

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "D" BENCH : MUMBAI

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA.Nos.1875 & 1872/Mum./2024
AND

Cross Objection Nos.88 & 89/Mum./2024
Assessment Years 2013-2014 & 2014-2015

The ACIT, Circle-3(4), Room No.559, 5 th Floor, Aaykar Bhvan, M.K. Road, Mumbai – 400 020. Maharashtra	vs.	Reliance Industries Limited, Reliance Corporate Park, Thane Belapur Road, Ghansoli, Navi Mumbai. PIN – 400 701. PAN AAACR5055K
(Appellant/Respondent in C.O.)		(Respondent/Cross-Objector in C.Os)

For Revenue :	Smt. Sanyogita Nagpal, CIT-DR
For Assessee :	Shri Nimesh Vora

Date of Hearing :	09.07.2024
Date of Pronouncement :	10.07.2024

ORDER

PER SATBEER SINGH GODARA, J.M.

These Revenue's twin appeals ITA.Nos.1875 & 1872/Mum./2024 with assessee's as many cross objection nos.C.O.Nos.88 & 89/Mum./2024, for assessment years 2013-2014 & 2014-2015; arise against the CIT(A)-57, Mumbai, Mumbai's common DIN & Order no.ITBA/APL/S/250/2023-24/

1060866250(1) dated 13.02.2024 in proceedings u/s. 271(1)(c) of the Income Tax Act, 1961 (in short “the Act”); respectively.

Heard both the parties. Case files perused.

2. The Revenue’s “lead” appeal ITA.No.1875/MUM./2024 for the former assessment year 2013-2014 raises the following sole substantive ground :

1. *“Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the assessee's appeal and allowed the grounds of assessee ignoring the fact that the appeal on this issue is pending before Hon'ble High Court, which may lead to increase in the income of the assessee under normal provision ?”*

3. Both the parties next invited our attention to the CIT(A)’s lower appellate discussion reversing the Assessing Officer’s findings imposing sec.271(1)(c) penalty of Rs.23,98,83,694/- vide order dated 26.03.2022; reading as under:

6.2 The facts recorded and finding of the AO in the penalty order and submission made by the appellant have been considered.

The facts of the case of the appellant are that the disallowance/addition amounting to Rs.77,63,22,635/- in relation to disallowance on depreciation of KGD6, addition of transfer pricing adjustment and disallowance of depreciation on account of steel purchases made by the AO were upheld by CIT(A) as well as ITAT. The AO has levied penalty u/s.271(1)(c) on the ground that the appellant furnished inaccurate particulars of income in respect of such disallowances/additions.

During the appellant proceedings, the appellant submitted that in response to the notice u/s.271(1)(c) dated 27.02.2017, the AO was requested to keep the penalty proceedings in abeyance till the decision of the CIT(A). The notice dated 10.11.2020 was not served on the appellant, therefore, it could not be responded. Further, notice

dated 13.09.2021 was an intimation letter, in which earlier notices were referred to, therefore, no response was filed. Further, notice dated 21.10.2021 also referred to earlier notices and asked the assessee to give factual details of the status of the appeal before the CIT(A), therefore, the assessee requested to keep the penalty proceedings in abeyance. Also, a notice dated 29.10.2021 was not served on the assessee. The appellant submitted that because of no clarity in the above mentioned notices as to which, original or re-assessment proceedings, for which the penalty proceedings were going on. Therefore, the request was made to keep the penalty proceedings in abeyance till the disposal of CIT(A). Thus, proper opportunity of being heard was not granted before passing the penalty order.

The appellant has provided copies of penalty notices dated 27.02.2017, 13.09.2021, 21.10.2021 and 29.10.2021. The notice dated 27.02.2017 was issued u/s.274 r.w.s. 271 of the IT Act. In the notice, the AO has scored off the phrase "have concealed the particulars of your income" and the charge intimated for initiation of penalty was "for furnishing of inaccurate particulars of such income". In subsequent notices, reference was made to notice dated 10.11.2020. In the subsequent notices, it was specifically mentioned that why order u/s.271(1)(c) imposing penalty should not be passed as initiated by penalty notices. The appellant was also requested to submit a response alongwith documentary evidences. It was also mentioned that if no response was received by the given time and date, penalty order would be passed without benefit of further explanation. Thus, it could be seen that by issuing various notices, the appellant was given the opportunity of being heard to represent the case against the levy of penalty.

Accordingly, the grounds of appeal nos. 3 and 4 are Dismissed.

7. The fifth and sixth grounds of appeal are related to levy of penalty u/s.271(1)(c) in respect of addition/disallowance made under normal provisions of the Act, even though the income-tax payable under normal provisions of the Act was less than the income-tax payable on book profit u/s.115JB of the Act.

7.1 During the penalty proceedings, the AO observed that in the case of the assessee for AY. 2013-14 in the order u/s.143(3) r.w.s. 144C(3) r.w.s. 92CA(5) r.w.s. 154 dated 27.02.2017, total income of Rs.19223,66,55,142/- was computed under normal provisions of the Act and book profit of Rs.26485,46,16,823/- u/s.115JB of the Act. In the order, various additions and disallowances were made in respect of (i) notional sales tax, (ii) depreciation, (iii) depreciation on KGD6, (iv) disallowance u/s.14A, (v) transfer pricing, (vi) depreciation on account of steel purchases from P K Agrawal group of concerns, (vii) disallowance of depreciation in respect of Jetty of GMB, (viii) depreciation on office equipments, (ix) CSR expenses, (x) disallowance u/s.80IA, (x) disallowance u/s.80IB(9) and (xi) wealth tax. Against the assessment

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order, the assessee filed an appeal before CIT(A)-57, Mumbai and vide CIT(A)'s order dated 09.10.2017, partly allowed the appeal of the assessee. Against the order of the CIT(A), the Department as well as the assessee filed appeal before the ITAT, Mumbai and ITAT vide order dated 10.11.2020 in ITA No. 7299/Mum/2017, partly allowed the appeal of both the revenue and the assessee. After the order of the ITAT, addition/disallowance in respect of (i) depreciation on KGD6, (ii) transfer pricing adjustment of Rs.67,98,511/- and (iii) depreciation on account of steel purchases amounting to Rs.5,35,215/-, totalling to Rs.77,63,22,635/- remained upheld. The AO issued notice u/s.271(1)(c) on 13.09.2021, 21.10.2021 and 29.10.2021. In respect of such notices, the assessee filed reply vide letter dated 21.10.2021. The assessee had requested for keeping the penalty proceedings u/s.271(1)(c) in abeyance. The AO noted that the CIT(A) as well as the ITAT has already passed order against the appeals and, therefore, the penalty proceedings could not be kept in abeyance.

With regard to the levy of penalty in respect of disallowance on depreciation on KGD6, the AO noted that the assessee had claimed depreciation under "oil and gas division" in respect of KGD6 basin/block amounting to Rs.687,34,79,136/-. In the assessment order u/s.143(3) r.w.s. 144C(3) r.w.s. 92CA(5) r.w.s. 154 dated 27.02.2017, the depreciation was allowed to the extent of Rs.610,44,90,227/- and the depreciation amounting to Rs.76,89,88,909/- was disallowed. The penalty proceedings on claim of depreciation on KGD6 was confirmed by the CIT(A) in the order dated 09.10.2017. On further appeal, the ITAT vide order dated 10.11.2020, dismissed the ground raised by the assessee as not pressed. Further, in the earlier years also, the disallowance on depreciation on KGD6 was confirmed by the CIT(A)/ITAT. Thus, the penalty proceedings u/s.271(1)(c) for furnishing inaccurate particulars of income in respect of claim of depreciation on KGD6 was rightly initiated.

With respect to adjustment made consequent to order u/s.92CA(5) r.w.s. 154, the AO noted that the TPO vide order dated 31.10.2016 u/s.92CA(3) made adjustment of Rs.404,08,21,640/-, which was reduced to Rs.402,38,83,151/- vide order u/s.92CA(5) r.w.s. 154 dated 08.02.2017. The CIT(A) restricted the adjustment to Rs.36,53,66,224/- in the order dated 09.10.2017. The ITAT, Mumbai vide order dated 10.11.2020 restricted the disallowance to the extent of Rs.67,98,511/-. The TPO noted that the addition in respect of transfer pricing adjustment to the extent of Rs.67,98,511/- has been upheld by the ITAT, therefore, penalty proceedings u/s.271(1)(c) for furnishing of inaccurate particulars of income were rightly initiated.

Further, with respect to depreciation on account of steel purchases, the AO noted that the claim of purchase of steel during the AY. 2003-04 was held as non-genuine and, therefore, claim of depreciation on steel purchases to the extent of

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Rs.5,35,215/- @ 15% on WDV of Rs.35,68,101/- as on 01.04.2012 related to capitalization of steel purchase in AY. 2003-04 was disallowed. Both the CIT(A) as well as ITAT upheld the disallowance on depreciation on steel purchase. Therefore, penalty proceedings u/s.271(1)(c) on the issue was rightly initiated.

The AO referred to the provisions of section 271(1)(c) of the Act. The AO relied upon the decision in the case of A M Shah & Co. vs. CIT (108 Taxman 137 (Guj)), CIT vs. Reliance Petroproduct (P) Ltd. (322 ITR 158)(SC) and Dharmendra Textiles Processors (306 ITR 277)(SC). Referring to the above mentioned judgements, the AO noted that falsity in any constituent element of Return of income would constitute "inaccurate particulars of income". The AO also noted that the particulars mentioned in the Return of income when found to be inaccurate, the liability of penalty would arise. The AO also noted that wilful concealment of income is not essential ingredient for attracting civil liability u/s.271(1)(c) of the Act. The AO held that the addition/disallowance amounting to Rs.77,63,22,635/- was upheld by the CIT(A) as well as the ITAT and in respect of such addition/disallowances, the assessee did not disclose it voluntarily in the Return of income. If the case was not selected for scrutiny, then income to such extent would not had been taxed and would had resulted into leakage of revenue for national exchequer. The AO also held that if penalty was not levied, it would lead to injustice to other honest tax payers and there would be possibility of repetition of offence by the assessee. Thus, the AO was satisfied that the assessee had furnished inaccurate particulars of income to the extent of Rs.77,63,22,635/- and, therefore, levied penalty amounting to Rs.23,98,83,694/- @ 100% of tax sought to be evaded u/s.271(1)(c) of the Act.

7.2 During the appellate proceedings, the appellanthas filed written submission which is reproduced as under:

3.1 *"The appellant filed its original return of income declaring total income of Rs. 14912,61,56,700/- under normal provisions of the Act and Book profit of Rs. 26207,76,56,848/- under section 115JB of the Act.*

3.2 *The appellant electronically filed a revised return on 31.03.2015 declaring total income of Rs.14956,85,42,970/- under normal provisions and Rs. 26207,76,56,848/- under section 115JB of the Act. Copy of the computation of income is enclosed page nos. A to D of the paperbook.*

3.3 *The scrutiny assessment u/s 143(3) r.w.s. 144C(3) of the Act was completed vide order dated 28.02.2017 determining taxable income at Rs. 19223,66,55,142/-after deduction under Chapter VIA and Book profit under section 115JB of the Act was computed at Rs. 26485,46,16,823/-.*

3.4 *Aggrieved by the scrutiny assessment order, the Appellant filed appeal*

before the Hon'ble CIT(A) which was disposed vide order dated 09.10.2017. The Order giving effect to the order of the CIT(A) was passed on 27.12.2017 determining total Income of Rs. 15779,87,79,234/- under normal provisions of the Act and Book Profit of Rs. 26213,11,91,029/- under the provisions of section 115JB of the Act.

3.5 Being aggrieved by the order of the CIT(A), the Appellant as well as the Revenue Department filed appeal before the Hon'ble Income-tax Appellate Tribunal ('ITAT') which was disposed by the Hon'ble ITAT vide order dated 10.11.2020. The Order giving effect dated 05.02.2021 to the order of the Hon'ble ITAT was passed determining total Income of Rs. 12122,71,83,444/- under normal provisions of the Act and Book Profit of Rs. 26193,71,27,501/- under the provisions of section 115JB of the Act.

3.6 As can be seen from all the aforesaid orders, since the tax payable under MAT provisions was higher than the tax payable under normal provisions, the appellant was assessed to tax under MAT provisions.

3.7 Under clause (iii) of sub-section (1) of section 271 of the Act, penalty for concealment of income or furnishing inaccurate particulars of income is determined based on the "amount of tax sought to be evaded" which has been defined inter alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income or income in respect of which inaccurate particulars had been filed.

3.8 In this context, Hon'ble Delhi High Court in the case of CIT v. Nalwa Sons Investments Ltd. [2010] 194 Taxman 387, has held that when the tax payable on income computed under normal procedure is less than the tax payable under the deeming provisions of section 115JB of the Act, then penalty under section 271(1)(c) of the Act could not be imposed with reference to additions/disallowances made under normal provisions. The judgment has attained finality by Hon'ble Supreme Court, vide its order dated 4th May 2012.

3.9 Subsequently, Explanation 4 to sub-section (1) of section 271 of the Act has been substituted by Finance Act, 2015, which provides for the method of calculating the amount of tax sought to be evaded for situations even where the income determined under the general provisions is less than the income declared for the purpose of MAT u/s 115JB of the Act. The substituted Explanation 4 is applicable prospectively w.e.f. 01-04-2016.

3.10 In view of the Delhi High Court judgment and substitution of Explanation 4 of section 271 of the Act with prospective effect, it is now a settled position that prior to 01-04-2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under section 271(1)(c) of the

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Act, is not attracted with reference to additions/disallowances made under normal provisions. It is further clarified that in cases prior to 01-04-2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 271(1)(c) of the Act, will depend on the nature of adjustment.

3.11 The aforesaid position is confirmed by the Central Board of Direct Taxes, vide its Circular No 25/2015 F, No 279/Misc/140/2015/TTJ dated 31 December 2015 (which is enclosed in page nos 444 - 445 of the paperbook) provides that where income tax payable on the total income as computed under normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under section 271(1)(c) of the Act, is not attracted with reference to additions/disallowances made under the normal provisions, for assessment year prior to AY 2016-17.

3.12 Since CBDT in the said circular has categorically stated that amendment to Explanation 4 to section 271(1)(c) is prospective w.e.f. 01.04.2016, the said CBDT circular is applicable for cases prior to AY 2016-17 i.e. it is applicable for the year under appeal.

3.13 Hon'ble Supreme Court, in case of Navnit Lal C. Javeri v. K.K. Sen, AAC [1965] 56 ITR 198 (SC), has held that benevolent circulars are binding on departmental officers. Circulars issued by the Board in order to carry out the assurance given by the Minister in Parliament to provide relief in cases of extreme hardship would be binding on all officers and persons employed in the execution of the Act.

3.14 Hon'ble Supreme Court, in case of Ellerman Lines Ltd. v. CIT [1971] 82 ITR 913 (SC), has held that even if the directions contained in a circular issued by the CBDT deviate from the provisions of the Act, they are binding on the Department.

3.15 The Appellant draws attention to the order in Appellant's Own case for AY 2007-08 and 2009-10, wherein, following the decision of the Hon'ble ITAT in the case of Nalwa Sons (supra), the penalty levied on the additions/disallowances made under normal provisions of the Act was deleted as the income for those years was assessed u/s. 115JB of the Act.

3.16 In the facts of the present case,

all the additions / disallowances on which penalty has been levied by the AO are made under the normal provisions of the Act and not on the addition / disallowance made under section 115JB of the Act; and

the tax payable under MAT provisions was higher than the tax payable under normal provisions and therefore, the appellant has been assessed to tax under MAT provisions in the assessment order, order giving effect to the CIT(A) order

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as well as in the order giving effect to the ITAT order.

3.17 Hence, based on the aforesaid CBDT circular and in light of the facts in the present case, the appellant submits that penalty levied u/s 271(1)(c) of the Act ought to be deleted, since the appellant is assessed to tax under MAT provisions and the penalty has been levied with reference to additions / disallowances made under the normal provisions of the Act."

4.1 As per the order of the AO dated 05.02.2021 giving effect to the order of the Hon'ble ITAT, the total assessed income is determined at Rs 12122,71,83,444 under normal provisions of the Act, which is much lower than the returned income of Rs 14956,85,42,970, as per revised return filed on 31.03.2015. Thus, in totality, there is no 'tax sought to be evaded' and as such question of consequent levy of penalty does not arise.

4.2 The AO has levied penalty in respect of the following additions/disallowances made during the course of assessment proceedings:

- a. Disallowance of Depreciation in respect of Block KG-DWN- 98/3 ('KGD6') – Rs 76,89,88,909
- b. Disallowance of Depreciation on Steel Purchases – Rs 535,215
- c. Transfer pricing additions – Rs 67,98,511

We have provided our submissions on each of the above issues in the following Grounds."

7.3 The facts recorded and finding of the AO in the penalty order and submission made by the appellant have been considered.

7.3.1 The facts of the case of the appellant are that for AY. 2013-14, the appellant filed Return of income showing total income of Rs.14912,61,56,700/- under normal provisions of IT Act and book profit of Rs.26207,76,56,848/- u/s.115JB of the Act. The Return of income was revised on 31.03.2015, showing total income of Rs. 14956,85,42,971/- under normal provisions of the Act and Rs.26207,76,56,848/- u/s.115JB of the Act. In the order u/s.143(3) r.w.s. 144C(3) r.w.s. 92CA(5) r.w.s. 154 dated 28.02.2017, the income was assessed at Rs.19223,66,55,142/- under normal provisions of the Act and Rs.26485,46,16,823/- u/s.115JB of the Act. In the order dated 27.12.2017 giving effect to the order of the CIT(A), the total income was assessed at Rs.15779,87,79,234/- under normal provisions and book profit of Rs.26213,11,91,029/- u/s.115JB of the Act. In the order dated 05.02.2021 giving effect to the order of the ITAT, the total income was assessed at Rs.12122,71,83,444/- under normal provisions of the Act and book profit of Rs.26193,71,27,501/- u/s.115JB of the Act. Thereafter, the penalty u/s.271(1)(c) has

been levied in respect of disallowance of depreciation on KGD6, addition of transfer pricing adjustment and disallowance of depreciation on steel purchases under normal provisions of the Act.

7.3.2 During the appellate proceedings, the appellant submitted that in the case of CIT vs. Nalwa Sons Investments Ltd. (194 Taxman 387)(Del), the Hon'ble Delhi High Court had held "where tax payable on income computed under normal provisions of the Act was less than tax payable u/s.115JB, then no penalty u/s.271(1)(c) could be imposed with reference to disallowance/addition made under normal provisions". The order of the Hon'ble Delhi High Court has been upheld by the Hon'ble Supreme Court vide order dated 04.05.2012. Thereafter, explanation 4 to section 271(1) of the Act was substituted by Finance Act, 2015 w.e.f. 01.04.2016. The explanation 4 provided method of calculating tax sought to be evaded where the income determined under normal provisions was less than the income determined u/s.115JB of the Act. It is also submitted that the CBDT had accepted the position of law declared by Hon'ble Delhi High Court in the case of CIT vs. Nalwa Sons Investments Ltd. (*supra*) and issued Circular No. 25/2015 bearing F.No. 279/Misc/140/2015/TTJ dated 31.12.2015. In the circular, it has been stated that no penalty u/s.271(1)(c) of the Act should be levied in respect to addition/disallowances made under normal provisions for assessment years prior to AY.2016-17, where the tax payable under normal provisions of the Act is less than the tax payable u/s.115JB of the Act. The appellant further submitted that the Hon'ble Supreme Court in the case of Ellerman Lines Ltd. vs. CIT (82 ITR 913 (SC), held that CBDT Circulars are binding on the Department. The appellant further submitted that in the appellant's own case for AYs. 2007-08 and 2009-10, the ITAT followed the decision in the case of CIT vs. Nalwa Sons Investments Ltd. (*supra*) and deleted the penalty levied in respect of addition/disallowance made under normal provisions of the Act because the tax payable on income assessed u/s.115JB was more than the tax payable on income assessed under normal provisions of the Act.

Thus, the appellant submitted that after giving effect to the ITAT's order for AY. 2013-14, the tax payable on income assessed under normal provisions of the Act was less than the tax payable on income assessed u/s.115JB. Therefore, following the CBDT Circular No. 25/2015 dated 31.12.2015, no penalty u/s.271(1)(c) should be levied with reference to the addition/disallowance made under normal provisions of the Act.

7.3.3 From perusal of the order dated 05.02.2021 giving effect to ITAT's order, it is seen that the taxable income of Rs.12122,71,83,444/- and tax payable of Rs.3933,21,59,669/- was determined under normal provisions of the Act. Book profit u/s.115JB was computed at Rs.26193,71,27,501/- on which tax payable was

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determined at Rs.5240,77,25,628/-. Thus, the tax payable under the normal provisions of the Act was less than the tax payable under section 115JB of the Act for AY. 2013-14. The CBDT issued Circular No. 25/2015 dated 31.12.2015, in which it has been stated that prior to 01.04.2016 where the income tax payable on total income as computed under normal provisions of the Act is less than the tax payable on book profit u/s.115JB, then penalty u/s.271(1)(c) is not attracted with reference to addition/disallowance made under normal provisions of the Act. Further, if any adjustment is made in the income computed for the purpose of MAT, then levy of penalty u/s.271(1)(c) would be determined on the nature of the adjustment.

For ready reference circular no. 25/2015 issued by the CBDT is reproduced as under:

CIRCULAR NO.25/2015

F.NO.279/MISC./140/2015/ITJ

Government of India

Ministry of Finance,

Central Board of Direct Taxers

New Delhi.

31st December, 2015

Section 115JB of the Act is a special provision for levy of Minimum Alternate Tax on Companies, inserted by Finance Act, 2000 with effect from 1-4-2001.

2. Under clause (iii) of sub-section (1) of section 271 of the Act, penalty for concealment of income or furnishing inaccurate particulars of income is determined based on the "amount of tax sought to be evaded" which has been defined inter-alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income or income in respect of which inaccurate particulars had been filed.

3. In this context, Hon'ble Delhi High Court in its judgment dated 26-8-2010 in ITA No.1420 of 2009 [2010] 194 taxman 387 (Delhi) in the case of Nalwa Sons Investment Ltd. (available in NJRS as 2010-LL-0826-2), held that when the tax payable on income computed under normal procedure is less than the tax payable under the deeming provisions of section 115JB of the Act, then penalty under section 271(1)(c) of the Act could not be imposed with reference to additions /disallowances made under normal provisions. The judgment has attained finality.

4. Subsequently, the provisions of Explanation 4 to sub-section (1) of section 271 of

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the Act have been substituted by Finance Act, 2015, which provide for the method of calculating the amount of tax sought to be evaded for situations even where the income determined under the general provisions is less than the income declared for the purpose of MAT u/s 115JB of the Act. The substituted Explanation 4 is applicable prospectively w.e.f. 1-4-2016.

5. Accordingly, in view of the Delhi High Court judgment and substitution of Explanation 4 of section 271 of the Act with prospective effect, it is now a settled position that prior to 1-4-2016, where the income tax payable on the total income as computed under the normal provisions of the Act is less than the tax payable on the book profits u/s 115JB of the Act, then penalty under section 271(1)(c) of the Act, is not attracted with reference to additions /disallowances made under normal provisions. It is further clarified that in cases prior to 1-4-2016, if any adjustment is made in the income computed for the purpose of MAT, then the levy of penalty u/s 271(1)(c) of the Act, will depend on the nature of adjustment.

6. The above settled position is to be followed in respect of section 115JC of the Act also.

7. Accordingly, the Board hereby directs that no appeals may henceforth be filed on this ground and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/not pressed upon. This may be brought to the notice of all concerned.

(Ramanjit Kaur Shethi)

DCIT(ITJ)(OSD),

CBDT, New Delhi

7.3.4 The CBDT Circular No. 25/2015 has been referred by various courts in their judgments.

In the case, **CIT v. Aleo Manali Hydro Power (P.) Ltd. [2013] 38 taxmann.com 288 (Allahabad)**, the Hon'ble High Court of Allahabad has held that where deemed income assessed under section 115JB becomes basis of assessment as it was higher than income determined under normal provision, concealment made under normal provision having no effect, penalty under section 271(1)(c) could not be levied.

The relevant paras of the decision of the Hon'ble Allahabad High Court is reproduced as under:

"... 7. The ITAT found that the case is squarely covered by the judgment of Delhi High Court in **CIT v. Nalwa Sons Investment Ltd. [2010] 327 ITR 543/194 Taxman**

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387. An SLP was filed by the Commissioner of Income Tax against the judgment, which was dismissed by the Supreme Court on 4th May, 2012. The judgment dated 4th May, 2012 dismissing the appeal against the judgment of the Delhi High Court is reported in CIT v. Nalwa Sons Investment Ltd. [2012] 21 taxmann.com 184 (SC).

8. The Delhi High Court held that in respect of company in question on the basis of normal provision income was assessed at negative i.e. on loss of Rs.36,95,21,018/-. The company was MAT company and that the assessment under Section 115-JB resulted in calculation of profit at Rs.4,01,63,180/-. The income of the assessee was thus assessed under Section 115-JB and not under normal provision. It was held; "no doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed u/s 115JB which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed u/s 115JB. Hence, when the computation was made u/s 115JB, the concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all. The upshot of the aforesaid discussion would be to sustain the order of the Tribunal, though on different grounds. Therefore, while the reasoning and approach of the Tribunal is not tenable, for the reasons disclosed above, penalty could not have been imposed even in respect of the false claim of depreciation made by the assessee. CIT v. Gold Coin Health Food (P) Ltd. [2008] 218 CTR (Supreme Court 359: (2008) 11 DTR (Supreme Court 185: (2008) 304 ITR 308 (Supreme Court distinguished.)"

9. The reasoning given by the Delhi High Court has been approved on merits by the Hon'ble Supreme Court. In the circumstances the questions raised in this appeal are covered and do not require further examination.

10. The income tax appeal is accordingly dismissed..."

In the case of **BSEL Infrastructure Realty Ltd. v. ACIT [2012] 22 taxmann.com 155 (Mum.)**, the ITAT, Mumbai has held that when assessment had been made on basis of book profit, penalty under section 271(1)(c) cannot be levied on additions made under normal provisions.

In this case, the ITAT, Mumbai has held as under:

"...It was an undisputed fact in this case that under the normal provisions, the total income was assessed at Rs. 16,13,33,970 and book profit under section 115JB the income was computed at Rs. 67,44,11,568. Since the tax computed under the provisions of section 115JB was higher than the tax computed on the income under the normal provisions of the Act, the Assessing Officer has completed the assessment and levied the tax under section 115JB only. On this background, it is to be seen as to whether in such a situation penalty under section 271(1)(c) can be

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levied in this case. Section 115JB starts with a clause and provides that where in the case of an assessee company, the income-tax payable on the total income as computed under this Act is less than 15 per cent of its book profits, such a book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax. The scheme of the Act is that, if the tax payable under the normal procedure, i.e., under the normal computation under the Income-tax Act is higher, then such amount is taxable income of the appellant. On the other hand, if the book profits are deemed to be the total income of the assessee in terms of section 115JB and is more than the income under the normal provisions of the Act, then by legal fiction such a book profit will be deemed to be the 'total income' of the assessee. Thus, if the tax has been imposed and collected on the deemed income under section 115JB in the assessment, then the tax under the normal provisions/computation is not leviable or charged. On the same logic if any addition or disallowance has been made in the normal computation/provisions of the Income-tax Act and finally assessment has not been completed or tax has not been levied on such normal computation, then such additions/disallowances cannot be a subject-matter of penalty, as no tax have been levied on such additions/disallowances. When the income-tax is paid on the book profits by a legal fiction, such a legal fiction has to be taken to its logical conclusion and it cannot be held that for the purpose of penalty, normal computation would be considered even though tax has not been levied under the normal provision/computation.

Thus, penalty under section 271(1)(c) in the case of the assessee cannot be imposed, because there was no tax sought to be evaded because the additions in respect of which penalty have been imposed, were made while computing the total income under the normal provisions of the Act and finally the income of the assessee was determined on the basis of the book profit under section 115JB. Accordingly, the penalty imposed by the Assessing Officer and as confirmed by the Commissioner (Appeals) was to be cancelled. [Para 8.2]..."

In this case, CIT v. Citi Tiles Ltd. [2014] 46 taxmann.com 344 (Gujarat), the Hon'ble High Court of Gujarat has held that simply because before and after additions, assessee remained a MAT company and paid tax under section 115JB, that by itself does not mean that no penalty could be imposed.

In this case, the Hon'ble High Court of Gujarat has held as under:

"... Under section 271, if the Income tax Authority prescribed therein is satisfied that if any person has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay penalty, which shall not be less than but shall not exceed three times of the amount of tax sought to be avoided by the reasons of the concealment of the particulars of his income or furnishing of inaccurate particulars of such income. Clause (c) of Explanation 4 to

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section 271(1) provides that for the purpose of clause 3 of the said sub-section, the expression 'amount of tax sought to be avoided' means the difference between tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished. If, even after the concealment is unearthed or the assessee's act of supplying inaccurate particulars comes to light, the tax liability before or after such concealment or providing of inaccurate particulars remains the same by virtue of clause (c) of Explanation 4 to section 271(1), there would be no penalty imposable. This is so because the penalty is to be computed in terms of the amount of tax sought to be avoided, such expression 'amount of tax sought to be avoided' is explained in Explanation 4. Clause (c) thereof when applied to such a case, the amount of tax sought to be avoided would be 'Nil'. If this is so, the penalty under section 271(1)(c) would not be possible to be imposed. [Para 10]

In the instant case, the Commissioner (Appeals) in his order partially allowed the assessee's appeal in terms of quantum addition and in terms held that no addition for the purpose of computation of book profit under section 115JB could have been made.

While computing the income of a company under the provision for minimum alternative tax, the Assessing Officer has only the power of examining whether the books of account are certified by the authorities under the Companies Act is as having been properly maintained in accordance with the Companies Act. The Assessing Officer thereafter has the limited power of making increases and reductions as provided in the Explanation to such provision. [Para 11]

Such order in effect was that addition for normal computation sustained, for the purpose of computation of book profit deleted. The result of this decision of the Commissioner (Appeals) would be that the tax that the assessee would pay before and after additions would remain exactly the same. In other words, since the Commissioner did not permit any increase in the assessee's book profit computation under section 115JB, even after unearthing the concealed income, the assessee ended up paying the same amount of minimum alternative tax under section 115JB even after the concealments were unearthed and accepted by the assessee. When in facts of a case, the assessee's tax liability did not change despite unearthing of concealed income, no penalty could have been levied. It does not mean simply because before and after the additions the assessee remained a MAT company and paid tax under section 115JB or such similar provision, that by itself would mean that no penalty could be imposed. If the effect of the addition of the concealed income results into higher minimum alternative tax by increasing the book profit also, penalty could as well be imposed. Resultantly, appeals are dismissed. [Para 12]..."

In the case, CIT v. Jindal Polyester & Steel Ltd. [2014] 52 taxmann.com

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259 (Allahabad), the Hon'ble High Court of Allahabad has held that where assessee company had paid MAT, book profit disclosed by it was not income determined under Income-tax Act; therefore claim of extra depreciation did not lead to tax evasion and, hence, no penalty could be levied.

In this case, the Hon'ble High Court of Allahabad has held as under:

"... The High Court, while dealing with the penalty under section 271(1)(c), in *CIT v. Aleo Manali Hydro Power (P) Ltd.* [2013] 38 taxmann.com 288/219 Taxman 90 (All.) (Mag.) had held that when the computation was made under section 115JB, the concealment had no role to play and was totally irrelevant. [Para 14]

On the facts and circumstances the issue involved is squarely covered by Division Bench decision of this Court in the case of *Aleo Manali Hydro Power (P.) Ltd.* (infra). [Para 15] SC./140/2015/ITJ

The book profit disclosed by the assessee for the purpose of the liability of tax under section 115J is relevant and not the income determined under the provisions of the Income tax Act. [Para 16]

The Tribunal, on the facts and circumstances of the case, has further recorded the finding that, on the facts and in the circumstances of the case and on the bona fide of the explanation given by the assessee and the disclosure made in the accounts accompanying the return, no penalty is leviable. [Para 17]

The appeal is accordingly dismissed. [Para 20]..."

In the case, *Pr. CIT v. Multiplex Capital Ltd.* [2017] 88 taxmann.com 586 (Delhi), the Hon'ble High Court of Delhi has taken similar view. The relevant paras of the decision of the Hon'ble High Court of Delhi are reproduced as under:

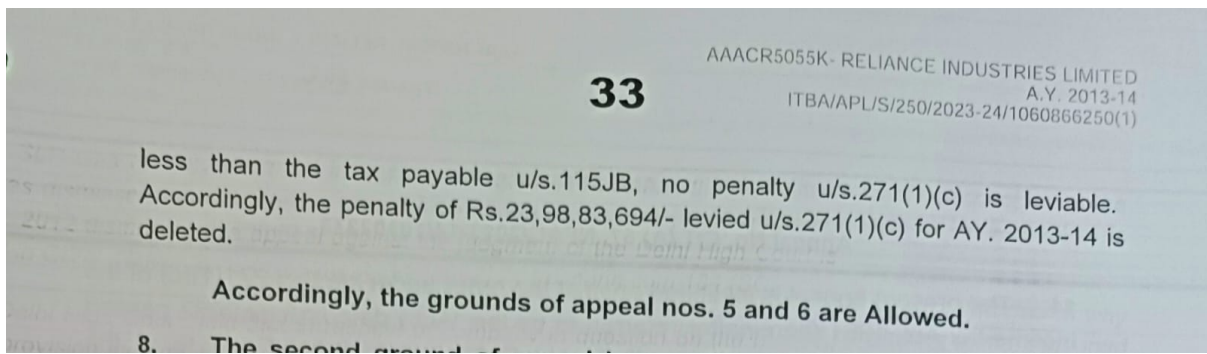
"... 5. Learned counsel for the revenue had sought to distinguish *Nalwa Sons Investment Ltd.* (supra) by stating that the ITAT itself had in the present case decided that the SCN could not be said to have been time-barred. This Court is of the opinion that the distinction sought to be made between the reasoning in *Nalwa Sons Investment Ltd.* (supra) and the present case is not germane. What is of importance is that at the time when jurisdiction is assumed by the AO - i.e. upon completion of proceedings or within the time stipulated by forming an opinion that there is no concealment of income, there should be objective material to reach the conclusion that such concealment is material having regard to the nature and circumstances of the case, especially where two computations are involved. At the stage when the AO sought to assume jurisdiction and form an opinion, the assessment was completed under Section 115JB. Concededly, there was no concealment of any material particulars in respect of that part of the return. The concealment found was in respect

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of normal computation. That the normal computation involved certain disallowances at later and higher stages of the proceedings at the first appellate and the ITAT's proceedings reflect the unfortunate circumstances of the litigating parties. That would not in any manner deviate from the fact as to whether the AO could have assumed, on the basis of the opinion that there was concealment of income which led to revenue loss. If the revenue evasion were to be accepted, a satisfaction which was otherwise warranted at the time when it was recorded because of operation of Section 115JB(1) or other such like provision would remain pending for about 15 years and the revenue can hopefully urge at later stage that an opinion formed which was not valid at the time it was made, can be revived after a period of hibernation to revisit the assessee. Such circumstances can hardly be called satisfactory or lead to any certainty; it will anyway lead to no certainty in law at all; we are satisfied that no question of law arises. The appeal is accordingly dismissed..."

7.3.5 It has been now a settled principle of law that CBDT Circulars are binding on the officers of the Income-tax Department. In the case of the appellant for AY. 2013-14, after giving effect to the order of the ITAT, the total assessed income under normal provisions of the Act was Rs.12122,71,83,444/- on which tax payable was Rs.3933,21,59,669/- and the income assessed u/s.115JB was Rs.26193,71,27,501/- and tax payable was Rs.5240,77,25,628/-. Thus, the total income assessed and the tax levied under normal provisions of the Act was less than the total income computed and tax levied u/s.115JB of the Act. The AO has levied penalty u/s.271(1)(c) in respect of disallowances of depreciation on KGD6, addition of transfer pricing adjustment and disallowance of depreciation on steel purchases. All of these disallowances/additions were made under normal provisions of the Income-tax Act. The AO made adjustment in the book profit u/s.115JB in respect of disallowance u/s.14A and provisions for wealth tax. The CIT(A) allowed relief in respect of provisions of wealth tax and gave partial relief for disallowance u/s.14A of the Act. The ITAT allowed further relief in respect of disallowance u/s.14A. Thus, the adjustment in respect of provision for wealth tax and disallowance u/s.14A made u/s.115JB of the Act by the AO got deleted after the ITAT's order. Thus, after giving effect to the order of the ITAT, no adjustment was made in computation of book profit u/s.115JB of the Act. As discussed above, the tax payable under normal provisions of the Act after giving effect to the ITAT's order is less than the tax payable under MAT u/s.115JB of the Act, therefore, as per CBDT Circular No. 25/2015 and also the decisions referred above, no penalty u/s.271(1)(c) is attracted with reference to addition or disallowance made under normal provisions of the IT Act. The AO has levied penalty u/s.271(1)(c) in respect of disallowance of depreciation on KGD6, addition of transfer pricing adjustment and disallowance of depreciation on steel purchase, which were made under normal provisions of the Act. In the case of the appellant for AY. 2013-14, the tax payable under normal provisions of the Act being



4. We wish to make it clear that both the parties are very much *ad idem* during the course of hearing that the learned CIT(A) has followed the very reasoning in paragraphs 17 to 17.1 to delete the corresponding penalty of Rs.234,33,40,276/- in his impugned order for the latter assessment year 2014-2015. It is evident therefore that the learned CIT(A) has held that the assessee's taxable income computed under normal provisions is less than its sec.115JB book profits in both these assessment years and conclude that the Assessing Officer had erred in law and on facts in levying the consequential penalty(ies) hereinabove *inter alia* going by CIT vs. Nalwa Sons Investments Ltd., [2010] 194 Taxman 387 (Del.) (HC); CBDT's circular no.25/2015 dated 31st December, 2015 as well as the legislative amendment to sec.271(1)(c) Explanation-4, applicable in prospectively w.e.f. 01.04.2016. Learned CIT-DR vehemently argued in this factual

backdrop that the CIT(A) herein has erred in law and on facts in deleting the impugned penalty(ies) for the sole reason of the assessee's taxable income coming out to be less than its sec.115JB book profits. She further stated that the Revenue's quantum appeals are indeed pending before higher judicial forums and therefore, the impugned penalty(ies) deserve to be kept in abeyance being consequential in nature.

5. Learned counsel representing the assessee has drawn strong support from the CIT(A)'s above extracted detailed discussion deleting the impugned penalty(ies) for the reason that its book profits are more than the income computed under the normal provisions.

6. We have given our thoughtful consideration to the foregoing rival stands and find no merit in the Revenue's instant identical sole substantive ground(s). Suffice to say, it has come on record that we are in assessment years 2013-2014 and 2014-2015 wherein case law *Nalwa Sons* (supra) as well as the CBDT's circular no.25/2015 have settled the issue in assessee's favour that the impugned penalty could not be levied in an instance of

the taxable income computed under the normal provisions turning out to be less than sec.115JB book profits. We wish to make it clear that the legislative amendment in sec.271(1)(c) Explanation-4 carries only prospective effect from 01.04.2016 onwards. Faced with this situation, we affirm the learned CIT(A)'s action deleting the impugned penalty(ies) in both these assessment years. These Revenue's twin appeals ITA.Nos.1875 & 1872/Mum./2024 fail in above terms. The assessee's cross objections C.O.Nos.88 and 89/MUM./2024 stand render academic in very terms. Ordered accordingly.

7. To sum-up, these Revenue's twin appeals ITA.Nos.1875 & 1872/Mum./2024 and assessee's cross objections C.O.Nos.88 & 89/MUM./2024 are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 10.07.2024

Sd/-
[GIRISH AGRAWAL]
ACCOUNTANT MEMBER
Mumbai, Dated 10th July, 2024
VBP/-

Sd/-
[SATBEER SINGH GODARA]
JUDICIAL MEMBER

Copy to

1.	The applicant
2.	The respondent
3.	The Pr. CIT, Mumbai concerned
4.	D.R. ITAT, "D" Bench, Pune.
5.	Guard File.

//By Order//

//True Copy //

Sr. Private Secretary, ITAT, Pune Benches,
Pune.