

आयकर अपीलिय अधिकरण, 'ए' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपीलसं./ITA Nos.: **2604 & 2605/CHNY/2017**

निर्धारण वर्ष/Assessment Years: 2011-12 & 2012-13

**Nagarjuna Oil Corporation
Ltd.,**
MD Chambers, New No.53,
Old No.31, Dr. Radhakrishnan
Salai, Chennai – 600 004.

The ACIT,
vs. Corporate Circle 4(2),
Chennai.

PAN: AAACN 9369E

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

&

आयकर अपीलसं./ITA Nos.: **2703 & 2704/CHNY/2017**

निर्धारण वर्ष/Assessment Years: 2012-13 & 2011-12

The DCIT,
Corporate Circle 4(2),
Chennai.

**Nagarjuna Oil Corporation
Ltd.,**
vs. MD Chambers, New No.53,
Old No.31, Dr. Radhakrishnan
Salai, Chennai – 600 004.

PAN: AAACN 9369E

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

निर्धारिती की ओर से/Assessee by : None

राजस्व की ओर से /Revenue by : Shri R. Mohan Reddy, CIT

सुनवाई की तारीख/Date of Hearing : 21.11.2022

घोषणा की तारीख/Date of Pronouncement : 21.11.2022

आदेश / O R D E R**PER MAHAVIR SINGH, VICE PRESIDENT:**

These cross appeals, two by the assessee and two by the Revenue, are arising out of the common order of the Commissioner of Income Tax (Appeals)-8, Chennai-1 in ITA Nos.159 & 160/16-17 dated 30.08.2017. The assessments were framed by the ACIT, Company Circle IV(4), Chennai for the assessment year 2011-12 and by the DCIT(OSD), Corporate Circle-4, Chennai for the assessment year 2012-13, both u/s.143(3) of the Income Tax Act, 1961 (hereinafter the 'Act') vide orders dated 30.03.2014 & 27.02.2015. The penalties under dispute were levied by the ACIT, Corporate Circle 4(2), Chennai u/s.271(1)(c) of the Act for assessment years 2011-12 & 2012-13 vide orders of even date 29.04.2016.

2. The only common issue in these four appeals, is as regards to the common order of CIT(A) for both the assessment years confirming the levy of penalty u/s.271(1)(c) of the Act in regard to interest income claimed by assessee, on the pre-commencement of business period, as capital receipt as against assessed by AO as

revenue receipt. According to AO, the assessee has concealed the particulars of income and also furnished inaccurate particulars of income.

3. The facts and circumstances in both the years are exactly identical, the grounds raised by assessee in both the years are also identically worded and grounds raised by Revenue in both the years are also identically worded except the quantum. The Revenue had challenged restriction of penalty u/s.271(1)(c) of the Act, to the extent of 100% as against levied by AO at 200%. The assessee had challenged the order of CIT(A) restricting the same at 100%.

4. Since the facts and circumstances are identical, we will take the facts from assessment year 2011-12, which is the lead year.

5. Despite service of notice, none is present from assessee's side and it seems that the company is under liquidation and despite service of notice on the official liquidator, nobody is coming forward and hence, these appeals are heard ex-parte qua assessee as well as official liquidator after hearing Id.CIT-DR.

6. Brief facts are that the assessee is engaged in the business of refining of petroleum oil, etc. The business activity has still not started which is noted by the AO and this is undisputed fact. The assessee company started its construction and related project works, which were being carried out during the previous year. During the previous year, assessee earned interest income of Rs.25.92 crores as a result of investment made including investment in FDR's in banks. The assessee has claimed exemption of this interest income to the tune of Rs.21.79 crores out of the total interest earned at Rs.23.86 crores. The assessee before AO pleaded that in view of the decisions of Hon'ble Supreme Court in the case of Karnal Cooperative Sugar Mills Ltd., 243 ITR 2 and Bokaro Steels Ltd., 236 ITR 315, the interest income has been capitalized as the deposit of the money was directly linked with the purchase of plant & machinery. Hence, the income earned on such fixed deposits was instrumental to the acquisition of assets for setting up of plant & machinery and as such, the interest income could not be treated as revenue receipt. However, the AO relying on the decisions of Hon'ble Supreme Court in the case of CIT vs. Autokast Ltd., 248 ITR 110 and Tuticorin Alkali Chemicals and Fertilizers Ltd., 227 ITR 172 held that the interest income earned on margin money kept in

deposits against the letter of credit for supply of equipments, scrap sale, etc., as revenue receipt by observing as under:-

6. In this connection, it is relevant to refer to subsequent decisions of the Hon. Supreme Court in the case of CIT Vs Autokast Ltd. (248 ITR 110) (SC) and Tuticorin Alkali Chemicals and Fertilizers Ltd. (227 ITR 172)(SC). In the case of Autokast Ltd., it was observed that interest on money borrowed for purchase of Plant & Machinery and placed in Short Term Deposit with bank till payment was made and used in bill discounting was taxable as income from other sources. In the case of Tuticorin Alkali Chemicals & Fertilizers Ltd., the Hon. Supreme Court observed that "Interest income is always of a revenue nature, unless it is received by way of damages or compensation. If a person borrows money for business purposes but utilizes that money to earn interest, however, temporarily, the interest so generated will be his income. This income can be utilized by the assessee whichever way he likes. He may or may not discharge his liability to pay interest with this income. Merely because it was utilized to repay the interest on the loan taken by the assessee, it did not cease to be his income. When the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law, and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provision of the Income tax Act."

7. In view of the Hon. Supreme court decisions referred above, I am of the view that the Interest income earned by the assessee on the Margin Money kept in Deposits against the letter of credit for supply of equipment, scrap sales etc. is a Revenue Receipt. It is accordingly charged to tax as income from other sources u/s 56 of the Income tax Act.

6.1 Aggrieved, assessee preferred appeal before the CIT(A) and the CIT(A) also confirmed the addition and subsequently, the ITAT also confirmed the addition. The AO initiated penalty proceedings

and levied the penalty u/s.271(1)(c) of the Act by observing as under:-

The assessee company has quoted various decisions of the Hon'ble Supreme Court in support of its claim. In this regard, it is pertinent to mention here that the assessee company has made similar submissions before the Ld. Commissioner of Income Tax (Appeals) during the appellate proceedings. The Ld. Commissioner of Income Tax (Appeals) has elaborately discussed the relevant case laws in his order and after duly considering the submissions of the assessee-company only, the Ld. CIT(A) has dismissed the appeals of the assessee-company.

The assessee-company being a large entity dealing in petro products is assisted by a battery of auditors, Chartered Accountants and Company Secretaries etc., who are eminent professionals. As such, the assessee-company is expected to be aware of the provisions of the Act before claiming such a huge amount of Rs.21,79,69,805/- as non-taxable capital receipt particularly in view of the decision of the larger Bench of the Hon'ble Supreme Court in the case of M/s. Bongaigaon Refinery and Petrochemicals, which has held that "the interest income earned on the deposits made during the formation period of the business cannot be adjusted against project cost". By claiming that the interest received on the deposits made during the pre-commencement period are not chargeable to tax the assessee has tried wilfully to avoid its tax liability on this receipt. This claim of the assessee that the interest on the deposits is not chargeable to tax is tantamount to 'furnishing of inaccurate particulars of income' with an intention to reduce its tax liability. As such, I am satisfied that the assessee has furnished inaccurate particulars relating to the interest on short term deposits which are chargeable to tax under the head Other Sources.

Further, the explanation offered by the assessee is not convincing and acceptable since the issues raised by the assessee in the reply to the notice u/s 271(1)(c) are similar to those raised during the assessment as well as appellate proceedings which have been discussed elaborately by the Assessing Officer in the Assessment order and the Ld. Commissioner of Income-tax (Appeals), Chennai in the Appellate Order, while confirming the addition made by the Assessing Officer. In this context and also considering the facts in totality, it is a fit case for levy of penalty u/s.

271(1)(c) for furnishing inaccurate particulars of Income. Also it is pertinent to note that penalty u/s. 271(1)(c) is a civil liability and it is a remedy for loss of Revenue, as held by the Hon'ble Apex Court in the case of Union of India vs. Dharmendra Textiles Processors (2008) 306 ITR 277 (SC).

The addition made in the assessment order is Rs.21,79,69,805/- and the tax effect on the same works out to Rs.7,24,04,119/- including Surcharge and Education Cess which was sought to be evaded by the assessee by furnishing inaccurate particulars about the taxable income. As per the provisions of Sec.271(1)(c), the penalty leviable shall not be less than, but shall not exceed three times, the tax sought to be evaded by reason of the furnishing of inaccurate particulars of income. In this case, the tax sought to be evaded is Rs.7,24,04,119/-. As such, the penalty that can be leviable is a minimum of Rs.7,24,04,119/- and a maximum of Rs.21,72,12,357/-, The assessee has intentionally furnished inaccurate particulars of its income chargeable to tax and also not cooperated with the Department during the assessment proceedings as well as in recovery proceedings. I, therefore, levy a penalty of Rs.15,00,00,000/- (Rupees fifteen crores only) under Section 271(1)(c) of the Income Tax Act, 1961.

6.2 It seems that the AO levied penalty @ 200%. Aggrieved, assessee preferred appeal before CIT(A).

7. The CIT(A) restricted the penalty to minimum and accordingly, restricted the penalty of Rs.7.25 crores for assessment year 2011-12 and Rs.5.50 crores for assessment year 2012-13 by observing in paras 9 to 12 as under:-

9. As per the submissions made, the assessee has claimed that it followed the decision of the Hon'ble ITAT for Assessment Year 2005-06 with the bonafide belief but the interest income was not chargeable to tax. However, it is noted that the interest income received during Assessment Year 2005-

06 was only the interest received of Rs.11,13,628/- from certain deposits kept as margin money deposits for opening the letters of credit. However, the interest incomes received for Assessment Year 2011-12 & 2012-13 were on account of deployment of surplus funds available with the assessee concern and invested for the purpose of interest on fixed deposits. This crucial difference between Assessment Year 2005-06 & 2011-12 & 2012-13 will deny the benefit of any claim of bonafide belief on account of the second appellate order for Assessment Year 2005-06. The assessee has further quoted the decision of the Hon'ble Supreme Court in M/s. Reliance Petro Products Pvt. Ltd. (322 ITR 158) in support of its claim that penalty is not leviable when full particulars of a case are declared in the return of income. The Assessing Officer had also quoted the decision of Madras High Court in the case of M/s. Caplin Point Laboratories Ltd. (TCA No.712 of 2007) in support of its claim that penalty cannot be levied on account of a particular view taken by the assessee under bonafide belief. However, in this regard it is noted that the decision of the Hon'ble Supreme Court as well as that of Hon'ble Jurisdictional Court were available to the assessee at the time of filing the return of income and that the assessee chose not to declare incomes liable for taxation at its own risk and induced faith. The assessee has further stated that its appeal before the Hon'ble Madras High Court against the combined order of Hon'ble ITAT for Assessment Year 2011-12 & 2012-13 has been admitted with a substantial question of law. The assessee seeks deletion of penalty levied in view of its claim that penalties cannot be levied when the issue on which the tax and penalty are demanded is a subject matter of an admitted appeal before the Hon'ble High Court.

10. The Contentions and factual averments made by the assessee are considered. In fact, the Assessing Office had already considered the same contentions of the assessee and has countered the same with a reasoned and speaking order. The Assessing Officer has specifically countered the objections of the assessee with his observations as under:

The assessee company has quoted various decisions of the Hon'ble Supreme Court in support of its claim. In this regard, it is pertinent to mention here that the assessee company has made similar submissions before the Ld CIT (A) during the appellate proceedings, The Ld CIT(A) has elaborately discussed the relevant case laws in his order and after duly considering the submissions of the assessee-company only, the Ld.CIT(A) has dismissed the

appeals of the assessee-company. The assessee-company being a large entity dealing in petroproducts is assisted by a battery of auditors, Chartered Accountants and Company Secretaries etc, who are eminent professionals. As such, the assessee-company is expected to be aware of the provisions of the Act before claiming such a huge amount of Rs.16,08,92,680/- as non-taxable capital receipt particularly in view of the decision of the larger Bench of the Hon'ble Supreme Court in the case of M/s. Bongaigaon Refinery and Petrochemicals, which has held that the interest income earned on the deposits made during the formation period of the business cannot be adjusted against project cost". By claiming that the interest received on the deposits made during the pre-commencement period are not chargeable to tax, the assessee has tried wilfully to avoid its tax liability on this receipt. This claim of the assessee that the interest on the deposits is not chargeable to tax is tantamount to furnishing of inaccurate particulars of income' with an intention to reduce its tax liability. As such, I am satisfied that the assessee has furnished inaccurate particulars relating to the interest on short term deposits which are chargeable to tax under the head Other Sources.

Further, the explanation offered by the assessee is not convincing and acceptable since the issues raised by the assessee in the reply to the notice /s 271(1)(c) are similar to those raised during the assessment as well as appellate proceedings which have been discussed elaborately by the Assessing Officer in the Assessment Order and the :Ld. CIT(A), Chennai in the Appellate Order, while confirming the addition made by the Assessing Office. In this context and also considering the facts in totality, it is fit case for levy of penalty w/s 271(1)(c), for furnishing inaccurate particulars of income. Also it is pertinent to note that penalty u/s 271(1)(c) is a civil liability and it is a remedy for loss of Revenue, as held by the Hon'ble Apex Court in the case of Union of India vs Dharmendra Textiles Processors (2008) 306 ITR 277(SC).

11. The judicial precedents for levy of penalty are further examined.

Mens rea not essential for civil liability of penalty -Penalties under fiscal statutes are for breach of civil liabilities - Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution u/s 276C.

Union of India Vs Dharmendra Textile Processors (Supreme Court)
306 ITR 277

Gukjag Industries Ltd. Vs CTO (SC) 317 ITR 1

Failure to disclose interest received u/s 244A - Penalty upheld - Assessee having exercised his statutory right of entitlement of interest u/s 244A ought to have shown the same as income in his return and the question of lack of intention and defence of oversight does not arise.

Thirupathy Kumar Khemka Vs CIT (mad) ITR 122

Mentioning of the words - "penalty proceedings initiated separately "in assessment order is sufficient for invoking penal action

M.Sajjanraj Nahar & Ors. Vs CIT (Mad) 283 ITR 230

Nainu Mal Het Chand Vs CIT (All) 294 ITR 185

It is not necessary that before feeling satisfied regarding the necessity of initiating proceedings for imposition of penalty and before issuing the consequential notice, the ITO should issue another notice to the assessee and hold a preliminary equity regarding the necessity of initiating proceedings.

D.M. Manasvi Vs CIT (Supreme Court)86 ITR 557

12. On account of cumulative reasons as above, it is seen that penalty deserves to be levied in the case of the assessee to punish and reprimand the assessee from making such incorrect claims /declarations in the return of income. However, there is no compelling reason for levying penalty in excess of the minimum penalty to be levied in this case under the present matrix of facts and circumstances. Hence, the Assessing Officer is directed to reduce the penalty to Rs.7,25,00,000/- for Assessment Year 2011-12 and Rs.5,50,00,000/- for Assessment Year 2012-13. The penalty sustained is almost to the extent of the tax sought to be evaded. The assessee gets relief of Rs.4.5 Crores for Assessment Year 2011-12 and Rs. 7.75 Crores for Assessment Year 2012-13.

Aggrieved, both assessee as well as Revenue came in appeal before the Tribunal.

8. We have heard Id. CIT-DR and gone through facts and circumstances of the case. We noted that the AO in his assessment order for assessment year 2011-12 considered the fact that the business activity were yet to start and company was under construction and related project works being carried out during the previous year relevant to this assessment year. The AO in his penalty order also admitted that during the year, fresh allotment of shares to the extent of Rs.76.5 crores was made in September, 2010 and the said amount was not utilized immediately. The same was invested in fixed deposit on 24.09.2010 and earned interest on short term deposit of Rs.2,06,57,532/- and offered the same as 'income from other sources'. The balance deposit was converted into short term deposits as and when the bankers released the loan funds and kept in separate earmarked account. Thus, bank deposits were out of borrowed funds and were always under lien for the loan and letter of credit. These amounts were not available to the assessee company as unencumbered funds. The assessee earned total interest income on FDR's at Rs.23.86 crores, as a result of investment made in FDR's in bank. The assessee claimed exemption of interest income for an amount of Rs.21.79 crores out of the total interest income earned for the reason that whenever

loan funds kept in separate earmarked account was capital in nature. For this, the assessee relied on the decisions of Hon'ble Supreme Court in the case of Bokaro Steels Ltd., and Karnal Cooperative Sugar Mills Ltd., *supra*. We also noted from the paper-book filed by assessee at page 71 of assessee's paper-book, the quantum order of Tribunal was challenged before the Hon'ble High Court of Madras in TCA No.824 & 825 of 2016 & CMP No.18831 of 2016, dated 01.02.2017 and the Hon'ble High Court has admitted the following substantial question of law :-

- i) Whether the Tribunal was right in law in holding that interest which accrued on funds deployed with the bank as margin money is to be taxed as income from other sources and not as a capital receipt liable to be set off against pre-operative expenses?
- ii) Whether, on the facts and in the circumstances off the case, the Tribunal was right in law in not following the decision of the coordinate Bench in assessee's own case on identical facts for the AY 2005-06 in ITA No. 1938/Mds/09 dated 11h March, 2010, in which the same decisions as cited in the impugned order were also considered?
- iii) Whether, on the facts and in the circumstances of the case, the Tribunal ought to have held that in any event as the deposits were made out of the borrowed funds, the interest payable on borrowings should be considered as expenses incurred for the purpose of earning interest income and hence the interest payable should be allowed as a deduction from the interest income under provisions of Sec.57(iii)?

8.1 From the above, it is clear that there is a debate involved, whether the loan obtained from bank and kept in earmarked

accounts on temporary basis, whether it is a capital receipt or revenue receipt. The assessee treated this as capital receipt and claimed exemption from tax on these amounts because the assessee was in the process of setting up of the business. In such circumstances, whether penalty u/s.271(1)(c) of the Act for furnishing of inaccurate particulars of income can be levied. It is an admitted fact that the assessee has filed complete particulars of income before the AO and nothing was concealed. As in the present case, the assessee has disclosed all the facts relating to the transaction of loans obtained from banks and the details of bank account and the details of interest earned but treated the same as capital in nature, in view of the decisions of Hon'ble Supreme Court in the cases of Bokaro Steels Ltd., and Karnal Cooperative Sugar Mills Ltd., *supra*. It means that there is a debate available whether idle funds kept temporarily during the intermittent period between the set-up of business and actual start of the business, the interest income earned is capital or revenue. The assessee only claimed the same as capital in nature and not disclosed as revenue income on which taxes to be paid. This issue has been deliberated by the Hon'ble Madhya Pradesh High Court in the case of CIT vs. Kishan Chand Tara Chand, (1995) 15 Taxation 72, wherein it is held that

where the assessee has disclosed all the facts relating to a transaction but has not included the resultant income in its return on the bonafide belief that such income was eligible for exemption u/s54F, from the mere fact that the claim of the assessee has been negative by the AO, it does not amount to concealment of income or furnishing of inaccurate particulars of income by the assessee. In our view, the assessee has made complete disclosure of facts and only issue is whether the interest received on idle funds lying with banks in the shape of fixed deposits is a capital receipt or revenue receipt. This, being a highly debatable issue, the assessee is exigible to penalty u/s.271(1)(c) of the Act, for furnishing of inaccurate particulars of income. In our view, this being a highly debatable issue and once there is a debate as assessee's present case, Hon'ble Madras High Court has admitted the substantial question of law against the order of Tribunal in quantum, we are of the view that assessee is not liable for penalty u/s.271(1)(c) of the Act. Hence, we delete the penalty levied by AO completely in both the assessment years and allow both the appeals of assessee. Consequently, the Revenue appeals are dismissed.

9. In the result, the appeals filed by the assessee in ITA Nos.2604 & 2605/CHNY/2017 are allowed and the appeals filed by the Revenue in ITA Nos.2703 & 2704/CHNY/2017 are dismissed.

Order pronounced in the open court on 21st November, 2022 at Chennai.

Sd/-

(मनोज कुमार अग्रवाल)

(MANOJ KUMAR AGGARWAL)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,

दिनांक/Dated, the 21st November, 2022

RSR

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

- | | | |
|------------------------|-------------------------|------------------------------|
| 1. निर्धारिती/Assessee | 2. राजस्व/Revenue | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त /CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF. |