

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.496/Ind/2023
(Assessment Year: 2014-15)

M/s. Swan Petrochemicals Pvt.Ltd, Unit No.308 Acme Plaza, Opp. Sangam Cinema, Andheri Kurlka, Maharashtra	Vs.	DCIT (Central), Indore
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AABCR9592C		
Assessee by	Shri Ajay Tulsian & Ms. Ruchira Singhal, ARs	
Revenue by	Shri Ashish Porwal, Sr.DR	
Date of Hearing	22.05.2024	
Date of Pronouncement	16.07.2024	

ORDER

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 30.09.2023 of the Commissioner of Income Tax (Appeals), National Faceless Appeal Centers,(NFAC) Delhi arising from the penalty order passed u/s 271(1)(c) of the Act for A.Y.2014-15.

2. The assessee has raised following grounds of appeal:

"1. The Learned CIT(A) erred in confirming the penalty levied by the AO u/s 271(1)(c) of Rs. 13,80,000/-, That on the facts and in the circumstances of the case and in law the penalty levied is wrong, bad in law and prayed to be deleted.

2. The Learned CIT(A) erred in confirming the penalty levied u/s 271(1)(c) stating that the addition was made by the AO in the assessment order and that the said assessment order was not challenged by the appellant and also that there is an element of concealment. That on the facts and in the circumstances of the case the very premises, on which the Learned CIT(A) confirmed the penalty is misconceived and not tenable.

3. The appellant craves leave to add, to alter, amend, modify, substitute, delete and of re-adding all or any of the grounds of appeal on or before final hearing, if necessity so arises."

3. The assessee is a private Limited Company and filed its e-return of income on 24.09.2014 declaring total income at Nil. The case of the assessee was selected for scrutiny under CASS and consequently notice u/s 142(1) was issued by the Assessing Officer on 23.09.2016. In the scrutiny assessment the A.O had made an addition of Rs.44,57,310/- on account of impermissible loss claimed by the assessee from the transactions carried out in the National Multi Commodity Exchange of India (MCX) by treating them as bogus transactions on account of manipulated synchronized trading on MCX. The assessee did not challenge the assessment order as this was otherwise speculative loss not allowable for set off against any other income except profit from

speculation business. The Assessing Officer initiated penalty proceedings after recording the satisfaction in the assessment order as well as by issuing show cause notice dated 28.12.2016 and thereby levied the penalty u/s 271(1)(c) of the Act at Rs.39,18,000/- being 100% of tax ought to be evaded vide order dated 30.06.2017. Aggrieved by the penalty order the assessee filed an appeal before CIT(A) but could not succeed. Before the Tribunal the Ld. AR of the assessee has submitted that the assessee itself has filed the revised computation of income and also paid tax on 14.12.2016 before completion of the assessment. Therefore the assessee has made suo-motto disallowance of the claim of set off of speculative loss against his business income before the show cause notice dated 19.12.2016 issued by the A.O. The Ld. AR has thus submitted that it is a case of addition made by the Assessing Officer by treating the business loss/speculative loss as bogus claim whereas all the transactions are carried out on the stock exchange through the registered broker and therefore, once the assessee itself has withdrawn the claim of set off loss in the revised computation as speculative loss it cannot be a case of furnishing inaccurate

particulars of income or concealment of particulars of income. Thus he has contended that the initial claim of business loss was due to the confusion about the definition of speculative loss provided u/s 43(5) and further amendment of Clause-e to the said sub-section by Finance Act 2/2013 w.e.f 1.4.2014. Hence it was a bona fide claim of the assessee. He has further submitted that the entire loss of Rs.44.57 lakhs was incurred in the month of April 2013 and therefore, it cannot be planned to set off against the unpredictable future business loss. Thus the Ld. AR has submitted that treating the claim of the assessee as bogus by the Assessing Officer is a highly debatable issue having no tax impact as the assessee itself has withdrawn the claim of set off of this loss against the business income. The Ld. AR has submitted that the A.O has levied the penalty by relying on explanation-1 to Section 271(1)(c) whereas at the most it is a case of furnishing incorrect particulars of income and not concealment of particulars of income. Therefore the Explanation-1 is not applicable in the case of the assessee. In support of his contention he has relied upon the following decisions:

- (i) Hon'ble Supreme Court in the case of CIT V/s Reliance Petroproducts Pvt. Ltd. 322 ITR 158(SC).
- (ii) Hon'ble Delhi High Court in the case of CIT v/s Auric Investment 310 ITR 121 (Del.)

3.1 Ld. AR has also raised the objection about the validity of the initiation of penalty proceedings and consequential order passed by the A.O on the ground that the A.O was not sure about the default/charge under which the penalty was to be levied and therefore, the order of levying penalty is not sustainable and liable to be quashed. In support of this contention the Ld. AR has relied upon the following decisions:

- (i) ITO V/s Shri Uday Kumar B Bhatt ITA No.2072/Ahd/2018 of ITAT Ahmedabad Bench dated 06.08.2021.
- (ii) M/s HPCL Mittal Pipe Lines Ltd V/s ACIT ITA No.266(ASR)/2018 of ITAT Amritsar Bench dated 14.02.2019.
- (iii) M/s Oriental Clearing Agency V/s DCIT ITA No.356 to 359/Pun/2015 of ITAT Pune Bench.
- (iv) M/s Atibir Hi-Tech Pvt. Ltd V/s DCIT CC-XI, Kolkatta ITA No.1221/Kol/2011 of ITAT, Kolkatta Bench.

4. On the other hand Ld. DR has submitted that the A.O has issued the show cause notice u/s 142(1) on 18.12.2015 and only

thereafter the assessee has revised its computation of income and withdrew the claim of business loss incurred on account of transactions carried out on MCX. The show cause notice dated 19.12.2016 was specifically on the point that the assessee has carried out these transactions which are in the nature of synchronized manipulated transactions for bogus claim of loss. The A.O conducted an enquiry from the stock exchange and has given the finding on the basis of the details procured from the stock exchange that the transactions of incurring the loss are bogus synchronized manipulated transactions. The assessee has not challenged the assessment order and the finding of the A.O has attained the finality. The Ld. DR has referred to the show cause notice issued by the A.O placed at page-62 of paper book and submitted that the A.O has specifically mentioned the charge for initiation of the penalty proceedings u/s 271(1)(c) of the Act. In support of his contention he has relied upon the following decisions;

- (i) Sundaram Finance Ltd V/s ACIT 403 ITR 407 (Madras).**
- (ii) The SLP filed by the assessee was also dismissed by the Hon'ble Supreme Court, 259 Taxman 220(SC).**

4.1 He has also relied upon the impugned order of the CIT(A).

5. We have considered the rival submissions and relevant material on record. The assessee has not disputed the fact to the extent that the transactions carried out on MCX resulting loss of Rs.44,57,310/- are speculative transactions. It is manifested from the details of the transactions which are reproduced by the A.O in the assessment order that all these transactions are intra day transactions with no delivery and the purchase and sale of the particular commodity is within the difference of few seconds therefore, there is no dispute on this fact that the loss of Rs.44,57,310/- claimed by the assessee in the return of income as business loss is a speculative loss and impermissible to set off against the business income.

5.1 The Ld. AR of the assessee has contended that the assessee has suo-moto withdrew the claim before the A.O issued show cause notice. However, we find that the case of the assessee was selected for scrutiny and A.O issued notice u/s 143(2) of the Act on 21.09.2015 and show cause notice u/s 142(1) of the Act was issued on 18.12.2015. In response to these notices one Shri Kapil Shah,

CA appeared and submitted the details and submissions which were considered by the A.O and thereafter, the A.O has further proceeded to conduct enquiry about the nature of transactions being manipulated, synchronized trading on MCX by obtaining the details from the Stock exchange. In this process the A.O has again issued a show cause notice and confronted with the assessee about the facts detected during the investigation conducted by the A.O. Against the said show cause notice the Ld. AR has taken the plea that the assessee already suo-moto withdrew the claim by the filing the revised computation. However, it is not a case of voluntarily withdrawal of the impermissible claim by the assessee but only when the case of the assessee was taken up for scrutiny and the A.O issued notice u/s 142(1) on 18.12.2015, the assessee filed revised computation of income on 13.12.2016 to withdraw the claim. Thus it is not a case of voluntarily act on the part of the assessee before the A.O taken up the case for scrutiny or even before first show cause notice issued u/s 142(1) dated 18.12.2015. Therefore, we do not find any substance or merit in the contention of the Ld. AR of the assessee. Though the A.O has treated the claim

of loss as bogus on account of manipulated synchronized trading carried out by the assessee on MCX however, it is not in dispute that the loss in question has been incurred on speculative transactions carried out by the assessee and therefore, the said claim is impermissible resulting furnishing of incorrect particulars of income by the assessee in the return of income. The subsequent withdrawal of the claim by the assessee would not change the status of making the impermissible claim of speculative loss against business income. It is not the case of the assessee that he has made a wrong claim of setting off loss but the assessee has shown and reported this loss as business loss which clearly establishes the case of furnishing of incorrect particulars of income by the assessee. Hence, it is not a case of bona fide claim of assessee being speculative loss is mistakenly set off against business income but the assessee has consciously claimed the speculative loss as business loss and therefore, the decisions relied by the Ld. AR in case of **CIT V/s Reliance Petroproducts Pvt. Ltd. (supra)** as well as **CIT v/s Auric Investment 310 ITR (supra)** would not help the case of the assessee.

6. The next contention of the Ld. AR is regarding validity of initiation of proceedings u/s 271(1)(c) of the Act and consequential penalty order. The Assessing Officer has recorded his satisfaction in the assessment order in para 4.9 as under:

"4.9 Thus, in view of above analysis regarding losses booked on NMCE platform it is ample clear that the losses obtained by the assessee on NMCE Platform are contrived and preplanned losses which are incurred by executing the synchronized trades. The losses are incurred with a specific intention to reduce the taxable income by setting off the same against the profit earned from business activities other than trading on NMCE. Therefore, the losses incurred by the assessee at NMCE platform of Rs. 44,57,310/- is disallowed and added back to the total income. As the assessee has furnished inaccurate particulars, penalty proceedings is initiated u/s 271(1)(c) separately". [Emphasis supplied by us]

6.1 Thus it is manifested from the satisfaction recorded by the A.O that the penalty was to be initiated for furnishing incorrect particulars of income by the assessee and the A.O has mentioned a specific charge of furnishing incorrect particulars of income. Further in the show cause notice dated 28.12.2016 issued u/s 274 r.w.s. 271(1)(C) of the Act placed at page-62 of the paper book the A.O has again mentioned the specific charge for initiating proceedings u/s 271(1)(c) of the Act. For ready reference the show cause notice is reproduced as under:



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OFFICE OF THE
DEPUTY COMMISSIONER OF INDORE TAX (CENTRAL)-1, INDORE
Aayakar Bhawan Main Building, Room No.101, Opp. White Church, A.B Road, Indore

PAN: AABCR9592C

Date: 28/12/2016

M/s Swan Petrochemical Pvt. Ltd.
308, Acme Plaza, Opp. Sangam Cinema
Andheri Kurla Road,
Mumbai- 400059

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

Whereas in the course of proceedings before me for the A.Y. 2014-15 it appears to me that you:-

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

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

You are hereby requested to appear before me at 03:30 PM on 30/01/2017 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 authorised 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).



Avaneesh Tiwari
(Avaneesh Tiwari)

Dy. Commissioner of Income Tax (Central)-I
Indore

6.2 The A.O has consciously deleted all irrelevant and unrelated part of the show cause notice and only the charge of furnishing inaccurate particulars of income was mentioned in the show cause notice. Thus, it is a case of initiation of penalty proceedings against a specific charge of furnishing inaccurate particulars of income which in our view is a correct charge for initiation of penalty u/s 271(1)(c) of the Act. Accordingly there is no defect either in recording of satisfaction or in issuing the show cause notice u/s 274 r.w.s. 271(1)(c) of the Act for initiating the penalty proceedings u/s 271(1)(c) of the Act. Once the penalty proceedings were initiated on a definite charge and was made known to the assessee by both means of recording the satisfaction in the assessment order as well as serving the show cause notice then the objection of the assessee has no legs to stand. Accordingly we do not find any substance in this objection of the assessee.

7. In view of the facts and circumstances of the case as discussed above we are of the considered view that the levy of penalty u/s 271(1)(c) of the Act is proper and justified as it is a case of furnishing of incorrect particulars of income by making a claim

of business loss as against the speculative loss not permissible under the provisions of the Act. Hence we do not find any reason to interfere with the impugned order of the CIT(A) confirming the levy of penalty u/s 271(1)(c) of the Act.

8. In the result appeal of the assessee is dismissed.

Order pronounced in the open court on 16.07.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 16.07.2024

Dev/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore