

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA No. 196/Ahd/2019
Assessment Year 2007-08**

The DCIT, Central Circle-2, Ahmedabad (Appellant)	Vs	Rubamin Limited, 2 nd Floor, Synergy House, Subhanpura Road, Subhanpura, Baroda-390023 PAN: AAACR8758H (Respondent)
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**Appellant by : Shri Rakesh Jha, Sr. D.R.
Respondent by : Ms. Amrin Pathan, A.R**

Date of hearing : 27-09-2022
Date of pronouncement : 19-10-2022

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

This appeal is filed by the Revenue against order dated 28.11.2018 passed by the Commissioner of Income Tax (Appeals)-12, Ahmedabad, as against cancellation of penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Year (A.Y) 2007-08.

2. The brief facts of the case is that the assessee is a company engaged in the manufacturing various grades of zinc oxide. For the Assessment Year 2007-08, the assessee filed its Return of Income declaring total income of Rs. 23,12,60,710/-. Regular assessment u/s. 143(3) r.w.s. 92CA r.w.s. 144C of the Act was completed determining the total income as Rs. 27,06,13,861/- making addition of Rs. 1.34 Crore including 29.70 lakhs on account of upward adjustment; Rs. 2.51 Crores on account of notional sales tax and other additions. The A.O. also initiated penalty proceedings u/s. 271(1)(c) of the Act on the ground that the assessee in its Return of Income had claimed notional sales tax of Rs. 2.51 Crores as capital in nature, but the Assessing Officer held the receipt as Revenue in nature.

3. During the penalty proceedings, the assessee submitted that the notional sales tax liability in respect of sales of finished goods being in the nature of subsidy from the Government, the receipt is not liable to tax and relied upon the Supreme Court Judgment in the case of Ponni Sugars & Chemicals Ltd. and Special Bench Judgment in the case of Reliance Industries Ltd. Thus in a case of controversial/debatable issue penalty u/s. 271(1)(c) cannot be levied and relied upon Hon'ble Gujarat High Court Judgment in the case of CIT vs. Madhusudan Industries Ltd. [2014] 47 Taxmann.com 241 wherein the Hon'ble High Court held that exclusion of excise duty and sales tax from turnover etc. had been matter of dispute between the Department and the Assessee and thus the issue of deduction is debatable one, on which two

opinions are possible, penalty under section 271(1)(c) of the Act cannot be levied in such circumstances. However, the above submissions have been rejected by the Assessing officer and relying upon Hon'ble Supreme Court Judgment in the case of Union of India vs. Dharmendra Textile Processors & Others reported in [2008] 306 ITR 277 and levied a penalty of Rs. 84,69,600/-.

4. Aggrieved against the same, the assessee filed an appeal before the Ld. Commissioner of Income Tax(Appeals)-12, Ahmedabad. During the appellate proceedings, the assessee submitted for the earlier assessment years 2005-06 & 2006-07 on sales tax subsidy as revenue receipt instead of capital receipt, Ld.CIT(A)-II, Baroda vide his order dated 27.01.2012 deleted the penalty levied. The issue before the present assessment year 2007-08 is identical in nature and covered in favour of the assessee and pleaded to delete the penalty levied. The Ld. CIT(A) after considering the facts of the case held that neither Explanation 1 to section 271(1)(c), nor the main section itself supported the AO in levying the penalty. That mere treatment of an amount as revenue (by the AO) instead of capital (by the taxpayer) does not make such disallowance/ addition a case of concealment u/s. 271(1)(c) of the Act and thereby deleted the penalty.

5. Aggrieved against the same, the Revenue is in appeal before us raising the following Grounds of Appeal:

- 1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred In deleting the penalty of Rs.84,69,600/- levied u/s 271(l)(c) of the I.T. Act by holding that neither explanation 1 to*

section 271(l)(c) nor the main section itself supported the levy of penalty by the A.O. Whereas, it is abundantly clear that the assessee furnished inaccurate particulars of income, treating revenue expenditure of Rs,2,51,62,142/- as capital in nature. Therefore, furnishing of inaccurate particulars of income is covered within the meaning under main section 271(1)(c) of the I.T. Act.

2. On the facts and in the circumstances of the case and in law, the Ld, CIT(A) has erred in deleting the penalty of Rs.84,69,600/- levied u/s 271(1)(c) of the I. T. Act by holding that neither explanation 1 to section 271(1)(c) nor the main section itself supported the levy of penalty by the A.O. Whereas, the Hon'ble ITAT, 1-Bench, Ahmedabad had confirmed the order of the A.O. for treating the above expense of Rs.2,51,62,142/- as revenue expenditure instead of capital expenditure in ITA No.665/AHD/2012, 795/AHD/2012 dated 17.02.2017 and in earlier orders in ITA No.999, 2467,& 3426/AHD/2008 in the case of assessee . The above finding of the Hon'ble ITAT also confirms that the assessee furnished inaccurate particulars of income.

3. It is, therefore, prayed that the order the Ld.CIT(A)-12, Ahmedabad may be set aside and that of the AO may be restored to the above extent.

6. The Ld. Sr. D.R. Shri Rakesh Jha appearing for the Revenue supported the order of the Assessing Officer and pleaded to confirm the levy of penalty u/s. 271(1)(c) of the Act.

6.1. Per contra the Ld. Counsel Ms. Amrin Pathan appearing for the assessee submitted before us a Paper Book containing various details including ITAT's order dated 17.02.2017 in ITA Nos. 665, 795/AHD/2012 on the quantum appeals wherein this Tribunal has held that the subsidy received by the assessee from Government as Revenue in nature. The Ld. Counsel further brought to our attention that as against that orders of the ITAT, the assessee is in appeal before the High Court of Gujarat wherein Tax Case Appeal

No. 629 of 2017 was admitted on 23.08.2017 on the following question of law:

“[A] Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the benefit received by the appellant by way of sales tax waiver was in the revenue filed and not in the capital field and therefore, the appellant was not entitled to reduction of such benefit from the total profits of the year?”

6.2. Thus the Ld. A.R. pleaded that the issue of subsidy is capital or revenue in nature is a debatable issue pending before the Hon'ble High Court of Gujarat, therefore penalty u/s. 271(1)(c) cannot be levied. The Ld. A.R. further submitted that in the previous assessment years 2005-06 & 2006-07 as against the orders of the Ld. CIT(A), the revenue is not in appeal before the Tribunal, which has become final. Therefore, pleaded to cancel the levy of penalty u/s. 271(1)(c) of the Act for the present Assessment Year 2007-08.

7. Heard rival submissions and perused materials available on record including the Paper Book filed by the assessee. In order to invoke the penalty proceedings under section 271(1)(c) of the Act, the Revenue should prove that the claim made was not sustainable in law and also the assessee had concealed the particulars of income. In order to expose the assessee to penalty, the Revenue should show that there was contumacious conduct on the part of the assessee in suppressing the income in the return. The rejection of such a claim by the Appellate Tribunal does not amount to furnishing inaccurate particulars of income, thereby levying penalty

u/s. 271(1)(c) of the Act as held by the Hon'ble Supreme Court in the case of Reliance Petroproducts (P.) Ltd. as follows:

A glance of provision of section 271(1) (c) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. The instant case was not the case of concealment of the income. That was not the case of the revenue either. It was an admitted position in the instant case that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee could not be held guilty of furnishing inaccurate particulars. The revenue argued that submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. Such cannot be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. [Para 7]

Therefore, it must be shown that the conditions under section 271(l)(c) exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed, because that is the only document, where the assessee can furnish the particulars of his 'income. When such particulars are found to be inaccurate, the liability would arise. [Para 8]

The word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In the instant case, there was 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(l)(c). A mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. [Para 9]

The revenue contended that since the assessee had claimed excessive deductions knowing that they were incorrect, it amounted to concealment of income. It was argued that the falsehood in

accounts can take either of the two forms: (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. Such contention could not be accepted as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. 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 attract the penalty under section 271(l)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(l)(c). That is clearly not the intendment of the Legislature. [Para 10]

Therefore, the appeal filed by the revenue had no merits and was to be dismissed.

7.1. Since the quantum appeal of the assessee is now pending before the Hon'ble High Court, it is appropriate to rely upon the Hon'ble Delhi High Court judgment in the case of PCIT, Central-11, vs. Harsh International Pvt. Ltd. reported in [2021] 128 taxmann.com 88. The Judicial discipline demand that until and unless the judgment of the Hon'ble Jurisdictional High Court is reversed. It has to be respected and followed by the Tribunal functioning under the jurisdiction of that Court, as follows:

“Whether penalty can be levied in cases where concealment of income has not been proven – whether since High Court had framed substantial question of law in appeal preferred by assessee challenging quantum order itself, alleged concealment was not final and issue was debatable and therefore impugned penalty could not survive in such cases.”

8. For the above reasons and respectfully following the above judgments, the penalty levied u/s. 271(1)(c) for furnishing inaccurate particulars of income is hereby deleted.

9. In the result, appeal filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 19-10-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER **True Copy**
Ahmedabad : Dated 19/10/2022

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद