

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH KOLKATA

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA Nos.320 /Kol/2023
Assessment Year: 2014-15**

Akram Hossain Mullick NA, Dharsa Mullick Para, Balitikuri, Howrah-711113 (PAN: AEUPM 6002 Q)	Vs.	Deputy/Assistant Commr. of Income Tax, Circle-47, Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri S. P. Datta, Advocate
Respondent by : Shri P. P. Barman, Addl. CIT, Sr. DR

Date of Hearing : 22.06.2023
Date of Pronouncement : 11.07.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. CIT(A), National Faceless Appeal Centre (NFAC), Delhi vide Order No. ITBA/NFAC/S/250/2022-23/1049486063(1) dated 07.02.2023 passed against the penalty order by ACIT, Circle-47, Kolkata u/s.271(1)(c) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”), dated 29.06.2017 for AY 2014-15.

2. Sole issue involved in this appeal is against the action of the Ld. CIT(A) confirming the action of the Ld. AO in respect of imposing penalty u/s. 271(1)(c) of the Act of Rs.26,89,515/-.

3. Briefly stated facts are that assessee is engaged in retailing of petroleum and diesel under the proprietary concern as M/s. M.H.

Filling Centre, operating petrol pump. Assessee filed his return of income on 30.11.2014 reporting total income of Rs.45,57,980/-. Case was selected for scrutiny under CASS and assessment was completed u/s. 143(3) by making certain additions and disallowances at an assessed total income of Rs.74,59,290/-. In the course of assessment proceedings, Ld. AO noted from the tax audit report that assessee has not reported any loss on account of excess evaporation loss. However, in the course of assessment proceeding, assessee suo moto disclosed an amount of Rs.26,51,843/- towards excess evaporation loss on the pretext that it occurred due to inadvertent mistake on his part. Assessee furnished the computation regarding evaporation loss which is extracted from the assessment order as under:

<i>Sales Quantity</i>		<i>8389381ltrs.</i>
<i>Shortage quantity</i>		<i>63890</i>
<i>% of shortage against sale quantity</i>		<i>0.76</i>
	<u><i>IOC Norms</i></u>	
<i>Up to 600000 Unit</i>		<i>0.25%</i>
<i>Above 600000 Unit</i>		<i>0.20%</i>
	<u><i>Quantity Allowable</i></u>	
<i>Up to 600000 Unit</i>	<i>600000</i>	<i>1500</i>
<i>Above 600000 Unit</i>	<i>7789381</i>	<i><u>15579</u></i>
	<i>17079</i>	
<i>Disallowable quantity</i>		<i>46811</i>
<i>Average Rate</i>		<i>56.65</i>
<i>Value</i>		<i>2651843.2</i>

3.1. In the assessment order, Ld. AO considered the claim of the assessee in the light of various circulars and regulations of Oil Ministry and various price charts downloaded from the Website of Indian Oil Corporation. Ld. AO disallowed the claim and made an addition of Rs.26,51,843/-. While making the addition, Ld. AO observed that "as the assessee itself has suo moto voluntarily disclosed

the same and also claimed that such thing has happened due to inadvertent mistake without any mala fide intentions and offer the same for taxation, therefore, the said amount of Rs.26,51,843/- (rounded off) is disallowed on account of excess evaporation loss and added back to the total income of the assessee for the AY 2014-14.” He further noted that penalty proceedings u/s. 271(1)(c) of the Act is initiated separately for furnishing inaccurate particulars of income. Ld. AO also made disallowance of certain other expenses in respect of car, conveyance, food and welfare expenses, wages to delivery man after scrutinizing and verifying the records, Ld. AO arrived at an amount of Rs.1,57,702/- for these expenses and disallowed the same. Further, Ld. AO made a disallowance of Rs.91,764/- towards building plan, repairing expenses and late payment to HPCL by observing that building plan and repairing expenses of boundary wall are capital in nature, whereas payment to HPCL is penal in nature.

3.2. In the penalty proceedings, assessee contended that it was an inadvertent mistake in reporting of excess evaporation loss which has been accepted by the Ld. AO in the course of assessment on which assessee has voluntarily made the disclosure and deposited the applicable taxes along with interest. However, Ld. AO proceeded to impose the penalty on the total amount of disallowance made of Rs.29,01,309/- @ 300%. Aggrieved, assessee went in appeal before the Ld. CIT(A) who confirmed the penalty so imposed. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel for the assessee reiterated the above facts which led to improper reporting in respect of excess evaporation loss. He submitted that evaporation loss is normal in the line of business in which the assessee is. There are certain standards prescribed by the oil supplying companies based on which the evaporation loss normal to the trade done by the assessee is calculated and is to be reported.

There was an excess evaporation loss in the case of the assessee which could not be reported in the tax audit report on account of inadvertent mistake. This reporting mistake has been accepted by the Ld. AO in the course of assessment itself. There is no dispute on the quantification of the excess evaporation loss which the assessee suo moto voluntarily offered in the course of assessment proceeding itself.

4.1. Ld. Counsel placed reliance on the decision of Hon'ble High Court of Bombay in the case of CIT Vs. Rucha Engineers Pvt. Ltd. (2015-ITR-V-HC-MUM-025) wherein it was held that *before proceeding to apply explanation below section 271 and putting the responsibility on the assessee, it is necessary for the AO to first demonstrate that the explanation of the assessee or conduct is not reasonable for human probabilities or that it was in the nature of violating settled legal position. If the explanation is not fanciful, baseless, unacceptable, penalty cannot be levied.* In the present case, the inadvertent mistake occurred due to entry from the manual scrips to computerised system for calculating the excess evaporation loss which has been repeatedly explained before all the authorities below. However, Ld. CIT(A) dismissed the appeal of the assessee, confirming the penalty.

4.2. Ld. Counsel also placed reliance on the decision of Hon'ble Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. Vs. CIT in [2012] 25 taxmann.com 400 (SC) and submitted that penalty was deleted by the Hon'ble Supreme Court in a case where an inadvertent and bona fide error had occurred and that there was no intention or attempt either to conceal the income or furnish inaccurate particulars of income. He also referred to the observation of Hon'ble Supreme Court in the said judgment that *we are all prone to make human error. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error.* The relevant extracts from the said judgment are as under:

“The contents of the Tax Audit Report suggest that there is no question of the assessee concealing its income. There is also no question of the assessee furnishing any inaccurate particulars. It appears to us that all that has happened in the present case is that through a bona fide and inadvertent error, the assessee while submitting its return, failed to add the provision for gratuity to its total income. This can only be described as a human error which we are all prone to make. The calibre and expertise of the assessee has little or nothing to do with the inadvertent error. That the assessee should have been careful cannot be doubted, but the absence of due care, in a case such as the present, does not mean that the assessee is guilty of either furnishing inaccurate particulars or attempting to conceal its income.

20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars.

21. Under these circumstances, the appeal is allowed and the order passed by the Calcutta High Court is set aside. No costs.”

4.3. Ld. Counsel also placed on record an affidavit by the assessee, explaining the inadvertent mistake caused in respect of disclosure of excess evaporation loss.

5. Per contra, Ld. Sr. DR asserted on the fact that assessee has disclosed this amount of excess evaporation loss only during the course of assessment proceeding when it was pointed out by the Ld. AO. Had there been no such reference by Ld. AO, this amount was escaped from assessment. In respect of other disallowances also, Ld. Sr. DR submitted that these have been disallowed only after detailed verification and examination of the records produced by the assessee, details of which are noted in the assessment order itself. Hence, the penalty has been rightly imposed.

6. We have heard the rival contentions and perused the material available on record. We have also gone through the judicial precedents referred by the Ld. Counsel. It is fact

that evaporation loss is normal in the line of trade in which the assessee is engaged in. Further, there is a miss on the part of assessee in reporting the details of evaporation loss in the tax audit report which was pointed out by the Ld. AO. Assessee has disclosed the details along with computation for the excess evaporation loss in the course of assessment proceeding which has been accepted by the Ld. AO after considering various circulars and regulations of the Oil Ministry and pricing charts downloaded from the website of Indian Oil Corporation. The claim of the assessee towards excess evaporation loss has been disallowed by the Ld. AO after accepting the fact of inadvertent mistake on the part of the assessee in reporting of the same.

6.1. Ld. AO has imposed the penalty by treating it as furnishing of inaccurate particulars of income by the assessee. However, at the same time, we note that Ld. AO himself in the assessment order has noted and accepted that there is an inadvertent mistake on the part of the assessee in this respect. We after taking into consideration the observations made by Hon'ble Supreme Court in the case of Price Waterhouse Coopers Pvt. Ltd. (supra) are of the considered view that it is a case of inadvertent mistake which the assessee has accepted and discharged its liability by depositing the tax and interest thereon. In the peculiar facts of this case and considering the line of business in which the assessee is engaged in, the imposition of penalty on the assessee is not justified. We thus, direct to delete the penalty on the component of disallowance relating to excess evaporation loss. In respect of penalty on the other disallowances, we do not find any reason to interfere with

the findings given by the Ld. AO and the Ld. CIT(A). Thus, we direct Ld. AO to recompute the amount of penalty in terms of our aforesaid findings. Accordingly, grounds taken by the assessee are partly allowed.

7. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 11th July, 2023.

Sd/-

(Sanjay Garg)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 11th July, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:.
 3. CIT(A), NFAC, Delhi
 4. CIT,
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata