

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

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

**ITA No.4305/M/2014
Assessment Year: 2003-04**

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| DCIT, Circle 3(1), Room No.607, Aayakar Bhavan, Mumbai - 400020 | Vs. | M/s. ICICI Bank Ltd., ICICI Bank Towers, Bandra Kurla Complex, Mumbai - 51 PAN: AAACI1195H |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Ms. Aarti Vissanji, A.R.
Revenue by : Shri P.C. Chhotaray, Spl Counsel

Date of Hearing : 09 . 11 . 2023
Date of Pronouncement : 19 . 12 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

The appellant, DCIT, Circle 3(1), Mumbai (hereinafter referred to as ‘the Revenue’) by filing present appeal against the order dated 24.03.2014 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. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting of the penalty u / s 271(1)(c) of the IT Act on the assessee without appreciating the fact that the exemption u / s 10(23G) and u/s10(5) were not allowable in the case of

the assessee and making such claims amounts to furnishing of inaccurate particulars of income.

2. The appellant prays that the order of CIT (A) on the above ground be set aside and that of Assessing Officer be restored.

3. The appellant craves leave to amend or alter any ground or add a new ground which may necessary"

2. 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 Income Tax Act, 1961 (for short the Act) by making addition of Rs.70,90,29,837/- by way of reducing the deduction claimed by the assessee under section 10(23G) of the Act, initiated the penalty proceedings under section 271(1)(c) of the Act. Declining the contentions raised by the Assessing Officer (AO) proceeded to levy the penalty to the tune of Rs.21,07,00,000/- @ 100% of the tax sought to be evaded.

3. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the penalty by allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeal.

4. 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.

5. Undisputedly the assessee in its revised return claimed an amount of Rs.5,20,11,22,766/- as exempt under section 10(23G) of the Act for various components of income detailed as under:

| | | |
|------|-----------------------------|-------------------------|
| i) | <i>Interest income</i> | <i>Rs.408,63,41,366</i> |
| ii) | <i>Guarantee commission</i> | <i>Rs.6,16,23,120</i> |
| iii) | <i>Fees</i> | <i>Rs.13,01,16,944</i> |
| iv) | <i>Future interest lows</i> | <i>Rs.92,30,41,335</i> |
| | | <i>Rs.520,11,22,766</i> |

6. It is also not in dispute that the assessee again revised its claim made under section 10(23G) of the Act during the course of assessment proceedings detailed as under:

| | | |
|------|------------------------------|-------------------------|
| i) | <i>Interest Income</i> | <i>Rs.446,38,68,610</i> |
| ii) | <i>Guarantee Commission</i> | <i>Rs.6,16,23,121</i> |
| iii) | <i>Fee Income</i> | <i>Rs.21,03,80,849</i> |
| iv) | <i>Future Interest flows</i> | <i>Rs.91,32,27,037</i> |
| | | <i>Rs.564,90,99,618</i> |

7. It is also not in dispute that the assessee offered an amount of Rs.4,40,19,95,794/- as expenses worked out on the basis of modified gross profit margin of 22.08% and thereby claimed exemption under section 10(23G) to the tune of Rs.1,24,71,03,824/-. It is also not in dispute that the assessee without prejudice by following the decision of Ld. CIT(A) in erstwhile ICIC Limited for preceding assessment year 1998-99 to 2000-2001 has worked out the gross profit ratio at 22.08% and has offered Rs.405,29,14,994/- for disallowance as expenses. It is also not in dispute that the AO by proportionately allocating the expenditure to gross receipts and income arrived at from the infrastructure sector for a long exemption reduced the deductions claimed by the assessee under section 10(23G) of the Act by an amount of Rs.709,70,29,837/-. It is also not in dispute that the Ld. CIT(A) in quantum appeal reduced the deduction claimed under section 10(23G) to Rs.23,10,14,835/- from Rs.70,90,29,837/- made by the AO.

8. In the backdrop of the aforesaid facts and circumstances of the case, ground raised by the assessee and the argument addressed by the authorised 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 and concealment of income to attract the penal provisions contained under section 271(1)(c) of the Act?”

9. The Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) by relying upon the penalty order passed by the AO contended inter-alia that when the deduction claimed by the assessee has been reduced by the AO by Rs.70,90,29,837/-, which amount was reduced by Ld. CIT(A) to Rs.23,10,14,835/- doctrine of apportionment has to be applied; that it is the case of the assessee that it has not incurred any expenses but at the same time has failed to furnish record/real fact the AO had no option except to go for estimation; that even rule 8D of the Income Tax Rules is on the basis of estimation; that the AO has specifically invoked explanation (1) to section 271(1)(c) of the Act and by relying upon the decision rendered by Hon'ble Supreme Court in case of Union of India And Others vs. Dharmendra Textiles Processors And Others (2008) 306 ITR 277 (SC).

10. However, on the other hand, to repel the argument addressed by the Ld. D.R. for the Revenue the Ld. A.R. for the assessee contended that when the assessee was having sufficient own surplus funds no disallowance can be made; that when the AO by not agreeing with the method adopted by the assessee bank to compute the expenses and adopted his own method the penalty provisions contained under section 271(1)(c) of the Act are not attracted and

relied upon the decision of Honourable Supreme Court in case of CIT vs. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC); that explanation (1) to section 271(1)(c) invoked by the AO does not apply to furnishing of inaccurate particulars of income but it does apply to concealment of particulars; that merely because exempt income is computed differently by the AO vis-à-vis no case for penalty is made out.

11. We have perused the impugned order passed by the Ld. CIT(A) deleting the penalty levied by the AO. Operative part of which is extracted as under:

“The above grounds are taken together as they address a common issue.

5.1 I find from the records that the appellant has claimed exemption u/s.10(23G) in respect of tax free income amounting to Rs.124,71,03,824/-. Expenses apportioned by the assessee for earning the said income were found to be inadequate by the AO. Therefore, the AO reduced the exempt income u/s.10(23G) by Rs.70,90,29,837/- by applying the gross profit ratio @ 9.63% to the gross income received of Rs.5,58,74,76,497/-. As a result, the exempt income u/s.10(23G) was worked out to Rs.53,80,73,987/-. In view of the above, the AO made a disallowance of Rs.70,90,29,837/- in respect of exemption u/s.10(23G). On appeal the CIT(A) had given partial relief of Rs.23,10,14,835/- to the assessee on this issue and the effective disallowance confirmed by the CIT(A) comes to Rs.47,80,15,002/-.

I also find that the appellant has claimed exemption u/s. 10(15) in respect of tax free interest amounting to Rs.11,01,05,995/-. No expenses have been apportioned by the assessee for earning the said income on the ground that investment in tax free securities have been made out of its own cost free funds. Therefore, the AO reduced the exempt income u/s.10(15) by Rs.9,95,02,788/- by applying the gross profit ratio @ 9.63% to the gross interest received. As a result, the exempt income u/s. 10(15) was worked out to Rs.1,06,03,207/-. The AO therefore made a disallowance of Rs.9,95,02,788/- in respect of exemption u/s.10(15). On appeal, the CIT(A) had given partial relief of Rs.43,87,021/- to the assessee on this issue. Thus the effective disallowance confirmed by the CIT(A) comes to Rs.9,51,15,767/-.

Thus the AO came to a finding that the assessee has concealed the particulars of its income as envisaged by sec.271(1) in respect of the amounts aggregating to Rs.57,31,30,769/-.

5.2 In CIT v. Reliance Petroproducts (P.) Ltd. [2010] 189 TAXMAN 322 (SC), for the relevant assessment year, the assessee-company filed its return of income claiming interest expenditure in respect of loan incurred by it for purchasing shares by way of its business policies. The Assessing Officer disallowed said expenditure under section 14A and simultaneously levied penalty under section 271(1)(c) on account of concealment of income/furnishing of inaccurate particulars of income.

On appeal, the Commissioner (Appeals) deleted the penalty. The Tribunal confirmed the order of the Commissioner (Appeals). The revenue's appeal to the Court was also dismissed.

On appeal, the Hon'ble Supreme Court held the following:

"A glance of provision of section 271(1)(c) would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee Secondly, the assessee must have furnished inaccurate particulars of his income. The instant case was not the case of concealment of the income. That was not the case of the revenue either. It was an admitted position in the instant case that no information given in the return was found to be incorrect or inaccurate. It was not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee could not be held guilty of furnishing inaccurate particulars. The revenue argued that submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. Such cannot be the interpretation of the concerned words. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing of inaccurate particulars. [Para 7]

Therefore, it must be shown that the conditions under section 271(1)(c) exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed, because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. [Para 8]

The word 'particulars' must mean the details supplied in the return, which are not accurate, not exact or correct, not according to truth or erroneous. In the instant case, there was

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). A mere making of the claim, which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. [Para 9]

The revenue contended that since the assessee had claimed excessive deductions knowing that they were incorrect, it amounted to concealment of income. It was 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 for 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. Such contention could not be accepted 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 attract the penalty under section 271(1)(c). If the contention of the revenue was accepted, then in case of every return where the claim made was not accepted by the Assessing Officer for any reason, the assessee would invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature. [Para 10]

Therefore, the appeal filed by the revenue had no merits and was to be dismissed."

5.3 It has been held in CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P&H) following CIT vs. Metal Products of India (1984) 150 ITR 714 (P&H) and Harigopal Singh vs. CIT (2002) 258 ITR 85 (P&H) that in a case of addition based upon estimation, there can be no penalty unless the Income-tax Department brings something on record to indicate that there has been concealment on the part of the assessee.

5.4 It has been held in Balaji Vegetable Products P Ltd v CIT (2007) 290 ITR 72(Kar); Gopal D.Shetty v. ITO (2008) 298 ITR (AT) 49 (Pune); CIT v Femmantle India Television Production P Ltd(2007) 294 ITR 88 (Del) that merely because a claim for deduction was found to be inadmissible, penalty does not necessarily follow.

5.5 In view of the factual matrix narrated at para 5.1 here-in-above, the decisions in the case of CIT vs.K.P.Madhusudan 246 ITR 218 (Ker), K.P.Madhusudan vs. CIT 251 ITR 99 (SC) and UOI Vs. Dharmendra Textiles Processors (2008) 14 DTR judgements relied on by the AO is distinguishable from the case of the appellant.

5.6 In view of the ratio laid down in the judgements mentioned at para 5.2, 5.3 & para 5.4 here-in-above the penalty of Rs.21,07,00,000/- imposed by the AO u/s.271(1)© is deleted.”

12. By now it is settled principle of law that when the assessee has come up with computation of disallowance for the purpose of seeking exemption under section 10(23G) of the Act by adopting some permissible methods, computation by AO by adopting some other method does not and could not lead to the furnishing of inaccurate particulars by the assessee. The Honourable Supreme Court has decided this issue in case of Reliance Petro Product (supra) in favour of the assessee. The Honourable Supreme Court has held, “merely making an incorrect claim in law cannot tantamount furnishing of inaccurate particulars but instant case of the assessee is on better footing because here the disallowance is computed differently by the assessee as well as AO by adopting different methods which leads to the addition on the basis of penalty provisions have been invoked.

13. In other words when the addition is based upon estimation there can be no penalty unless revenue authorities bring on record to indicate that the assessee has furnished inaccurate particulars of income as has been held by Hon'ble Punjab and Haryana High Court in case of CIT vs Dhillon Rice Mills (2002) 256 ITR 447. The AO has failed to specify in the show-cause notice issued u/s 271(1)(c)/274 of the Act if the assessee has concealed the particulars of income or has furnished inaccurate particulars of

income and relied upon the decisions of Hon'ble Karnataka High Court in CIT vs. SSA's Emerald Meadows -73 taxmann.com 241 (Kar.) (Revenue's SLP dismissed in 242 taxman 180) and Hon'ble High Court of Delhi in Pr. CIT vs. Sahara India Life Insurance Company Ltd. in ITA 475/2019 order dated 02.08.2019. In order to proceed further we would like to peruse the notice dated 29.12.2006 issued by the AO under section 274 read with section 271(1)(c) of the Act to initiate the penalty proceedings which is extracted as under for ready perusal:

आई.टि.एन.एस.-29. I.T.N.S.-29

आयकर अधिनियम, 1961 की धारा 271 के साथ पढ़ी गई धारा 274 के अधिन सूचना
NOTICE UNDER SECTION 274 READ WITH SECTION 271 OF
THE INCOME-TAX ACT, 1961

Pen. 32/4/06.07

आयकर कार्यालय / Income-tax Office,

सेवा में, / To, m/s ICICI Bank Ltd.
Taxmi commercial complex
2nd Floor, E. wing
B.K.C. Bandra (E) Mumbai - 400051

29/12/2006
तारीख / Dated

चूंकि कर निर्धारण वर्ष _____ के सम्बन्ध में मेरे यहाँ होने वाली कारवाई के दौरान मुझे प्रतीत होता है कि आपने :-

Whereas in the course of proceeding before me for the assessment year 2004-05 it appears to me that you :-

* बिना उचित कारण के वह आय विवरणी नहीं दी है जो आपको भारतीय आयकर अधिनियम, 1922 की 22(1)/22(2)/34 के अधीन दी गई सूचना के अनुसार देनी थी या जो आपको धारा 139(1) के अधीन या आयकर अधिनियम, 1961 के धारा 139 (2)/148 के अधीन दी गई सूचना सं. _____ ता. _____ अनुसार दाखिल करनी थी अथवा उचित कारण के बिना आपने दिए गए समय के अन्दर और उक्त धारा 139(1) या इस प्रकार की सूचना द्वारा अपेक्षित रीति से विवरण नहीं दी है।

* have without reasonable cause failed to furnish me return of income which you were required to furnish by a notice given under section 22 (1)/22 (2) 34 of the Indian Income-tax Act, 1922 or which you were required to furnish under section 139(1) or by a notice given under section 139 (2)/148 of the Income Tax Act, 1961, No. dated or have without reasonable cause failed to furnish it within the time allowed and the manner required by the said section 139 (1) or by such notice.

(क.पू.उ/P.T.O)

14. Bare perusal of the notice issued u/s 274 read with section 271(1)(c) of the Act, extracted above, in order to initiate the penalty proceedings against the assessee goes to prove that the AO himself was not aware / sure as to whether he is issuing notice to initiate the penalty proceedings either for “concealment of particulars of income” or “furnishing of inaccurate particulars of such income” by the assessee rather issued vague and ambiguous notice by incorporating both the limbs of section 271(1)(c). When the charge is to be framed against any person so as to move the penal provisions against him/her, he/she is required to be specifically made aware of the charges to be leveled against him/her.

15. Hon’ble Apex Court in case of CIT vs. SSA’s Emerald Meadows - (2016) 73 taxmann.com 248 (SC) while dismissing the SLP filed by the Revenue quashing the penalty by the Tribunal as well as Hon’ble High Court on ground of unspecified notice has held as under:-

“Section 274, read with section 271(1)(c), of the Income-tax Act, 1961 - Penalty - Procedure for imposition of (Conditions precedent) - Assessment year 2009-10 - Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271 (1)(c) was bad in law, as it did not specify under which limb of section 271 (1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income - High Court held that matter was covered by aforesaid decision of Division Bench and, therefore, there was no substantial question of law arising for determination - Whether since there was no merit in SLP filed by revenue, same was liable to be dismissed - Held, yes [Para 2] [In favour of assessee]”

16. Hon'ble Delhi High Court in case of Pr. CIT vs. Sahara India Life Insurance Company Ltd. in ITA 475/2019 order dated 02.08.2019 while deciding the identical issue held as under :-

“21. The Respondent had challenged the upholding of the penalty imposed under Section 271 (1) (c) of the Act, which was accepted by the ITAT. It followed the decision of the Karnataka High Court in CIT v. Manjunatha Cotton & Ginning Factory 359 ITR 565 (Kar) and observed that the notice issued by the AO would be bad in law if it did not specify which limb of Section 271(1) (c) the penalty proceedings had been initiated under i.e. whether for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Karnataka High Court had followed the above judgment in the subsequent order in Commissioner of Income Tax v. SSA's Emerald Meadows (2016) 73 Taxman.com 241 (Kar) , the appeal against which was dismissed by the Supreme Court of India in SLP No. 11485 of 2016 by order dated 5th August, 2016.”

17. Following the decisions rendered in the cases of CIT vs. Manjunatha Cotton and Ginning Factory [2013] 359 1TR 565/218 Taxman 423/35 taxmann.com 250, CIT vs. SSA's Emerald Meadows and Pr. CIT vs. Sahara India Life Insurance Company Ltd. (2016) 73 Taxman.com 241 (Kar), we are of the considered view that when the notice issued by the AO is bad in law being vague and ambiguous having not specified under which limb of section 271(1)(c) of the Act the same has been issued, the penalty proceedings initiated u/s 271(1)(c) are not sustainable.

18. Not only this, it is also brought on record by the Ld. A.R for the assessee that the AO has proceeded to levy the penalty on the basis of notice dated 10.03.2012 whereas no such notice was issued rather notice dated 29.12.2016 was issued as discussed in the preceding paras. Perusal of para 3 of the penalty order vis-a-vis notice issued by the AO under section 274 read with section 271(1)(c) of the Act available at page 1 & 2 of the paper book

apparently lead to basic contradictions which goes to prove that the AO while initiating the penalty proceedings as well as during the penalty proceedings was not aware of the correct facts as to on the basis of which of the notice he is going to levy the penalty.

19. Furthermore, para B of explanation (1) to section 271(1)(c) of the Act invoked by the AO as is evident from para 5 of the penalty order is not applicable to the facts circumstances of the case. It is not applicable to this case because the same is applicable to concealment of particulars of income by the assessee where as in the instant case the assessee is alleged to have furnished inaccurate particulars of income while claiming exempt income under section 10(23G) of the Act.

20. In view of what has been discussed above, we are of the considered view that the Ld. CIT(A) has rightly deleted the penalty levied by the AO. Finding no illegality or perversity in the impugned order the appeal filed by the Revenue is hereby dismissed.

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.