

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL 'D' BENCH, CHENNAI
श्री वी. दुर्गा राव, न्यायिक सदस्य एवं श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष ।
Before Shri V. Durga Rao, Judicial Member &
Shri G. Manjunatha, Accountant Member

आयकर अपील सं./I.T.A. No.1402/Chny/2015
निर्धारण वर्ष/Assessment Year: 2000-01

M/s. Penta Media Graphics Ltd.,
'TAURUS', No. 25, First Main Road,
United India Colony, Kodambakkam,
Chennai 600 024.

The Deputy Commissioner of
Income Tax, Media Circle I,
Room No. 311, 3rd Floor, New Block,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.

[PAN: AAACP1647B]

(अपीलार्थी /Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से / Appellant by

: Shri G. Baskar, Advocate &
Smt. Sree Valli Lakshmi, Advocate

प्रत्यर्थी की ओर से/Respondent by

: None [Dept. Letter submission]

सुनवाई की तारीख/ Date of hearing

: 12.04.2023

घोषणा की तारीख /Date of Pronouncement

: 10.05.2023

आदेश /O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) 14, Chennai dated 30.03.2015 passed under section 271(1)(c) of the Income Tax Act, 1961 ["Act" in short].

2. The appeal filed by the assessee is delayed by one day in filing the appeal before the Tribunal. The assessee has filed a petition for condonation of delay against which, the Id. DR has not objected. Since the assessee was prevented by reasonable cause, we hereby condone

the delay in filing the appeal and admit the appeal for adjudication.

3. The grounds raised by the assessee are as under:

1. *The Order of the Commissioner of Income tax (Appeals) dated 30.03.2015, confirming the levy of penalty u/s 271(1)(c) of the Income Tax Act of an amount of Rs.13,50,00,000/- is erroneous, contrary to law and facts of the case and liable to be cancelled in full.*

2. *The Commissioner ought to have noted that the mandatory pre-condition for invocation of the statutory provisions i.e. furnishing of inaccurate particulars and concealment of income have not been established in the present case and thus vitiates the levy.*

3. *The Commissioner erred in not considering the fact that the claim of the Appellant is wholly based on an interpretation of the provisions of the Act. All relevant information has been furnished in the return of income. The levy of penalty is thus wholly unwarranted.*

4. *The Commissioner errs in concluding that the alleged omission was deliberate and ought to have noted that in fact there was no omission at all, let alone one that was deliberate. The entire amount represented Intellectual Property Rights, the consideration of which was a capital receipt and no portion thereof was 'goodwill'. The amounts and details thereof stood reflected in the financials of the Appellant and there was thus no non-disclosure warranting the levy of penalty.*

5. *The Commissioner erred in not applying the rationale of various judgments that supported the present case. Further it ought to have been noted that an incorrect claim, if at all, does not result in a conclusion of concealment of income as such, so as to attract penalty u/s 271(1)(c) since the same proceeds only on a different interpretation of the statutory position .*

6. *The Commissioner of Income-tax (Appeals) ought to have noted that the quantum of Royalty as well as the manner of computation thereof had been estimated by various officer of the department and this estimation cannot be the basis of the levy of penalty.*

7. *The Commissioner of Income-tax (Appeals) erred in not noting that the earlier orders of the Income Tax Appellate Tribunal and the Commissioner of Income-tax (Appeals) have not been accepted and are pending appeal before the High Court, Madras.*

8. *Any other ground that may be raised at the time of personal hearing.*

3.1 Facts are, in brief, that the assessee is engaged in the business of multimedia Computer graphics and animation. The assessee also had been running software and training division. This software and training division was hived off to its sister concern M/s. Pentafour Communications Ltd. (later on renamed as Pentafour Technologies Ltd.). The transfer was made through an agreement dated 23-2-2000. The consideration for the transaction was ₹.894.21 crores. This amount consisted of ₹.236.76 crores towards fixed assets, ₹.113.64 crores towards net current assets and investments and ₹.544.21 crores towards brand value. The brand value related to the brand amount of ₹.544.21 crores claimed as relating to transferring of intellectual property rights in the software developed by the assessee and also towards non-competee fee.

3.2 The assessee, M/s. Pentamedia Graphics Ltd. filed its return of income for the assessment year 2000-01 on 20.11.2000 admitting total income of ₹.18,03,59,730/-. In the course of the assessment proceedings concluded on 31-3-2003 under section 143(3) of the Income-tax Act, 1961["Act" in short], the Assessing Officer examined the details filed by the assessee in respect of the transfer of the software and training division to its sister concern M/s. Pentafour Communications Ltd. (later on

renamed as Pentafour Technologies Ltd.). In the agreement of sale, the intellectual property rights transferred to the sister concern are explained to be trade names, trade-marks or service marks together with the goodwill associated therewith and also copyrights, trade secrets, confidential or proprietary information, computer programmes and all other sorts of intangible rights and properties.

3.3 On going through the above explanation embedded in the sale agreement, the Assessing Officer has noted that in the computation of income, the assessee has not offered any capital gains towards transfer of goodwill. Therefore, the Assessing Officer made enquiries to the assessee to explain the position. In reply to the queries made by the assessing authority, it was informed by the assessee that the sister concern has debited the consideration under the head 'goodwill', pending allocation of the excess consideration paid over depreciation value of the assets. But for this difference, as far as the assessee is concerned, there was no goodwill included in the transaction. The assessee explained that a sum of Rs. 66.9 crores related to depreciation reserve received on transfer and the balance amount related to additional consideration paid against purchase of the assets. The assessee accordingly submitted before the Assessing Officer that no consideration was exchanged for

transfer of goodwill as such. The above explanation offered by the assessee was not acceptable to the Assessing Officer. He held that the consideration also included a portion attributable to the transfer of goodwill of the software division of the assessee company. Relying on the judgment of the Hon'ble Bombay High Court in the case of Evans Fraser & Co. Ltd. vs. CIT 137 ITR 493, the Assessing Officer held that even if it is impossible to ascertain in terms of money value of goodwill in view of its nebulous character and its uncertain nature, it is possible to value the goodwill by applying accounting standards at a certain multiple of the average profits of the past in the belief that if the business is continued in the same name and style, the same amount of profits would be earned in future as well. The Assessing Officer, therefore, held that this presupposes that goodwill would form part of sale consideration when the same business is continued by the transferee in the same magnitude in the years to come. The Assessing Officer also relied on the judgment of the Hon'ble Supreme Court in the case of Jogtacoal Company Ltd. vs. CIT, 36 ITR 521, in support of his proposition that a portion of the consideration related to the transfer of goodwill.

3.4 The Assessing Officer has come to a conclusion that the assessee has transferred goodwill to its sister concern, proceeded to compute the

amount of goodwill that has been transferred by the assessee to its sister concern. The Assessing Officer observed that among the various methods for accounting of the goodwill acquired, valuation by adopting the average profit of the past years is the most appropriate and readymade method normally followed in the field. He also observed that generally the average profit of past five years is determined. Accordingly, he worked out the average of the profits of five years from 1996 to 2000. This average has been worked out at ₹. 31,74,40,000/-. The Assessing Officer treated the amount of ₹. 31,74,40,000/ - as goodwill and brought the same to tax as short-term capital gains under the provisions of section 55(2)(a) (ii) of the Act. Accordingly, the assessment order was completed.

3.5 The Assessing Officer also examined the accounts of the sister concern M/s. Pentafour Technologies Ltd. As against the total consideration paid by it, ₹.626,08,80,282/- was accounted under 'fixed assets' towards goodwill on acquisition of the software division. It was also stated in the notes attached to the accounts of the sister concern that the goodwill amount of ₹. 626.09 crores included non compete value of ₹.180 crores and overseas products, intellectual rights and brand name of ₹.364.21 crores. Ultimately, the amount attached to the goodwill has been stated in its accounts as ₹. 81.88 crores.

3.6 Subsequently, the Id. CIT, by exercising powers conferred under section 263 of the Act, examined the records and called for reply from the assessee by letter dated 23.03.2005 and noted that the Assessing Officer passed the assessment order under section 143(3) of the Act dated 31.03.2003, though treated ₹.31,74,40,000/- as the price of the goodwill, the quantum determined by the assessing authority was not correct. The Id. CIT found that the Assessing Officer has adopted the value of goodwill at the average of the five years' profit and no multiplier was applied to follow the accepted method of valuation of goodwill and therefore, held that the assessment order was erroneous and prejudicial to the interests of the Revenue, as far as this issue of valuation is concerned.

3.7 The Id. CIT, further noted that the amount attributed to non-compete fee is nothing but a colourful arrangement of the accounts to shadow over the reality of the transfer of goodwill. He further noted that the treatment given by M/s. Pentafour Technologies Ltd, which is transferee company, in its account, wherein a sizeable portion of the consideration has been accounted as 'goodwill' and came to conclusion that the average profit of the assessee has to be multiplied by a reasonable factor to decide the fair value of goodwill and as this multiplying exercise has not been done by the Assessing Officer, the

assessment order has become erroneous and prejudicial to the interests of the Revenue. Accordingly, he set aside that portion of the assessment order and directed the Assessing Officer to examine the whole issue afresh and decide the multiplying factor by a reasonable number of years of purchase price for the valuation of goodwill. Likewise, he further noted that the assessing authority has not examined the justification of the consideration for transfer of IPR and directed the Assessing Officer to re-examine the issue.

3.8 Subsequently, the Assessing Officer passed the assessment order under section 143(3) r.w.s. 263 of the Act dated 31.03.2006 by determining the assessee's total income at ₹.164,92,63,742/- by making the additions assessing the capital gains on goodwill at ₹.126,67,00,000/ as against the original capital gain in goodwill assessed at ₹.31,74,40,000/-.

4. Aggrieved against the original order, the assessee has filed an appeal before the CIT(A) vide ITA No. 156/07-08 and also against the order under section 143(3) r.w.s. 263 of the Act vide ITA No. 134/06-07.

5. The Id. CIT(A) has arrived at the capital gain on sale of goodwill at ₹.67.50 crores as against ₹.126,67,00,000/- assessed in the order under section 143(3) r.w.s. 263 of the Act.

6. The assessee preferred an appeal before the ITAT on jurisdiction challenging the order of the Id. CIT. The ITAT, in their order Nos. 1780(Mds)/2009, 1768 & 1733 (Mds)/2010 dated 11.06.2012, upheld the order passed by the Id. CIT dated 23.03.2005.

7. Subsequently, the Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Act and issued show-cause notice dated 15.03.2012. The assessee filed its reply dated 21.03.2012 by stating that the penalty proceedings may be dropped. The content of the assessee's reply is reproduced as under:

In the return of income filed for the A.Y.2000-01 the assessee-company had claimed exemption u/s 10B in respect of

- i) Interest receipt of Rs.6,78,25,947*
- ii) Miscellaneous Income Rs.1,04,96,650*
- iii) Rental income Rs.49,84,852*
- iv) Creditors written off Rs.55,21,052/- The assessee's claim of exemption u/s.10B was rejected by the Assessing Officer.*

The Assessing Officer had held that the sale consideration received for transfer of software division included element of Goodwill and accordingly assessed to tax a sum of Rs.31,74,40,000.

The Assessing Officer has arrived at the capital gains on sale of assets

Rs.47,62,02,528/-. While arriving at this figure of at Rs.47,46,01,529/- the Assessing Officer has adopted the WDV of the asset after deduction of notional depreciation on the assets.

On appeal by the assessee, the CIT(A) upheld the Assessing Officer's decision to deny exemption u/s.10B in respect of interest receipts, misc. receipts etc. The CIT(A) had held that the Assessing Officer was not correct in law in adopting the written down value of assets after deduction of notional depreciation. The CIT(A) had concurred with the Assessing Officer that there was element of Goodwill in sale value of software division.

It is respectfully submitted that the assessee-company, has preferred an appeal before ITAT against the CIT(A)'s order and the favourable decision of the ITAT is awaited.

It is submitted that the various claims made in the return of income are based in interpretation on the provisions of the Act. The assessee has not furnished any inaccurate particulars of income or concealed any part of the income for the year under consideration.

The assessee respectfully submits that in order to attract the provisions of section 271(1)(c) there has to be concealment of income or furnishing of inaccurate particulars of assessee's income for the relevant year. In the instant case, as already stated, the assessee claimed various deductions/exemptions based on the interpretation of the provisions of the Act. Admittedly, no information given in the return was found to be inaccurate. Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. In order to expose the assessee towards penalty unless the case is strictly covered by the provisions of the Act, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. Therefore, it is obvious that it must be shown that the conditions u/s 271(1)(c) must exist before the penalty is imposed.

In the light of the above discussions, the assessee-company humbly request your Honour to kindly drop the proceedings under consideration.

The Assessee relies on the Supreme Court decision in the case of Commissioner of Income Tax Vs Reliance Petroproducts (P) Ltd (322 ITR 158 (SC)) copy of which is enclosed for your kind consideration.

8. After considering the explanations of the assessee, the Assessing Officer passed the penalty order dated 28.03.2012 and the relevant portion of the order is extracted as under:

10. I have carefully considered the assessee's reply and not accepted for the following reasons:

- (a) The assessee has failed to admit any capital gain on sale of goodwill. The Assessing Officer has originally assessed capital gain on sale of goodwill at Rs.31,74,40,000/- which was enhanced to Rs.1,26,67,00,000/- in the order u/s 143(3) rws 263 of the Act. However, the CIT(A) in the order referred to above has confirmed the addition of capital gain on sale at Rs.67.50 crores. In view of this, I am of the opinion that the assessee has failed to disclose its true and correct income and thereby attracted the provisions of section 271(1)(c) and hence penalty is leviable on this ground.
- (b) The case laws relied upon by the assessee are distinguishable from the facts of the case since in the assessee's case it has not disclosed any capital gains which amounts to concealment of income.

Income sought to be evaded	Rs.	67.50 crores
Tax @ 20%	Rs.	13.50 crores
Penalty @ 100% of the tax sought to be evaded	Rs.	13.50 crores
Penalty @ 300% of the tax sought to be evaded	Rs.	40.50 crores

12. Considering the facts and circumstances of the case, I levy a minimum penalty of Rs.13.50 crores. This should be paid as per demand notice and challan enclosed. As the penalty levied is more than Rs.20,000/- this penalty is levied with the prior approval of the Joint Commissioner of Income-tax, Media Range, Chennai.

9. Aggrieved, the assessee carried the matter in appeal before the Id.

CIT(A). The assessee has raised following grounds before the Id. CIT(A):

4. Aggrieved on the penalty order, the appellant preferred this appeal raising the following grounds of appeal:

1. The order of the Id. AO is contrary to law, facts and circumstances of the case.
2. The Id. AO erred in levying penalty u/s. 271(1)(c) of the Income Tax Act 1961 of an amount of Rs.13,50,00,000/- without considering the appellant's reply filed on 21.03.2012 to the show cause notice dated 26.12.2008.
3. The Id. AO erred in not considering the various claims made on the return of income which are based on the interpretation of the provisions of the Act. The appellant had not furnished any inaccurate particulars of income or concealed any part of the income for the year under consideration.

4. *The Id. AO erred in not considering the fact that the appellant had fully disclosed the fact about the non-existence of capital gain on sale of goodwill which warrants levy of penalty.*

10. The Id. CIT(A), by considering the detailed submissions made by the assessee, confirmed the order of the penalty passed under section 271(1)(c) of the Act dated 28.03.2012. The relevant portion of the order is extracted as under:

5. *The Decision:*

5.1 *The learned AR argued that*

- i. The issue involved is a legal issue.*
- ii. only a different view was taken by the assessee and the department and*
- iii. relied on the decision of Reliance Petro Products.*

5.2 *But from details mentioned above following facts emerges:*

i. During the relevant accounting period the assessee company transferred its software division to its sister concern Pentasoft Technologies Ltd. by a business transfer agreement dated 23.03.2000.

ii. In its computation of income, the assessee has not offered any capital gains towards transfer of goodwill. The amount of Rs.544.21 crores which was received, claimed as the consideration for transfer of intellectual property rights and non-compete fees. The appellant claimed this amount of Rs.544.21 crores as capital receipt and therefore not exigible to tax.

iii. Both the transferor company and transferee company, are having a common chairman and CEO and they are all working in a closely related manner, there is no much relevance in attributing a sizeable amount of the consideration as non compete fee. Factually speaking, there was no case of any competition between these units working under the same management with a common chairman and CEO. Therefore, it viewed that the amount attributed to non compete fee is nothing but a colourful arrangement of the accounts to shadow over the reality of the transfer of goodwill. Further, many of the components of the consideration have been termed by the assessee as

non compete fee, IPR value, brand value, etc. to evade payment of capital gains tax on the transfer of the software division for the reason that goodwill alone was taxable for the assessment year 2000-01, compared to the transfer of other intangible assets like non compete fee, brand value, etc.

iv. On examination of the treatment given by M/s. Pentafour Technologies Ltd. (the transferee company) in its accounts, wherein a sizeable portion of the consideration has been accounted as 'goodwill'. After examining every aspect of the case in a very detailed manner, the Commissioner of Income-tax in his order u/s 263 came to the conclusion that the alleged payment towards non compete fee, IPR on brand/ brand value, etc. was a figment of a creative accounting with no relevance to real price. He observed that all these figures were imaginary to re-engineer the balance sheet of the assessee and group companies with no cash flow affected because of cross transactions where issue of shares at an exorbitant premium as a payment consideration for alleged sale. As an evidence to this, he has pointed out that the amount relating to the sale consideration has been written off by the assessee and the value of shares has come down

below Rs.25/-. It means brand value is nothing but goodwill. The Commissioner of Income-tax observed that if the terminology 'goodwill' is used, the assessee will have to pay capital gains tax on it. But if it is couched as non compete fee or IPR, the assessee will not be liable for tax.

Thus there is a deliberate attempt on the part of the assessee company not to disclose the goodwill transfer, as the provisions of capital gains will be attracted. Thus the imposition of penalty by the AO is justified.

5.3 Now coming to question of the quantum of tax evaded. The AO observed that the assessee was in this business over a period of more than five years. He computed the quantum of goodwill by adopting the method of Purchase of Past Average Profits: by a certain number of years purchase of earnings. This method of valuing goodwill is past average profits or commonly adopted in practice and is the one most generally understood. It is calculated on the following basis: i. The profit (gross or net) for an agreed number of years preceding valuation are averaged so as to arrive at the average annual profit earned during that period. ii. The goodwill is then estimated to be worth so many years' purchase of such average profit. The number of years selected is presumed to bear relation to the number of years benefit to be derived from past association.

The assessing Officer has originally assessed capital gain on sale of good will at Rs.31,74,40,000, but while doing so AO erroneously forgot to multiply the average profit with multiplying factor. This error was rectified by the order u/s 263. The capital gain was then enhanced to Rs. 1,26,67,00,000/- in the order u/s 143(3) rws 263 of the Act. However, the CIT(A) in the order referred to above has confirmed the addition of capital gain on sale at Rs.67.50crores. The AO imposed penalty on this quantum i.e. 67.50 crores. The software division was transferred for a consideration of Rs.350 crores. This consideration was apportioned as follows:

Towards Current Assets	Rs.	1,13,23,85,139
Gross Fixed Assets	Rs.	2,36,76,14,861
	Rs.	3,50,00,00,000

The appellant computed the short-term capital gains on the transfer of software division as follows:

Sale consideration of Fixed Assets	Rs.	2,36,76,14,861
Less: Cost of acquisition of fixed assets	Rs.	2,18,67,48,574
Short Term Capital Gain	Rs.	18,08,66,287

In addition to the sum of Rs.350 crores as consideration for sale of fixed assets for the transfer of software unit, the appellant received a sum of Rs.544.21 crores as brand value and non-compete fee. The assessee did not offer this receipt as income on the ground that it was a capital receipt.

I am of the view that the price of transfer of Intellectual Property Rights of Pentafour brand includes the component of goodwill which calls for taxation after quantification. I, therefore hold that the AO was justified in law in taxing the goodwill component included in the IPR Pentafour brand. The quantum addition was already confirmed. The goodwill component of 67.50 crores out of the sum 544.21 crore is reasonable. Hence the income sought to be evaded is 67.50 crores and on that imposition of penalty is justified.

The justification of quantum is emanated from

- i. The goodwill component of Rs.67.50 crores out of Rs.544.21 crores, which is shown as consideration received on account of intellectual property rights, seems reasonable.
- ii. The transferee company M/s. Pentafour Technologies Ltd, is showing Rs.81.88 crores as the goodwill acquired in its balance sheet.

iii. *The computation of goodwill of Rs.67.50 crores made by the AO by adopting the accepted accounting practices.*

Hence, the quantum of penalty is also justified.

5.4 The Id. Authorized Representative cited the decision of Reliance Petro Product for consideration. In the case of RELIANCE PETROPRODUCTS (P) LTD (2010) 322 ITR 158, assessee claimed deduction of interest on loans taken by it for purchase of shares. AO disallowed such interest. Admittedly no information given in the return was found to be incorrect or inaccurate. Hence, the assessee cannot be held guilty of furnishing inaccurate particulars. Making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. Merely because the assessee claimed deduction which has not been accepted by the Revenue, penalty under s. 271(1)(c) is not attracted.

The facts of case are entirely different. In the present case, there is deliberate attempt to conceal the taxable income. Hence I don't agree with the contention of the appellant.

Hence, the penalty imposed by the AO is justified.

In the result, the appeal filed by the appellant is dismissed.

11. On being aggrieved, the assessee carried the matter in appeal before the Tribunal.

11.1 The first argument of the Id. Counsel for the assessee was that there is no goodwill at all in this case.

11.2 The Assessing Officer as well as the Id. CIT reviewed the order of the Assessing Officer and wrongly presumed that there is goodwill. It was also submitted that neither the assessee concealed the income not

furnished inaccurate particulars of income and therefore, the provisions of section 271(1)(c) of the Act has no application.

11.3 The Id. Counsel for the assessee further submitted that the penalty levied by the Assessing Officer vide order dated 28.03.2012 is time barred for the reason that the penalty was initiated only in the assessment order passed under section 143(3) of the Act dated 31.03.2003. There is no initiation of penalty by the Assessing Officer in respect of the order passed under section 143(3) r.w.s. 263 of the Act dated 31.03.2006. Therefore, the penalty proceedings initiated by the Assessing Officer are time barred.

11.4 The Id. Counsel further submitted that vide order dated 11.06.2012, the ITAT upheld the revision order passed by the Id. CIT dated 23.03.2005 and other orders of the Id. CIT(A) in toto. Against the orders of the Tribunal, the assessee filed three appeals before the Hon'ble Madras High Court, which was admitted and substantial question of law has been framed by the Hon'ble High Court. Once substantial question of law has been framed by the Hon'ble High Court, no penalty under section 271(1)(c) of the Act can be imposed. For this preposition, the Id. Counsel relied on the judgement of the Hon'ble Delhi High Court in the case of PCIT v. Harsh International (P.) Ltd. [2021] 128 taxmann.com 88 (Delhi).

11.5 The Id. Counsel relied on the decision of the Hon'ble Madras High Court in the case of Transferee Company i.e., Pentasoft Technologies Ltd. v. DCIT [2014] 264 CTR 0187 (Mad) and submitted that the Hon'ble High Court has confirmed that there is no goodwill at all. It was further submission that it is not the case of the Revenue before the Hon'ble High Court that it was a colourable device nor that it had goodwill component. Therefore, no penalty can be levied under section 271(1)(c) of the Act.

12. On the other hand, by filing detailed written submissions, the Id. DR has submitted that the assessee filed its return of income without disclosing goodwill and it is a clear case for imposing penalty under section 271(1)(c) of the Act for the reason that (1) having failed to disclose true and correct income by filing inaccurate particulars, the assessee has concealed the income, (2) it is a colourable device adopted by the assessee in not disclosing the goodwill, (3) both the assessee M/s. Pentamedia Graphics Ltd. and the transferee sister concern M/s. Pentafour Technologies Ltd., the Chairman is common. Once the transferee company, in its books, goodwill has already recorded, the Chairman of the company knows very well that what is goodwill and the same was not offered in the case of the assessee attracts levy of penalty

under section 271(1)(c) of the Act by filing inaccurate particulars by concealing the income.

12.1 The Id. DR has further submitted in his written submission that vide its order in ITA Nos. 1780(Mds)/2009, 1768 & 1733 (Mds)/2010 dated 11.06.2012, the ITAT has clearly held that the transferee company has treated a prominent portion of the consideration towards goodwill and the argument of the assessee was that the transferee company has shown the amount towards good will only as an interim arrangement, pending appropriation of the consideration among properly classified heads, cannot be accepted in its entirety. The transferee company (M/s Pentafour Technologies Ltd.) has stated in its published accounts that out of the consideration of ₹.894.21 crores, a sum of ₹.629.09 crores related to goodwill. Some portion of that amount may be attributed to other assets and rights acquired by the sister concern. The accounts of the sister concern itself is a documentary evidence for the Revenue to come to a fair conclusion that the consideration definitely included consideration towards goodwill and submitted that it is a clear case of filing of inaccurate particulars and concealment of income and thus, the provisions of section 271(1)(c) of the Act clearly applies.

13. We have heard both the sides, perused the materials available on record and gone through the orders of authorities below including paper books filed by the assessee along with written submissions of both parties. In this case, the assess company, M/s. Pentamedia Graphics Ltd., by agreement dated 23.02.2000, has transferred its software and training division to sister concern M/s. Pentafour Communications Ltd. (later on renamed as M/s. Pentafour Technologies Ltd.) and the consideration for the transaction was ₹.894.21 crores. The assessee filed its return of income, wherein, he has not offered any capital gains towards goodwill. The Assessing Officer, after examining the details filed by the assessee and also by considering all the relevant documents including agreement with M/s. Pentafour Technologies Ltd., assessed the capital gains on sale of goodwill at ₹.31,74,40,000/-. Subsequently, the Id. CIT, by exercising powers conferred under section 263 of the Act set aside the assessment order passed by the Assessing Officer under section 143(3) of the Act dated 31.03.2003 and directed the Assessing Officer to recalculate the capital gains. The Assessing Officer, consequent to the order passed by the Id. CIT under section 263 of the Act dated 23.03.2005 passed the assessment order under section 143(3) r.w.s. 263 of the Act dated 31.03.2006 and the capital gain was enhanced to ₹.126,67,00,000/-. Against the assessment order under section 143(3) of

the Act dated 31.03.2003, the assessee preferred an appeal before the Id. CIT(A) and the Id. CIT(A) assessed the capital gain on goodwill at ₹.67.50 crores against ₹.31.74 crores assessed by the Assessing Officer. Accordingly, the Assessing Officer has initiated penalty proceedings under section 271(1)(c) of the Act and levied penalty on the quantum addition of ₹.67.50 crores. On appeal against the penalty order, the Id. CIT(A) confirmed the penalty levied under section 271(1)(c) of the Act.

14. We find that the assessee has not shown any capital gains on sale of goodwill inspite of the fact that the transferee company had already recorded goodwill in their books. The peculiar facts in this case are that the Chairman is common for both the assessee company as well as transferee company M/s. Pentafour Technologies Ltd. The transferee company, in its published accounts, recognized goodwill and it cannot be said that the assessee was not aware of the goodwill. Thus, we are of the opinion that it is a clear case of concealment of income by filing inaccurate particulars.

15. In this case, it is pertinent to note on merits that the ITAT vide order in ITA Nos. 1780(Mds)/2009, 1768 & 1733 (Mds)/2010 dated 11.06.2012 in assessee's case, considered the issue and held as under:

“..... transferee company M/s. Pentafour Technologies Ltd. has stated in its published accounts that out of the consideration of ₹.894.21 crores, a sum of ₹.629.09 crores related to goodwill. The transferee company has treated a prominent portion of the consideration towards goodwill. The argument of the assessee that the transferee company has shown the amount towards goodwill only as an interim arrangement, pending appropriation of the consideration among properly classified heads, cannot be accepted in its entirety. Some portion of that amount may be attributed to other assets and rights acquired by the sister concern. The accounts of the sister concern itself is documentary evidence for the Revenue to come to a fair conclusion that the consideration definitely included consideration towards goodwill”.

16. From the above findings, it is very clear that the assessee has deliberately made an attempt not to disclose true facts before the Assessing Officer, thereby, concealed the income by filing inaccurate particulars. Thus, the provisions of section 271(1)(c) of the Act clearly applies to the present case.

17. So far as argument of the Id. Counsel that there is no goodwill is concerned, factually, the argument of the Id. Counsel is not correct as the Tribunal has given a clear findings that there is goodwill, which was not disclosed by the assessee.

18. Another argument of the Id. Counsel is that penalty proceedings was initiated by the Assessing Officer as per assessment order under section 143(3) of the Act dated 31.03.2003, whereas, no penalty was initiated in view of the order under section 143(3) r.w.s. 263 of the Act dated 31.03.2006 and therefore, penalty cannot be levied under section 271(1)(c) of the Act. So far as this argument is concerned, the Assessing Officer has initiated penalty proceedings on 31.03.2003 for concealment of goodwill. Subsequently, in his revision order under section 263 of the Act, the Id. CIT enhanced the quantum, which is continuation of the proceedings. The concealment of income and furnishing of inaccurate particulars has been considered by the Assessing Officer by passing assessment order under section 143(3) of the Act dated 31.03.2003. It is not the case that the concealment started after passing order under section 143(3) r.w.s. 263 of the Act. Therefore, the argument of the Id. Counsel no penalty was initiated in view of the order under section 143(3) r.w.s. 263 of the Act dated 31.03.2006 is rejected.

19. So far as limitation issue raised by the Id. Counsel is concerned, the issue of limitation to pass penalty order under section 271(1)(c) of the Act was neither raised before the Assessing Officer during the course of penalty proceedings nor raised before the Id. CIT(A) or even before the

ITAT without raising such ground in the grounds of appeal. Only when the appeal was taken up for hearing, the Id. Counsel has argued that penalty order passed by the Assessing Officer is time barred. If the assessee wanted to raise a legal ground before the ITAT, which was not raised before the Id. CIT(A), the assessee should have filed a petition seeking for admission of the additional ground explaining as to why he has not raised such ground before the Id. CIT(A). In the present case, the assessee has not filed any additional ground and no reason was given and the Id. Counsel has raised this issue for the first time while arguing the case. In our opinion, only based on the argument, legal issue cannot be decided unless there is a ground raised in the appeal. Since no such ground was raised in the appeal, the argument of the Id. Counsel is rejected.

20. Another argument of the Id. Counsel that once substantial question of law has been framed by the Hon'ble High Court, no penalty under section 271(1)(c) of the Act can be imposed is concerned, the Hon'ble High Court can frame substantial question of law based on the facts and circumstances of each case. In this case, there is a clear finding of the ITAT that the assessee has not disclosed goodwill and thereby, the addition was sustained. Consequent upon the confirmation of the

quantum addition by the Id. CIT(A), the Assessing Officer levied penalty under section 271(1)(c) of the Act. The assessee has not brought on record the order of higher judicial forum having reversed the order of the ITAT in sustaining the addition. The case law relied on by the Id. Counsel in the case of PCIT v. Harsh International (P.) Ltd. (supra) has no application to the facts of the present case for the reason that in that case, the facts are entirely distinguishable. In the present case, the ITAT sustained the addition on the ground that there was deliberate attempt on the part of the assessee company not to disclose the sale of goodwill and non-disclosure of goodwill tantamount to concealment of income and furnishing of inaccurate particulars of income by adopting colourable device stating that the payments were made towards non-compete fee, IPR on brand value, IPR on brand, etc. Otherwise also, the Delhi High Court in the case of PCIT v. Harsh International (P.) Ltd. (supra) is not binding on the Tribunal in view of the decision in the case of Visvas Promoters P. Ltd. v. ITAT & Anr. 323 ITR 114, wherein, the Hon'ble Jurisdictional High Court has held that the decision of one High Court is neither binding precedent for another High Court nor for Courts or Tribunals outside its own territorial jurisdiction, and in other states or outside the territorial jurisdiction of that High Court, it may, at best, have only persuasive effect.

21. With regard to the case law relied on by the Id. Counsel for the assessee relied on the decision of the Hon'ble Madras High Court in the case of transferee company i.e., M/s. Pentasoft Technologies Ltd. (supra) and submitted that the Hon'ble High Court has confirmed that there was no goodwill at all, we have gone through the judgement of the Hon'ble High Court in the case of Pentasoft Technologies Ltd. (supra) and find that the Hon'ble High Court has no application for the reason that the entire facts are different. Thus, the case has no application to the facts of the present case.

22. Considering the entirety of facts and circumstances of the case, we are of the considered opinion that the Assessing Officer has correctly levied penalty under section 271(1)(c) of the Act, which was confirmed by the Id. CIT(A). We find no reason to interfere with the order passed by the Id. CIT(A).

23. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on the 10th May, 2023 at Chennai.

Sd/-
(G. MANJUNATHA)
ACCOUNTANT MEMBER

Sd/-
(V. DURGA RAO)
JUDICIAL MEMBER

Chennai, Dated, the 10.05.2023

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/
Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5.
विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.