

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA 1047/Mum/2024
(Assessment year : 2014-15)

Inimitable Capital Finance Private Limited, Office No.7, 2 nd Floor, Readymoney Terrace, 167,Dr A.B. Road, Worli, Mumbai-400 018 PAN : AABCE9885H	vs	Dy.Commissioner of Income-tax 7(1)(2), Mumbai Room No.506, Aayakar Bhavan, Maharishi Karve Road, Mumbai- 400 020
APPELLANT		RESPONDENT

Assessee by : Shri Ganesh Rajagopalan
Respondent by : Shri H.M. Bhatt, (SR.DR)

Date of hearing : 10/06/2024
Date of pronouncement : 12/ 06/2024

ORDER

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee is preferred against the order of the National Faceless Appeal Centre, Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2014-15, date of order 16.01.2024. The impugned order is emanated from the order of the Ld. Deputy Commissioner of Income-tax, Ward 6(3)(1), Mumbai (in short, 'the A.O.') passed U/s 271(1)(c) of the Act, date of order dated 30/05/2017.

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

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals)/National Faceless Appeal Centre ("CIT(A)/NFAC") erred in sustaining the penalty under section 271(1)(c) of the Income-tax Act, 1961 (the "Act") on the amount of R. 2,22,73,973/- being interest expenses incurred during the year and payable to M/s Global Vantage Ltd which was not allowable as deduction in the assessment order dated for the reason that the said interest was not paid by the Appellant nor payable by it and was therefore not genuine expense.

2. "The Appellant craves leave to add, amend or delete any of the above grounds of appeal."

2.1. The assessee has taken the following additional ground.

Additional Ground:

On the facts and in the circumstances of the case, and without prejudice to the other ground(s), the order passed under section 271(1)(c) is bad in view of the fact that both at the time of initiation as well as at the time of imposition of the penalty the Assessing Officer was not clear as to which limb of section 271(1)(c) was attracted."

3. Brief facts of the case are that the assessment was completed under section 143(3) of the Act dated 15/11/2016 determining the total income of Rs.6,35,370/-. The addition was confirmed related to disallowance of interest amount to Rs.2,22,73,973/- and disallowance under section 14A read with Rule 8D amount to Rs.26,492/-. So, the total amount works out to Rs.2,23,00,465/-. The assessee has not challenged the quantum appeal before any of the authorities. The penalty proceeding was initiated U/s 271(1)(c) of the Act. The Ld.AO determined the tax sought to be evaded amount to Rs.75,70,923/- which is 100% of the tax sought to be evaded of the total income. Accordingly, the penalty is confirmed amount to Rs.75,70,923/-. Accordingly, the assessee filed an

appeal before the CIT(A) by challenging the penalty order. The Ld.CIT(A) upheld the penalty order. Being aggrieved, assessee filed an appeal before us.

4. The Ld.AR filed a written submission which are kept in the record(in short, APB). The Ld.AR has invited our attention in the penalty order para 4.1 and 4.3 which are reproduced as below:-

“4.1 The facts of the issue and the submissions of the asscssee were considered carefully. However, the same was not convincing. On going though die Profit and Loss Account of the Asscssee Company, it is noticed thatthe assessee co. had debited interest expenses to the tune of Rs. 2,22,73,973/- under the head "Finance Cost" in the P&L Account. It was seen that the assessee had issued optionally convertible debentures amounting to Rs. 26,86,13,500/-, inclusive of interest amounting to Rs. 6,86,13,500/- to Global Vantage Private Limited with the option of gaining a part ownership in the assessee co. and no interest was thus paid on the said debentures. It is important to mention here that these optional convertible debentures were issued in the current year in full settlement of the Inter Company Deposit of Rs. 20.00.00.000/- made by the said company withthe assessee co., which included the interest amount of Rs. 6,86,13,500/- and thus, issued optionally convertible debentures amounting to Rs. 26.86, 13,500/-,. Accordingly, the assessee's liability to pay interest has been ceased and no such interest was paid by the assessee. The assessee had confirmed this fact in its submission dated 08.08.2016. Therefore, the assessee had neither paid the said interest till date, nor, had any liability to pay any such interest in future.

4.3 It was also noticed that the. assessee co. had debited interest expenses of Rs. 2,22,73,973/- as interest on Inter Corporate Deposits which are the same Deposits that have been fully settled in the form of convertible debentures which also includes the interest payable. Further, the Assessee's Authorised Representative, vide order sheet noting dated 09.11.2016 has agreed that the said interest expenses claimed, amounting to Rs. 2,22,73,9737- needs to be disallowed as the Assessee Company had not paid

any such interest nor is liable to pay/payable in the view of above discussion. Hence, the said interest expenses was disallowed and added back to total income of the assessee company. “

5. The Ld.AR placed that the addition was made related to the disallowance of interest amounting to Rs.2,22,73,973/- charged in the P&L Account in the head of 'Finance Cost'. The assessee has issued optionally convertible debentures amounting to Rs.26,86,13,500/- to Global Vantage Private Limited with the option of gaining a part of ownership in the assessee company and no interest was paid on the said debenture. Later on, this interest was calculated in the optionally converted share and finally, the settlement was done in ICD (Inter Company Deposit) of Rs.20 crore was made by the said company with the assessee company which included the interest amount Rs. 6,86,13,500/- which works out total amount to Rs.26,86,13,500/- and thus issued the optionally converted debenture amounting to Rs.26,86,13,500/-. For explanation of the fact, the relevant para of the assessment order para 4 is reproduced below: -

“4. Disallowance of interest amounting to Rs. 2,22,73,973/-.

4.1 During the course of assessment proceedings, ongoing though the Profit and Loss Account of the Assessee Company, it is noticed that the assessee co. had debited interest expenses to the tune of Rs. 2,22,73,973/- under the head "Finance Cost" in the P&L Account. On perusal of the details submitted by assessee co. it is seen that the assessee has issued optionally convertible debentures amounting to Rs. 26,26,13,500/-, inclusive of interest amounting to Rs. 6,86,13,500/-, to Global Vantage Private Limited with the option of gaining a part ownership in the assessee co. and no interest was thus paid on the said debentures. The assessee company has submitted, vide its submission dated 09.11.2016, Balance confirmation of Global Vantage Private Limited along with the Financial statement and Income Tax Return of Global Vantage Private Limited, which confirms the above.

4.2 It is important to mention here that these optionally convertible debentures were issued in the current year in full settlement of the Inter Company Deposit of Rs. 20,00,00,000/- made by the said company with the assessee co., which included the interest amount of Rs. 6,86,13,500/- and thus, issued optionally convertible debentures amounting to Rs. 26,86,13,500/-. Accordingly, the assessee's liability to pay interest has been ceased and no such interest was paid by the assessee. The assessee has confirmed this fact in its submission dated 08.08.2016. Therefore, the assessee has neither paid the said interest till date, nor, has any liability to pay any such interest in future.

4.3 On further perusal, it is seen that the assessee co. has debited interest expenses of Rs. 2,22,73,973/- i.e. interest on Inter Corporate Deposits which are the same Deposits that have been fully settled in the form of convertible debentures which also includes the interest payable. Accordingly, a show cause was issued to assessee vide notice dated. 7.10.2016 as to why the said amount of Rs. 2,22,73,973 shall not be disallowed for the year under consideration in the view of above discussion.”

6. The Id. DR vehemently argued and fully relied on the order of the revenue authorities.

7. We heard the rival submission and considered the documents available in record. The Id. AR explained that the observation of both the revenue authorities are not correct related to adjustment of interest. The Id. AR has accepted the interest are wrongly debited in P & L account. The Id. AR was unable to prove about the contrary on imposition of penalty. The addition U/s 143(3) of the Act was also accepted by the assessee and has not challenged the addition before the higher authority. In our considered view the **ground no-1 is dismissed.**

The **ground no-2** is general in nature.

ADDITIONAL GROUND: -

8. The Id. AR now proceed to argue the additional ground. The Id. AR has drawn our attention in APB page-2, notice issued by the Id. AO u/s 271(1)(c)/ 274 of the Act dated 15/11/2016. In argument Id. AR mentioned that the notice is itself defective for non-mentioning the specific limb of the penalty U/s 271(1)(c) of the Act.

Copy of the notice is duly annexed herewith: -

Pen/Pg. 8/26/2016-17

2

**NOTICE UNDER SECTION 274 READ WITH SECTION 271(1)(c)
OF THE INCOME TAX ACT, 1961**

PAN/GIR NO. AABCE9885H

Office of
DCIT Circle-5(3)(1),
Room No 505, 5th Floor,
Aayakar Bhavan, M.K. Marg,
Mumbai 400 020.

Dated : 15/11/2016

To,

**M/s Inimitable Capital Finance Pvt. Ltd.
77/56, Essar House,
C.P. Ramaswamy Road,
Abhiramapuram - 600018.**

Whereas in the course of proceedings before me for the assessment year 2014-15 it appears to me that you:-

* 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(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 manner required by the said section 139(1) or by such notice.

* have without reasonable cause failed to comply with a notice under section 22(4)/23(2) of the Indian Income-tax Act, 1922 or under section 142(1)/143(2) of the Income tax Act, 1922 or under section 142(1)/143(2) of the Income Tax Act, 1961.

* have concealed the particulars of your Income or _____ furnished inaccurate particulars of such income.

You are hereby requested to appear before me at 12:30 A.M./P.M. on 15.12.2016 and show cause why an order imposing a penalty on you should not be made under section 271(1)(c) of the Income-tax Act.1961. If you do not wish to avail yourself of this opportunity of being heard in person or through authorized representative you may show cause in writing on or before the said date which will be considered before any such order is made under section 271(1)(c).

(SEAL)

(MEETU AGARWAL)

8. The Id. DR vehemently argued and fully relied on the order of the revenue authorities.

9. We heard the rival submission and considered the documents available in record. The issue is squarely covered by the judgement of Hon'ble **Jurisdictional High Court** in the case of **Mohammed Farhan A. Shaikh Vs. PCIT (125 taxamnn.com 253) vide order dt. 11.3.2021**. The relevant paragraphs are reproduced as below: -

“179. Besides, the prima facie opinion in the assessment order need not always translate into actual penalty proceedings. These proceedings, in fact, commence with the statutory notice under section 271(1)(c) read with section 274. Again, whether this prima facie opinion is sufficient to inform the assessee about the precise charge for the penalty is a matter of inference and, thus, a matter of litigation and adjudication. The solution, again, is a tick mark; it avoids litigation arising out of uncertainty.

180. One course of action before us is curing a defect in the notice by referring to the assessment order, which may or may not contain reasons for the penalty proceedings. The other course of action is the prevention of defect in the notice—and that prevention takes just a tick mark. Prudence demands prevention is better than cure.

Answers:

Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiating the penalty proceedings?

181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.”

The counsel laid down that in the absence of such specific notice, the notice would be invalid. As held in various judicial pronouncements including the decision of Hon'ble **Karnataka High Court** in **CIT V/s SAS's Emerald Meadows (73 Taxmann.com 241)** against which Special Leave Petition (SLP) filed by the department stood dismissed by Hon'ble Supreme Court which is reported as **73 Taxmann.com 248**. The notice u/s 274/271(1)(c) of the Act is not carrying the specific limb. Therefore, this is a case where both the parts of the offences i.e., concealment of income as well as furnishing of inaccurate particulars of income were involved.

Finally, respectfully following the binding judicial precedents as cited aforesaid, we are of the considered opinion that the impugned penalty is not sustainable on legal grounds. Hence, by deleting the same, we allow the appeal of the assessee. Accordingly, the additional ground of the assessee is allowed.

10. In the result, the appeal of the assessee bearing **ITA No.1047/Mum/2024** is allowed.

Order pronounced in the open court on 12th day of June, 2024.

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 12/06/2024

Pavanan

sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
5. गार्डफाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar), ITAT, Mumbai