

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD

BEFORE Ms SUCHITRA KAMBLE, JUDICIAL MEMBER,
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 1690/AHD/2019
निर्धारण वर्ष/Asstt. Year: 2015-2016

D.C.I.T., Circle-2(1)(1), Ahmedabad.	Vs.	M/s. ECS Environment Pvt. Ltd., 11-12, ECS House, Garden View, Opp. Auda Garden, Opp. D.G. Highway, Ahmedabad. PAN: AACCE8366J
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(Applicant)		(Respondent)
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Revenue by :	Shri V.K. Mangla, JCIT, D.R
Assessee by :	Shri Sunil Maloo, A.R

सुनवाई की तारीख/**Date of Hearing** : **01/11/2022**
घोषणा की तारीख /**Date of Pronouncement**: **07/12/2022**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeal)-2, Ahmedabad, dated 21/08/2019 arising in the matter of Penalty Order passed under s. 271(1)(c) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-2016.

2. The only issue raised by the Revenue is that the learned CIT (A) erred in deleting the penalty of Rs. 2,29,67,144/- levied under section 271(1)(c) of the Act on account of furnishing inaccurate particulars of income.

3. The facts in brief are that the assessee is a private limited company and engaged in the business of E-Waste Management. The assessee for the year under consideration i.e. A.Y. 2015-16 declared loss of Rs. 7,81,06,659/- after claiming the deduction of preoperative expenses of Rs. 6,88,77,331/- only. The AO during the assessment proceeding under section 143(3) of the Act found that the business operation of the assessee was started in the preceding year i.e. A.Y. 2014-15 and therefore the preoperative expenses cannot be claimed as deduction in the year under consideration which is against the principle of accountancy. Therefore, the AO disallowed the same and reduced the loss of the assessee to the extent of Rs. 92,29,328/- only. The AO also initiated penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income. The AO finally vide order dated 29-06-2018 levied penalty of Rs. 2,29,67,144/- by observing as under:

*5.2 As it is, firstly it has to be seen "what constitutes furnishing of inaccurate particulars is". As the term 'inaccurate particulars' is not defined in the I. T. Act, 1961, recourse has to be taken to other established source(s). As per Webster's Dictionary, "inaccurate" has been defined as: **"not accurate, not exact or correct; not according to truths erroneous; as an inaccurate statement, copy or transcript."***

6. As per the deeming provisions of Explanation 1 to section 271(1), the amount of addition on any issue about which the assessee is unable to offer any satisfactory explanation shall be deemed to represent the income in respect of which particulars have been inaccurate. In this case, as brought out in the assessment order, the assessee failed to offer any satisfactory explanation.

7. From the facts enumerated above, it is clear that the assessee company has intentionally and will fully furnished inaccurate particulars with dishonest intent to evade payment of rightly full taxes income. Therefore, I am satisfied that the act of assessee of not offering the said amount to tax (before it being detected and brought to tax by the AO) amounts to furnishing of inaccurate particulars within the meaning of provisions of section 271(1)(c) of the Act. Accordingly & hence, levy penalty of Rs,229,67,144/- being 100% of the tax [; sought to be evaded.

4. The aggrieved assessee preferred an appeal before the learned CIT(A).

4.1 The assessee before the learned CIT(A) submitted that during the penalty proceeding it furnished explanation vide submission dated 09-02-2018 against levy of penalty but the AO without considering the same levied penalty vide order dated 29-06-2018. Therefore, the order imposing penalty under section 271(1)(c) of the Act without considering the explanation furnished by the assessee is invalid and deserved to be quashed. The assessee in this regard places its reliance on the judgment of Hon'ble Jurisdictional High Court of Gujarat in the case of CIT vs. Scientific Chemicals reported in 198 CTR 665.

4.2 The assessee further submitted that the genuineness of preoperative expenses nowhere has been doubted by the AO. In fact, the AO observed that all the details with regard to the preoperative expenses have been furnished before him, demonstrating that these expenses were revenue in nature. However, the AO disallowed the same merely on the reasoning that the same was not pertaining to the year under consideration. Thus, AO only found the year of claim as wrong and not the genuineness of claim of expenses. Therefore, the allegation for levy of the penalty that the inaccurate particulars have been furnished does not hold well. Further, the disallowances made by the AO was tax neutral for the reason that if the claim is disallowed in the year under consideration, then the same is to be allowed in the earlier year to which belongs/ pertains.

5. The learned CIT (A) after considering the facts in totality deleted the penalty levied by the AO by observing as under:

The appellant has filed return of income showing loss of Rs.[-]7,81,06,659/-. The appellant company is engaged in E-Waste Management business and incurred expenditure of Rs.6,88,77,3317- during Financial Year 2011-12 to 2013-14. Appellant company during the year has written off the above expenditure relating to feasibility study etc. as the projected activities were abandoned. The appellant has contended that there is no furnishing of inaccurate particulars as the expenditure were genuine and duly certified by the Chartered Accountant. Appellant has also contended that Honourable Mumbai ITAT in the case of DCIT

Cir- 3(2) Vs. Mukund Limited [ITA No.2708/MUM/2009] A. Y. 2002-03 has held that if the project is abandoned the expenditure incurred during the development and preliminary stage of the company in earlier years can be claimed as deduction. Appellant has also relied on the decision of Honourable Supreme Court in the case of Reliance Petroproducts Pvt. Ltd. [322 ITR 158] that merely disallowance of claim does not attract penalty u/s. 271(1)(c). I agree with the submission made by the appellant that merely disallowance of claim in itself does not attract penalty u/s. 271(1)(c) of the Act. This is not a case where expenditure has been proved to be bogus. Even Assessing Officer has held that the expenditure are revenue nature and relating to preceding years. It has been held by jurisdictional High Court in the case of Geeta Prints Pvt. Ltd. [2013] 33 Taxmann.com 393, that if the assessee has made full disclosure about them claim and the claim has been certified by the Chartered Accountant, the incorrect claim does not amount to concealment of particulars. Similar view has been taken by Honourable ITAT, Ahmedabad in the case of Carnation Neutra Analogue Foods Ltd. [2009] 34 SOT 203 {Ahmedabad}.

The Honourable Supreme Court in the case of Reliance Petro Products Pvt. Ltd. [322 ITR 158] has also held that merely disallowance of claim does not attract penalty u/s. 271(1)(c):-

"9. We are not concerned in the present case with the mens rea. 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, transcript."

We have already seen the meaning of the word "particulars" in the earlier part of (his 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."

The Honourable Gujarat High Court in the case of CIT-4, Ahmedabad Vs. Sambhav Media Ltd. [32 Taxmann.com 371], has also held that merely because a claim was not accepted or was not acceptable to the revenue by itself could not attract penalty u/s.271(1)(c).

In view of the above, the penalty levied by the Assessing Officer cannot be sustained and therefore same is cancelled.

6. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

7. The learned DR before us contended that the assessee was not eligible for the deduction of the expenses pertaining to the earlier year and therefore the assessee has furnished inaccurate particular of income within the provisions of

section 271(1)© of the Act. The learned DR vehemently supported the order of the AO.

8. On the other hand, the learned AR before us submitted that claim made by the assessee was genuine and the same was not doubted by the authorities below. However, the same was disallowed merely on the reasoning that it pertains to the earlier year. According to the learned AR, the claim of the assessee at the most can be regarded as wrong claim which is different from furnishing the inaccurate particulars of income. Thus, there cannot be any penalty under the provisions of section 271(1)© of the Act. The learned AR vehemently supported the order of the learned CIT-A.

9. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the preoperative expenses for Rs. 6,88,77,331/- was disallowed by holding that the assessee started business operation in earlier year, therefore the same is not allowable in the year under consideration as pre-operative expenses. Further, the AO held such claim as an act of furnishing inaccurate particular of income and levied the penalty of Rs. 2,29,67,144 being 100% of the amount of tax sought to be evaded under the provisions of section 271(1)(c) of the Act. On appeal by the assessee, the learned CIT(A) was pleased to delete the same.

9.1 On perusal of the materials on record we note there was no allegation evidencing that the amount of expenses claimed by the appellant assessee was not genuine or not correct. As such, the AO disallowed the same only for the reason that the expenses claimed in the year under consideration was against the Accounting principles. Therefore, the question of furnishing inaccurate particulars income does not arise. It is only a case of claim made by the assessee which was not admitted by the AO. Thus, the AO calculates different total income than the income declared by the assessee and the difference between the income declared by assessee and assessed by the AO would not amount to furnishing of inaccurate

particulars of income or concealment of income per say. Definitely this is not the intention of the legislator to treat every addition or disallowances in assessment proceeding as either concealment or furnishing inaccurate particular of the income and thereby levying the penalty. The phrase furnishing inaccurate particular of incomer has not been defined under the provisions of the Act. However, we note that the Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts Pvt Ltd reported in 189 taxman 322 has discussed the term inaccurate particulars as *"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"*. Thus, to arrive at the conclusion that, the assessee has furnished inaccurate particulars of income, it has to be tested whether the detail furnished in the return of income is incorrect or erroneous or false. In other words the element of consciousness in furnishing inaccurate particulars of income coupled with circumstantial evidences should be present in the particular case. Unless, the characters of inaccurate particulars of income as discussed above are present in any particular case, the penalty provisions under section 271(1)(c) of the Act cannot be attracted.

9.2 Coming to the present case, we find that revenue authority nowhere brought any evidences on record that the information provided in the return of income are not true or false or not as per truth. There was no finding of the AO that amount of preoperative cost claimed by the assessee is not as per truth. As such as per the AO, the preoperative expenses claimed by assessee were duly supported with the detail furnished by it (the assessee) and were in the nature of revenue expenses. However, the same was not allowed on the allegation that the business of the assessee was already started in earlier year. Thus, in our considered view, the provisions of 271(1)(c) of the Act cannot be attracted in the given facts and circumstances.

9.3 Before parting, it is also important to highlight that the penalty under section 271(1)(c) of the Act is levied on the amount of tax sought to be evaded which means that there should be tax payable by the assessee which has been evaded

due to concealment or furnishing inaccurate particular of income. In the given case on hand, the appellant assessee declared loss of Rs. 7,81,06,659/- which has been reduced to the extent of 92,29,328/- after making disallowances of claim of preoperative expenses. Thus after making disallowances still there was no positive income on which assessee was liable to pay tax. Hence in the absence of positive income the question of evading tax does not arise. In holding so we draw support and guidance from the judgment of Hon'ble Madras High Court in case of Rattha Citadines Boulevard Chennai (P.) Ltd. vs. DCIT reported in [2021] 124 taxmann.com 439 (Madras), where it was held as under:

12. The considerations for imposition of penalty under section 271(1)(c) of the Act are however entirely different. It requires existence of mens rea on the part of the Assessee and either of the twin conditions of (i) concealment of income or (ii) filing of inaccurate particulars by Assessee, are required to be satisfied and the burden of proving that lies upon the revenue authority and not on the Assessee. Merely because the claim of expenditure made by the Assessee is found to be a wrong claim and is disallowed, it does not per se attract imposition of penalty under section 271(1)(c) of the Act.

13. From the extract of the penalty order above, curiously, the learned Assessing Authority, namely Deputy Commissioner of Income Tax, Ms. Saratha.G, IRS, in her Assessment Order "reduced the loss" of the Assessee, which was claimed in the form of expenditure and interest charges by disallowing the said claim to the extent of Rs. 1,28,28,005/-, on which 30% tax thereon "would have" been Rs. 38,48,402/- and therefore, with the cess of 3% thereon, the 100% penalty would work out to Rs. 39,63,854/-. One fails to understand how the "reduction of loss" in the Assessment order would amount to "income" on which tax payment could have been evaded by Assessee. No positive income could result by such disallowance and therefore, no tax in fact could ever be imposed on such assumed "reduction of loss" considered by the Assessing Authority. This is just a hypothetical figure of "income" taken by the authority concerned in order to impose somehow penalty under section 271(1)(c) upon the Assessee.

14. The tax on the actual income of Rs. 4,76,517/-, which was foreign exchange gain, was already imposed on the Assessee to the extent of Rs. 2,00,240/- by the same Assessment Order and have been already paid by the Assessee. Therefore, the Assessing Authority could not have adopted these imaginary figures of alleged evaded income tax on the "reduction of loss" as claimed in the Revised Return filed by the Assessee and as the basis for "assumed income tax liability" thereon, 100% penalty thereon could not have been imposed.

9.4 In view of the above and after considering the facts in totality, we do not find any reason to interfere in the finding of the learned CIT (A), hence we uphold the same and direct the AO to delete the penalty levied by him under section

271(1)(c) of the Act. Hence the ground of appeal of the Revenue is hereby dismissed.

10. In the result, the appeal of the Revenue is hereby **dismissed**.

Order pronounced in the Court on 07/12/2022 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated **(True Copy)**
Manish 07/12/2022