

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

BEFORE

**DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 632/Del/2019
Asstt. Year: 2005-06

Pragati Power Corporation Ltd. Himadari, Rajghat Power House Office Complex, Rajghat New Delhi – 110 002 PAN AACCP8035F	Vs.	DCIT, Circle-10(1) New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ved Jain, Advocate Ms. Supriya Mehta, CA
Department by:	Ms. Monika Dhami, CIT DR
Date of Hearing:	30.08.2023
Date of pronouncement:	17.11.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order dated 29.11.2018 of the Ld. Commissioner of Income Tax (Appeals)-38, Delhi (**"CIT(A)"**), whereby the Ld. CIT(A) confirmed the penalty of Rs. 4,72,81,561/- imposed by the Ld. Assessing Officer (**"AO"**) under section 271(1)(c) of the Income Tax Act, 1961 (**the "Act"**) for furnishing inaccurate particulars of income for the Assessment year (**"AY"**) 2005-06 and all its grounds relate thereto.

2. Briefly stated, the assessee company is an enterprise of Govt. of NCT of Delhi. It is engaged in the business of generation of power. For AY 2005-

06, it filed its return on 31.10.2005 declaring income of Rs. 13,70,69,307/- which was subsequently revised to Rs. 16,43,97,948/- by filing revised return which was processed under section 143(1) of the Act on 23.05.2006. Its case was selected for scrutiny under CASS. Statutory notices under section 142(1) and 143(2) were issued/served and complied with. Assessment was completed on total income of Rs. 16,43,97,948/- as per the normal provisions and on total income of Rs. 1,05,04,76,821/- as per section 115JB of the Act. The Ld. AO initiated penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income. In quantum appeal, the Tribunal confirmed the addition/disallowances under MAT provisions amounting in all to Rs. 60,29,85,000/- comprising of IT provisions (Rs.17,34,50,000/-); Transfer of General Reserve (Rs. 10,00,00,000/-); Proposed dividend (Rs.14,00,00,000/-); Taxes on proposed dividend (Rs.1,96,35,000/-); Advance against depreciation (Rs. 13,70,00,000/- and provision for doubtful debts (Rs. 3,29,00,000/-).

3. In response to show cause notice, the assessee submitted before the Ld. AO during penalty proceedings that at the time of filing return, provisions of section 115JB of the Act did not provide for any such adjustment on account of provision for doubtful debts. There was no attempt to file inaccurate particulars of income. Confirmation of the impugned additions/disallowances is only for the purpose of charge of income tax and cannot be used for imposing penalty under section 271(1)(c) of the Act.

4. The explanation of the assessee was not acceptable to the Ld. AO who imposed the impugned penalty. The assessee appealed before the Ld. CIT(A) but without success. This has brought the assessee before the Tribunal.

5. The Ld. AR submitted in synopsis filed before the Tribunal that penalty has been levied even in respect of those adjustments to book profits which were made by the assessee suo-moto in the revised return accepted

by the Ld. AO including the adjustment of Rs. 5,59,339/- being provision for ex-gratia leave salary gratuity deleted by the ITAT. He further submitted that there has been retrospective amendment in law brought by the Finance (No.2) Act, 2009 providing for add back of any provision for diminution in the value of any asset for the purpose of computation of book profit but this amended law did not exist when the assessee filed the return on 23.05.2006. Therefore, penalty is not leviable as held in the decisions rendered in many cases by the ITAT, Delhi. The Ld. AR also contended that the assessee is a Public Sector Undertaking and there cannot be any malafide intention. Hence no penalty is leviable. He placed reliance on the decisions of ITAT Jaipur, Delhi, MP, Nagpur, Ahmedabad and Bombay. The Ld. AR pointed out that notice under section 271(1)(c) has been issued without specifying the charge whether it is concealment of income or furnishing of inaccurate particulars of income. He relied on the decision of Hon'ble Supreme Court in CIT vs. SSA's Emerald Meadows wherein the Hon'ble Apex Court dismissed the SLP filed by the Revenue against the decision of Hon'ble Karnataka High Court in CIT vs. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565.

6. The Ld. CIT-DR defended the order of the Ld. CIT(A). It is submitted that the Ld. CIT(A) has supported the order of the Ld. AO who mentioned in para 11 of the penalty order that consciously furnishing of inaccurate particulars of income by the assessee attracts penalty by citing numerous judicial precedents.

7. We have given our very careful thought to the submission of the parties and perused the records. It is not in dispute that the assessee company is a Public Sector Undertaking engaged in the business of generation of power. Therefore, no malafide intention can easily be attributed to the company that it has consciously furnished inaccurate particulars of income in filing the return. We cannot be oblivious of the fact that the assessee is not a private businessman but it is a Govt. statutory

organisation. No such allegation is justified in the absence of reliable evidence in support thereof. There is no such evidence forthcoming from the records except the bald statement of the Ld. AO which is bereft of any material on facts or in law establishing malafide intention on the part of the assessee. Element of conscious furnishing of inaccurate particulars of income by the assessee is absolutely lacking. Reliance on various decisions by the Ld. CIT(A) is off the mark.

8. It is also evident that the income of Rs. 16,43,97,948/- declared by the assessee in the revised return under the normal provisions of the Act is the same as assessed by the Ld. AO. It is testimony of the bonafide intention of the assessee to file return reflecting the true state of affairs of the company.

9. The difference of Rs.3,34,59,339/- between the income declared in the return at Rs. 1,01,70,17,482/- by the assessee under the provisions of section 115JB of the Act and income assessed at Rs. 1,05,04,76,821/- by the Ld. AO is attributable to adjustment of provision for ex-gratia leave salary, gratuity of Rs. 5,59,339/- and that of provision for doubtful debts of Rs. 3,29,00,000/- aggregating to Rs. 3,34,59,339/-. Record reveals that in quantum appeal the Tribunal in its order in ITA No. 5510/Del/2010 dated 01.09.2017 held that provision for ex gratia leave salary is an ascertained liability which can not be adjusted while working out the book profit under section 115JB of the Act reversing the finding of the Ld. CIT(A) in this regard. However, the finding (supra) of the Tribunal has been overlooked by the Ld. AO/CIT(A) for the purpose of levy of penalty under section 271(1)(c) of the Act. This is not fair. No penalty for furnishing of inaccurate particulars of income is exigible if the disallowance itself has been deleted by the Tribunal in quantum appeal.

10. As regards the disallowance of Rs. 3,29,00,000/- on account of provision for doubtful debts under the provisions of section 115JB of the

Act, confirmed by the Tribunal in the decision (supra) in quantum appeal, it is observed that the Tribunal confirmed the said disallowance due to retrospective amendment in law brought by the Finance (No.2) Act, 2009 w.e.f 01.04.2001. It is thus obvious that at the time when the assessee company filed its return for the AY 2005-06 on 31.10.2005 and revised return on 23.05.2006, the amended law introduced in the statute book by the Finance (No.2) Act, 2009 w.e.f. 1st April, 2001 had not come into existence. No penalty can be levied on the addition/disallowance made on the basis of retrospective amendment under the law. The assessee has placed reliance on the following decisions of the ITAT wherein penalty imposed on the basis of similar addition/disallowance was deleted:

- (i) DCIT vs. Eastern India Powertech Ltd. 2014 (11) TMI 374-ITAT Delhi
- (ii) DCIT vs. DCM Shriram Consolidated Ltd. 2012 (7) TMI 941-ITAT Delhi
- (iii) DCIT vs. Escorts Construction Equipment 2013 (6) TMI 472-ITAT Delhi
- (iv) M/s Chambal Fertilisers & Chemicals Ltd. vs. ACIT 2014(10) TMI 152-ITAT Jaipur

11. For the reasons set out above and following respectfully the decisions (supra) we have no hesitation in holding that on the facts and in the circumstances of the assessee's case, levy of the impugned penalty by the Ld. AO and confirmation thereof by the Ld. CIT(A) is wholly unwarranted, unjustified and is unsustainable on merits. We, therefore, vacate the orders of the Ld. AO/CIT(A). Consequently, the appeal of the assessee is allowed.

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

Order pronounced in the open court on 17th November, 2023.

sd/-
(DR. BRR KUMAR)
ACCOUNTANT MEMBER

Dated: 17/11/2023

sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	