mahindra Ltd. the aforesaid order of Hon'ble Supreme Court have not been discussed or distinguished. He accordingly held that the waiver of loan is taxable in the hands of assessee as per the provisions of Section 41(1) of the Income Tax Act, 1961.

6.27. Without prejudice to the above the AO further proceeded to hold that the rogelipt is also taxable in the hands of the assessee as per provisions of Section 28(1) of the Act placing reliance on judicial decisions as referred to in Para 4 of the assessment order dated 22.12.2006.

6.2.8. In appeal, the ld. CIT(A) has considered the issue and has held that the facts in the case of the assessee is different from the facts in the case of Mahindra & Mahindra and the case of the assessee is in fact covered by the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. v/s. DCIT (2009) 308 ITR 417 (BOM). In this regard the Ld. CIT(A) has observed that:-

"following & relying on CIT vs. T.V. Sundaram lyengar & Sons Ltd. 136 CTR (SC) 444 and CIT vs. Aries Advertising (P) Ltd. 255 ITR 510 (Mad.) and distinguishing Mahindra & Mahindra Ltd. vs. CIT 261 ITR 501 (Bom). The High Court of Bombay in Solid Containers Ltd. vs. Dy. CIT (2009) 308 ITR 417 (Bom) has held that amount received as loan by the assessee and ultimately retained in the business upon waiver of the loan is taxable under Section 28(iv); No question of law, much less a substantial question of law arises for consideration appeal dismissed in limine.

6.2.9. In further appeal the findings of the Ld. CIT(A) was upheld by the Hon'ble ITAT in an ex-parte order with following findings:-

8. We have heard Ld. DR and also perused the material place on record as well as the orders passed by revenue authorities. The only ground raised in the present appeal is challenging the additions of Rs. 10,23,88,000/- on account of waiver of loan by parent company. Ld. CIT(A) while adjudicating these grounds has taken into consideration and has given a detailed finding in para

no.4 of its order. We have carefully perused the order passed by Ld. CIT(A) and we find that Ld. CIT(A) has decided these grounds while relying upon the judgement of 'Solid Containers Pvt. Ltd.', the decision of Hon'ble Bombay High Court and therefore had treated the waiver of loan as taxable in the hands of the assessee. No new facts or contrary judgements have been brought on record before us by the learned AR in order to controvert or rebut the factual findings so recorded by Ld. CIT(A). Moreover there is no reason for us to deviate from the findings so recorded by Ld. CIT(A). Therefore, we are of the considered view that the findings so recorded by Ld. CIT(A) are judicious and are well reasoned. Accordingly, we uphold the same. Resultantly, the grounds of appeal raised by the assessee stand dismissed.

6.2.10. In this regard, it is pertinent to note that loans are taken to meet financial requirements and such loans could be used for the purpose of acquiring capital assets as well as working capital requirements of the business. Although, loans obtained are obviously required to be repaid but on certain occasions, due to some financial crunch or because of some negotiations between the parties, loans are waived by the creditors. In the present case the annellant has taken a loan from its holding company, which has subsequently been waived and was held as taxable in its hands as against the claim of the assessee that the same was on capital account.

6.2.11. I find that the ld. AO has held the receipt on account of waiver of loan as taxable as per provisions of section 41(1) of the Act, and on without prejudice basis the same was held as taxable u/s 28(iv) as well. Whereas, Id. CIT(A) has held that the impugned receipt is taxable in the hands of the assessee as per provisions of section 28(iv) of the Act. The same was further affirmed

by the Hon'ble ITAT, in an ex-parte order, wherein Hon'ble Tribunal held that the Id. CIT(A) has upheld the order of the AO following decision of Hon'ble Bombay High Court in the case of "Solid Containers Pvt. Ltd." and no new facts or contrary judgments have been brought on record and hence, the findings of the Id. CIT(A) was affirmed.

6.2.12. In this regard, it is pertinent to note that taxability of loan waiver has been a matter of debate having been considered by the Hon'ble Courts in various judicial decisions. Section 28(iv) of the Act provides, inter alia, that the value of any benefit or perquisite arising from business, whether convertible into money or not, should be taxed as business income. Whereas, section 41(1) of the Act provides, inter alia, that if an allowance or deduction has been claimed by an assessee in respect of a trading liability and subsequently, it obtains some benefit in respect of such trading liability by way of remission or cessation thereof in cash or in any other manner, such amount is deemed to be business income of the borrower. In this case, the waiver of loan by the holding company was held as taxable under Section 28(iv) of the Act.

6.2.13. As to the provisions of section 28(iv), the question arises that whether the words 'value of any benefit or perquisite' also cover benefits in cash or money or whether the said words shall be restricted to any benefit or perquisite in kind which could be valued. The said issue was discussed by the Hon'ble Gujarat High Court in the case of CIT v. Alchemic (P.) Ltd. [1981] 130 ITR 168, wherein it was held that section 28(iv) does not apply to benefits in cash or money. Further, the said issue has been also settled by the Hon'ble Supreme Court (SC) in the case of CIT vs. Mahindra & Mahindra

Ltd. [2018] 93 taxmann.com 32, wherein it was categorically held that in order to invoke the provision of section 28(iv), the benefit which is received has to be in some other form rather than in the shape of money.

6.2.14. *Further to the above, the provisions of section 41(1) of the Act are attracted if any benefit arises from remission or cessation of a trading liability. The question that arises for consideration is that whether loan is a trading liability and waiver of the same will be chargeable to tax under the provisions of Section 41(1) of the Act. In this regard, it is pertinent to note that as per general accounting principles loan perse is a financial liability and not a trading liability. However, while determining the taxability of waiver of loans, various courts have taken divergent views. So, it is imperative to take reference from the said judicial precedents.*

6.2.15. *The Hon'ble High Court of Bombay in the case of Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501 (Bombay), has held that as Toolings constituted capital asset and not stock-in-trade, section 41(1) was not applicable. The said principle laid down by the Hon'ble Bombay HC that loans received/or taken for purchase of capital assets does not constitute trading liability was upheld by the Hon'ble Apex Court in Commissioner v. Mahindra And Mahindra Ltd. [2018] 302 CTR 213, by observing that waiver of loans taken for capital assets amounts to cessation of liability other than trading liability.*

6.2.16. *In Logitronics (P.) Ltd. v. CIT [2011] 333 IT 386, the Hon'ble Delhi HC held that waiver definitely gives some benefit to the assessee. Whether, it is to be treated as capital receipt or income chargeable to tax would depend upon the purpose for which the said loan was taken. If the loan was taken for acquiring a capital*

asset, waiver thereof would not amount to any income exigible to tax, but on the other hand, if the loan was taken for trading purpose and was treated as such from the very beginning in the books of account, the waiver thereof may result in the income, more so when it was transferred to the P&L account.

6.2.17. In the case of Rollatainers Ltd. v. CIT [2011] 339 ITR 54, Hon'ble Delhi High Court, by referring to the judgment of the Bombay High Court in the case of Mahindra & Mahindra (supra), held that waiver of term loans given by financial institutions cannot be treated as income in the hands of the assessee. It is only the writing off loans on cash credit account which was received for carrying out the day-to-day operations of the assessee which is to be treated as "income" in the hands of the assessee.

6.2.18. From the analysis of the aforesaid judicial precedents, it is apparent that law is settled in case of waiver of loans obtained for purchase of capital asset by the recent judgment of the Hon'ble Apex Court in case of Mahindra & Mahindra (supra) and accordingly, no tax implications shall arise if loan amount waived was obtained and/or utilized for purchase of capital assets by an assessee. However, as far as the issue in relation to waiver of working capital loans is concerned, it is worthwhile to note that Hon'ble Delhi High Court in the case of Logitronics (P.) Ltd. (supra) has laid down an altogether different principle of purpose test i.e. the purpose of obtaining the loan is to be considered for determining whether the respective loan is a trading liability or not. The same test was also applied by Hon'ble High Court of Bombay in its subsequent decision in the case of Solid Containers Ltd. v. DCIT (2009) 308 IT 417. Hence, the aforesaid judgments have given a

principle of purpose test in order to tax the remission of a loan.

6.2.19. After discussing the applicability of Section 28(iv) and Section 41(1) of the Act in case of waiver of loan, it is also important to analyze some of the recent judgments of the Hon'ble Courts/Tribunals wherein by following the judgment of Mahindra & Mahindra Ltd. (supra), in some cases, decisions have been given in favour of the assessee by holding that no income shall be taxable under Section 28 (iv) or Section 41(1) of the Act in case of waiver of loans.

6.2.20. In the case of Jai Pal Gaba v. Income Tax Officer, Ward-III, Ludhiana (2019) 178 ITD 357, Chandigarh Tribunal held that where assessee took loan from bank for the purpose of business but not in course of business i.e. loan sourced was not linked to trading receipts, then subsequent waiver of loan amount under one time settlement could not be said to be benefit or perquisite arising from business to assessee taxable under Section 28(iv) of the Act. Also, it was held that waiver of loan amount would not amount to cessation of trading liability so as to attract Section 41(1) of the Income Tax Act, 1961.

6.2.21. In the case of PCIT v. Vibhadeep Investment & Trading Ltd. (2019), in Income Tax Appeal No. 843 of 2017, Hon'ble Bombay High Court held that waiver of loan being waived off by the lender on account of one time settlement of loan cannot be termed as revenue receipt. Therefore, on such waiver of loan taken on capital account, neither the Section 41(1) of the Act nor Section 28(iv) of the Act, are applicable.

6.2.22. In the case of Principal Commissioner of Income Tax v. SICOM Ltd. (2020) IT APPEAL NO. 1692 OF 2017, Hon'ble Bombay High Court held that the very first

condition of Section 28(iv) of the Act which says that any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Also, Section 41(1) will not apply to waiver of loan as waiver of loan does not amount to cessation of 6.2.23. Hon'ble Supreme Court in the case of Siemens Public Communication Network (p) Ltd(2017) 30 ITJ 117 has held that the voluntary payment made by the parent company to its loss making Indian Company can be understood to be Dayment made to in order to protect capital investment of the assessee company. The assessee contended that following the same principle, the payment made to the assessee, which is a loss making company, by its holding company by way of waiver of loan has to be taken on capital account.

6.2.24. The submissions of the assessee is also that the fact that the waiver of loan was taken in the capital account was properly disclosed in the computation of income filed along with the Return of Income for the Assessment Year under reference. While framing the Assessment Order, the Assessing Officer was of the opinion that this amount was primarily taxable us 41(1) of the Act. In the Quantum Appeal the CIT(A) came to a conclusion that the sum is taxable u/s. 28(iv) of the Act. Thus, there has been some difference of opinion between the assessee and the Assessing Officer as well as that between the assessee and CIT(A) as regards taxability of the same but that does not denote that the assessee has submitted inaccurate particulars of income. The assessee submitted that considering the fact that the proper disclosure was made in the course the Return of Income filed by the Appellant for the Assessment Year under consideration, it was not liable to be visited with penalty. The assessee relied upon several judicial

pronouncements most prominently of the Hon'ble Supreme Court in the case of CIT vs Reliance Petroproducts Pvt. Ltd. [2010] 322 IT 158 (SC).

6.2.25. It is evident from the impugned penalty order that the Id. AO has levied penalty merely because a receipt, being waiver of loan by the holding company, which was held by the appellant on capital account was held by the Id. AO as taxable in the hands of the assessee for being on revenue account and the same was upheld by the Id. CIT(A) albeit as per provisions of different section, which was a without prejudice finding of the Id. AO. I find that in the impugned penalty order, the Id. AO did not make out any case how the assessee has filed inaccurate particulars of income so as to warrant levy of penalty u/s 271(1)(c) of the Act. He also did not make any mention of how the submissions of the assessee for penalty not leviable in its case was not acceptable.

6.2.26. In this regard, it is pertinent to note that Levy of penalty u/s 271(1)(c) of the Act is not automatic and mandatory in all cases where disallowances have been made. It is well settled that in the scheme of the Act, the proceedings for imposition of penalty, though emanating from proceedings of assessment, are essentially independent and a separate aspect of the proceedings which closely follow the assessment proceedings. It is also well settled that findings given in assessment proceedings are certainly relevant and have probative value, but such findings are material alone and may not justify the imposition of penalty in a given case, because the considerations that arise in penalty proceedings are different from those that arising assessment proceedings as held in Banaras Textorium v. CIT (1988) 169 ITR 782, 790, 791 (All) ; CIT v. Govindankutty Menon (1989) 178

IT 509, 515 (Ker) ; Hotel & Allied Trades (P.) Ltd. v. CIT (1996) 221 ITR 619, 646 (Ker). 6.2.27. It is also pertinent to refer here the judgment of the Hon'ble Supreme court in the case of Anantharam Illies Engg.Veerasinghaiah & Co. v. CIT (1980) 123 ITR 457, 462 (SC), wherein it is held that the findings recorded in assessment order constitute good evidence in the penalty proceedings but those findings cannot be regarded as conclusive for the purpose of the penalty proceedings. In the case of CIT v. Anwar Ali 76 ITR 676, it was held by the Hon'ble Supreme Court that the assessment proceedings and penalty proceedings are separate and findings in the assessment order can be relevant but it cannot be conclusive for levying penalty merely because additions had been made. Whether a penalty can be imposed in a given case, the entirety of the circumstances must be taken into account. All will depend on the circumstances of a case. There cannot be any such inflexible rule. Further, in the case of CIT v. S.M. Construction(2015) 92 CCH 0099 (Mumbai),it was held by the Hon'ble Bombay High Court that the fact that the explanation of the assessee is not accepted in quantum proceedings would not ipso facto visit the assessee with penalty in the absence of the claim being held to be bonafide.

6.2.28. The Hon'ble Supreme Court in Dharmendra Textiles & Processors (supra), observed that the penalty u/s 271 (1)c) of the Act is a civil liability. However, the liability is penal in nature though being civil liability and there is no requirement of establishing the mens rea or the intention of the assessee in cases where the assessee is found to have concealed the particulars of his income or furnished inaccurate particulars of income. However, if the information furnished by the assessee in the return of income to the best of knowledge of the assessee is correct and complete, it cannot be said that

the onus on the assessee has not been discharged to prove its bonafide. Where any addition to, or disallowance from, had been made to the returned income, it per se cannot be the foundation of penalty u/s 271 (1)c) of the Act, as findings in the assessment order cannot be taken a conclusive proof of concealment for the purpose of levy of penalty us 271 (1)(c) of the Act. Under the Explanation 1 to section 271 (1 c), the onus is upon the assessee, loestablish the bonafde of his claim and where the assessee discharges its onus of proving his claim to be bonafide, the Courts have held that there is no merit in levy of penalty u/s 271(1)(c) of the Act.

6.2.29. In the case of D. M. Dahanukar v. CIT (1967) 65 IT 280, 286 (Bom), it was held that mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. A similar view was held in the case of M. Hussain Ali & Sons v. CIT (1965) 58 ITR 787 (Mad) as well.

6.2.30. Further, in the case of ACIT vs VIP Industries 122 TTJ 289 (Mum), the effect of decision in the case of Dharmendra Textile was considered by the Hon'ble Tribunal and it was opined that the Hon'ble Supreme Court has not held that in all cases where addition is made, the penalty shall automatically follow. The true effect is that mens rea is not to be proved by the revenue, but if the assessee can successfully prove his bona fide by tendering a valid explanation then, penalty cannot be levied. Hence, in case of genuine difference

between AO and the assessee, penalty cannot be levied. Same view has been taken by the Hon'ble Pune Bench of the ITAT in the case of Kanbay Software India 122TTJ 721.

6.2.31. Hon'ble Supreme Court in the case of CIT vs Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC) has observed that;By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In CIT v. Atul Mohan Bindal (2009] 9 SCC 589, where this Court was considering the same provision, the Court observed that the Assessing Officer has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. (emphasis supplied) The Hon'ble Apex Court has accordingly held in the aforesaid case that :

" 9. We are not concerned in the present case with the mensrea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript." " We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not

amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars." (emphasis supplied)

It was further observed in para (10) of the aforesaid decision of Hon'ble Supreme Court that-

..Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature."

6.2.32. I find that the fact that the nature of the impugned receipt being on account of waiver of loan was disclosed in the return of income and the same was claimed as not taxable by a valid return of income and clearly stated in Point No. 5 of the computation of income is not in dispute. The AO disallowed the claim of the assessee following decision as relied upon in the assessment order. The Id. CIT(A) has confirmed the addition with a finding that the waiver of loan was taxable in view of decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra). The Hon'ble ITAT, in an ex-parte order, has upheld the same with a finding that the Id. CIT(A) has followed jurisdictional High Court and that no other decision was brought to its notice to hold a different view on the matter.

6.2.33. It is also evident from the assessment order passed u/s 143(3) of the Act that the details in respect of the same were filed before the Id. AO, which were not found as factually incorrect or having any factual

discrepancies. Since, there is very thin line between the revenue and capital receipts on account of waiver of loan, as discussed in detail previously, the difference in opinion is very much possible. Hence, the issue could fairly be considered as such on which two views are possible. Hon'ble High Court of Punjab and Haryana in the case of Commissioner of Income Tax versus Amtek Auto Limited (P&H) 36 com 342,; has held that "merely because assessee claimed expenditure as revenue, which was held as capital by the Assessing Officer, penalty for concealment could not be imposed where assessee discloses nature of transaction". In the given facts and circumstances of the case, such claim could not be said to be amounting to filing of either inaccurate particulars of income or a case of concealment of particulars of income.

6.2.34. The Hon'ble Supreme Court in CIT, Ahmedabad Vs. Reliance Petroproducts Pvt Ltd (supra) further noted that in the facts of the case before it, there were no findings that any details supplied by the assessee in its return of income were not incorrect or erroneous or false nor any statement made or any details supplied was found to be factually incorrect. The Court thus held that merely because the assessee had claimed the expenditure, which was not accepted or was not acceptable to the Revenue, that by itself would not, attract penalty under section 271 (1)(c) of the Act. It was also laid down by the Hon'ble Court that the intentment of the Legislature is not to levy penalty u/s 271 (1)(c) of the Act in case of every non acceptance of claim made by the assessee in the return of income,

6.2.35. The Hon'ble Supreme Court of India in CIT, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd (supra) while referring in the word particulars in "inaccurate

particulars of income", observed, "as per Law Lexicon, the meaning of word 'particular' is a detail or details, the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in Section 271 (1)(c) would embrace the meaning of the details of the claim made. It was further held as under:-

"We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in the case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271 (1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to inaccurate particulars. (emphasis supplied)

6.2.36. As per the ratio of DV. CIT V Nana 144 190151 52 favemann.com 137 (Indore - Trib.), it has been observed that in case of furnishing of inaccurate particulars of income, the onus is on the revenue to prove that assessee has furnished inaccurate particular. In this regard, it is also pertinent to note that in order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked.

6.2.37. Hon'ble Bombay High Court in case of CIT vs. Rucha Engineers Pvt. Ltd. [2015-ITRV-HC-MUM-025] has held that before proceeding to the Explanation below section 271 and putting the responsibility on the

assessee, it is necessary for the AO to first demonstrate that the assessee's explanation or conduct is not reasonable on human probabilities, or that it was in the nature of violating settled legal positions. If the explanation is not fanciful, baseless or unacceptable, penalty cannot be levied.

6.2.38. I further find that Hon'ble Delhi High Court in the case of CIT Vs. HMA Udyog (P) Ltd. (2007) 211 CTR (Del) 543, dismissing the departmental appeal, observed that it was a debatable issue and penalty was not leviable against the disallowance of said expenditure by treating the same as capital expenditure. For the sake of convenience, the relevant portion of finding of Hon'ble High Court is reproduced below:

"The assessee was earlier in the business of advertisement activities of various cigarette products and also concealed with garment manufacturing and sale. During the previous year relevant to the assessment year in question, the assessee started a business of restaurants and film distributorship and carried out extensive repairs in his commercial premises. The assessee claimed the expenditure as a revenue expenditure, but the AO was of the view that this represented a capital expenditure and, therefore, made the requisite addition. Penalty proceedings were also initiated against the assessee under sec. 271(1)(c) of the IT Act. The view of the AO on merits of the case was upheld by the CIT(A) as well as by the Tribunal.

In so far as the penalty proceedings are concerned, the matter ultimately came up before the Tribunal and by the impugned order, the Tribunal was of the view that the question whether the expenditure incurred by the assessee was a revenue expenditure or a capital expenditure was a debatable issue and even if it was

ultimately decided against the assessee, it could not be said that the assessee had attempted to conceal the particulars of his income or furnished inaccurate particulars so as to attract the penal provisions of s. 271(1) (c). After hearing Id. Counsel for the parties, we are of the view that there is no question of the assessee having attempted to conceal the particulars of his income, which is not even in the case of the revenue. So far as furnishing of inaccurate particulars are concerned, it is quite clear that the assessee had furnished all relevant particulars of his income but only claimed it to be a revenue expenditure while according to the Department, the expenditure incurred was of a capital nature. This was, as rightly held by the Tribunal, a debatable issue and would not amount to furnishing of inaccurate particulars so as to attract penalty proceedings. Under the circumstances, we are of the view that no substantial question of law arises • for our consideration. Dismissed." (emphasis supplied)

6.2.39. Further, Hon'ble Bombay High Court in the case of CIT Vs. Dalmia Dychem Industries Ltd. [2015] 377 ITR 133 (Bombay) held that where the Assessing Officer levied penalty holding that assessee claimed deductions in respect of borrowed funds, which were diverted to sister concern and not for business and assessee bona fide pleaded that its deduction was covered by a particular provision of law, penalty could not be levied.

6.2.40. In CIT v. Harshvardhan Chemicals and Minerals Ltd [2003] 259 IT 212 (Raj), where the assessee claimed a larger relief under section 80HH and 80- I on its own interpretation, penalty was found to be not exigible merely because the assessee's claim was found to be inadmissible in the Assessing Officer's view. The Tribunal has found that the grounds taken by the

assessee for relief were arguable. Hon'ble High Court endorsed this finding of the Tribunal, since the inference of concealment does not readily follow merely because the claim was found inadmissible.

6.2.41. I find that a similar standpoint has been upheld by the Hon'ble High Court of Delhi in the case of Commissioner of Income Tax v. Shervani Hospitalities Ltd. reported in [(2013) 261 CTR 449 (Del)], wherein the following observations have been made:

"Disallowance of claim for deduction was made. Issue raised by the assessee was debatable and capable of two views. Assessee had an arguable case or had taken a bonafide plea. Assessee had given its explanation and categorically and clearly stated the true and full facts in the return itself. It did not try to camouflage or cover up the expenses claimed. Every addition or disallowance made does not justify and mandate levy of penalty for concealment u/s 271 (1)(c) of the Act. Levy of penalty is not automatic consequence when an addition is made by disallowance of an expenses and by not accepting the explanation given by the assessee. Merely making a claim which is held as not sustainable under law should not lead to penalization. When the assessee had furnished full details in the Return itself and the claim is debatable, reasonably plausible or may well have been accepted. Penalty u/s 271(1)(c) of the Act was not justified." (emphasis supplied)

6.2.42. It, therefore, follows that a bona fide claim erroneously made does not justify penalty as also held in the case of VIT v. Span Holdings Ltd. [2007] 294 ITR 83 (Delhi). Further, it was so held in the case of Mewar Industries Ltd v. ITO [2009] 32 SOT 9 (Delhi) (URO) that a bona fide claim cannot be subjected to penalty for concealment under section 271 (1)(c). A similar view was

taken by the Hon'ble High Court in *CIT v. Pitambardas Sulichand* [2005] 273 IT 271 (MP).

6.2.43. In the case of *CIT v. International Audio Visual Co.* [2007] 288 IT 570 (Delhi), it was held that where the assessee discloses all the facts, but draws an inference not acceptable to the Assessing Officer, it does not mean that the assessee could be subjected to penalty on the addition consequent on his inference. In this case the Hon 'ble High Court held as below

" 2. The assessee had claimed a deduction under section 80HHC of the Income-tax Act in respect of dubbing rights of Hindi films, which it says, it had sold to some foreign company. The Assessing Officer did not agree that it was a sale by the assessee and concluded that it was not a sale of goods or merchandise but a receipt of royalty for transfer of dubbing rights.

3. Accordingly, he disallowed the claim for deduction under section 80HHC of the Act. The Assessing Officer also initiated penalty proceedings under section 271(1) (c) of the Act.

4. In response to the notice for initiating penalty proceedings, the assessee reiterated that it had not concealed any income nor had it furnished any inaccurate particulars of income and prayed that the penalty proceedings be dropped. The Assessing Officer rejected the contention of the assessee and imposed penalty under section 271(1) (c) of the Act.

5. The appeal filed by the assessee before the Commissioner of Income-tax (Appeals) was also dismissed. The second appeal filed by the assessee before the Tribunal was, however, accepted and that is how the Revenue is before us.

6. Having examined the record and heard learned counsel for the Revenue, we are of the opinion that there is nothing to suggest that the assessee was in any manner trying to mislead the Assessing Officer. It appears that he had a bona fide belief that by selling dubbing rights to a foreign company, he was selling goods or merchandise within the meaning of section 80HHC of the Act.

7. The Assessing Officer did not agree with this contention and concluded that the payment received by the assessee was towards royalty and not sale of goods or merchandise. The contention urged by the assessee may have been incorrect but there does not appear to be anything to suggest that it reflected on the particulars of the income of the assessee or any concealment of his true income.

8. Under the circumstances, since there was no concealment of primary facts, it cannot be said that the assessee was liable to suffer a penalty under the provisions of section 271(1)(c) of the Act. (emphasis supplied)

6.2.44. In view of above discussion and the referred case laws, I am of the considered view that the addition made by the Id. AO in respect of the impugned waiver of loan, treating the same as taxable does not tantamount to concealment of income or filing of inaccurate particulars of income and hence, the same does not qualify for levy of penalty u/s 271(1)(c) of the Act. The penalty levied vide the impugned order is accordingly directed to be deleted. The Grounds No. 1 to 3 are ALLOWED.

9. We find that the CIT(A) has considered the facts, provisions of law and judicial decisions and observed

that there is no furnishing of inaccurate particulars of income within meaning of section 271(1)(c) of the Act irrespective of the fact that the A.O. has made an addition of waiver of loan by the assessee parent company and the every addition shall not be a automatic gateway for levying the penalty and passed a reasoned and speaking order. The Ld. DR has only supported the penalty order of the A.O but could not controvert the findings of the CIT(A) on the disputed issue with any new cogent material or information to take different view. Accordingly, we do not find any infirmity in the order of the CIT(A) in deleting the penalty levied u/s 271(1)(c) of the Act and uphold the same and dismiss the grounds of appeal of the revenue.

10. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on 28.07.2022

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 28.07.2022

KRK, PS

Copy of the Order forwarded to :

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

//True Copy//

1.

आदेशानुसार / BY ORDER,

(Asst. Registrar)
ITAT, Mumbai