

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI T.R. SENTHIL KUMAR, JUDICIAL MEMBER &
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 1275/Ahd/2012
(निर्धारण वर्ष / Assessment Year : 2007-08)

Indian Chronicle Ltd. Gujarat Samachar Bhavan, Khanpur, Ahmedabad - 380001	बनाम/ Vs.	ITO Ward4(3), Ahmedabad
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. : AAACI0793H		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से/Appellant by :	Shri Tushar Hemani, Sr. Advocate & Shri Parimalsinh B. Parmar, A.R.
प्रत्यर्थी की ओर से/Respondent by:	Shri Rignesh Das, Sr. DR

Date of Hearing	28/11/2024
Date of Pronouncement	18/12/2024

ORDER

PER SHRINARENDRA PRASAD SINHA, AM:

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-VIII, Ahmedabad, (in short ‘the CIT(A)’), dated 26.03.2012 for the Assessment Year 2007-08 pertaining to the order under Section 271(1)(c) of the Income Tax Act, 1961 (in short ‘the Act’).

2. The brief facts of the case are that the assessee is a limited company and had filed its return of income for A.Y. 2007-08 on 30.10.2007 declaring total income of Rs.62,90,780/-. The assessee had derived long term capital gain (‘LTCG’) of Rs.8,52,63,544/- during the year, which was claimed as exempt from income under the provision of section 10(38) of the Act.

This exempt income was, however, required to be considered for computation of book profit u/s.115JB of the Act. In the course of assessment, the AO noticed that the assessee had not furnished computation of book profit u/s.115JB of the Act. As per amended provision of Section 10(38) of the Act, the income claimed exempt under that section was required to be offered for taxation u/s.115JB of the Act. The AO, therefore, computed the book profit by including the exempt LTCG of Rs.8,52,63,544/- in the book profit and accordingly determined the tax payable by the assessee. As the book profit of the assessee was higher than the normal profit, tax was computed on the book profit. The AO also initiated penalty proceeding u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of income in respect of computation of book profit. Thereafter, penalty u/s.271(1)(c) of the Act was imposed vide order dated 20.05.2010 and penalty was imposed for concealment of MAT income. The appeal filed by the assessee against the imposition of penalty had travelled up to ITAT and the ITAT vide order ITA No.1275/Ahd/2012 dated 09.02.2017 had adjudicated the issue of levy of penalty u/s. 271(1)(c) of the Act and confirmed the penalty in respect of concealment of MAT income.

3. The assessee had filed a miscellaneous application u/s.254(2) of the Act with a request to rectify the mistakes apparent from the record in the order passed by the ITAT in ITA No.1275/Ahd/2012 dated 09.02.2017. The rectification was sought in respect of the first two grounds taken by the assessee, which are reproduced below:

- “1. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in upholding the validity of the penalty order passed by the Assessing Officer.
2. In law and in the facts and circumstances of the appellant's case, the learned CIT(A) has grossly erred in upholding the order levying penalty of Rs.98,79,990 u/s. 271(1)(c) on the ground that the appellant was guilty of concealment of income inasmuch as it had failed to show in its return the total income pursuant to Section 115JB and instead, merely returned total income as per the normal provisions of the Income-tax Act, 1961. The same may be deleted for the reasons stated in the Synopsis attached herewith.”

4. The miscellaneous application filed by the assessee was allowed vide order M.A. No.224/Ahd/2017 in ITA No.1275/Ahd/2012 17.09.2024. The findings given in the MA order in respect of the mistake in respect of the two grounds as raised by the assessee was as under:

“8. Having heard contentions of both the parties, we are in agreement with the ld.counsel for the assessee that the non-adjudication of ground No.1 raised by the assessee treating it as general in nature is a mistake apparent on record in the order passed. The bare reading of the contents of the ground reveal that the assessee vide the said ground had raised a challenge to the order of the Ld. CIT(A) upholding the validity of the penalty order passed. This surely cannot be said to be a general ground. Besides there were submissions made by the assessee vis-a-vis this ground, which formed part of the appeal set being contained in the Synopsis cum Submissions filed alongwith F. No.36 which also shows that the ground raised a specific challenge to the order of the Ld. CIT(A).The Ld. DR's argument that this ground is dealt with by the ITAT while dealing with the other grounds raised by it is not discernable from the order nor was pointed out to us by the Ld.DR. Therefore, treating the said ground No.1 as general in nature is, we hold, a mistake apparent from record in the order of the ITAT. Accordingly, we recall the impugned order of the ITAT for adjudicating the ground no.1 raised by the assessee.

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16. Having heard contentions of both the parties, we find merit in the contentions of the ld.counsel for the assessee. The order, while dealing with ground no.2 , notes the Ld.Counsel for the assessee to have stated the issue to be squarely covered in its favour by decision of the Hon'ble Punjab & Haryana High Court in CIT Vs. Stock Home India Ltd (supra), but goes on to distinguish it by finding that while in the facts of the case before the Hon'ble High Court the assessee was noted to have filed a revised return including therein calculation of Book Profits u/s 115JB of the Act and also filing Form No.,29B , the same was

not done by the assessee in the present case. Ld.Counsel for the assessee has pointed out that both the acts could not have been done by the assessee as per law itself since the limitation prescribed in law for filing revised return and form No29B had expired by the time the assessee became aware of the lapse on its part during assessment proceedings. Ld.DR was unable to controvert this contention of the Ld.Counsel for the assessee.

Clearly the distinction made for not applying the decision of the Hon'ble High court has been demonstrated to be incorrect.

17. *Also while finding the assessee to have acted malafidely by not paying taxes on book profits by including therein exempt long term capital gain, the ITAT we have noted has not dealt with the explanation of the assessee that inclusion of exempt capital gain in Book Profits was by way of amendment in law applicable from the impugned year onwards and therefore missed out for its consideration. We agree with the Ld.Counsel for the assessee that there was a mistake apparent on record in the order of the ITAT finding the assessee to have acted malafidely by only considering the fact that the assessee had consistently been disclosing computation of book profits as per section 115JB of the Act in preceding years while not doing so in the impugned year, without dealing with the aforestated explanation of the assessee of exempt income being included in Book Profits being a recent amendment. This explanation of the assessee not only addresses non-disclosure of Book Profits in the impugned year but also the fact why it was consistently disclosed in earlier years. Not dealing with this explanation of the assessee has resulted in there being a mistake in the order of the ITAT.*

18. *In the light of the same, we hold, that there is a clear mistake in the order of the ITAT, while holding the assessee to have not established its bona fides for escaping the levy of penalty, on ground no.2 raised by the assessee."*

The order passed by the ITAT in ITA No.1275/Ahd/2012 was recalled for de novo adjudication of Ground nos. 1 & 2. Accordingly, we proceed to re-adjudicate the Ground Nos. 1 & 2 as taken by the assessee.

5. Shri TusharHemani, Ld. Senior Counsel appearing for the assessee explained that the assessee had earned LTCG of Rs.8,52,63,544/- during the year which was claimed exempt u/s.10(38) of the Act. This LTCG was duly disclosed in the return of income, in the Tax Audit Report and also in the annual accounts. The AO had made adjustment of this exempt LTCG

of Rs.8,52,63,544/- to the book profit u/s.115JB of the Act. The Ld. Sr. Counsel submitted that the assessee had not filed any appeal against the assessment order and thus the adjustment was accepted. He further submitted that the penalty proceeding was initiated by the AO for the reason that the assessee had furnished *inaccurate particulars of income*. However, in the impugned penalty order, the AO had imposed the penalty on the count that the assessee had *concealed particulars of income*. The Ld. Sr. Counsel submitted that it was well settled that when penalty proceeding was initiated for one charge but ultimately the penalty was levied for some other charge, such penalty cannot be sustained. In this regard, he has relied upon the following decisions:

- ✓ *CIT State Bank of India-SLP(C) 29581 of 2018 (Annex. A);*
- ✓ *CIT v. State Bank of India - ITA 129/2016 (Annex. B);*
- ✓ *Manjunatha Cotton & Ginning Factory-359 ITR 565 (Kar);*
- ✓ *MultivisionInfotech P. Ltd. - 88 taxman..com 874 (Ahd);*
- ✓ *Dharni Developers - 61 taxmann.com 208 (Mumbai);*
- ✓ *CIT us. LakhdhirLalji - (1972) 85 ITR 77 (Guj);*
- ✓ *R. M. Bhatia vs. CIT-(1992) 193 ITR 379 (Guj);*
- ✓ *H. Lakshminarayana-61 taxmann.com 373 (Bang.);*
- ✓ *Autoriders India (P) Ltd.-191 TTJ 376 (Mumbai)*

6. The Ld. Sr. Counsel has drawn our attention to the penalty notice dated 30.11.2009 issued by the AO, a copy of which was filed in a paper book. He submitted that from the said notice, it was evident that the AO had not been able to make up his mind as to whether penalty proceeding was initiated for furnishing “inaccurate particulars of income” or for “concealment of income”. He further submitted that when the charge for levy of penalty was not clearly mentioned in the notice, then the

penalty cannot be levied. In this regard, he has relied upon the following decisions:

- ✓ *Manu engineering Works- (1980) 122 ITR 306 (Guj);*
- ✓ *Whiteford India Ltd. - (2013) 38 taxmann.com 15 (Guj);*
- ✓ *New SorathiaEngg. Co. (2006) 282 ITR 642 (Guj);*
- ✓ *Manjunatha Cotton & Ginning Factory -359 ITR 565 (Kar);*

7. The Ld. Sr. Counsel further submitted that when the LTCG, which was claimed as exempt income u/s.10(38) of the Act, was duly disclosed in the return of income, tax audit report and the annual accounts, there cannot be a case of concealment of income. Therefore, penalty was wrongly levied for concealment of income.

8. On merits, the Ld. Sr. Counsel explained that the A.Y. 2007-08 was the first year of e-filing where details relating to MAT were required to be auto filled and Form 29B could not have been filled until there was liability under MAT. He explained that under these circumstances, the addition was attributable to the technical glitch on the part of the department. He further submitted that the assessee was under a bona-fide belief that the provision of Section 115JB of the Act did not apply to exempt income u/s 10(38) in the present assessment year. The Ld. Senior Counsel submitted that there was a bona-fide error on the part of the assessee and there was no intention to conceal or to furnish any inaccurate particulars; which was evident from the fact that the LTCG derived by the assessee was duly disclosed in the return of income. He further submitted that the MAT tax is available as credit in subsequent years. Therefore, there was no motivation on the part of the assessee either to furnish any inaccurate particulars of income or to

conceal any particulars of income. There was no deliberate attempt on the part of the assessee to furnish inaccurate particulars of income or to conceal any income and, therefore, the imposition of penalty was not justified. The Ld. Sr. Counsel submitted that merely because an addition was made to the return of income, it does not mean that penalty proceeding has to be automatically initiated. In this regard, he placed reliance on the decisions of *Hon'ble Supreme Court* in the case of *Reliance Petroproducts Pvt. Ltd.*, 332 ITR 158(SC) and in the case of *Price Water House Coopers P. Ltd.* 348 ITR 306 (SC).

9. Per contra, Shri Rignesh Das, Ld. SR DR submitted that the assessee had not responded to the query raised by the AO in the course of assessment proceeding in respect of working of MAT income, which was clear manifest of the fact that the assessee had deliberately neither provided working of MAT income nor responded to the proposed adjustment. Thus, there was a clear-cut case of furnishing of inaccurate particulars of income for which the penalty was rightly levied by the AO. He, therefore, strongly supported the orders of the AO & CIT(A).

10. We have carefully considered the rival submissions. The first ground taken by the assessee is in respect of validity of the penalty order passed by the AO. The assessee has contended that the penalty proceeding was initiated for furnishing inaccurate particulars of income, whereas penalty order u/s. 271(1)(c) of the Act was passed for concealment of income. It is found from the assessment order that the AO had initiated penalty u/s. 271(1)(c) of the Act for furnishing inaccurate particulars of

income in respect of book profit. However, in the penalty order u/s. 271(1)(c) of the Act dated 20.05.2010, the AO had imposed penalty for concealment of MAT income of Rs.9,87,99,018/-. The Co-ordinate Bench of this Tribunal in the case of *MultivisionInfotech P. Ltd.(supra)* has held that where the penalty proceeding u/s. 271(1)(c) of the Act was initiated for furnishing inaccurate particulars of income, but the penalty was imposed for concealment of income, such order was invalid and liable to be cancelled. An identical view was taken by the Co-ordinate Bench, Mumbai in the case of *Samson Perinchery vs. ACIT in ITA No. 4625 to 4630/Mum/2013*, which was upheld by Hon'ble Bombay High Court in the case of *CIT v. Samson Perinchery [2017] 88 taxmann.com 413/392 ITR 4 (Bom.)*.

11. It is found that notice u/s.274 of the Act was issued by the AO on 30.11.2009 i.e. on the same date when the order u/s.143(3) of the Act was passed. Thus, the notice was for furnishing of inaccurate particulars of income as recorded by the AO in the assessment order. However, the penalty u/s. 271(1)(c) of the Act was imposed for concealment of income. The facts of the present case are, thus, found to be identical to the facts as discussed in the above referred decisions. We, therefore, hold that the order imposing penalty in this case for concealment of income when the penalty proceeding was initiated for furnishing of inaccurate particulars of income, was invalid. Therefore, the penalty imposed u/s. 271(1)(c) of the Act for concealment of income is cancelled. The legal ground taken by the assessee is allowed.

12. On merit also, we do not find any reason to impose the penalty. The fact that the assessee had earned LTCG exempt u/s.10(38) of the Act, was duly disclosed in the return of income, in the tax audit report and also in the annual accounts. Under these circumstances, no penalty u/s. 271(1)(c) of the Act could have been imposed for *concealment of income*. The question of concealment would arise only if the relevant fact regarding earning of exempt LTCG was not disclosed by the assessee in the return of income. There could have been a case for furnishing of inaccurate particulars of income, for which the penalty proceeding was rightly initiated by the AO. However, considering the fact that there was amendment in this year in the provision of Section 10(38) of the Act, which stipulated that the exempt LTCG shall be taken into account in computing the book profit u/s.115JB of the Act, but there was no such corresponding amendment in Section 115JB of the Act; no motive can be imputed to the assessee. The explanation of the assessee that there was a bona-fide mistake on its part, is found acceptable. The technical glitch explained by the assessee in the first year of e-filing wherein the details relating to MAT was required to be auto filled and Form 29B could not be filled until there was liability under MAT, has not been controverted by the Revenue. Obviously these technical glitches had led to misreporting of the book profit under MAT. In the e-filing scheme of return filing, when the assessee has reported its exempt income u/s 10(38) of the Act, the book profit for MAT should have been automatically computed by the Systems by including this exempt income. The assessee alone can't be blamed for such misreporting which was also due to technical

glitch in the system. Therefore, on merit also there was no case for imposition of penalty u/s. 271(1)(c) of the Act. In view of the above facts and the judicial pronouncements, we hold that the impugned penalty order was not sustainable. Accordingly, the penalty imposed u/s. 271(1)(c) of the Act in respect of concealment of book profit is cancelled and the ground no.-2 as taken by the assessee is allowed.

13. The ground no.3 was already adjudicated vide order dated 09/02/2017 and allowed and the grounds 4 & 5 were held to be general in nature.

14. In the result, the appeal of the assessee is allowed.

This Order pronounced on 18/12/2024

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

Ahmedabad; Dated 18/12/2024
S. K. SINHA

आदेश की प्रतिलिपि अग्रहित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

Sd/-
(NARENDRA PRASAD SINHA)
ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad