

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
MISS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2265 and 2266/AHD/2018
Assessment Year :1991-1992 and 1999-2000

M/s.VAM Airtex P.Ltd. 5/15, Vasupujya Chambers Ashram Road Ahmedabad 380 014. PAN : AAACV 6614 N	Vs.	ITO, Ward-4(1)(4) Ahmedabad.
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/(Respondent)
Assessee by :	Shri S.N. Divatia, AR with Samir Vora, AR
Revenue by :	Shri Satish Solanki, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : **29/09/2022**
घोषणा की तारीख /**Date of Pronouncement**: **07/10/2022**

आदेश/O R D E R

PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER

Present two appeals have been filed by the assessee against separate orders passed by the ld. Commissioner of Income-Tax(Appeals)-8, Ahmedabad [hereinafter referred to as "Ld.CIT(A)"] dated 3.10.2018 and 31.10.2018 pertaining to the Asst.Year 1991-92 and 1999-2000 respectively by which the ld.CIT(A) has confirmed levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 ("the Act" for short).

2. It was common ground that the issue pertaining to which penalty was levied in both the cases was identical, and therefore, both the appeals needed to be heard together. Accordingly, both the appeals were taken up together for adjudication.

3. Thereafter, drawing our attention to the facts of the case, the ld.counsel for the assessee pointed out that the assessment years involved before us are A.Y. 1991-92 and A.Y. 1999-2000 respectively, i.e. very old assessment years, and the reason being that quantum appeals in both these years had travelled upto the ITAT twice, and on both the occasions the appeals had been restored back to the AO for fresh adjudication. The ld.counsel for the assessee pointed out that the issue involved in the quantum appeals related to the assessee's claim of loss on account of embezzlement. It was pointed out that one Shri Ketan B. Thakkar, was accountant of the company and his father Sh. Bhailal Thakkar was auditor of the company since incorporation of the company; that on account of levy of excise duty different units were created and assembled car air conditioners were purchased by the assessee company from these units. One said unit belonged to Shri Ketan Thakkar, in the name of H.K. Enterprise, who was involved in fraudulent activities and had embezzled huge sum of money from the company; modus operandi being issuing bogus sales bills to the assessee-company, who in good faith made payment of the same, which were thereafter withdrawn from the company and thus embezzled; that when this embezzlement was noticed, criminal as well as civil cases both against Ketan Thakkar and Bhailal Thakkar was filed; that for the impugned years, the assessee had claimed embezzlement loss to the tune of Rs.25,08,800/- in the Asst.Year 1999-2000 and Rs.5,16,480/- for Asst.Year 1991-92; that on account of this claim of embezzlement, the case of the assessee was reopened and the matter travelled twice upto the Tribunal on 11.11.2005 and 23.12.2016 when, on both the occasions, the appeals were sent back for verification to the AO, the last case being finally decided on 23.12.2016. Thus, after 16 years, the issue was settled, and after

making of verification of the assessee's claim of embezzlement, the AO ultimately allowed the entire claim made by the assessee in both the years except to the extent in both the cases of Rs.40,000/- for Asst.Year 1991-92 and Rs.3,15,000/- for Asst.Year 1999-2000 (comprising of two amounts i.e. Rs.50,000/- and Rs.2,65,000/-), and penalty accordingly was levied on this claim of embezzlement loss which was denied to the assessee, and the penalty confirmed by the Id.CIT(A). That the assessee is in appeal before us against the order of the Ld.CIT(A) confirming the levy of penalty u/s 271(1)(c) of the Act.

4. The Id.counsel for the assessee contended that with respect to denial of claim of embezzlement loss pertaining to the Asst.Year 1991-92 amounting to Rs.40,000/- the same was denied by the AO noting that one cheque bearing no.21540 of Rs.40,000/- was issued in favour of the assessee on 19.5.1990 by H.K. Enterprise. Therefore, according to the AO, since this amount was returned by H.K. Enterprise, the assessee's claim of loss on account of embezzlement to this extent was not allowable. He drew our attention to the finding of the AO in this regard at page no.50 of the assessment order as under:

"The assessee has made claim of loss of Rs.5,16,480/- due to embezzlement. However, Cheque No.21540 of Rs.40,000 /- was issued in favour of VAM Air Pvt. Ltd. on 19/05/1990 by HK Enterprise. Therefore, the loss of Rs. 40,000/- due to embezzlement is not allowable. As a result, out of claim of loss of Rs. 5,16,480/- due to embezzlement, loss amounting to Rs. 4,76,480/ is allowed. The Penalty proceeding/s 271(l)(c) of the act initiated for furnishing inaccurate particulars of income."

5. The Id.counsel for the assessee pointed out that during penalty proceedings the assessee had contended that it had not actually received back the amount from H.K. Enterprises at all, and even furnished copy of the bank statement as proof, but the AO had

rejected the same and dismissed this contention of the assessee, noting that the bank account of the H.K. Enterprises reflected this issue of cheque. Accordingly, the AO held that to this extent, the assessee had concealed particulars of income by incorrectly claiming loss on account of embezzlement and levied penalty on the same. Our attention was drawn to para 2.1 to 3 of the penalty order containing finding of the AO in this regard while levying penalty on this amount of Rs.40,000/- amounting to Rs.23,000/-.

"2.1 The assessee has made claim of loss of Rs.516,480/- due to embezzlement. However, cheque no.21540 of Rs.40,000/- was issued in favour of VAM AIR TEX PVT LTD (assessee company) on 19/5/1990 by H K Enterprises hence claim of loss of Rs.40,000/- not allowed out of total claim of Rs.5,16,480/-. Since the assessee has furnished inaccurate particulars of income, the penalty proceeding u/s 271(l)(c) of the act were initiated and consequently, the notice u/s 271(l)(c) issued and served on 23.12.2016 giving it an opportunity of being heard and to give submission either personally or through Authorised representative, against the proposed levy of penalty. In response to that the assessee failed to furnish reply.

2.2. Thereafter, for the sake of natural justice another notice u/s 274 r.w.s. 271(l)(c) dated 27.02.2017 was issued and served upon the assessee. In response to that the assessee has furnished reply vide letter dated 14.03.2017. The relevant portion of reply is reproduced hereunder:

"4. There is addition of Rs.40000/- on account of embezzlement. This addition is on account of amount returned by Ketan Thakkar to the company. As such no such amount is received by the company which can be verified from the bank statement of Vam Airtex Pvt Ltd which was given to your goodself during the course of assessment proceedings. Bank account for the month of May 1990 (cheque of Ketan Thakkar 19.05.90 bearing no. 21540 is again enclosed herewith for your ready reference."

2.3 The reply of the assessee considered carefully, but found not acceptable as during the reassessment proceedings, the bank a/c no.2202 of H K Enterprises verified wherein cheque No.21540 debited on 19.05.1990 in the name VAM Airtex Pvt Ltd. It appears that die person made embezzlement has returned Rs.40,000/- by issuing and debited in his account hence contention of the assessee that said cheque issued is not credited in his books is no acceptable.

3. In view of the above, I am satisfied that the assessee has furnished inaccurate particulars of its income to the extent of Rs.40000/- within the meaning of Section 271(1) (c) read with Explanation (1) of the Act. The minimum penalty leviable u/s. 271(1) (c) of the Act on the above discussed addition/disallowance is 100% of tax effect which works out to Rs. 23000/- and maximum penalty is 300% of tax effect which works out to Rs.69,000/-. Accordingly, considering the facts and circumstances of the case, I levy penalty of Rs.23000/- u/s.271(1)(c) of the Act for furnishing inaccurate particulars of income."

6. Vis-à-vis Asst.Year 1999-2000, the ld.counsel for the assessee pointed out that embezzlement loss to the extent of Rs.3,15,000/- had been denied by the AO noting that the assessee had failed to furnish documentary evidences, such as bank certificate and destination bank statement regarding two cheques of Rs.2,65,000/- and Rs.50,000/- issued in the name of Everest Services. He drew our attention to the finding of the AO in this regard at para 6.11 of the order for Asst.Year 1999-2000 as under:

“6.11 In view of the discussion made in forgoing paras, the claim of Rs.22,08,800/- in respect of embezzlement (albeit in the name of purchases from H.K. Enterprise) was already recorded in books of the account for the F.Y. 1998-99. The loss was incurred due to misappropriation by employee of the company by manipulating books of account, therefore, the loss occurred during normal course of business operations and it was incidental to the business carried out by the assessee. There is no evidence on record to prove that money siphoned off was paid back to the company. Therefore, the claim of loss due to embezzlement is allowed to the extent as mentioned below.

Regarding Cheque of Rs.2,65,000/- issued in the name of Everest Services, the assessee has not furnished any documentary evidence such as bank certificate and destination bank statement, hence it is not verifiable. Further, the assessee has issued cheques of Rs.50,000/- in the name of Everest Services, the assessee has not furnished any documentary evidence such as bank certificate and destination bank statement, hence it is not verifiable.. Since the assessee has not substantiate its claim of embezzlement alongwith documentary evidence which show that there embezzlement, the aggregate claim of Rs.3,15,000/- is not allowable and added to the total income. The penalty proceeding u/b 271(l)(c) of the act initiated separately for furnishing inaccurate particulars of income.”

7. The ld.counsel for the assessee, thereafter pointed out that with respect to the same during the penalty proceedings, the assessee had admitted to the wrong claim made by the assessee with respect to payment of Rs.50,0000/- and had mentioned that mistake must have been occurred due to long period of time which had elapsed since the claim of the assessee, and all documents got mixed up in the meanwhile. With regard to the remaining amount of Rs.2,65,000/-, the assessee had contended that this entry appeared in the bank account of the assessee though it did not appear in the bank account of the sister concern. The bank account of the

assessee and all the parties were enclosed, but even this contention of the assessee was dismissed by the AO. He drew our attention to para 2.2 of the penalty order wherein the assessee's explanation in this regard was furnished as under:

"2.2. Thereafter, for the sake of natural justice another notice u/s 274 r.w.s. 271(l)(c) dated 27.02.2017 was issued and served upon the assessee. In response to that the assessee has replied vide letter dated 08.03.2017 filed and 14.03.2017. The relevant portion of reply is reproduced hereunder:

"1. In this case, assessment order u/s. 143(3) rws 254 of the UT Act was received determining total income Rs.303060/-.

2. Previously for this assessment year, total income was determined at loss Rs.11040/-

3. At the time of passing this order on 23/12/16, addition of Rs.31500/- has been made. This addition is on account of two cheques as under:

*50000/- 01/04/1998 paid to Everest Services
265000/- 03/04/1998 paid to Everest Services*

4. Regarding Rs.50000/- it is stated that this amount is paid against outstanding bill of Everest Services. Copy of account Everest Services and Vam Airtex are enclosed herewith. Thus this amount is not embezzlement amount. This mistake has been noticed after the assessment order is received. Bank account of both the persons are enclosed alongwith contra account of both the persons.

5. Regarding Rs.265000/- it is stated that this amount does not appear in both the party's accounts. As such this entry appears in the bank account of Vam Airtex Pvt Ltd on 04/04/1998 by cheque no. 379203 Rs.265000/- but this amount does not appear on credit side of any of the sister concerns i. e.

- i. Everest Services*
- ii. S R Services*
- iii. Nishant Enterprise*
- iv. Neelav Engineers*
- v. Priyam Enterprise*

Bank account of all the above parties are enclosed.

6. No appeal is filed against this addition because the matter is very old and concluded after a lapse of about 18 years.

7. In this penal proceedings evidences are given being separate proceedings from assessment.

8. In view of the above submission no question of levy of penalty u/s.271(1)(c) arises. Kindly drop penal proceedings and oblige."

8. He pointed out that the AO however rejected the explanation of the assessee stating he had no tenable explanation and went to levy penalty on the additions made on account of denial claim of loss of embezzlement to the extent of Rs.3,15,000/- and made penalty of Rs.1,10,250/-. Our attention was drawn to para-3 of the penalty order in this regard as under:

"3. The reply of the assessee is considered carefully, but contention of the assessee that no appeal filed against addition, matter is very old and penalty proceedings are separate from assessment proceeding and to drop the penalty is found not acceptable as the assessee has made wrong claim for embezzlement as found in details submitted during assessment proceeding and also in his reply, it is clear that the assessee has furnished inaccurate particulars of income. The assessee during the assessment proceeding as well as penalty proceeding not furnished tenable explanation/clarification and substantiate it for disallowance or levy of proposed penalty which appears that the assessee has accepted the addition made to the returned income and not filed any appeal on these grounds. Here it is to be mentioned that the decision of Punjab & Haryana High court in the case of CIT V. Lalchand Thirth Ram - 225 ITR 675 (Pub) - is squarely applicable to the facts of this case. In this case, their Lordships have held that "merely offering an explanation would not absolve the assessee from liability of penalty. It is necessary for the assessee to offer an explanation and substantiate it." Here, the assessee has not substantiate its explanation in respect of disallowance of claim of embezzlement of Rs.3,15,000/- Therefore, the case of the assessee company falls within the ambit of explanation to section 271 (1) of the act, which is being invoked in this case. As per Hon'ble Allahabad High Court's decision in the case of Banaras Textorium v CIT (1988) 169 ITR 782 and Zeekoo Shoe Factory v CIT (1981) 127 ITR 837, the burden of proving lack of fraud or gross or willful negligence is on the assessee. If assessee fails to discharge its onus then it can be presumed that the assessee has concealed its income or furnished inaccurate particulars thereof. Reliance is also placed on the decision of Hon'ble Delhi High Court in the case of Motor General Finance Ltd v CIT 254 ITR 449 wherein it was held that failure to furnish the documents and details goes against the assessee company and further observed that the assessee could not produce any document in this regard, an adverse inference in terms of section 114 of the Evidence Act should be drawn to the effect that had those documents been produced, the same would have gone against the interest of the assessee. As per Hon'ble Gujarat high court's decision in the case of Jamnadas & Co v CIT (1994) 210 ITR 218, if the assessee who is required to prove that the failure to return the correct income did not arise from any fraud or any gross or willful negligence on its part, fails to prove these elements, the presumption as contemplated by the said explanation can be raised. The assessee company did not furnish any evidence in its support at all despite opportunities being given. Therefore, in the light of explanation section 271 (1) and above

mentioned case law the assessee company is liable for penalty u/s 271 (1) (c) of the act for furnishing inaccurate particulars of income.”

9. The ld.counsel for the assessee contended that ld.CIT(A) upheld order of the AO holding that the assessee having been allowed substantial claim of loss of embezzlement, this small claim which was not allowed in two years were patently incorrect claim by the assessee, and therefore, was a fit case for levy of penalty for having concealed/furnished inaccurate particulars of income.

The ld.counsel for the assessee contended that it was highly unfair on the part of the Revenue authorities to have levied penalty in the said two years that too despite the fact that the assessee had pointed out to the Revenue authorities that its claim to embezzlement loss in the said two years was genuine and had even furnished documentary evidences to prove its case. He contended that there was no categorical finding by the Revenue authorities that the assessee's explanation was patently wrong or incorrect or that the assessee had made patently incorrect claim vis-à-vis the said amounts. He therefore pleaded that penalty levied in both the years be deleted.

10. On the other hand, the ld.DR relied upon the order of the authorities below.

11. We have heard both the authorities below; we have also carefully gone through the facts and circumstances of the case. As narrated above, the penalty levied in the present case for concealment/furnishing of inaccurate particulars of income u/s 271(1)© of the Act, relates to a very old issue pertaining to A.Y 1991-92 and 1999-2000, with respect to denial of assessee's claim of embezzlement loss to the tune of Rs.40,000/- and Rs.3,15,000/-

respectively. The assesses actual claim of loss on account of embezzlement was to the tune of Rs.5,16,480/- and Rs.25,08,800/- respectively which was substantially allowed except for the amounts as stated earlier i.e Rs. 40,000 and Rs.3,15,000/- resp.. It is on account of this denial of claim of embezzlement loss that the assessee has been held to have concealed/furnished inaccurate particulars of income and penalty u/s 271(1)(c) of the Act levied on the same amounting to Rs. 23,000/- and Rs.1,10,250/- resp.

Undoubtedly, the assessee has not challenged the additions upheld in both the years, and has accepted it as such after going through process of litigation for 16 years when finally substantial claim of the assessee was allowed by the AO.

12. Coming to the specific claim which has been disallowed in both the years, we find that the assessee, during penalty proceedings, had demonstrated that its claim to embezzlement loss with respect to Rs.40,000/- in Asst.Year 1991-92 and to the extent of Rs.2,65,000/- out of Rs.3,15,000/- denied in A.Y 1999-2000, was a genuine claim. The assessee had pointed out that Revenue's contention of Rs.40,000/- having been returned by the party which had committed fraud on the assessee was not correct since the amount was not reflected in the bank statement of the assessee of that year. The explanation was substantiated with copy of Bank statement of the assessee. This contention of the assessee has not been controverted by the Revenue authorities. The claim of the Revenue is that Rs.40,000/- stands reflected in the bank statement of the party which has claimed to have refunded this amount to the assessee. This one-sided evidence with the Revenue does not prove that the assessee had actually received back this amount more particularly in the light of counter evidence filed by the assessee

reflecting non receipt of the said amount in its bank statement. The assesses claim of embezzlement loss of Rs.40,000/-, in these facts and circumstances, cannot be said to have been found to be false and wholly untenable. The assessee therefore, we hold, cannot be charged with having furnished inaccurate particulars or concealed particulars of income with respect to the said claim. Therefore, as far as Asst.Year 1991-92 is concerned, wherein penalty has been levied on account of this Rs.40,000/- which has not been allowed as embezzlement loss to the assessee, we hold that there is no case for levy of penalty at all and the impugned penalty levied of Rs.23,000/-is therefore directed to be deleted.

13. Now coming to Asst.Year 1999-2000, penalty has been levied on embezzlement loss denied to the assessee of Rs.3,15,000/-.Out of this, the assessee has admitted wrong claim made with respect to an amount of Rs.50,000/- and it had fairly admitted that considering long period of time, it had to verify various documents involved and had mistakenly made a wrong claim in this regard. With respect to an amount of Rs.2,65,000/- however, the assessee still claimed before the Revenue authorities, even in penalty proceedings, that its claim of embezzlement loss was genuine. The assessee demonstrated that it had issued these cheques to H.K. Enterprises, who in turn had allegedly embezzled this amount after crediting to its bank account. The assessee demonstrated through its bank accounts that this cheque was issued to the concerned party by it and this contention of the assessee has remained uncontroverted by the Revenue. The fact that this cheque does not figure in the bank account of other party does not by itself prove the explanation of the assessee as wrong, as long as cheque stands reflected as issued in the bank statement of the assessee, which was

not proved to be false by the Revenue. Therefore the facts on record do not make out it a clear case of an incorrect claim made by the assessee to the extent of Rs.2,65,000/-. The assessee, therefore, in this case also cannot be said to have furnished any inaccurate particulars of income or concealed any income with respect to Rs.2,65,000/- claimed as embezzlement loss.

14. As far as Rs.50,000/-, since the assessee fairly admitted to the same being a mistake, the assessee cannot be visited with penalty on this admission. The assessee's explanation for the mistake appears to be *bonafide* considering the long period of sixteen years that it took the Revenue to verify the claim of the assessee and the documents on the basis of which the claim was made being very old, the chances of some claims having been made wrongly cannot be completely ruled out.

15. In view of the above, penalty levied in Asst.Year 1999-2000 of Rs.1,10,250/- is directed to be deleted.

16. In the result, the penalty levied u/s 271(1)(c) of the Act in both the assessment years before us, i.e A.Y 1991-92 and A.Y 1999-00 is deleted and both the appeals of the assessee are allowed.

Order pronounced in the Court on 7th October, 2022 at Ahmedabad.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Ahmedabad, dated 07/10/2022

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