IN THE INCOME TAX APPELLATE TRIBUNAL, RAJKOT BENCH, RAJKOT

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER & SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER

(Conducted through Virtual Court)

ITA No. 132/RJT/2019
Assessment Year: 2011-12

<table>
<tr><td>The DCIT (Intl. Taxn.)
Amruta Estate
Room No.312 MG Road
Girnar Cinema
Rajkot</td><td rowspan="2"><u>बनाम/</u>
Vs.</td><td>M/s.Korea South East Power Co.Ltd.
C/o. P.V. Page & Co.,
201, Sardar Griha, 198 L.T. Marg
Mumbai – 400 002</td></tr>
<tr><td>(Appellant)</td><td>(Respondent)</td></tr>
<tr><td colspan="3">PAN: PAN : AHVPS 3555Q</td></tr>
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Assessee by	None
Revenue by	Shri Ashish Kumar Pandey, Sr.DR
Date of Hearing	25/09/2023
Date of Pronouncement	15/12/2023

<u>आदेश/ O R D E R</u>

<u>PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER :</u>

This appeal is filed by the Revenue against the order passed by the Learned Commissioner of Income-Tax-(Appeals)-13, Ahmedabad [in short “Ld.CIT(A)”] dated 27/03/2019 deleting penalty levied by the Assessing Officer (AO) u/s.271(1)(c) of the Income-Tax Act, 1961 [hereinafter referred to as "the Act" for short] amounting to Rs.53,97,870/- for Assessment Year (AY) 2011-12.

2. None appeared on behalf of assessee despite repeated notices of hearing sent to the assessee. As is evident from the order-sheet, in all five notices were given to the assessee and despite the notices being sent through Registered post and also being served through the DR the assessee has not responded to

the same. Since sufficient opportunities of hearing have been granted to the assessee, who for reasons best known to it did not choose to come present , the matter was proceeded to be heard *ex-parte* the assessee.

2.1. As noted above, the present appeal of the Department challenges the order of the Ld.CIT(A) deleting the penalty levied by the Assessing Officer on the assessee for having concealed and /or furnished inaccurate particulars of income, the penalty being levied u/s.271(1)(c) of the Act. On going through the penalty order passed by the Assessing Officer, we have noted that penalty was levied by the Assessing Officer noting that the assessee had incorrectly returned its income as taxable u/s.44BBB of the Act, while the Assessing Officer had held the same taxable as Fee for Technical Services (FTS). The assessment order, assessing the income of the assessee so, reveals the facts of the case as being that the assessee is a foreign company registered under the laws of Republic of Korea and the assessee is also a Korean tax resident that it is engaged in the business of development of electric power resources, generation and other related business activities, Research and Development of technology related to development and generation of electric power and also doing overseas business in relation to above, as its main objects. The assessee had entered into an agreement with Costal Gujarat Pvt.Ltd. (CGPL) for commissioning services in connection with their power project, CGPL being engaged in setting up of Ultra Mega Power Project of a capacity of 1000 MW , which project was approved by the Central Government.

2.2 The assessee had originally filed its return of income declaring income of Rs.3,56,86,403/-. Subsequently, this return was revised declaring the same income and thereafter the assessee again filed revised return of income declaring income of Rs.44,31,125/- u/s.44BBB of the Act, which provides for

presumptive taxation, computing the profits and gains of specified entities , being foreign companies engaged in the business of Civil Construction in certain key power projects, @ 10% of their gross receipts. Accordingly, the assessee, finding itself eligible u/s 44BBB of the Act, had returned 10% of its gross receipts, amounting to Rs.44,31,125/-, for taxation in the revised return filed. During assessment proceedings, the Assessing Officer inquired into the veracity of assessee's claim of income returned u/s.44BBB of the Act and found to the same to be untenable both on facts and law,noting that the receipts of the assessee qualified as Fees for technical Services (FTS) which was liable for taxation u/s.115A of the Act @ 10% of the receipts. Therefore, he treated the assessee's income from FTS to be taxed as per the provisions of Section 115A of the Act @ 10%. The income from FTS was noted to be of Rs.5,39,78,696/- and the same was subject to tax @ 10% . While holding so, the Ld.AO held that the provision of the Act was clear in this regard, and even as per the advice of the C.A. in Form No.15CA/CB the nature of the receipts was by way of technical services while the assessee had treated the same as business receipts and tried to claim the benefit u/s.44BBB of the Act. Noting so, he held that it was a clear case of furnishing inaccurate particulars of income and, accordingly, initiated proceedings u/s.271(1)(c) of the Act. While levying penalty u/s.271(1)(c) of the Act, the Assessing Officer rejected assesses plea that its claim of returning income u/s 44BBB of the Act was a bonafide claim and the income assessed by the AO u/s 115JA of the Act was due to difference of opinion, noting that the penalty was initiated on the ground that the assessee was aware of the fact that the receipts were liable to be taxed as Fees from technical services since the Certificate issued by C.A. in Form No.15CA/CB clearly stated so. The AO held that it was a clear case of furnishing inaccurate particulars of income and, accordingly, levied penalty of

100% of the tax sought to be evaded by the assessee amounting to Rs.53,97,870/-.

3. We have carefully gone through the order of the Ld.CIT(A) deleting the levy of penalty and we have noted that she deleted the penalty noting that

- **the only impact of the assessment was rejecting the assessee's claim of returning presumptive income u/s.44BBB of the Act and treating it as taxable as FTS @ 10% of the gross income.**
- **That there were no adverse findings as to any inaccurate particulars of income in the books of accounts maintained by the assessee or as to any other claim of deduction**.
- **That initially the assessee had returned its income computed in terms of section 28 of the Act and paid taxes at the normal rates @ 42% and only subsequently the same was revised and income returned on presumptive basis u/s 44BBB of the Act .that while doing so there was no change in the Book results or other figures.**
- **That similar benefit was availed by the assessee in subsequent years also A.Y 12-13 & 13-14 , and similar adverse inference drawn by the AO , but no penalty was levied.**

The relevant portion of the order of the CIT(A), at page Nos.29 & 30, is as under:-

> *"I have noticed from various documents and orders that even while passing the order and that too after approval of the draft by DRP under section 144C of the Act,* ***there is clearly no adverse finding by the AO either as to any inaccuracies in the books of account maintained or as to any other claims of deduction. It is also a fact available on record that the assessee had originally filed its return of income paying tax under Section 28 of the ACT at 42% (including surcharge) in respect of the***

income earned and without claiming any deduction under section 44BBB of the Act. At this stage, it had not even claimed benefit of the Applicable Article of DTAA. The development of the case clearly shows that it was by subsequently revising the return that the benefit of DTAA and presumptive taxation under section 44BBB were claimed. It is however noticed that even while doing this, all other figures and book results have remained unchanged. It is also noticed that a similar benefits in respect of tax liability were claimed by it while furnishing the returns of income for the subsequent two years i.e. A.Y. 2012-13 and A.Y. 2013-14. It is noticed that while similar adverse inference was drawn by the AO while completing the assessments of these two later years, the AO deemed it proper not to levy penalty under section 271(1)(c) of the Act."

3.1. **The Ld.CIT(A) has noted that the claim of inaccurate particulars of income has arisen only on account of Assessing Officer taking a view as to the underlying business activities not being in the nature of "turn-key power projects" as specified u/s.44BBB of the Act, but being of the nature of FTS. Therefore, it was a mere change of head of income albeit by falling under the same head, "income from business and profession**". She has relied on various decisions of the Hon'ble High Courts holding that mere change of head of income will not tantamount furnishing inaccurate particulars of income/concealing particulars of income for levy of tax u/s.271(1)(c) of the Act. Her findings in this regard at page Nos.30 to 32 of the order is as under:

"The claim of filing inaccurate particulars of income has arisen only on account of the AO taking a view as to the underlying business activities not being in the nature of turnkey power projects as specified in section 44BBB of the Act but of the nature of FTS. It is pertinent to mention here that the Project undertaken by the Appellant did have approval from Central Govt. of India on 1st November, 2006, through the Ministry of Power, Government of India for Ultra Mega power project of a capacity of 1000 MW or more. There is thus clearly a change of head albeit both falling under the same head "Income from Business or Profession". Reliance is placed on the following judgments wherein a view is taken that the penalty under section 271(1)(c) cannot be levied merely

because the AO has shifted the chargeable head of income which resulted in there being increase in tax liability in the hands of the assessee.

"CIT v. Hiralal Doshi - ITA No.2331/2013 - Bombay HC:

"The contention on behalf of the Revenue that in case there is a tax impact by virtue of change of head during the assessment proceedings then penalty is imposable and the decision of this Court in M/s. Bennett Coleman (supra) would not apply. In such a case, Mr. Malhotra, for the Revenue emphasized the fact that in M/s Bennett Coleman (supra) the Court was dealing with the change of head of income but not with regard to a claim for full exemption from payment of tax as in this case. We are unable to accept the aforesaid submission. According to us, the distinction sought to made on behalf of the Revenue is not acceptable as the ratio of the decision in M/s Bennett Coleman (supra) is where complete disclosure of income had been made in the return of income and head of the income undergoes a change at the hands of the Assessing Officer would not by itself justify the imposition of penalty under Section 271(1)(c) of the Act".

CIT v. Amit Jain - (2013) 351 ITR 74 - Delhi HC:

"Section 271(1)(c), read with sections 28(i) and 45, of the Income-tax Act, 1961 Penalty For concealment of income (Bona fide claim) - Assessee declared an income as short term capital gain Assessing Officer, however, treated said income as income from business - He also levied penalty under section 271(1)(c) on ground that assessee had produced inaccurate particulars Whether since amount in question was truthfully reported in returns of income, penalty under section 271(1)(c) was not leviable - Held, yes (Para 3)."

CIT v. Bennett Coleman & Co. Ltd. - ITA No.2117/2012 - Bombay HC:

"Section 271(1)(c) of the Income-tax Act, 1961- Penalty - For concealment of income Bona fide claim, disallowance of Assessment year 1999-2000 - Assessee claimed premium received on redemption of debentures as income from capital gains - Assessing Officer held that said premium was assessable to tax under head income from other sources Thereupon he also levied penalty under section 271(1)(c) on assessee Tribunal deleted penalty on plea that there was only a change of head of income by Assessing Officer and it was not case of department that assessee had concealed any particulars of income or furnished inaccurate particulars of income by stating incorrect facts. Whether Tribunal was justified in cancelling penalty levied upon assessee - Held, yes (Para 3)"

CIT v. Praveen B. Gada (HUF).- (2011) 244 CTR 463 - Madhya Pradesh HC:

"Section 271(1)(c) of the Income-tax Act, 1961 Penalty For concealment of income-Assessment year 2004-05- Whether in absence of any independent finding by Assessing Officer that assessee concealed his income or furnished inaccurate particulars, merely because in quantum proceedings assessee treated a certain sum as business loss whereas revenue treated it as capital loss, provisions of section 271(1)(c) would not get attracted - Held, yes."

Simran Singh Gambhir v. DDIT - ITA No. 1423/Del/2013 - Delhi ITAT:

"Section 271(1)(c) of the Income-tax Act, 1961- income (Disallowance of claim, effect of) - Assessment year 2008-09- Where Penalty For concealment of assessee offered to tax income from maturity of National Housing Bond under head long term capital gains' but Assessing Officer chose to tax same under head other sources, penalty levied under section 271(1)(c) was to be cancelled."

CIT v. Auric Investment & Securities Ltd. [2007] 163 Taxman 533 (Delhi):

"Section 271(1)(c) of the Income-tax Act, 1961- Penalty For concealment of income - Assessment year 2001-02-Assessee had declared its income from brokerage and other income against which it had claimed share trading loss - Assessing Officer found that loss was speculative in nature and could not be adjusted against assessee's normal income Assessing Officer holding that assessee had furnished inaccurate particulars of income to extent of making a wrong claim of share trading loss against normal income, imposed penalty under section 271(1)(c) - Whether mere treatment of business loss as speculation loss by Assessing Officer did not automatically warrant inference of concealment of income - Held, yes - Whether since there was nothing on record to show that in furnishing its return of income, assessee had either concealed its income or had furnished any inaccurate particulars of income, penalty imposed by Assessing Officer was to be deleted - Held, yes"

3.2. **The Ld.CIT(A) has also noted that the assessee had relied on the opinion of Tax Consultants while changing its view of the nature of its income when in the original return it has offered the income as "business income" and, thereafter as FTS, then lastly in its last revised return as income from "turn key power projects" liable to be taxed u/s.44BBB of the Act. The Ld.CIT(A) has noted that company a non-resident company, it was expected to rely on the opinion of Tax Consultants and when the tax Consultants were not providing any concrete opinion, the assessee can very**

well be expected to be ignorant of the local laws of India. The findings contained in paragraph Nos.11 & 12 are as under:

> *"11. It is observed that the Appellant being a non-resident in India was expected to rely on the opinion of tax consultants in India. When the Appellant filed its original return of income and first revised return of income, it was guided that income should be offered to tax as business income and thereafter as fees for technical services, respectively.*
>
> *12. Later on when the Appellant was further guided that the income earned by the Appellant is eligible for presumptive taxation under section 44BBB of the Act, the Appellant further revised its tax return and claimed excess taxes paid as refund. When Indian tax consultants were also not able to provide any concrete opinion when income was offered to tax in the original return and first revised return, the Appellant being non-resident can be expected to be ignorant of the local laws of India."*

3.3. **The Ld.CIT(A) has also held that mere disallowance of claim of the assessee will not attract the levy of penalty u/s.271(1)(c) of the Act** and has relied on the decisions of the Hon'ble Apex Court in the case of CIT vs. Reliance Petroproducts (P.)Ltd. reported in (2010) 189 Taxman 322 (SC), wherein the Hon'ble Supreme Court observed as under:

> *"9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate has been defined as:-*
>
> *"not accurate, not exact or correct; not according to truth, erroneous; as an inaccurate statement, copy or transcript."*
>
> *We have already seen the meaning of the word "particulars in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) f the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount*

to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars."

3.4. **The Ld.CIT(A) has also dealt with the basis of the Assessing Officer for levying penalty that the assessee was aware of the nature of the income being for FTS on account of the C.A's Certificate in Form No.15CB clearly noting its nature so. The Ld.CIT(A) has noted that Form 15CB was obtained by the payer, i.e. M/s. CGPL and not the assessee. That, even otherwise, Form 15CA/CB is not to be treated as conclusive nature of income, but only tentative opinion which is not a binding opinion or mandate on the assessee.** The findings, in this regard, contained in paragraph No.14 of the CIT(A)'s order are as under:

> *"14. The AO has also observed that the Appellant has not observed advice from a CA (i.e. Form Nod.15CB) wherein it was clearly observed that income earned by the Appellant is taxable as fees for technical services. However, one should clearly understand that Form No.15CB is required to be obtained by the payer of income, i.e. Costal Gujarat Power Limited in this case. Further, Form No.15CA/15CB provides only the tentative rate at which tax is deductible by the payer of income. That does not provide any biding opinion or mandate on the Appellant. The Appellant is completely justified in taking a stand which he is able to justify. Further, the Appellant has already provided all the required documents such as certificate from Government of Income approving project of Costal Gujarat Power Limited as Mega Power Project, certificate from Costal Gujarat Power Limited certifying that the Appellant was engaged in commissioning, testing and training activities on the project in India and so on which indicates that Appellant should have been eligible for presumptive taxation under section 44BB of the Act."*

3.5. **Lastly, the Ld.CIT(A) has noted that in subsequent two years, i.e. AYs 2012-13 & 2013-14, the Assessing Officer himself has dropped penalty proceedings which she noted clearly proves that the Assessing Officer also believed that it is not a fit case for levy of penalty**. The relevant portion of the order of the Ld.CIT(A) reads as under:

"15. Further, in the subsequent two years i.e. AY 2012-13 and AY 2013-14, the AO himself has dropped the penalty proceedings, which also clearly proves that the AO also believes that he does not have any case for levy of penalty on the Appellant.

15.1 Reliance is placed on the decision of ACIT us Nortel Networks Ltd. [2013] 37 Taxmann.com 453 (ITAT Delhi), wherein the assessee was engaged in providing marketing services, installation, testing and commissioning services and technical services including repair & maintenance of equipments supplied by the group companies. During original scrutiny assessment, AO held that the income of the assessee was in the nature of fee for technical service and was taxable at the rate of 15 per cent under article 12. Subsequently, the Assessing Officer changed his mind and held that since the assessee had a PE in India, the assessee's case was covered under article 5(2)(1) and its income was taxable at the rate of 20 per cent and initiated reassessment and imposed penalty under section 271(1)(c).

The Tribunal after considering the facts, deleted the penalty and observed that since there is no change in the income declared and income assessed by the Assessing Officer, it cannot be said that there were any concealment of income.

Relevant extract is reproduced as under:

"We find that the income of the assessee during re-assessment proceedings was not enhanced as is apparent from the assessment order and it was only the rate of tax which has been increased from 15% To 20%. Since there is no change in the income declared and income assessed by the Assessing Officer, it cannot be said that there were any concealment of income. In view of the above, we do not see any infirmity in the order of Ld. CIT(A)"

15.2 Further reliance is placed on the following cases:

1. Shailesh D. Patel v. Income-tax Officer – [2013] 33 taxmann.com 51 (Ahmedabad - Trib.)

The brief facts of the case is that the assessee is engaged in construction business. For the year under consideration the assessee declared capital gains. During the assessment proceedings the assessee submitted that the long term capital gain shown in the return of income was in fact "business income" and the same has been wrongly shown as "capital gains" instead of "business income". The A.O. levied penalty u/s. 271(1)(c) for the reason that the assessee had furnished inaccurate particulars of income and it's a deliberate default on the part of the assessee.

Ahmedabad Tribunal observed that the assessee suo moto, during the assessment proceedings informed the A.O. that by mistake in the return of

income, profit from sale of land has wrongly been considered as capital gain instead of business income. The assessee submitted the details, its computation and offered it as business income. In the assessment order passed u / s 143(3) the A.O. taxed the profit on sale of land as business income as offered by assessee without making any changes to the amount of gains. From these facts it is clear that the assessee had offered explanation by furnishing necessary details and also substantiated it. The explanation of the assessee was not found to be false by Revenue in view of the fact that the computation as submitted by assessee was accepted by Revenue. Thus, it is clear that no material was found by Revenue to hold that the explanation offered by assessee was false. In view of above, the assessee's case does not fall within the ambit of Explanation 1 to Sec. 271(1) (c) and no penalty can be levied by merely disbelieving explanation given by the assessee.

ii. Commissioner of Income Tax us Reliance Petroproducts (P.) Ltd. [2010] 189 Taxman 322 (SC), the Supreme Court observed that:

"9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate has been defined as:-

"not accurate, not exact or correct; not according to truth, erroneous; as an inaccurate statement, copy or transcript."

We have already seen the meaning of the word "particulars in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) f the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars."

iii. Commissioner of IT vs Kiranjit Foils Ltd. [2010] taxmann.com 312 (Del HC)

The High Court of Delhi, observed that "3. As is evident from the aforesaid observations recorded by the learned CIT(A) in his impugned order, the issue as to whether the interest earned by the assessee on the investment made in short term deposits with the bank prior to commencement of the business is a capital receipt or a revenue receipt was a highly debatable issue and two views were clearly possible about the allowability of the said expenses as is apparent

from the decisions of Hon'ble Supreme Court referred to in the relevant portion of the learned CIT (A)'s impugned order reproduced above. The claim of the assessee on this issue thus was based on one possible view and although the said claim was not accepted in the quantum proceedings on a difference of opinion, we are of the view that making of such claim bona fide on the basis of a possible view could not be treated as concealment of its income by the assessee company or furnishing of inaccurate particulars of such income so as to attract the penal provisions of section 271(1)(c) as rightly held by the learned CIT(A). His impugned order cancelling the penalty imposed by the Assessing Officer under section 271(1)(c) is, therefore, upheld and this appeal preferred by the Revenue is dismissed."

15.3. In view of the above cases, when there is no change in the income declared and income assessed by the Assessing Officer, mere change in rate of taxation or difference of opinion due to a debatable issue cannot be construed as any concealment of income or furnishing of inaccurate particulars of income.

Considering the totality of the case, I am of the considered view that there is clearly no case for levy of penalty under section 27 1(1)(c) of the Act. I am also of the clear view that the charge of furnishing inaccurate particulars of income is clearly not satisfied. In view of the above, penalty levied by the AO is deleted. This ground of Appeal is Allowed."

3.6. **Finally, the Ld.CIT(A) held that when there was no change in the "income declared" and "income assessed" by the Assessing Officer, mere change in the head of taxation or difference of opinion due to a debatable issue cannot be construed as concealment of income or furnishing inaccurate particulars of income** and, accordingly, directed to delete the levy of penalty.

4. The Department is aggrieved by this order of the Ld.CIT(A) and has raised the following grounds before us:

1. *That the Ld. CIT(A) has erred in facts and in law in deleting the minimum penalty of Rs.53,97,870/- levied @ 100% u/s. 271(1)(c) of Act for furnishing of inaccurate particulars of income.*
2. *The Ld. CIT(A) has erred in facts and in Law in holding that there is no difference in the returned income of the assessee and the assessed income*

without even verifying the facts of the case as in the Return of income, the gross receipts shown by the assessee was Rs. 4.43 crores whereas the assesssed income was Rs. 5.39 crores.

3. *The order passed by the Ld CIT (A) suffers from perversity on the facts as the Ld. CIT(A) has held that there is no difference between the returned income and the assessed income which is contrary to the facts as available on record.*
4. *The Ld CIT(A) has erred in holding that it is a mere change of opinion of the AO in taxing the receipts as FTS completely ignoring the judgment of the Hon'ble ITAT, being the highest fact finding authority which has confirmed the action of the AO holding that the nature of receipts are FTS.*
5. *The order of Ld. CIT (A) suffers from perversity in so far as it is against the findings of the Hon'ble ITAT with respect to the nature of receipts which is held to be in the nature of FTS which is binding on the subordinate Appellate Authority.*

5. As is evident from the above, that besides raising a general ground challenging the deletion of penalty by the Ld.CIT(A), specific grounds have also been raised primarily to the effect that the order of the Ld.CIT(A) suffers from perversity on account of :

I. the findings of the Ld.CIT(A) that there was no difference between the "returned income" and the "assessed income" being contrary to facts

II. the finding of the Ld.CIT(A) that it was a mere change of opinion of the Assessing Officer in taxing receipts as FTS, being unacceptable and perverse since the ITAT had confirmed the action of the Assessing Officer holding so.

6. We have heard the Ld.DR also, who has reiterated the issues raised in the grounds before us. Before dealing with the grounds raised by the Revenue it is pertinent to reiterate the facts leading to the levy of penalty u/s 271(1)(c) of the Act. Penalty was levied by the Assessing Officer noting that the assessee had incorrectly returned its income as taxable u/s.44BBB of the Act, while the Assessing Officer had held the same taxable as Fee for Technical Services (FTS). The assessee had originally filed its return of income

declaring income of Rs.3,56,86,403/- . Subsequently, this return was revised declaring the same income and thereafter the assessee again filed revised return of income declaring income of Rs.44,31,125/- u/s.44BBB of the Act being in the nature of profits and gains from specified business ,@ 10% of their gross receipts. The AO held the income to be in the nature of Fees for Technical Services liable to tax @ 10% of the receipts u/s 115A of the Act. Penalty u/s 271(1)(c) of the Act was levied by the AO noting that despite the assessee being aware of the nature of receipts being FTS, yet it had wrongly returned the same u/s 44BBB of the Act. Taking up Ground No.1 challenging the deletion of penalty by the Ld.CIT(A) , we do not find any merit in the same. The Ld.CIT(A) has noted very pertinent facts while deleting the levy of penalty:

- She has noted that no infirmity in the books of the assessee, as far as the claim of income is concerned ,was found by the AO.
- That, only the nature of receipts has been the matter of dispute .
- That the assessee had itself repeatedly taken a different stand on the nature of its receipts disclosing the same as business income initially, changing it to FTS in the second revised return of income filed and finally claiming it to be in the nature of "receipts from turn key power projects" u/s.44BBB of the Act.
- That, all its views were based on the opinion of Consultants, the assessee being a foreign entity and non-resident in India.
- The Ld.CIT(A) has also noted that in the subsequent years ,i.e A.Y 12-13 & A.Y 13-14, penalties initiated on identical issue by the Assessing Officer, was dropped.

All these findings of the Ld.CIT(A) have not been controverted before us. We see no infirmity in the conclusion drawn by the Ld.CIT(A) therefrom

that the dispute only related to the nature of income , there being no adverse findings by the AO relating to the facts of the income earned . We agree with the Ld.CIT(A) that the assessee in such circumstances cannot be charged with having concealed particulars of income. Pertinent is also the fact noted by the Ld.CIT(A) that the assessee itself had returned this income under different heads ,including as FTS as finally held by the AO. The assessee surely himself was uncertain of the head under which the income was to be returned and its claim u/s 44BBB of the Act is clearly bonafide claim. As rightly noted by the Ld.CIT(A), the assessee being a non resident was guided by consultants . The fact that it returned incomes under different heads in the original and revised returns filed shows that even the consultants were unable to guide the assessee with certainty in determining the head/ section under which it was taxable. Therefore merely because the AO assessed the income of the assessee as FTS u/s 115A of the Act, the assessee cannot be charged with having concealed or furnished inaccurate particulars of income for returning it as income u/s 44BBB of the Act. The fact that in similar circumstances in succeeding years the AO did not find it fit to levy penalty streghthens the case for no penalty to be levied in the impugned year. The Ld.CIT(A)'s , we find, has adequately dealt with the AO's basis of levying penalty noting that it rests on Form 15C disclosing income of the assessee as fts and the assessee therefore being fully aware of the nature. The Ld.CIT(A) has brushed aside this logic noting that Form 15C is required to be filed by the payer of income and the assessee is therefore not bound by any disclosure made in it since it is not responsible for the same. The Ld.DR was unable to point any infirmity in this finding of the Ld.CIT(A). We see no reason therefore to interfere in the order of the Ld.CIT(A) holding that with no infirmity found in the books of the assessee and only the nature of income being in dispute it tantamounted to mere disallowance of claim which would not attract levy of penalty

u/s.271(1)(c) of the Act . The issue we agree with the Ld.CIT(A) is squarely covered by the decision of Hon'ble Apex Court in the case of CIT vs. Reliance Petroproducts (P.) Ltd. (supra). The Ld.CIT(A) has taken a holistic view and we are in complete agreement with the Ld.CIT(A) that there is no case made out by the Revenue Authorities for charging the assessee with having furnished inaccurate particulars of income so as to attract the levy of penalty u/s.271(1)(c) of the Act. Ground of appeal Nos.1 is also dismissed.

7. As far as the specific averment of the Department that the Ld.CIT(A)'s order suffered from perversity on finding no difference in the returned income and assessed income raised in ground No. 2 &3 , we do not find any merit in the same. We hold, so noting, that this difference in income pointed out in Ground No.2 was never the basis adopted by the Assessing Officer for holding that the assessee had furnished inaccurate particulars of income for levying the penalty u/s.271(1)(c) of the Act. The penalty order of the Assessing Officer categorically states that the penalty was initiated and is being levied on the ground that the income was taxable as FTS and not u/s.44BBB of the Act. This is evident from paragraph No.5 of the assessment order, which is reproduced hereunder:-

> *"5. The penalty was initiated by the erstwhile AO on the ground that the assessee was aware of the fact that the receipts were liable to be taxed as income from technical grounds due to the certificate issued by the CA in form 15CA/CB while the assessee has submitted that it was a bonafide claim due to difference of opinion."*

7.1. There is no finding in the order of the Assessing Officer with regard to any difference in income returned by the assessee as noted in Ground No.2 of the appeal filed before us. As for the finding of the Ld.CIT(A) in this regard, as noted above by us , she has, as we have noted above, taken a holistic view on the issue while deleting the penalty. She has noted no adverse finding by the AO with regard to Book results and figures , only change of head by AO ,

and noted identical rejection of claim by AO in succeeding years not inviting any levy of penalty by AO in those years. In conclusion she has noted no difference in returned income and assessed income alongwith other factors for deleting levy of penalty. The department cannot just pick up one factor, which was not even the basis for levying penalty by the AO, for pointing out perversity in the Ld.CIT(A)s order Ground No. 2 & 3 of appeal of the Revenue are dismissed.

8. Ground Nos.4 & 5 of the appeal challenge the order of the Ld.CIT(A) deleting penalty holding that taxing the receipts as FTS by Assessing Officer as opposed to that returned by the assessee u/s.44BBB of the Act was a mere change of opinion. The contention of the Revenue is that the Hon'ble ITAT has found, as a matter of fact, the nature of income to be in the nature of FTS and, therefore, the CIT(A)'s order suffers from perversity as it is against the findings of the ITAT. We do not find any merit in the same. The fact remains that the AO assessed the income of the assessee treating the income returned by the assessee as profits and gains of business of civil construction in turnkey power projects , u/s 44BBB of the Act, to be in the nature of Fees for Technical Services taxable u/s 115JA of the Act and it is for this reason alone that penalty was levied charging the assessee with furnishing inaccurate particulars of income. There are no adverse findings with respect to the Books of accounts maintained by the assessee. All facts and figures disclosed therein have been accepted. It all therefore boils down to interpreting the nature of activities carried out by the assessee whether qualifying u/s 44BBB of the Act or being FTS. All particulars relating to the nature of income remaining unchallenged, the Ld.CIT(A)s finding that the determination of its income by AO only tantamounted to change of head is we hold correct. That the ITAT confirmed the findings of the AO makes no difference to the aforesaid fact.

Therefore, the plea raised by the Revenue in Ground No. 4 & 5 of its appeal is also found devoid of merit and is dismissed.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 15th December-2023 at Ahmedabad.

Sd/-	**Sd/-**
(T.R. SENTHIL KUMAR)	**(ANNAPURNA GUPTA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad, Dated 15/12/2023

TC Nair, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-13, Rajkot
5. विभागीय प्रतिनिधिअधिकरण अपीलीय आयकर ,/DR,ITAT, Rajkot,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

//True Copy//सत्यापित प्रति //

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण
ITAT, Rajkot