

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “B”, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.1351/M/2023
Assessment Year: 2015-16**

M/s. Birla Integrated Textile Park Ltd., Birla Mansion No.2, Room No.23, D.D. Sathe Marg, Prathana Samaj, Mumbai, Girgaon S.O., Maharashtra – 400 004 PAN: AADCB5317R	Vs.	Asst. Director of Income Tax, Circle 3(1)(1), Room No.607, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Priyank Ghia, C.A.
Revenue by : Shri S. Srinivasu, D.R.

Date of Hearing : 13 . 12 . 2023
Date of Pronouncement : 19 . 12 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Registry vide defect memo brought on record the fact that the present appeal is time barred by 1091 days. The appellant M/s. Birla Integrated Textile Park Ltd. (hereinafter referred to as ‘the assessee’) by moving an application for condonation of delay supported with an affidavit sought to condone the delay on the grounds inter-alia that the impugned order passed by the Ld. CIT(A) dated 27.02.2020 was entrusted to tax advisor

Shri R.S. Sharma, Chartered Accountant; that due to Covid-19 pandemic office of the chartered accountant remained closed as a precautionary measure and on 24.03.2022 nationwide lockdown was imposed; that due to Covid-19 the assessee could not collect the documents necessary for filing the appeal and consequently lost the track of the physical copy of the impugned order received from the tax advisor prior to Covid-19; that it is only after 20.03.2023 the misplaced notice/order came to the notice of the assessee and they engaged the tax advisor and immediately filed the appeal; that delay in filing the appeal is neither intentional nor wilful but due to the factor beyond the control of the assessee.

2. However, on the other hand, the Ld. D.R. for the Revenue opposed the application for condonation of delay on the ground that the late filing of appeals in this case is apparently malafide due to callous attitude of the assessee and prayed for dismissal of the application.

3. Keeping in view the averments made by the assessee in its application for condonation of delay supported with an affidavit that the delay is attributed to covid-19 and the inadvertent mistake on the part of the assessee that their office remained closed for a pretty long period and they have lost the track of the appeal to be filed in the court and that when they laid hand on the impugned order/notice they immediately filed the appeal, there are sufficient causes to condone the delay, to meet with the ends of justice keeping in view the law laid down by the Honourable Supreme Court in case of Land Acquisition Collector vs. MST Katiji & Others 167 ITR 471 (SC) wherein the Hon'ble Supreme Court has

held that “it is on contention of delay that when substantial justice and technical considerations are pitted against each other, the case of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done because of a non deliberate delay.” So in view of the matter delay of 1091 days in filing the present appeal is hereby condoned and present appeal is ordered to be registered and heard on merits today itself by the Bench.

4. The assessee by filing present appeal against the order dated 25.02.2020 passed by Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as the CIT(A)] confirming the penalty levied by the Assessing Officer (AO) under section 271(1)(c) of the Income Tax Act, 1961 (for short the Act) on the grounds inter-alia that:

“1. The Ld. CIT(A) has erred in confirming the penalty imposed by the Ld. AO vide its order dated 29.06.2018 for Rs.3,16,24,795/-u/s. 271(1)(c) of the Income tax Act, 1961 without considering the facts and circumstances of the case. The same be considered and the penalty be deleted.

2. The Ld. CIT(A) has erred in confirming the penalty without considering that the details were duly submitted during assessment proceedings to the Ld. AO and the same has been recorded by the Ld. AO in his assessment order u/s 143(3) of the ITA. The same be considered and the penalty be deleted.

3. The Ld. CIT(A) has not considered facts that, the amount of long-term capital loss of Rs.9,30,61,490/- had been duly mentioned in computation of income. Therefore, there was no concealment of any material facts by assessee and have submitted revised computation of income disallowing the loss to be carried forward. The same be considered and the penalty be deleted.

4. The Ld. CIT(A) has not taken into account material facts submitted during the appeal and has confirmed the penalty. The same be considered and penalty be deleted.

The assessee craves leave add, alter or delete to the grounds of appeal at the time of or before hearing.”

5. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : on the basis of assessment framed under section 143(3) of the Act making disallowance of Rs.9,30,41,469/- on account of capital loss claimed by the assessee in the return of income, initiated the penalty proceedings under section 271(1)(c) of the Act. Declining the contentions raised by the assessee the AO proceeded to levy the penalty to the tune of Rs.3,16,24,795/- being @ 100% of tax sought to be evaded.

6. The assessee carried the matter before the Tribunal by way of filing present appeal who has confirmed the penalty by dismissing the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing present appeal.

7. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

8. Undisputedly the assessee company in its return of income has claimed capital loss amounting to Rs.9,30,41,469/- (after indexation). It is also not in dispute that before passing the assessment order assessee company has filed revised return relinquishing its claim of capital loss by claiming that due to typographical error at the time of filing the original return the amount in question has been claimed as capital loss but without any

intention to carry forward and set off the loss against the profit as the company is already a loss making company.

9. In the backdrop of the aforesaid facts and circumstances of the case the order passed by Ld. lower authorities and arguments addressed by the authorized representatives of the parties to the appeal the sole question arises for determination in this case is:

“As to whether the assessee has furnished inaccurate particulars of income during the assessment proceedings?”

10. The Ld. A.R. for the assessee challenging the impugned order passed by Ld. CIT(A) contended that the capital loss claimed by the assessee company was due to inadvertence and clerical error and it has no intention to carry forward and set off the loss against profit as the company is already a loss making company. It is also further contended by Ld. A.R. for the assessee that before passing the assessment order the assessee company filed revised return of income by rectifying the error as to claiming the amount in question as capital loss which has been accepted and relied upon the order passed by the Honourable Delhi High Court in case of PCIT vs. National Textiles Corporation Ltd. (2023) 151 taxmann.com 512 (Delhi) and the order passed by the Hon'ble High Court of Karnataka in case of (2023) 151 taxmann.com 293 (Karnataka).

11. However, on the other hand, the Ld. D.R. for the Revenue while supporting the impugned order passed by the Ld. CIT(A) contended inter-alia that had there been no scrutiny the assessee would have gone scot free and it is a blatant case of furnishing of inaccurate particulars of income sufficient to attract part B of explanation (1) to section 271(1)(c) of the Act.

12. Keeping in view the undisputed facts and circumstances of the case that the assessee company is continuously in loss in the subsequent years as it has filed the return of income claiming loss of Rs.13,622/- and Rs.31,616/- in A.Y. 2016–17 and A.Y. 2017-18 respectively and as such had no occasion to carry forward and set off the loss against profit. Had the company been in profit and sought to carry forward and set off the loss against profit the intention would have been clear that the assessee company has furnished inaccurate particulars of income to claim the false capital loss.

13. So during the assessment proceedings the assessee company has made rectification by filing the revised return by relinquishing its inaccurate claim of capital loss of Rs.9,30,41,469/- which has been accepted.

14. So in these circumstances penalty could not have been imposed by the AO. Reliance is placed on the decision of Hon'ble High Court of Delhi in case of PCIT vs. National Textiles Corporation Ltd. (supra) wherein identical issue has been decided in favour of the assessee by returning following findings:

“INCOME TAX: Where assessee due to bona fide error wrongly claimed foreign exchange rate difference as an expense and after accepting said mistake it claimed depreciation on increased cost of plant and machinery, qua which foreign currency fluctuation loss had been incurred, since once error was pointed out assessee made a course correction before assessment order was passed, in said circumstances, Assessing Officer could not impose penalty upon assessee under section 271(1)(c)”

15. Furthermore, in order to invoke the explanation (1) existence of mens-rea is necessary for levying the penalty under section 271(1)(c) of the Act. For the reasons mentioned in the preceding

para that there is not an iota of evidence to prove that element of mens-rea was there while claiming the capital loss because the assessee company is consistently going into losses in the subsequent years and it has no intention to carry forward and set off the loss against the profit.

16. In view of the matter penalty levied by the AO and confirmed by the Ld. CIT(A) is not sustainable. Moreover explanation (1) is only in relation to concealment of particulars of income and not for furnishing of inaccurate particulars of income. All these facts go to prove that the AO has not applied his mind while initiating the penalty proceedings.

17. In view of what has been discussed above, we are of the considered view that the Ld. CIT(A) has erred in confirming the penalty levied by the AO under section 271(1)(c) of the Act, hence, the same is hereby ordered to be deleted.

18. Resultantly, the appeal filed by the assessee company is hereby allowed.

Order pronounced in the open court on 19.12.2023.

**Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

Mumbai, Dated: 19.12.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.