

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 3492/MUM/2010
(Assessment Year: 2002-03)**

**Deputy Commissioner of Income Tax,
Circle 2(3), Mumbai**

Room No. 555, Aayakar Bhavan,
Mumbai - 400020

.....

Appellant

Zensar Technologies Ltd

Magnet House, 2nd Floor,
Narottam Morarjee Marg,
Ballard Estate, Mumbai- 400001
[PAN: AAACF0742K]

Vs

.....

Respondent

**CO. No 31/Mum/2011
Arising out of ITA No. 3492/MUM/2010
(Assessment Year: 2002-03)**

Zensar Technologies Ltd

Magnet House, 2nd Floor,
Narottam Morarjee Marg,
Ballard Estate, Mumbai- 400001
[PAN: AAACF0742K]

.....

Appellant

**Deputy Commissioner of Income Tax,
Circle 2(3), Mumbai**

Room No. 555, Aayakar Bhavan,
Mumbai - 400020

Vs

.....

Respondent

Appearance

For the Appellant/Assessee : Shri Nitesh Joshi
For the Respondent/Department : Shri Manoj Kumar

Date

Conclusion of hearing : 20.09.2023
Pronouncement of order : 26.09.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal preferred by the Revenue and the Cross Objections filed by the Assessee arising from order, dated 16/02/2010, passed by the Ld. Commissioner of Income Tax (Appeals) - 15, Mumbai [hereinafter referred to as 'the CIT(A)'] pertaining to Assessment Year 2002-03, whereby the Ld. CIT(A) had partly allowed the appeal of the Assessee against the Penalty Order, dated 31/03/2009, passed under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') were by penalty of INR 3,61,37,778/- was levied on the Assessee.
2. The Revenue has raised following grounds of appeal:
 1. *The order of the CIT(A) is opposed to law and facts of the case.*
 2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the penalty u/s 271(1)(c) imposed on a compensation of Rs.8,44,02,000/- received by the assessee during the course of business activity which was related to its business.*
 3. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating the fact. that the compensation of Rs.8,44,02,000 received was held to be on revenue account and as per the deeming provisions of Explanation 1 to Section 271(1)(c), the addition made tantamounted to furnishing inaccurate particulars of income.*
 4. *On the facts and in the circumstances of the case and in law. the Ld.CIT(A) erred in deleting the penalty u/s 271(1)(c) imposed on capitalization of software expenses of Rs 26,40,800/-, as to this extent the assessee had furnished inaccurate particulars of income.*
 5. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating the fact, that the addition of Rs.26,40,800/- was confirmed by the CIT(A) to be on capital account and as per the deeming provisions of Explanation I to*

Section 271(1)(c), the addition made tantamounted to furnishing inaccurate particulars of income

6. For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the Assessing Officer be restored."

2.1. The Assessee has raised following Grounds in the Cross Objections as under:-

The respondents submit that the Commissioner of Income-tax (Appeals)-15, Mumbai erred in upholding the action of the Assistant Commissioner of Income-tax, Circle 2(3) in levying penalty on short term capital loss of Rs.6,23,064 disallowed under section 94(7) of the Act.

The respondents crave leave to add to, alter, amend, vary, omit or substitute the aforesaid grounds of cross objections or add a new ground or grounds of cross objections at any time before or at the time of hearing of the appeal as they may be advised.

3. The relevant facts in brief are that assessment under Section 143(3) of the Act was flamed for the Assessment Year 2002-03 on the Assessee vide Assessment Order, dated 29/12/2004. Further, penalty proceedings under Section 271(1)(c) of the Act were initiated against the Assessee and notice, dated 29/12/2004, was issued under Section 274 of the Act. The aforesaid penalty proceedings culminated into passing of the Penalty Order, dated 31/03/2009, under Section 271(c) of the Act whereby penalty of INR 3,61,37,778/-, being 100% of tax amount on aggregate addition of INR 10,12,26,268/- made by the Assessing Officer, was levied by the Assessing Officer.

4. Being aggrieved, the Assessee preferred appeal before CIT(A) against the levy of above penalty. Vide order, dated 16/02/2010, the CIT(A) granted substantial relief and restricted the levy of penalty to the addition of INR 6,23,064/- only.

5. The Revenue is now in appeal before us against the order of CIT(A) deleting the levy of penalty in relation to (a) addition of INR 8,44,02,000/- made by the Assessing Officer in respect of compensation received for settlement of dues, and (b) addition of INR 26,40,800/- made by the Assessing Officer in respect of software expenses. While the Assessee has filed Cross Objections against the order of the CIT(A) sustaining levy of penalty on INR 6,23,064/-, being Short Term Capita Loss disallowed by Assessing Officer under Section 94(7) of the Act.

6. When the appeal was taken up for hearing, at the outset, the Ld. Authorised Representative for the Assessee invited our attention to the penalty notice, dated 29/12/2004, issued under Section 274 of the Act and submitted that the levy of penalty under Section 271(1)(c) of the Act cannot be sustained in view of the judgment of Full Bench of the Hon'ble Bombay High Court in the case of **Mohd. Farhan A Shaikh Vs. DCIT, Central Circle-1, Belgaum: 434 ITR 1 (Bombay)**, as the penalty notice, dated 29.12.2004, has been issued without deleting or striking off inapplicable part. While the Ld. Departmental Representative relied upon the penalty order to support the stand of the Revenue, he fairly acknowledged the fact that inapplicable portion has not been deleted or struck off in the penalty notice issued under Section 271 read with 274 of the Act.

7. We have perused the record, considered the rival submissions and the legal position. The full Bench of the Hon'ble Bombay High Court in the case Mohd. Farhan A Shaikh Vs. DCIT (supra) has held that a mere defect in the notice - not striking off the irrelevant matter, would vitiate the penalty proceedings. The relevant extract of the aforesaid judgment reads as under:

"Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiating the penalty proceedings?

181. *It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness." (Emphasis supplied)*

8. A perusal of the penalty notice, dated 29.12.2004, issued under Section 274 read with 271 of the Act would show that it in an omnibus show cause notice issued without deleting or striking off the inapplicable part. Thus, the statutory notice issued to the Assessee does not inform the Assessee about the charge against the Assessee – whether penalty under Section 271(c) of the Act is sought to be levied for concealment of particulars of income or furnishing inaccurate particulars of income. Similarly, the Assessment Order, dated 29.12.2004, passed under Section 143(3) of the Act simply states 'Penalty u/s 271(1)(c) is initiated' without specified whether we penalty proceedings have been initiated for concealment of particulars of income or furnishing inaccurate particulars of income.
9. In view of the above, we find merit in the contention advance on behalf of the Assessee that penalty levied under Section 271(1)(c) of the Act cannot be sustained as per the judgment of the Full Bench

decision of the Hon'ble jurisdictional High Court in case of Mohammed Farhan A Shaikh vs DCIT (supra). Thus, Ground No. 1 to 5 raised by the Revenue in appeal are dismissed, and ground raised by the Assessee in Cross Objection is allowed.

10. In the result, appeal preferred by the Revenue is dismissed while the Cross Objection filed by the Assessee is allowed.

Order pronounced on 26.09.2023.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 26.09.2023

Shubham. P. Lohar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार //(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai