

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

**Before: Shri Waseem Ahmed, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA Nos: 388, 379, 389 & 386/Ahd/2023
Asst Years: 2009-10, 2011-12, 2013-14 & 2014-15**

The ACIT (Exemption) Circle-2, Ahmedabad (Appellant)	Vs	Vadodara Urban Development Authority Vuda Bhavan, L & T Circle, Karelibaug, Vadodara Gujarat 390018 PAN: AAABV0141M (Respondent)
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**Revenue Rep: Dr. Darsi Suman Ratnam, CIT-DR &
Shri Purushottam Kumar, Sr. D.R.
Assessee Rep: Shri Hardik Vora, A.R.**

Date of hearing : 15-02-2024
Date of pronouncement : 28-02-2024

आदेश/ORDER

PER BENCH:-

These four appeals are filed by the Revenue as against separate appellate orders dated 14.12.2022 and 19.12.2022 passed by Commissioner of Income Tax [Appeals], National Faceless Appeal Centre [NFAC], Delhi deleting the Penalty levied under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Years 2009-10, 2011-12, 2013-14

& 2014-15. Since common issue is involved in all these penalty appeals, the same are disposed of by this common order.

2. The registry has noted that there is a delay of 95 days in filing the above appeals by the Revenue. The reasons given by the Revenue are as follows:

“3. The chronology of events are submitted as under:

i) The Ld. CIT(A) has passed appeal order on 14/12/2022 and the same is uploaded to ITBA system.

(ii) This office downloaded appeal orders on 22/12/2022 and forwarded the same to the JCIT(E), R-2, Ahmedabad on 22/12/2022 with request to submit scrutiny report.

(iii) The DCIT(E) Cir-2, Ahmedabad had submitted scrutiny report vide his letter dated 12/05/2023 and the JCIT(E), R-2, Ahmedabad the same is forwarded to the office of the CIT(E), Ahmedabad on 15/05/2023.

4. The A.O. & Range head has submitted reasons for condonation delay that the appeal could not be filed within time due to heavy workload, shortage of staff, giving appeal effect to the order of Hon'ble Supreme Court vide civil appeal No.21762 of 2017 as many cases pertains to jurisdiction of DCIT Cir-2, Ahmedabad and the AO was busy in handing internal and revenue audit objection.

5. In view of the above facts and circumstance, it is humbly submitted that the delay in filing appeal is bonafide and not intentional and therefore it is humbly requested to kindly admit the same in the interest of substantive justice for which the undersigned will always be obliged.”

2.1. The reasons given above are not very much convincing, though the impugned orders were sent to JCIT (Exemption), Range-2 on 22.12.2022 itself with a request to submit scrutiny report on the appellate orders, but the DCIT (Exemption), Circle-2 submitted the scrutiny report after four months vide letter dated 12.05.2023

claiming that the delay is due to heavy workload, shortage of staff, giving appeal effect to the order of Hon'ble Supreme Court vide Civil Appeal No. 21762 of 2017 and he was busy in handling internals and Revenue Audit Objection matters.

2.2. Ld. Counsel Mr. Hardik Vora appearing for the assessee fairly stated that he has no objection in condoning the delay, since the respondent/assessee also statutory body, there was a delay of 397 days in filing the penalty appeals before Ld. CIT(A), which were condoned by the Ld. CIT(A) on account of heavy workload and shortage of man power in VUDA.

3. In our considered opinion, the Revenue always should keep in mind the "time clock" for preparing further appeals and get necessary approvals well before the time frame and file the appeal within the statutory time limit. With this observation, we hereby condone the delay of 95 days in filing the above appeals by the Revenue and take up the appeals for adjudication.

4. ITA No.386/Ahd/2023 is the taken as the lead case. The brief facts of the case is that the assessee is an autonomous body which is established under section 22 of the Gujarat Town Planning and Area Development Act, 1976 and Rules thereunder carrying Planned Development areas as defined and designed by the Government of Gujarat and also infrastructural activities relating thereto such as to undertake the preparation of development plans, monitoring and control of development of town planning as construction of Roads, bridges and carried out work in connection with supply of water, disposal of sewerage and drainage system for

the benefit of public at large. The assessee Trust is registered u/s. 12AA of the Act. For the Assessment Year 2014-15, the assessee filed its Return of Income on 28.09.2014 declaring total income at NIL after claiming deduction of Rs.18,92,93,630/- under section 11 of the Act. The return was selected for scrutiny and the A.O. assessed the income of the assessee at Rs.56,98,93628/- by denying exemption u/s.11 of the Act and making the following disallowances:

(a) Development Charges VUDA	Rs. 1,57,60,372/
(b) Development Charges BMC	Rs. 90,94,596/-
(c) Amenities fees	Rs. 35,20,32,264/-
(d) Impact fees	Rs. 19,07,405/-
(e) Addition to Fixed Assets	Rs. 18,51,602/-

4.1. Aggrieved against the additions, the assessee filed an appeal before Commissioner of Income Tax (Appeals) who has allowed the appeal in favour of the assessee.

5. Aggrieved against the same, the Revenue was in appeal before Income Tax Appellate Tribunal wherein the Co-ordinate Bench of this Tribunal vide common order dated 05.02.2019 and following Jurisdictional High Court judgment in the case of Ahmedabad Urban Development Authority [AUDA] -Vs.- ACIT 396 ITR 323 (Guj.) and CIT Vs. Gujarat Industrial Development Corporation [GIDC] (2017) 89 taxmann.com 366 (Guj.) allowed the claim of the assessee towards exemption u/s. 11 of the Act and deleted the disallowance made by the Assessing Officer.

6. Aggrieved against the Tribunal Order, the Revenue is in appeal before the High Court of Gujarat in Tax Appeal Nos. 658, 662, 665

and 667 of 2019 wherein the Hon'ble High Court admitted Substantial Questions of Law on 16.09.2019 and pending disposal.

6.1. In the meanwhile, the Assessing Officer initiated Penalty proceedings and issued a show cause notice to the assessee that the receipts to the tune of Rs.38,06,46,239/- has not been offered for taxation by treating the same as capital receipt. This receipt includes (i) Amenities fees of Rs.35,20,32,264/- (ii) Impact fees of Rs. 19,07,405/-, (iii) BMC Development Charges of Rs.90,94,596/-, (iv) VUDA Development charges of Rs1,57,60,372/- and (v) Addition to fixed assets of Rs.18,51,602/- According to the Accounting Principles, all these receipts received during the year are to be routed through profit and loss account or income and expenditure statement prepared at the end of the Financial Year. However, the assessee has directly reflected these receipts in its Balance-sheet, which is against the Standard Accounting Principle. The AO added these receipts to the total income of the assessee by treating it as Revenue Receipt and accordingly computed the tax and also initiated penalty proceeding u/s 271(1)(c) of the Act for furnishing inaccurate particulars of income on both the issues viz (i) disallowance of exemption claimed u/s 11 and 12 by invoking the provision of section 2(15) of the Act and (ii) Revenue receipts not offered for taxation under the disguise of it being capital receipt.

7. In response the Assessee made a detailed reply stating that as per the provisions of Section 271[1][c] of the Act penalty can be levied only if the assessee has furnished inaccurate particulars of income or has offered an explanation which they can't substantiate,

however in the case of the assessee they have not furnished any inaccurate particulars nor they have offered any explanation which they can't substantiate, and hence the conditions specified for the levy of penalty has not been satisfied and therefore the penalty under section 271(1)(c) can't be levied in their case. The assessee relied on the various judgments under which it has been decided that the penalty can't be levied under section 271(1) (C) only because the deduction claimed has not been allowed viz:

- a. Reliance Petro Products Pvt. Ltd. (2010)230 CTR 320 (SC)
- b. M/s Aakar Associates ITA No. 3516/Ahd/2010
- c. Liberty India Vs CIT 317 ITR 218
- d. CIT Vs Sterling Foods India (1999) 237 ITR 579
- e. CIT Vs Budh Well Co Operative Sugar Mills P&H HC
- f. CIT Vs Harshvardhan - Rajasthan High Court
- g. CIT Vs Raj Overseas (2011) 336 ITR 261 (P&H)
- h. CIT Vs Lakhani India Ltd. (2010) 324 ITR 73 (P&H)

7.1. The assessee also submitted the penalty proceedings are separate from assessment proceedings. What is valid for the purpose of making addition is not valid for the purpose of levy of penalty. In penalty- proceedings something more is required to be proved. There may be several considerations on which additions may be made by the Ld AO, but penalty u/s. 271(1)(c) cannot be initiated on all such grounds. For initiation of penalty u/s.271(1)(c), the conditions mentioned under the said section must be fulfilled. So long as the said conditions are not fulfilled penalty cannot be levied, which has been settled in the following cases:

- a. ACIT v/s Advance Film Club 45 TTJ 259 (AHD)
- b. ITO v/s Ambica Agencied 50 ITD 31 (Hyd) (SMC)
- c. Jumabhai Premchand (HUF) v/s CIT 243 ITR 812 (Guj.)

7.2. The assessee further submitted that in the case of Navnital Zaveri reported in 125 ITR 385 (Guj) it was held that only because there was variation between the returned income and assessed income by virtue of addition or disallowance made because of deemed income assessed, no penalty u/s 271(1)(c), is to be levied. Similar view was taken by Madras High Court in the Case of CIT Vs Ramaswamy Naidu 208 ITR 377.

8. However the Assessing Officer was not satisfied with the above reply filed by the assessee and levied a minimum penalty of Rs.7,97,59,946/- under section 271(1)(c) of the Act.

9. Aggrieved against the Penalty orders, the assessee filed further appeal before Ld. CIT(A). The Ld. CIT(A) after taking note of the Tribunal decisions in assessee's own case on quantum appeals and thereby deleted the penalties levied by the AO, observing as follows:

6.1 The only issue involved in this case is levy of penalty u/s 271(1)(c) amounting to Rs.7,97,59.946/-. During the course of appellate proceedings, it was informed that for the said year under consideration against the quantum addition made u/s 143(3)/147 dated 29.12.2016 where the exemption claimed u/s 11 of the IT Act was denied to the appellant, the appellant had filed an appeal with the First Appellate Authority, in which part relief was allowed to it. Subsequently, the Department preferred further appeal against the order of the First Appellate Authority allowing part relief to the appellant. The Hon'ble ITAT 'D' Bench, Ahmedabad vide its order dated 05.02.2019 has decided the appeal in favour of the appellant. The relevant portion of the Hon'ble ITAT's order No ITA Nos 2435,2436 & 2437/Ahd/2017 dated 05.02.2019 for AYs 2009-10, 2011-12 & 2014-15 is reproduced hereunder for the sake of clarity:-

7. Heard the respective parties and perused the relevant materials available on record. We have also perused the order passed by the Co-ordinate Bench in ITA 0.2751/Ahd/2014 for Asst Year 2010-11, relevant portion whereof is as follows:

"We find that in similar set of facts the Jurisdictional High Court passed the orders in the case of Urban Development Authority-vs-ACIT, where it was held follows

"Held that the object and purpose of permitting the Authority to sell the plots to a maximum extent of 15% of the total area, was to meet the expenditure for providing infrastructural facilities like gardens, roads, lighting, water supply, drainage system, etc. The reasons for selling the plots by holding public auction were: (a) to avoid any further allegation of favoritism and nepotism and (b) so that the maximum market price could be fetched, which could be used for the development of the urban development area. Considering the fact that the assessee was a statutory body, an Authority constituted under the provisions of the Act, to carry out the object and purpose of Town Planning Act and collected regulatory fees for the object of the Acts, no services were rendered to any particular trade, commerce or business, and whatever income was earned by the assessee even while selling the plots (to the extent of 15% of the total area covered under the Town Planning Scheme) was required to be used only for the purpose to carry out the object and purpose of the Town Planning Act and to meet the expenditure of providing general utility service to the public such as electricity, road, drainage, water etc and the entire control was with the State government and accounts were also subjected to audit and there was no element of profiteering at all. The activities of the assessee could not be said to be in the nature of trade, commerce and business and therefore, the proviso to Section 2(15) of the Act was not applicable so far as the assessee was concerned. Therefore, the assessee was entitled to exemption under section 11."

Apart from that CIT-is-Gujarat Industrial Development Corporation, wherein it was held as follows.

"Section 2(15), read with section 11, of the Income-tax Act, 1961 Charitable purpose (Objects of general public utility) - Assessment

year 2009-10 Whether where assessee corporation was constituted under Gujarat Industrial Development Act. 1962, for purpose of securing and assisting rapid and orderly establishment and organization of industrial areas and Industrial estates in State of Gujarat, and for purpose of establishing commercial centers in connection with establishment and organization of such industries it could not be said that activities carried out by assessed were either in nature of trade, commerce or business, for a Cess or Fee or any other consideration so as to attract proviso to section 2(15) and same could be said to be for charitable purpose and, consequently.. Assessee was entitled to exemption under section 11- Held, yes (Paras 15 and 17) favour of assessee]"

8. We find that the issue involved in this matter is squarely covered by the order passed by the Co-ordinate Bench in ITA No. 2751/Ahd/2014 is narrated hereinabove and respectfully following the same we allow the claim of the assessee towards exemption u/s 11 of the Act and delete the order of disallowance of exemption and an addition of Rs. 2,38,37,730/-

9. In the result, out of the five appeals two preferred by assessee are allowed and rest three preferred by the Revenue are dismissed.

6.2 The claim of the appellant was forwarded to the JAO in view of the order of the Hon'ble ITAT dated 05.02.2019 submitted by the appellant wherein quantum addition/disallowance of exemption u/s 11 of the Act has been deleted. It was also enquired whether any further decision of Hon'ble High Court on this issue has been rendered in the case of the appellant. The comments of the JAO were requested on 23.11.2022 through ITBA Portal on this combined order of the Hon'ble ITAT in ITA Nos. 1692 & 1693/Ahd/2017 for AYs 2012-13 & 2013-14 and in ITA Nos. 2435, 2436 & 2437/Ahd/2017 for AYs 2009-10, 2011-12 & 2014-15 respectively However, no response had been received till date.

6.3 In view of the above, respectfully following the order of the Hon'ble ITAT, since, the quantum addition itself has been deleted by the Hon'ble ITAT, the penalty levied by the AO cannot be sustained. Accordingly, the grounds of the appeal are allowed.

6.4 Without prejudice, as regards to the other grounds of appeal raised by the appellant, in view of the discussion in the preceding paragraphs since the penalty levied has not been sustained, the same being academic in nature are not adjudicated.

7. In the result, the appeal is partly allowed.”

10. Aggrieved against the appellate orders, the Revenue is in appeal before us raising the following Grounds of Appeal:

(i) Whether in the facts and in the law the Ld.CIT(A) was right in deleting the penalty levied on the issue of revenue receipts not offered for taxation after holding that the Hon'ble ITAT has deleted the quantum addition and therefore the penalty levied by Assessing Officer could not be sustained, ignoring the fact that the issue on which the impugned penalty was levied, was not adjudicated upon by ITAT?

(ii) The appellant crave leave to add, amend, delete or modify ground of appeal before the finalization of appeal.

11. Ld. CIT-DR in support of its Grounds of Appeal submitted that the Ld. CIT(A) is not correct in deleting the penalty levied u/s. 271(1)(c) of the Act, on the issue of claim of Revenue receipts not offered for taxation by the assessee and thereby requested to restore the penalty levied u/s.271[1][c] of the Act.

12. Per contra Ld. Counsel for the assessee submitted that as against the quantum appeals filed by the Revenue wherein the additions made by the Assessing Officer were deleted and the assessee was granted exemption u/s. 11 of the Act by the Co-ordinate Bench of this Tribunal in assessee's own case in ITA Nos. 2435, 2436 & 2437/Ahd/2017 which is reproduced by the Ld. CIT(A) in his order. The Co-ordinate Bench of this Tribunal has

followed Jurisdictional High Court Judgment in the case of AUDA and GIDC wherein activities carried out could not said to be in the nature of trade, commerce and business and therefore the proviso to Section 2(15) of the Act was not applicable so far as the assessee was concerned and thereby allowed exemption u/s. 11 of the Act. This judgment of AUDA and GIDC is confirmed by the Hon'ble Supreme Court in the case of CIT vs. AUDA reported in (2022) 143 taxmann.com 278 (SC). Further as against the quantum appeal Revenue's appeal before Hon'ble Gujarat High Court were admitted the Substantial Questions of Law and the same are pending disposal. Thus the Ld. CIT(A) is correct in deleting the penalty levied u/s. 271(1)(c) of the Act, which does not require any interference.

13. We have given our thoughtful consideration and perused the materials available on record including the Paper Book and Case Laws filed by the assessee and that of the Revenue. It is seen from the impugned order that the before disposal of the penalty appeals, Ld. CIT(A) asked for the information from the Jurisdictional Assessing Officer about the status of the quantum appeals passed by the ITAT. However the JAO failed to furnish the details relating to the quantum appeals pending before High Court. Therefore the Ld. CIT(A) held that the quantum additions itself has been deleted by the ITAT, the penalty levied thereon cannot be sustainable and deleted the penalty levied u/s. 271(1)(c) of the Act. We do not find infirmity in the order passed by the Ld CIT [A].

13.1. As against the quantum appeal common order passed by the co-ordinate Bench of this Tribunal, the Revenue is in appeal before the Hon'ble Gujarat High Court and admitted with the following Substantial Questions of Law:

“[A] Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was justified in holding the activities of the assessee as charitable in nature as per the definition contained u/s. 2(15) of the Income Tax Act, 1961, ignoring the facts that receipts of the assessee from the activities falls in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, and hence the same cannot be regarded as activities for charitable purpose in view of proviso to Section 2(15) of the Act?”

[B] Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was justified in allowing benefit of section 11 of the Act to the assessee without appreciating that the assessee is covered under the proviso to section 2(15) of the Act?”

[C] Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was justified in allowing the claim of exemptions under Section 11(1) on Rs.37,87,94,637/- being the revenue receipts without appreciating that the proviso to Section 2(15) r.w.s. 13(8) of the Act is applicable to the assessee?”

[D] Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was justified in allowing the claim of exemption under Section 11(1) on Rs.18,51,602/- on additions to assets, without appreciating that the proviso to section 2(15) r.w.s. 13(8) of the Act is applicable in the case of assessee?”

[E] Whether on the facts and circumstances of the case and in law, the Appellate Tribunal was justified in allowing exemption u/s. 11 of the Act on Net surplus of Rs.18,92,47,389/- without appreciating that the proviso to Section 2(15) r.w.s. 13(8) of the Act is applicable to the assessee?”

13.2. It is further submitted by the assessee that the above quantum appeals are pending disposal before Hon'ble High Court

of Gujarat. The Co-ordinate Bench of this Tribunal has followed Jurisdictional High Court Judgment in the case of AUDA and GIDC wherein activities carried out by the said Local Authorities could not said to be in the nature of trade, commerce and business and therefore the proviso to Section 2(15) of the Act was not applicable so far as the assesseees are concerned and thereby allowed exemption u/s.11 of the Act and consequently deleted the disallowances made by the AO. These judgments of M/s. AUDA and M/s. GIDC are now confirmed by the Hon'ble Supreme Court in the batch of cases reported in CIT vs. AUDA (2022) 143 taxmann.com 278 (SC).

14. Further, the Hon'ble Jurisdictional High Court in the case of Sun Pharmaceuticals Ind. Ltd. V DCIT [2009] 227 CTR 206 (Guj) have held that expenditure on right to use leasehold land are allowable as revenue expenditure, which means such issue is also highly debatable and therefore no penalty under Section 271(1)(c) can be levied on it.

14.1. The Hon'ble Supreme Court in case of CIT v/s Reliance Petro Products Ltd. 322 ITR 158 has held as under:

"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.

11. In this behalf the observations of this Court made in Sree Krishna Electricals v. State of Tamil Nadu[2009] 23 VST 249 as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the Return. However, the said transactions were reflected in the accounts of the assessee. This Court, therefore, observed:

"So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."

The situation in the present case is still better as no fault has been found with the particulars submitted by the assessee in its Return.

12. The Tribunal, as well as, the Commissioner of Income-tax (Appeals) and the High Court have correctly reached this conclusion and, therefore, the appeal filed by the revenue has no merits and is dismissed."

15. Further, the Hon'ble Jurisdictional High Court in case of PCIT -Vs- Jamnagar District Co Operative Bank Ltd. in Tax Appeal No. 365 of 2015 dated 09/06/2016 held as follows:

".....All facts were on record to enable the Assessing Officer to make the addition if he was of the opinion the claim made by the assessee was not sustainable in law. A bonafide raising of a wrong claim by itself would not give rise to penalty. Supreme Court in the case of Reliance Petroproducts Pvt Ltd (supra) held that where there is no concealment of particulars of income, penalty cannot be imposed. It was held that submitting incorrect claims in law do not give rise to penalty proceedings....."

16. Respectfully following the above judicial precedents, we have no hesitation in confirming the order passed by the Ld. CIT(A). Thus the grounds raised by the Revenue is devoid of merits and the same is hereby dismissed.

17. In the result, **the appeal filed by the Revenue in ITA No.386/Ahd/2023 is hereby dismissed.**

18. **ITA Nos. 388, 379 & 389/Ahd/2023 are filed by the Revenue on identical grounds,** following the decision rendered in ITA No.386/Ahd/2023 is squarely applicable to facts of the present cases and **the same are also dismissed.**

Order pronounced in the open court on 28-02-2024

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 28/02/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद