

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH "SMC", SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 209/Srt/2021 (Assessment Year: 2012-13)

(Virtual hearing)

The Bharuch District Co Op Milk Producers Union Limited, Old N.H. 8, Bholav, Bharuch-392001. PAN No. AAAAT 1470 A	Vs.	A.C.I.T. Circle-1, Bharuch.
Appellant/ assessee		Respondent/ revenue

Assessee represented by	Shri O.P. Rathi, CA
Department represented by	Shri J.K. Chandani, Sr. DR
Date of hearing	18/10/2022
Date of pronouncement	25/10/2022

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by the assessee is directed against the order of learned National Faceless Appeal Centre, New Delhi (in short, Id. NFAC)/ Commissioner of Income Tax (Appeals), Bharuch (hereinafter referred as the Id. CIT(A)] dated 21/09/2021 for the Assessment Year (AY) 2012-13.

The assessee has raised following grounds of appeal:

- "1. On the facts and circumstances of the case as well as law on the subject, the Id. Commissioner (Appeals) has erred in confirming the order of ACIT without considering our submission and confirmed levy of penalty u/s 271(1)(c).*
- 2. On the facts and circumstances of the case as well as law on the subject, the Id. Commissioner (Appeals) ought not to have confirmed the issue/items for which disallowance/additions made in the assessment order are highly debatable and favourable ruling for allowability of the said items as a revenue expenditure are available.*

3. *Appellant craves leave to add, alter or delete any or all ground(s) of appeal either before or in the course of hearing of the appeal.”*
2. Brief facts of the case are that the assessee is a Cooperative Society, engaged in processing and manufacturing of milk and milk products, filed its return of income for the A.Y. 2012-13 on 27/09/2012 declaring Nil income. The case was selected for scrutiny and assessment was completed under Section 143(3) of the Income Tax Act, 1961 (in short, the Act) on 27/02/2015 determining total income of Rs. 11,76,700/-. At the time of passing assessment order, the Assessing Officer made addition of Rs. 14,83,140/- on account of SAP software expenses by treating the same as capital expenditure against the revenue expenditure claimed by assessee. Addition of Rs. 9,29,138/- was made on account of depreciation on subsidy and addition of Rs. 14,65,972/- on account of delay in deposit of employees' contribution of PF and ESI and initiated penalty for furnishing inaccurate particulars.
3. On appeal before the Id. CIT(A), all the additions in quantum assessment was upheld and no further appeal was filed by assessee. The Assessing Officer after receipt of order of Id CIT(A) in quantum assessment, issued show cause notice dated 09/03/2018 as to why penalty under Section 271(1)(c) should not be levied on furnishing *inaccurate particulars* of income. In response thereto, the assessee filed its reply dated 15/03/2018. Part of reply of assessee is extracted by the Assessing Officer in para 5 of his

order. The assessee in its reply submitted that software expenses incurred by assessee is basically of revenue in nature. Such expenses were incurred for updating of software, training of staff and AMC (Annual Maintenance Contract) which are required to be incurred and deductible @ 100%. During the assessment, the Assessing Officer was of the view that the software will give benefit to the assessee in a long run. No details of expenses were concealed or no element of any inaccurate particulars for levying penalty. On depreciation of subsidy, the assessee submitted that in the course of assessment, it was submitted that there is difference of treatment of subsidy which is available to the cooperative society for different purposes. In case of assessee, the subsidy is subject to certain terms and conditions on compliance thereof. The assessee can only use such subsidy and on its use, the assessee has to be deducted from asset concerned, if the assessee does not comply with such condition, in such cases, the subsidy is to be refunded. For such reason, the assessee has not deducted subsidy from its fixed assets and the assessee was planning to deduct it from value of asset concerned. On disallowance under Section 36(1)(va) of the Act, the assessee stated that all payments were deposited before filing return of income. In a number of cases, it has been held that if such payment is made before due date of filing return of income, no disallowance is required to be made.

4. The reply of assessee was not accepted by the Assessing Officer. The Assessing Officer was of the view that it is the prime duty of assessee to show correct figure in the return of income, the assessee failed to offer his correct income in the return of income. The assessee ought to have shown the aforesaid disallowed amount in his return of income which has not been offered. The Assessing Officer worked out the penalty @ 100% of tax sought to be evaded on all three additions and levied penalty of Rs.11,98,380/- in his order dated 28/02/2018.
5. Aggrieved by the order of penalty, the assessee filed appeal before the NFAC/Id. CIT(A). The appeal of assessee was adjudicated by Id. NFAC, New Delhi. Before the Id. CIT(A), the assessee reiterated the similar submission as made before the Assessing Officer and relied upon certain case laws. The assessee submitted that they have neither concealed any income nor furnished any inaccurate particulars of income. The addition was made due to change of opinion. The assessee prayed for deleting the entire penalty. The Id. CIT(A) after considering the submission of assessee held that the appeal of assessee in quantum assessment was dismissed by the Id. CIT(A). The penalty is leviable if the assessee failed to disclose fully and correctly all particulars of its income. The NFAC/Id.CIT(A) after referring the decision in Union of India Vs Dharmendra Textile Processors (2008) 13 SCC 369 and CIT, Ahmedabad Vs Reliance Petroproducts (P) Ltd. (2010) 189 Taxman

322/ (2010) 322 ITR 158-SC has held that the case of assessee is clearly falls within the ambit of Explanation-1 of Section 271(1)(c) of the Act which raises rebuttable presumption and shifts the onus on the assessee to establish bonafide of its claim and upheld the order of penalty. Further aggrieved, the assessee has filed the present appeal before this Tribunal.

6. I have heard the submission of learned Authorised Representative (Id. AR) of the assessee and the learned Senior Departmental Representative (Id. Sr. DR) for the revenue and have gone through the orders of the lower authorities. The Id. AR of the assessee submits that at the time of completion of assessment, the Assessing Officer made three additions. The first addition, which relates to SAP Software expenses which was treated as capital expenses and granted depreciation. The Id. AR submits that the addition/disallowance was made due to different treatment, the assessee claimed it as a revenue expenditure, on the contrary, it was treated as capital expenditure. This is a quite debatable issue and on debatable issue, no penalty is leviable. A number of higher courts have taken a view that the software expenses are revenue expenses. On the disallowance/addition of subsidy on plant and machinery, the Id. AR of the assessee submits that this addition was also a result of difference of opinion between the assessee and the Assessing officer. The assessee neither concealed any income nor furnished any inaccurate particulars of income. Similarly, on third

disallowance of delay in deposit of ESI and PF contribution of employees, the Id. AR submits that the assessee deposited such contribution before filing return of income. During the relevant period, there was divergent view of different High Courts and issue was highly debatable. The assessee neither concealed any income not furnished any particulars of income. The Id. AR submits that all three additions/disallowance, no penalty is leviable. To support his submission, the Id. AR of the assessee has relied upon the following case laws:

- (i) CIT Vs Reliance Petroproducts P Ltd. 2010 (3) TMI 80 (SC)
- (ii) PCIT Vs CLP Power India Pvt. Ltd.
- (iii) Shri Ashishbhai Natwarlal Soparkar Vs ACIT (2022) 5 TMI 515 (Ahd. Trib)
- (iv) Torrent Pharmaceuticals Ltd. Vs ACIT (2022) 3 TMI 340 (Ahd. Trib)
- (v) M/s Safina Hotels Pvt. Ltd. Vs DCIT (2020) 11 TMI 413 (Bang. Trib)
- (vi) CIT Vs Associated Power Structure P Ltd. (2014) 12 TMI 604 (Gujarat)
- (vii) KC Builders and Anr Vs ACIT (2004) 1 TMI 7 (SC)

7. In other alternative submission, the Id. AR of the assessee submits that the Assessing Officer levied penalty for furnishing inaccurate particulars of income. However, the Id. CIT(A) while confirming the order, held that the assessee's case is covered by explanation-1 of Section 271(1)(c) of the Act. Explanation-1 of Section 271(1)(c) deals with concealment of income.

8. On the other hand, the Id. Sr. DR for the revenue supported the orders of the lower authorities. The Id. Sr.DR submits that the Id. CIT(A) as well as the Assessing Officer while levying penalty has given a detailed reasoning. The assessee intentionally and deliberately made a wrong claim in the return of income. All claims of assessee were not admissible, thus, the Assessing Officer levied penalty under Section 271(1)(c) of the Act. The Id. CIT(A) after making detailed discussions on various case laws, confirmed the penalty levied by the Assessing Officer and dismissed the appeal.
9. I have considered the submissions of both the parties and have gone through the orders of lower authorities carefully. I find that the assessing officer levied penalty on three additions, hence, I will deal with all three issues, if the such additions/ disallowances attracts levy of penalty on the basis of such additions. First addition relates to addition on account of software expenses. I find that there is no dispute that such expense was claimed by assessee as revenue expenses and the assessing officer treated the same capital expenses and allowed certain depreciation thereon. Thus, there is no concealment of such expenses it is merely added to different treatment by the assessing officer. Even otherwise, software expenses are capital or revenue in nature is a debatable issue on such debatable issues no penalty is leviable.

10. Second addition is on account of depreciation on subsidy. The State Government has granted subsidy on various scheme to encourage production of milk and milk product for milk federations, milk union and co-operative societies, for purchasing fixed assets, which are subject to various conditions. If such conditions are not complied such subsidy is liable to be refunded with the assets purchased. The case of the assessee is that they have amount of subsidy should be deducted only when the conditions are fulfilled to avoid the contingencies of refunding the subsidy along with the asset. The assessing officer reduced the amount of subsidy from the value of asset on receipt of it and reworked the depreciation based on the value of asset reduced by the amount of subsidy. Thus, the assessing officer given different treatment. Thus, the assessing reworked the value of depreciation Rs. 9,29,138/- and added to the income of assessee. In my considered view there was no concealment of particulars of income, rather the addition of disallowance of depreciation is also result of difference of opinion and no penalty can be levied on this addition of disallowance of depreciation.

11. Third addition was on account of delayed payment of contribution of employees ESIC and PF paid after due dates in the respective statutory provisions. The assessee claimed the deduction on the ground that the said contribution was deposited before filing return of income. And that details of payments were disclosed in the tax Audit report. The assessing officer

disallowed the said expenses by taking view that these payments were deposited after due date under the relevant Acts. Before me, the Id AR for the assessee argued that the assessee deposited such contribution before filing return of income. During the relevant period, there was divergent view of different High Courts and issue was highly debatable. The assessee neither concealed any income not furnished any particulars of income. I am in agreement with the submissions of Id AR for the assessee that during relevant period there was divergent view of various High Courts on this issues and it was also a debatable issue, whether the deposits of such employee contributions before filing return of income, is allowable deduction or not. Even otherwise, the assessee in its tax audit report has disclosed all such facts about the delay in deposits of such contribution. Hence, there is no concealment of expenses. In view of the aforesaid discussions, I am of the view that this is not a fit case for levy of penalty. In the result, the grounds of appeals raised by the assessee is allowed.

12. In the result, this appeal of assessee is

Order pronounced in the open court on 25th October, 2022.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 25/10/2022
**Ranjan*

Copy to:

1. Assessee –
2. Revenue -
3. CIT(A)
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Sr.Private Secretary, ITAT, Surat