

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 6930/Mum/2019 (A.Y. 2007-08)

ACIT(LTU-1) 29 <sup>th</sup> Floor Centre-1, World Trade Centre, Cuffe Parade Mumbai-400 005.	Vs.	TCS Limited 9 <sup>th</sup> Floor, Nariman Building Nariman Point Mumbai-400 021.  PAN : AAACR4849R
(Appellant)		(Respondent)

Assessee by	Shri Porus Kaka & Shri Manish Kanth
Department by	Shri Manoj Kumar
Date of Hearing	25.01.2023
Date of Pronouncement	22.02.2023

O R D E R

Per B.R.Baskaran (AM) :-

The Revenue has filed this appeal challenging the order dated 30.8.2019 passed by the learned CIT(A)-53, Mumbai deleting the penalty levied by the Assessing Officer under section 271(1)(c) of the I.T. Act.

2. The facts relating to the above said issue are set out in brief. The Assessing Officer completed the assessment of the assessee under section 143(3) read with section 144C of the Act determining total income at Rs. 1691.48 crores under normal provisions of the Act. The Assessing Officer initiated the penalty proceedings u/s 271(1)(c) of the Act along with completion of the assessment. After receipt of the appellate order passed by Ld CIT(A), the Assessing Officer completed the penalty proceedings and levied penalty of Rs. 51.82 crores under section 271(1)(c) of the Act for furnishing inaccurate particulars of income and concealed its income. The additions,

which were considered to be furnishing of inaccurate particulars of income by the Assessing Officer are listed out below:-

<b>Addition on account of</b>	<b>Addition/disallowance</b>
Claim of state taxes paid overseas	13,22,52,218
Penalty on overseas taxes paid	73,84,168
Software expenses [u/s. 40(a)(i)]	15,43,05,676
Software expenses treated as capital expenditure	78,65,86,792
Software expenses (products) Resale	17,48,99,176
Disallowance under section 14A of the Act	29,87,876
Transfer Pricing Adjustments	28,09,16,769
<b>Total</b>	<b>153,93,32,675</b>

The learned CIT(A) deleted the penalty levied u/s 271(1)(c) of the Act in respect of all the above said additions. The Revenue has filed this appeal before the Tribunal challenging the decision of Ld CIT(A) in deleting the penalty levied on the above said additions except addition relating to Transfer Pricing adjustment.

3. We have heard the parties and perused the record. The first addition on which penalty was levied relates to disallowance of State Tax paid in overseas countries. We noticed that this disallowance has since been restored back to the file of the Assessing Officer by the Coordinate Bench in order dated 11.11.2020 passed by the ITAT in quantum appeal proceedings in ITPA No. 3262/Mum/2017. Even otherwise, it is a claim made by the assessee which has not been accepted by the AO and the same would not amount to furnishing of inaccurate particulars of income as held by Hon'ble Supreme Court in the case of Reliance Petro Products P Ltd (322 ITR 158). The relevant observations made by Hon'ble Supreme Court are given below:-

"We have already seen the meaning of the word "particulars" in the earlier part of this 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.”

Accordingly, the Ld CIT(A) was justified in cancelling the penalty levied on this disallowance.

4. Next item of addition relates to disallowance of penal interest paid on overseas taxes. Learned AR submitted that the Coordinate Bench in the quantum appeal relating to A.Y. 2007-08 has restored this issue to the file of the Assessing Officer for deciding it afresh in the light of the discussion made by the Tribunal, vide paragraph No. 6.2 of its order (referred supra). The Learned AR submitted that the Tribunal has deleted an identical disallowance made in A.Y. 2008-09 holding that the interest paid on delayed payment of State Tax or federal tax are compensatory in nature and hence allowable. Accordingly learned AR submitted that the very fact that the two Benches of the Tribunal has taken two different views would show that this issue is debatable and hence penalty under section 271(1)(c) of the Act could not be levied on this item of disallowance. We agree with the submissions made by Ld A.R. Even otherwise, it is a case of disallowance of claim made by the assessee, which was not accepted by the AO. Hence the ratio of the decision rendered by Hon'ble Supreme Court in the case of Reliance Petroproducts p Ltd (supra) will apply on this addition also. Accordingly, we confirm the order of the learned CIT(A) in deleting the penalty on this item of disallowance.

5. Next two items of addition on which penalty was levied relate to disallowance of expenditure incurred on import software

(a) for internal use and

(b) for resale

under section 40(a)(i) of the Act for non-deduction of TDS from the payments made for purchase of software.

5.1 In the quantum assessment proceedings, both these additions have been restored to the file of AO for examining it afresh in the light of discussions made in the order by the Tribunal. In respect of disallowance of expenditure incurred on import of software, the assessee has contended that the AO did not include the same while issuing original show cause notice. However, we notice that the AO has specifically mentioned in the assessment order that he is initiating penalty proceedings u/s 271(1)(c) of the Act in respect of this addition. Be that as it may, we notice that the disallowance has been made for non-deduction of TDS, meaning thereby, it is a case of disallowance due to operation of statutory provisions, meaning thereby, the assessee has furnished all the details relating to the claim of expenditure, but the same is required to be disallowed on account of statutory provisions. It has been held in the case of *Devpras Institute vs. ITO* (ITA 1743/Ahd/2012 dated 23.11.12) that disallowance made u/s 40(a)(ia) will not result in levy of penalty u/s 271(1)(c) for furnishing of inaccurate particulars of income. Accordingly, we are of the view that the Ld CIT(A) was justified in deleting the penalty on both these disallowances.

6 The next item of addition on which penalty was levied relates to the disallowance of claim of software expenses treating the same as capital expenditure. The assessee claimed the expenditure incurred on purchase of certain software items as revenue in nature, while the AO disallowed the same holding it as Capital expenditure. We notice that the Ld CIT(A) has deleted the penalty levied on this items of disallowance by observing as under:-

“The decision whether a particular expense is capital or revenue expenditure is a matter of consistent dispute. Software by itself does not work and needs hardware to work and integration of software into hardware for deciding allowability is always a matter of dispute. Here again primary facts were placed. Instead of allowing same in one A.Y as an expense, it is spread over multiple AYs. A considered decision was needed to decide the same. The decision in *CIT vs. Reliance Petroproducts Pvt Ltd* (2010)(322 ITR 158) applies here. The assessing officer is directed to eliminate same in computation of tax sought to be evaded.”

6.1 We notice that the Ld CIT(A) has taken the view that the question as to whether the software expenses is capital expenditure or revenue expenditure is a debatable one. He has further observed that the assessee has furnished all primary facts relating to the purchase of software and hence, placing reliance on the decision rendered by Hon'ble Supreme Court in the case of Reliance Petroproducts P Ltd (supra), the Ld CIT(A) has directed for deletion of penalty levied on this item of disallowance. Thus, it is seen that this item of disallowance is held to be debatable. Accordingly, we are of the view that the Ld CIT(A) was justified in deleting the penalty levied on this item of disallowance.

7. The next item of addition relates to the disallowance made u/s 14A of the Act. The penalty has been levied on the disallowance of Rs. 29,87,876/- made u/s 14A of the Act. The AO noticed that the assessee has shown exempt income of Rs.4772.75 crores, which included dividend income of Rs.39.92 crores and exemption claimed u/s 10A of the Act amounting to Rs.38277.37 crores. The AO noticed that the assessee did not make any disallowance u/s 14A of the Act. However, AO took the view that the disallowance should be worked out as per Rule 8D. Before the AO, the assessee contended that the Rule 8D was introduced only in March, 2008 and hence the same will apply from AY 2008-09 only and not to the year under consideration. Without prejudice to the above said contentions, the assessee computed disallowance u/s 14A at Rs.29.17 lakhs.

7.1 The AO did not agree with the contentions of the assessee. Accordingly, he proposed to compute disallowance u/s 14A of the Act as per Rule 8D of IT Rules at Rs.3,38,53,099/-. However, the AO noticed that an identical disallowance had been made in AY 2006-07 and the Ld DRP, in that year, had given certain directions. The AO chose to follow those directions in this year also. Accordingly, the AO re-computed disallowance u/s 14A at Rs.29,87,896/-. The assessee also accepted the same and hence did not contest before Ld CIT(A) in quantum appeal proceedings.

7.2 We heard the parties on this issue and perused the record. The Ld A.R submitted that the AO has included this item of disallowance only in the notice

issued after the receipt of appellate order of Ld CIT(A) in the quantum proceedings. However we notice that the AO has stated in the assessment order that he is initiating penalty proceedings u/s 271(1)(c) of the Act against this addition.

7.3 We notice that the Ld CIT(A) has deleted the penalty levied on the addition made u/s 14A of the Act observing that this section is prone to multiple interpretation and disputes. We also noticed that the AO himself his original proposal and finally made addition of Rs.29,87,896/- as against the initial proposal of Rs.3.38 crores. The addition so made by the AO is also an estimate only. Hence we are of the view that the Ld CIT(A) was justified in deleting the penalty levied on this disallowance also.

8. In the result, the appeal filed by the revenue is dismissed.

Pronounced in the open court on 22.2.2023.

Sd/-  
(RAHUL CHAUDHARY)  
Judicial Member

Sd/-  
(B.R. BASAKARAN)  
Accountant Member

Mumbai; Dated : 22/02/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

PS