

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI**

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No.2412/Del/2023

निर्धारणवर्ष/Assessment Year: 2010-11

Manoj Mittal, H-1, Phase-1, Ashok Vihar, New Delhi.	बनाम Vs.	DCIT Central Circle-8, New Delhi.
PAN No. AAIPM7274J		
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारितकीओरसे /Assessee by	S/Shri Rajat Jain, CA Akshat Jain, CA
राजस्वकीओरसे /Revenue by	Shri Om Prakash, Sr. DR

सुनवाईकीतारीख/ Date of hearing:	09.10.2023
उद्घोषणाकीतारीख /Pronouncement on	16.10.2023

आदेश /O R D E R

This appeal is filed by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-24, New Delhi dated 08.08.2023 for the AY 2010-11 in sustaining the penalty levied u/s 271(1)(c) of the I.T. Act, 1961.

2. Brief facts are that the assessee is an individual filed his return of income on 30.09.2010 declaring income of Rs.47,28,153/-. The assessment was completed u/s 143(3) of the Act making an addition of Rs.18,42,000/- on account of loan received by the assessee which was treated as deemed dividend u/s 2(22)(e) of the

Act. The assessee preferred an appeal before the Ld.CIT(A) and also the Tribunal. The Tribunal vide order in ITA No.4596/Del/2016 restricted the addition towards deemed dividend u/s 2(22)(e) to Rs.4,73,526/- being the accumulated profits of the company M/s Mittal Construction and Real Estate Pvt. Ltd. as on the date of transfer of loan as the assessee was having more than 10% of the shareholding of that company. Pursuant to the order of the Tribunal an assessment u/s 143(3) read with section 254 of the Act was passed by the Assessing Officer making an addition of Rs.4,73,526/- u/s 2(22)(e) of the Act. Subsequently the Assessing Officer initiated penalty proceedings u/s 271(1)(c) of the Act and levied penalty of Rs.1,46,319/- by order dated 29.06.2022 pursuant to the addition of Rs.4,73,526/- made u/s 2(22)(e) of the Act while completing the consequential assessment. Assessee preferred an appeal before the Ld.CIT(A) and the Ld.CIT(A) by order dated 08.08.2023 sustained the penalty.

3. The Ld. Counsel for the assessee submits that on perusal of the impugned penalty order, it is quite evident that the Ld. AO has imposed penalty of Rs.1,46,319/- under section 271(1)(c) of the Income tax Act, 1961 on addition of Rs.4,73,526/- made on account of deemed dividend under section 2(22)(e) of the Act by alleging

that appellant has furnished inaccurate particulars of income. It is pertinent to note that the appellant is holding 25% share capital of M/s Mittal Construction & Real Estate Company Private Limited. The said company is having accumulated profit as on 31.03.2009 and 31.03.2010 of Rs. Nil and Rs.5,46,787/- respectively. The appellant has taken loan/advance of Rs.18,42,000/- during the financial year under consideration. Since, the appellant has taken loan / advance from M/s Mittal Construction & Real Estate Company Private Limited in which he is a beneficial shareholder, the Ld. AO has invoked deeming provisions of Section 2(22)(e) of the Act and made addition of Rs.4,73,526/- to the extent of accumulated profits on the date of giving loan by company as deemed dividend u/s 2(22)(e) of the Act. It is an admitted fact that the appellant is beneficial shareholder in M/s Mittal Construction & Real Estate Company Private Limited and has taken loans and advances of Rs.18,42,000/- during the financial year under consideration and neither concealed nor furnished any wrong or inaccurate particulars. Further, M/s Mittal Construction & Real Estate Company Private Limited has accumulated profit as on as on 31.03.2009 and 31.03.2010 of Rs. Nil and Rs.5,46,787/- respectively is also a matter of record. Therefore, it cannot be said that the appellant has furnished inaccurate particulars of his

income, more specifically when the addition of Rs.4,73,526/- was made on the basis of deeming provisions of Section 2(22)(e) of the Act by estimating income and not because of furnishing of any inaccurate particulars of income by the appellant.

4. The Ld. Counsel further submits that it is pertinent to note that the Ld. AO to justify his action of imposing penalty of Rs.1,46,319/- u/s 271(1)(c) of the Act on account of furnishing inaccurate particulars of income has arbitrarily invoked provisions of Explanation - 1 to Section 271(1)(c) of the Act and alleged that the explanation offered by the appellant is not acceptable. The Ld. AO has imposed penalty by invoking provision of Explanation 1 of Section 271(1)(c) of the Act without considering the fact that Explanation 1 of Section 271(1)(c) of Act can be invoked only if there is concealment of income, while in the case of appellant the Ld. AO himself imposed penalty for furnishing of inaccurate particulars of income. Thus, imposing of penalty by mechanically invoking provision of Explanation 1 of Section 271(1)(c) of the Act, is bad in law. From the said provisions, it is apparent that Explanation 1 to Section 271(1)(c) of the Act deeming fiction can only be invoked when an amount is added or disallowed in computation of total income which is deemed to represent the

income in respect of which particulars have been concealed. While, in the instant case, the Ld. AO initiated and imposed penalty for furnishing of inaccurate particulars of his income, thus invoking of Explanation 1 to section 271(1)(c) in the case of appellant for imposing penalty is bad in law. Reliance was placed on the decision of the ITAT, Delhi Bench in the case of **Tristar Intech (P.) Ltd. v. Assistant Commissioner of Income Tax, Circle 16(1), New Delhi [2017] 88 taxmann.com 392**. The Ld. Counsel for the assessee further placing reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products Pvt. Ltd. [322 ITR 158] submits that mere making of a claim which is not sustainable in law cannot lead to levy of penalty u/s 271(1)(c) of the Act.

5. The Ld. Counsel for the assessee further submits that the Assessing Officer initiated penalty proceedings for furnishing of inaccurate particulars in the assessment order and while levying the penalty u/s 271(1)(c) of the Act in the order passed on 29.06.2022 invoking the Explanation 1 to Section 271(1)(c) of the Act. The Ld. Counsel for the assessee placing reliance on the decision of the coordinate bench of the Tribunal in the case of Tristar Intech Pvt. Ltd. Vs. ACIT [In ITA No.1457/Del/2010 dated 07.09.2015] submits

that the Tribunal held that Explanation 1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income.

6. The Ld. DR strongly supported the orders of the authorities below.

7. Heard rival submissions, perused the orders of the authorities below. We find force in the submission of the assessee. In the case of Tristar Intech Pvt. Ltd. Vs. ACIT (supra) the Tribunal while dealing with Explanation 1 of Section 271(1)(c) of the Act held as under:

“15. Furthermore, the AO in the assessment order passed u/s.143(3), had initiated penalty for concealing the particulars of income, however, at the time of passing penalty order the AO levied the penalty for filing of inaccurate particulars of income under the virtue of Explanation 1 to Section 271(1)(c) of the Act.

16. For dealing with the above observation let us analyze the relevant provision u/s 271(1)(c) Explanation 1, which is reproduced herein below:

Failure to furnish returns, comply with notices, concealment of income, etc.

“271.(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—

(c) has concealed the particulars of his income or furnished inaccurate particulars of [such income, or

Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

- (A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or*
- (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.”*

17. From the said provision, it is apparent that, if the ld.AO in the course of assessment proceedings is satisfied that, any person has concealed the particulars of income or furnished inaccurate particulars of such income, then he may levy penalty on the assessee. Thus, there are two different charges i.e. concealment of particulars of income or furnishing of inaccurate particulars of income. The penalty can be imposed only for a specific charge. Furnishing inaccurate particulars of income means, when the assessee has not disclosed the particulars correctly or the particulars disclosed by the assessee are found to be incorrect whereas, concealment of particulars of income means, when the assessee has concealed the income and has not shown the income in its return or in its books of accounts. Explanation 1 is a deeming provision and is applicable when an amount is added or disallowed in computation of total income which is deemed to represent the income in respect of which particulars have been concealed.

Explanation 1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income.”

8. We further observe that the Jaipur Bench of the Tribunal in the case of Shri Uday Kant Mishra Vs. DCIT [ITA No.548/JP/2014] held as under:

“6. Regarding the levy of penalty on deemed dividend, it was held by the AO that M/s Trimurty Builders Pvt. Ltd. in which the assessee was a share holder of over 10% shares booked its profit on the last working day of the F.Y 31.3.2007 it has shown profit of Rs.5,35,787/- out of which Rs.2 lakh each was advanced to the appellant and to another sister concern. Thus this advance was treated as income by way of the deemed dividend u/s 2(22)(e) which was accepted by the assessee and in absence of any further appeal, has attained finality. It is noted that under identical set of facts, the Coordinate Bench in ITA No. 661/JP/2011 and others dated 12.02.2016 in assessee's group cases has deleted the penalty levied on deemed dividend and the relevant findings are as under:

“43. We have heard rival contentions and perused the material on record. The assessee filed the return under section 139 for all the years and disclosed the particulars of shareholding pattern, advances taken and given by the assessee company/individual in return itself. The accumulated profit also has been disclosed. Thereafter assessee filed return u/s 153A of the IT Act wherein also all the detailed facts and figures were disclosed in the return. The assessee's case is auditable. The assessee at the time of quantum addition as well as at the time of penalty proceedings has reiterated that these advances are in the course of regular business. It is a running account, said advances later on repaid. This issue is debatable arid various courts particularly in the case of Creative

Dyeing & Printing (P) Ltd. (supra) wherein it has been held that business transaction is not covered under section 2(22)(e) of the Act. Various other case laws cited by the assessee has also made this issue debatable. The case relied on by the AO i.e. Mak Data P. Ltd. is not applicable as assessee at every stage had filed the explanation before the AO as well as CIT(A) i.e. these transactions were made for the purpose of business and commercial expediency, in ITA No. 548/JP/20J4 Shri Udai Kant Mishra, Jaipur Vs. DCIT, Central Circle-3, Jaipur bonafide. Penalty imposed by the AO and confirmed by Id. CIT(A) are not justified. Accordingly we delete the penalty in all the cases. ”

7. *In ITA No. 476 & 477/JP/14 vide its order dated 29.06.2016, the Coordinate Bench under identical set of facts has followed the above decision and has deleted the penalty on addition on account of deemed dividend and the relevant findings are as under:*

“23 We have heard the rival contentions and perused the material available on record. Undisputedly the facts pattern in the impugned matters are similar to the facts before Coordinate Bench in respect of assessee’s group companies wherein the penalty on addition on account of deemed dividend u/s 2(22)(e) was deleted. Hence respectfully following decision of the Coordinate Bench referred (supra), we hereby delete the penalty in the hands of the assessee for both the years under consideration. ”

8. *Following the consistent position taken by the Coordinate Benches in assessee's group cases where the penalty levied under section 271(1)(c) has been deleted, the penalty levied.”*

9. It is further observed that the Hon'ble Supreme Court in the case of CIT Vs. Reliance Petro Products Pvt. Ltd. (supra) held as under:

“10. It was tried to be suggested that section 14A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form the part of the total income. It was, therefore, reiterated before us that the Assessing Officer had correctly reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income. We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the Return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature.”

10. It is also observed that by way of deeming provision the Assessing Officer made addition of Rs.18,42,000/- being the loan taken by the assessee from the company in which he was a substantial shareholder which addition was ultimately reduced to the accumulated profits of the lender company at Rs.4,73,526/- by the Tribunal vide order in ITA No.4596/Del/2016.

11. In view of the above, I am of the view that there is no concealment of particulars of income by the assessee so as to attract penalty u/s 271(1)(c) of the Act. Thus, the Assessing Officer is directed to delete the penalty levied u/s 271(1)(c) of the Act.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 16/10/2023

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 16.10.2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT
(DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi