THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

Before: Shri Siddhartha Nautiyal, Judicial Member
And Shri Makarand V. Mahadeokar, Accountant Member

ITA No. 463/Ahd/2022 **Assessment Year : 2011-12**

N.K. Proteins Ltd., 7th Floor, Popular House, Ashram Road, Ahmedabad PAN: AAACN9377N (Appellant)	Vs	The DCIT, Circle-3(1)(1), Ahmedabad (Respondent)

Assessee by: **Shri Vartik Choksi, A.R.**
Revenue by: **Shri Ketan Gajjar, CIT-D.R.**

Date of hearing : 03-06-2024
Date of pronouncement : 13-06-2024

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax, CIT(A)-11, Ahmedabad, in proceeding u/s. 250 vide order dated 27/09/2022 passed for the assessment year 2011-12.

2. The assessee has taken the following grounds of appeal:-

"1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming the legality of the Assessing Officer's order passed u/s. 271(1)(c) of the Act imposing penalty for furnishing inaccurate particulars of income.

1.1 While passing the penalty order, the learned CIT(A) has disregarded the fact that the issues on which penalty have been imposed are sub-judice before Honorable ITAT and in view of judicial precedents of Madras High Court in case of Rayala Corporation [161 Taxman 127(Madras)J and Ahmedabad ITAT in case of GE India Industries Pvt. Ltd (33 Taxman.com 15), passing an order in present case is illegal and void-ab-initio.

2. On the facts and in the circumstance of the case, the learned CIT(A) erred in confirming penalty levied by the Assessing Officer u/s. 271(1)(c) of the Act with regards to loss on account of trading in cotton wash oil amounting to Rs. 14,42,91,136/-.

3. On the facts and in the circumstance of the case, the learned CIT(A) erred in confirming penalty levied by the Assessing Officer u/s. 271(1)(c) of the Act with regards to disallowance of transaction charges amounting to Rs. 1,30,29,338/-.

4. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal."

3. At the outset, before us, the counsel for the assessee submitted that the issue pertains to levy of penalty under section 271(1)(c) of the Act, with regards to two additions made by the assessing officer during the course of assessment proceedings. The first addition is with regards to loss on account of trading in cotton wash oil amounting to ₹ 14,42,91,136/- and the second addition is on account of disallowance of transaction charges amounting to ₹ 1,30,29,338/-. However, the counsel for the assessee submitted before us that in the quantum appeal relating to both of the above additions, the ITAT vide order dated 16-11-2022 in ITA Nos. 328, 329/Ahd/2017 & 1211,

1213/Ahd/2018 has deleted both the additions referred to above, and therefore, since both the quantum additions itself have been deleted by ITAT in assessee's own case for the same assessment year i.e. AY 2011-12, penalty imposed on the assessee u/s 271(1)(c) of the Act has no legs to stand on and is liable to be deleted.

4. It would be useful to reproduce the relevant extracts of the ruling for ready reference. We observe that ITAT in assessee's own case for assessment year 2011-12 vide order dated 16-11-2022 has deleted the additions, therefore, it is pertinent to reproduce the relevant extracts of the ruling for ready reference:

> *"2. First we take up ITA No.328/Ahd/2017 for AY 2011-12 in the case of N.K. Proteins Pvt. Ltd. and the grounds of appeal raised therein are as under:*
> *1. On the facts and in the circumstances of the case, the CIT(A) has erred in not accepting Appellant's plea that the order passed by the Ld.CIT(A) is bad in law and void ab initio.*
> *2. On the facts and in the circumstances of the case, the Ld.CIT(A) ought to have accepted that assessment order was barred by limitation.*
> *3. On the facts and in the circumstances of the case, the learned CIT(A) is not correct in observing that the Assessing Officer had right reasons to believe that special audit was required in the given case.*
> *4. On the facts and in the circumstances of the case, the Ld.CIT(A) has erred by confirming the Assessing Officer's decision that the loss of Rs.14,42,91,136/- is speculative in nature.*
> *5. On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of transaction charges of Rs.2,65,865/- u/s.40(a)(ia) in as much as Section 194H is not applicable, since the transaction charges is not the commission or brokerage within the meaning of Section 194H.*
> *6. On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of transaction charges of Rs.1,30,29,338/- in as much as there is no obligation on the part of assessee to recover such amount from the client and the assessee is following consistent practice not to recover such charges from client.*

7. On the facts and circumstances of the case, the Ld.CIT(A) has erred in confirming the disallowance of depreciation of Rs.6,04,648/- without appreciating the tax audit report and the production sheet.

7. The Ld. DR submitted that as regards ground No.4, there was no transfer of goods and the assessee could not explain as to why the route of exchange, i.e. NSEL has been taken. The DR relied upon the assessment order and the order of the CIT(A). The Ld. D.R. submitted that the borrowers and lenders entered into a pair of contracts for every deal and conceptually NSEL was set up as an online trading platform for a number of commodities and each commodity as its delivery locations at NSEL designated warehouse or accredited godowns. But as per information the said platform was misused. Client of M/s. N. K. Proteins Pvt. Ltd. submitted that M/s. N. K. Industries Ltd. executed T+3 contract in the electronic platform of NSEL whereby N. K. Industries Ltd. sold 100 kg. of castor seeds to another prospective investor/client of another broker of NSEL for Rs. 100/-. The another prospective investor client of NSEL in turn executes T+36 trade contract on the electronic platform of NSEL whereby it sells the castor seeds to another client of M/s. N. K. Proteins Ltd. such as M/s. N. K. Corporation which is an associate concern for Rs. 110/-. Thereafter, the associate concern i.e. M/s. N. K. Corporation carry out intra group sale back to M/s. N. K. Proteins Ltd. to square off the sale/purchase transactions and to maintain the stock position. All these three transactions were executed simultaneously and after the above set off of circular transactions, M/s. N. K. Proteins Ltd. has to receive the amount on the 3rd day from prospective investor and the subsidiary concern of M/s. N. K. Proteins Ltd. has to pay to the prospective investor after 36 days. In this way the T+36 contracts are rolled over from one settlement cycle to next cycle. The Ld. D.R. further submitted that the assessee itself has not reflected these transactions as financial transaction in its books of accounts. Therefore, the addition of Rs. 14,42,91,136/- is justifiable.

8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note here that the Ld. AR submitted before us that the transactions were entered into with a view to avail finance for the business requirements of the assessee and the loss represented the cost to get the funds to run the business. The trading facility available on NSEL attracted the assessee to enter into such transaction. But the Assessing Officer has observed that if the assessee's contention that it is a finance transaction, then it attracts the interest element which is not reflected in assessee's account. Though the contention of the assessee is that it should not be taken as speculative loss, the test of speculative loss can only be determined when the transaction itself is speculative, but in the present case the transaction was that of payment made by banking channel through account payee cheque for purchase and sale with the seller and buyers who are assessed to tax as per the contentions of the assessee. When the parties that of purchaser and seller are present and not artificial then the said transaction cannot be treated as speculative transaction and the loss incurred thereon cannot be speculative loss. The contention of the Ld. D.R. that the N. K. Proteins and its client has executed T+3 and T+36 trade contracts itself establishes that there was a transaction to that effect from the platform of NSEL for which the NSEL has maintained a settlement

account with HDFC Bank in the name of N. K. Protein Ltd.. For the purpose of carrying out transaction with NSEL they use to keep 3.5% of the value of the transaction as margin money of this account which is released only after the transaction is over. But since the transaction was not materialized in end the settlement amount was received in consonance with these business transactions from NSEL and thus it cannot be treated as speculative loss andis a part of business loss. As rightly contended on behalf of the assessee company, the exercise of re-characterization of transactions in the light of statement given by Shri Nilesh Patel should be restricted to only determination of correct taxable income. The relevant purchase and sales transactions were entered into by the assessee-company in order to avail the funds and, therefore, the loss incurred in the said transactions actually represented cost of such funds which was a business loss. The adverse inference drawn by the learned CIT(A) against the assessee on the basis of withdrawal of such loss partly was also not correct as the reasons for such withdrawal proposed by the assessee were duly explained and the fact that the assessee-company by entering into these transactions had availed finance for the purpose of business was duly established. As regards the applicability of TDS provision, the learned Counsel for the assessee has pointed out from the relevant details of transactions that the sale proceeds were received by the assessee-company from different entities while payment towards the purchase was made towards different entities. The cost of finance thus was not paid to the party from whom the finance was actually availed and the applicability of TDS, therefore, was not warranted. Moreover, the cost incurred by the assessee for availing finance was not strictly in the nature of interest and the party selling the goods having offered the same for taxation, there is no obligation of deduction of tax at source by the assessee. Having regard to all these facts of the case, we are of the view that the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of alleged speculation loss is not sustainable and deleting the same, we allow Ground No.4 of the assessee's appeal.

10. As regards the next issue raised in Ground No.6 relating to disallowance of Rs.1,30,29,338/- made by the Assessing Officer and confirmed by the learned CIT(A) on account of transaction charges, the relevant facts are as follows. During the course of Special Audit, it was noticed that transaction charges were paid by the assessee-company for transactions on NSEL platform in connection to caster seeds, soya bean seeds, castor oil and cotton wash oil. Although it was submitted on behalf of the assessee that such transaction charges were not debited to the profit and loss account, the Assessing Officer found that the same were debited and included in the purchases. In this regard, it was explained by the assessee that it was not obligatory on its part as a broker to recover the transaction charges from the clients. It was also pointed out that as per the consistent practice followed by the assessee-company, the transaction charges were never recovered from the clients and the same, therefore, were debited to the purchase account as forming part of the purchase price. The Assessing Officer did not find this contention of the assessee-company to be acceptable. According to him, the transaction charges were recoverable by the assessee-company from clients and since it could not produce any documentary evidence to substantiate its claim that it was not obligatory to recover the transaction charges, he disallowed the entire transaction charges of Rs.1,30,29,338/-.

11. The disallowance made by the Assessing Officer on account of transaction charges was challenged by the assessee in an appeal filed before the learned CIT(A) and the following submissions in writing were made on behalf of the assessee in support of its case on this issue:-

> *"The Assessing Officer has stated that the company had paid transaction charges for the transactions carried out on NSEL platform for various commodities. This transaction charges was transferred to purchase account of the respective commodities, instead of charging it to the NSEL client. It is stated by the AO that the transaction charges are debited to the purchase of commodities and are charged to P&L A/c. and no recovery thereof has been made from the client. The appellant had explained that it is a practice followed by the appellant-company broker. It is not obligatory on the part of broker to recover the amount of transaction charges. The Assessing Officer has not accepted this contention of the appellant on the ground that before the Special Auditor, the appellant had explained that such transaction charges are not accepted, and hence, not recorded in the books. According to the AO, therefore, the appellant was of the view that the said charges are liable for recovery from the clients. Thereafter, he has stated that the transaction charges are debited in the P&L A/c. as accepted by the assessee and assessee could not produce documentary evidence to show that it was not its obligation to recover its transaction charges. Thus, he has made the addition.*
>
> *The Assessing Officer has further observed that before the auditors in the course of special audit, it was stated that the payment had not accepted such transaction charges and not recorded the same in the books, and hence, it is presumed by the AO that the assessee has confirmed that it is not debited to P&L A/c. Therefore, the question of recovery thereof from the client does not arise. According to him, the appellant has thus confirmed that it is liable to recover the transaction charges. This conclusion of the assessee is only his presumption. At the time of special audit, as the transaction charges were not separately debited in the P&L A/c., but it was debited as part of purchase cost, the concerned person had explained that it has not been debited to P& L A/c. However, it does not mean that it was conceded by him that charges are recoverable.*
>
> *The appellant submits that this contention of the Assessing Officer is not correct. It is the discretion of the businessman as to how the transactions are to be carried out. Whether the transaction charge paid by it to the Exchange are to be recovered or not, is the discretion of the assessee and the AO cannot ask the assessee to carry out the business as per his opinion. It is held by courts the revenue cannot justifiably claim to put itself in the arm-chair of businessmen and no businessmen can be compelled to maximize his profit. See CIT vs. Dalmia Cement 254 ITR 377 (Delhi). Further, it may be noticed that he has no-where established with any practice prevailing in this business that such transaction charges are liable to be recovered."*

11.1 The submission made by the assessee in support of its case on this issue did not find favour with the learned CIT(A) who proceeded to confirm the disallowance made by the Assessing Officer on account of transaction charges for the following reasons given in paragraph No.9.2 of his impugned order:-

> *"9.2 I have carefully considered the facts of the case, contention of the appellant as well as the case law relied upon by the appellant. It is observed that the A.O has made an addition of Rs. 1,30,29,338/- by disallowing transaction charges claimed by the appellant in its P & L A/c. It is observed from para-9 of the order of assessment that the appellant had claimed transaction charges, delivery charges, warehousing charges etc. in its P & L A/c. During the appellate proceedings initially the appellant has submitted that it has not accepted such charges and therefore, it has not recorded any such charges in the books of accounts or P & L A/c. The A.O pointed out that the transaction charges amounting to Rs. 1,30,29,338/- are indirectly charged to P & L A/c. and no recovery has been made from its clients. The appellant submitted to the A.O on 31/10/2014 that it has debited Rs.1,30,29,338/- to its purchase accounts as transaction charges and such charges should have been recovered from its clients. However, it contended that it is upto the broker whether to recover transaction charges from its clients or not. However, the A.O has not agreed with the contention of the appellant that it is not necessary for it to recover the charges from the clients. On admission of the fact that appellant can recover the transaction charges from the clients and admission of the appellant that the transaction charges have been debited in its purchase account indirectly, the A.O. has proceeded to disallow Rs.1,30,29,338/- on account of transaction charges. It is normal practice of any broker of any exchange that the only income that the broker earns is the commission income for the transactions taken place on the platform of exchange. Over a period of time the % of said brokerage or commission has gone down. Here, the appellant is further willing to incur expenses on behalf of clients, which is difficult to understand. Rest of all the expenses because of transactions are charged to the client. Therefore, I agree with the contention of the A.O and hereby confirm the disallowance of Rs. 1,30,29,338/- on account of transaction charges debited to P & L A/c. by the appellant. Thus, this ground of appeal is dismissed."*

12. The learned Counsel for the assessee invited our attention to page No.34 of the paper book to point out that the transaction charges of Rs.1,30,29,398/- were actually paid/incurred by the assessee-company. He submitted that the said charges incurred by the assessee represented additional cost of funds raised and utilized; and, since there was no requirement of TDS, it should have been allowed as deduction as rightly claimed by the assessee. He submitted that the factum and quantum of the expenditure incurred by the assessee towards transaction charges was not disputed by the authorities below and disallowance was made merely because the assessee did not recover the same from the clients. He contended that there was no obligation to recover the said charges from the clients and the assessee choose to bear the same as a matter of business expediency. In

support of assessee's case on this issue, he relied on the submission made on behalf of the assessee before the learned CIT(A) as reproduced in paragraph No.9.1 of the impugned order. He also relied on the decision of the Hon'ble Gujarat High Court in the case of CIT Vs. Khambhatta Family Trust, reported in [2013] 215 Taxman 602 (Guj.), to contend that for the allowability of any expenditure the requirement is that the same should be wholly and exclusively incurred for the purpose of business and not necessarily.

13. The learned DR, on the other hand, relied on the impugned order of the learned CIT(A) in support of the Revenue's case on this issue and read out paragraph No.9.2 of the same. He contended that the transaction charges should have been recovered by the assessee-company from its clients; but since the assessee choose not to recover the same without there being any business expediency, the claim of the assessee for deduction on account of transaction charges was rightly disallowed by the authorities below.

14. We have heard both the sides and perused all the relevant material available on record. It is observed that the transaction charges in question were actually paid/incurred by the assessee-company and this position was not disputed or doubted even by the authorities below. They, however, still disallowed the deduction claimed by the assessee on account of transaction charges on the ground that the same ought to have been recovered by the assessee from the clients. As submitted on behalf of the assessee-company before the authorities below as well as before the Tribunal, there was no such obligation on the part of the assessee to recover the transaction charges from the customers and the decision not to recover the same from the clients was taken as a matter of business expediency. The transaction charges actually represented additional cost of funds raised by the assessee company for the purpose of its business and the expenditure incurred on account of the same was wholly and exclusively for the purpose of business of the assessee as rightly contended by the learned Counsel for the assessee. In the case of Khambhatta Family Trust (supra) cited by the learned Counsel for the assessee, the Hon'ble Gujarat High Court has held that the requirement for allowability of any expenditure as business expenditure is that the same should be wholly and exclusively incurred for the purpose of business and not necessarily. Keeping in view the said decision of Hon'ble jurisdictional High Court and having regard to the facts of the case as discussed above, we are of the view that the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) on account of transaction charges is not justifiable and deleting the same, we allow Ground No.6 of the assessee's appeal."

5. In view of the above decision rendered by ITAT in assessee's own case, wherein both the additions on the basis of penalty under section 271(1)(c) of the Act was imposed have been deleted, then there is no basis for sustaining the levy of penalty u/s 271(1)(c) of the Act.

6. In the result, penalty u/s 271(1)(c) of the Act is directed to be deleted and the appeal of the assessee is allowed.

Order pronounced in the open court on 13-06-2024

Sd/-	**Sd/-**
(MAKARAND V. MAHADEOKAR)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 13/06/2024

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