

**आयकर अपीलीय अधिकरण "B" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI  
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND  
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 8644/Mum/2011

(निर्धारण वर्ष / Assessment Year : 2005-06)

Nandkishore & Co., Unit No. 208/209, Wadala Udyog Bhavan, Next to Wadala Telephone Exchange, Dadar (E), Mumbai - 400 031.	<b>बनाम/</b> v.	ACIT 4(2), 6 <sup>th</sup> floor, Aayakar Bhavan, M.K. Road, Mumbai- 400020.
स्थायी लेखा सं./PAN : AAAFN5385K		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Shri S.C. Tiwari
Revenue by :	Shri Chandrajit Singh(D.R.)

सुनवाई की तारीख / **Date of Hearing** : 8-03-2016

घोषणा की तारीख / **Date of Pronouncement** : 3-6-2016

**आदेश / ORDER**

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee-firm, being ITA No. 8644/Mum/2011, is directed against the order dated 25-11-2011 passed by learned Commissioner of Income Tax (Appeals)- 8, Mumbai (hereinafter called "the CIT(A)"), for the assessment year 2005-06, the appellate proceedings before the learned CIT(A) arising from the penalty order dated 29-03-2010 passed by the learned assessing officer (hereinafter called "the AO") u/s 271(1)(c) of the Income Tax Act, 1961 (Hereinafter called "the Act").

2. The grounds of appeal raised by the assessee-firm in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") read as under:-

“1. On the facts and circumstances of the case the learned CIT (A) erred in confirming the order passed by the assessing officer levying penalty u/s.271(1) (c) of Income Tax Act, 1961 in routine and mechanical manner without considering the facts of the case.

2. The learned CIT (A) erred in not appreciating the facts that the Appellant has neither concealed the particulars of its income nor filed inaccurate particulars of its income and that the income has been assessed at a higher amount an account of (a) inadvertent omission in case of disallowance u/s.94(7) and (b) honest difference of opinion between the Appellant and the department as regards the disallowance of interest claimed u/s.36(1) (iii) of Income Tax Act, 1961.

3. The learned CIT (A) further erred in confirming the order levying penalty u/s.271(1)(c) of Income Tax Act, 1961 by holding that the explanation offered by the Appellant is both false and non bonafide without any evidence and merely on surmises, assumption and guesswork and with a biased and prejudiced mind.

4. The learned CIT (A) erred in not considering the judgment of Supreme Court in the case CIT Vs. Reliance Petro Products (P) Ltd. 2010 (322 ITR 158).

5. The Appellant therefore prays that penalty of Rs.8,36,850/- levied u/s.271(1) (c) of Income Tax Act, 1961 be deleted.

3. The brief facts of the case are that scrutiny assessment was framed by the AO u/s 143(3) of the Act against the assessee-firm, vide assessment orders dated 30<sup>th</sup> October, 2007 whereby two additions have been made by the AO to the retuned income, first addition of Rs. 1,44,580/- u/s 94(7) of the Act and another disallowance of Rs. 21,42,363/- towards interest expenses . These additions were confirmed by the learned CIT(A) in quantum proceedings. Penalty proceedings u/s 271(1)(c) of the Act were initiated by the AO against the assessee-firm for furnishing of inaccurate particulars of income and concealment of income. The assessee-firm submitted before the

A.O. that there was no gross or willful neglect and there is no mens rea on the part of the assessee-firm. The assessee-firm submitted before the A.O. that the assessee-firm is dealing and trading in shares and the assessee-firm has to borrow funds from the market at varying rates to meet the business exigencies. Borrowing of funds and returning back the same is a continuous process in a business environment. The assessee-firm borrowed the funds from outside parties and has paid interest to them @ 12% per annum and it was submitted that sometimes there is surplus funds for short intervals which are likely to remain idle for some point of time and the said funds may again be required after a short interval for business purposes. In such a situation if the funds are parked with a bank for a short period of time, the funds may fetch lower interest rate of 3 to 4% p.a.. The assessee-firm submitted that any prudent businessman who is already shouldering higher interest rate on borrowed funds would like to minimize interest loss and hence the funds were parked with sister concerns at the rate higher than the bank rates but lower than the rate at which funds were borrowed. It was submitted that the funds if parked with third parties may fetch higher returns than at the rates on which funds are parked with sister concerns but safety and security of the funds will be in danger as well timely receipt back of the funds. It was submitted that business decisions are to be taken by the businessmen and the AO cannot sit in the armchair of businessmen. The interest expenditure was duly incurred by the assessee-firm on the borrowed funds. The assessee-firm relied upon the decision of Hon'ble Supreme Court in the case of CIT v. S.A.Builders (2007)288 ITR 1(SC) and decision of Hon'ble Delhi High Court in the case of CIT v. Sahni Silk Mills Private Limited (2001)253 ITR 294(Del. HC).

The A.O. rejected the contentions of the assessee-firm and held that the provisions of section 94(7) of the Act are very clear and hence there is no room for ambiguity. The AO held that the omission is not justified and it

cannot be said that there was no willful neglect. The assessee-firm did not contest the issue of disallowance u/s 94(7) before the learned CIT(A). With respect to the disallowance of interest which is covered u/s 40A(2)(b) of the Act, the A.O. held that the assessee-firm was aware of the unreasonable transactions carried out by the assessee-firm with sister concern and the assessee-firm has flouted the provisions of Section 40A(2)(b) of the Act, and hence it cannot be said that there was no deliberate evasion of taxes on the part of the assessee-firm. With respect to the disallowance on account of interest paid, the A.O. observed that assessee has borrowed money at higher rate of interest and deployed the same to the sister concerns at lower rate of interest and hence an amount of Rs. 22,04,282/- was disallowed by the AO in the assessment framed u/s 143(3) of the Act since these advances are not benefitting the business of the assessee-firm. The addition has been confirmed by the learned CIT(A) in quantum proceedings amounting to Rs. 21,42,363/- , whereby the learned CIT(A) held that the assessee-firm received interest from sister concerns @ 6% and 9% p.a. , whereas the assessee-firm has received interest @ 10 to 12% p.a. from other parties which are not related parties. The assessee-firm received lesser interest from sister concerns whereas the assessee paid interest to its relative of partners and to partners themselves @ 12% p.a.. Thus, the addition was confirmed by the learned CIT(A) to the tune of Rs. 21,42,363/- in quantum proceedings with respect to the disallowance of interest expenses as detailed above . As per the A.O. , the assessee-firm has not bonafidely explained the reasons to substantiate the claim made by the assessee-firm in the penalty proceedings u/s 271(1)(c) of the Act and the assessee-firm has furnished inaccurate particulars of income leading to the concealment of income within the meaning of section 271(1)(c) of the Act as the onus as cast u/s 271(1)(c) of the Act was not discharged by the assessee-firm to take it out of clutches of the penalty provisions u/s 271(1)(c) of the Act . The AO relied upon decision of Hon'ble Supreme Court in the case of UOI v. Dharmendra Textile Processors

(2008) 174 taxman 571(SC), Hon'ble High Court of Kerala decision in the case of CIT v. P K Narayanan (1999) 106 taxman 567(Ker.), ITAT, Hyderabad decision in the case of Shivalal Dulichand Agarwal v. ITO (1993) 45 ITD 319(Hyd. Trib.) and Hon'ble Bombay High court decision in the case of Western Automobiles (India) v. CIT (1978) 112 ITR 1048(Bom.) Accordingly, the A.O. levied penalty of Rs. 8,36,850/- u/s 271(1)(c) of the Act on the grounds that it is established that the assessee-firm has concealed its income and furnished inaccurate particulars of income leading to concealment of income within the meaning of Section 271(1)(c) of the Act vide penalty orders 29.3.2010 passed u/s 271(1)(c) of the Act.

4. Aggrieved by the levy of penalty of Rs.8,36,850/- on the assessee-firm vide penalty orders dated 29.3.2010 passed by AO u/s 271(1)(c) of the Act , the assessee-firm carried the matter before the learned CIT(A) and reiterated the same submissions what has been made before the A.O. which are not repeated here for the sake of brevity. The learned CIT(A) rejected the contentions of the assessee-firm and confirmed the penalty levied by the A.O. u/s 271(1)(c) of the Act vide appellate orders dated 25.11.2011. The learned CIT(A) relied upon the decision of UOI v. Dharmendra Textile Processors (2008) 306 ITR 277(SC) while confirming/sustaining the penalty orders of the AO levying penalty of Rs.8,36,850/- u/s 271(1)(c) of the Act.

5. Aggrieved by the appellate order dated 25.11.2011 of the learned CIT(A), the assessee-firm is in appeal before the Tribunal.

6. The learned counsel for the assessee-firm submitted that the learned CIT(A) confirmed the penalty levied by the A.O. u/s 271(1)(c) of the Act. The quantum appeal is filed before the Tribunal in ITA No. 424/Mum/2009 which has been dismissed by the Tribunal and the additions with respect to interest disallowance of Rs.21,42,363/- have been confirmed by the Tribunal vide

orders dated 17-07-2015, while the assessee-firm did not contest before the Tribunal disallowance u/s 94(7) of the Act in quantum proceedings as no grounds of appeal was taken before the Tribunal concerning disallowance u/s 94(7) of the Act . With respect to dividend stripping u/s 94(7) of the Act, the assessee-firm pleaded accidental or inadvertent omission due to oversight and represents bonafide and unintentional mistake and relied upon the case laws as detailed below to contend that the penalty u/s 271(1)(c) of the Act is not exigible with respect to additions made u/s 94(7) of the Act which additions were accepted by the assessee-firm and are not contested before the Tribunal in challenge to the quantum assessment. The assessee firm relied upon the following case laws to content that no penalty is exigible u/s 271(1)(c) of the Act due to inadvertent omission or mistake in filing the return of income with the Revenue:

1. Khanchand Thakurdas v. CIT -140 ITR 581(Kar. HC)
2. CIT v. Dev Raj-98 ITR 76(P&H HC)
3. Mahadeswara Movies v. CIT 144 ITR 127(Kar. HC)
4. CIT v. Hiralal Shankarlal 165 ITR 124(Calcutta HC)
5. CIT v. Raj Textile -166 ITR 632(MP HC)

The learned Counsel submitted that the assessee-firm borrowed funds @ 12% p.a. interest and deployed the funds at 6 to 9% p.a. interest to its sister concerns. The assessee-firm relied upon the decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. Pankaj Munjal Family Trust, (2010) 326 ITR 286(P&H HC) and the decision of Hon'ble Supreme Court in the case of S.A. Builders Ltd. v. CIT (2007) 288 ITR 1(SC). The learned counsel submitted that any prudent businessman who is already shouldering higher interest rate on borrowed funds would like to minimize interest loss. The Tribunal although confirmed the additions in ITA no. 424/Mum/2009 vide its orders dated 17-07-2015 but the penalty proceedings u/s 271(1)(c) of the Act

are separate proceedings. The assessee-firm has not violated any provisions of law. The Id. Counsel relied upon the decision of Hon'ble Bombay High Court in the case of CIT v. Aditya Birla Nova Limited, (2012) 82 CCH 206 (Bom. HC), Hon'ble Delhi High Court decision in the case of CIT v. P.H.I. Seeds India Ltd., (2008) 301 ITR 13 (Del. HC), the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts (P) Ltd, (2010) 322 ITR 158 (SC), decision of Hon'ble Madhya Pradesh High Court in the case of D&H Sechron Electrodes Pvt. Ltd. v. CIT, (1983) 142 ITR 528 (MP) and the decision of Hon'ble Supreme Court in the case of Sasoon J. David & Co. P. Ltd. v. CIT, (1979) 118 ITR 261 (SC). The learned Counsel for the assessee-firm submitted that the reliance placed by the Revenue in the case of Union of India v. Dharmendra Textile Processors [2008] 306 ITR 277(SC) and decision of Hon'ble Delhi High Court in the case of CIT v. Zoom Communication Private Limited(2010) 191 Taxman 179(Del. HC) is misconceived, but wherein the issue under the instant appeal was debatable and penalty is not leviable.

7. The learned D.R. submitted that the assessee-firm had furnished inaccurate particulars of income. It is a related party transaction whereby the assessee-firm has entered transactions with the sister concern to evade taxes by shifting the income to other sister concerns. The learned D.R. further relied on the orders of the learned CIT(A). The learned DR relied upon the decision of Hon'ble Supreme Court in the case of Union of India v. Dharmendra Textile Processors [2008] 306 ITR 277(SC) , decision of Hon'ble Delhi High Court in the case of CIT v. Zoom Communication Private Limited(2010) 191 Taxman 179(Del. HC) and decision of Hon'ble Supreme Court in the case of UOI v. Azadi Bachao Andolan (2003) 132 Taxman 373(SC).

8. We have considered the rival submissions and also perused the material available on record including the case laws relied upon by the rival

parties. We have observed that the assessee is a partnership firm engaged in the business of share trading. The assessee-firm has borrowed funds from partners and relatives of the partners whereby interest is payable at 12% per annum. The assessee-firm has deployed its funds to certain sister concerns @ 6 to 9% interest p.a.. The additions made by the AO disallowing interest expenses due to the above differential in the assessment orders passed u/s 143(3) of the Act has been confirmed by the learned CIT(A) and also by the Tribunal in quantum proceedings and the same has attained finality. It was the contention of the assessee-firm that deploying the funds for short intervals of time with the sister concerns was undertaken to avoid keeping the funds idle, hence, lower rate is charged @ 6-9% p.a., while bank interest rate is 3-4% p.a.. The assessee-firm submitted that if the funds are deployed with outside parties, the assessee-firm will receive higher interest but the safety and security of the investment will be in jeopardy as well the timely return of the funds deployed will be also not certain and hence the funds are kept for short period of time with sister concern which fetched 6-9% p.a. interest and which can be recalled at any time as per requirements of the assessee-firm. The assessee firm sighted that it is a business decision based on commercial expediency relying upon the decision of Hon'ble Supreme Court in the case of S A Builders(supra) and the Revenue cannot put itself into an armchair of the business men to decide the business decisions of the businessmen.

With respect to dividend stripping u/s 94(7) of the Act, the assessee-firm has pleaded accidental or inadvertent omission due to oversight and represents bonafide and unintentional mistake and relied upon the case laws as under :

1. Khanchand Thakurdas v. CIT -140 ITR 581(Kar. HC)
2. CIT v. Dev Raj-98 ITR 76(P&H HC)
3. Mahadeswara Movies v. CIT 144 ITR 127(Kar. HC)
4. CIT v. Hiralal Shankarlal 165 ITR 124(Calcutta HC)

5. CIT v. Raj Textile -166 ITR 632(MP HC)

In our considered view and peculiar facts and circumstances of the case, this is not a fit case for levying of penalty u/s 271(1)(c) of the Act as the assessee-firm has not concealed the particulars of income nor furnished any inaccurate particulars of income. No doubt there has been slip up in filing the claim u/s 94(7) of the Act but the same keeping in view the explanation submitted by the assessee-firm was an inadvertent omission and mistake which was not intentional or deliberate on the part of the assessee-firm or otherwise with an intention to defraud revenue to fall within four corners of rigours of penalty provisions u/s 271(1)(c) of the Act , and rather the assessee-firm came forward with an bona-fide explanation accepting the inadvertent mistake on its part and did not persue the litigation further. The case laws cited by the assessee-firm supports the contentions of the assessee-firm to take it out of rigours of penalty provisions u/s 271(1)(c) of the Act.

With respect to the disallowance of interest expenses, the assessee-firm has duly disclosed the transactions of borrowing and lending of funds in the return of income filed with the Revenue and made complete disclosures about the same before the Revenue. The assessee-firm came forward with an explanation which is a bonafide explanation as set out above and it cannot be said that the assessee-firm has concealed particulars of its income or furnished inaccurate particulars of income so that the rigours of the provisions of section 271(1)(c) of the Act can be attracted. It could be said that the assessee-firm made claim before the authorities below which did not found favour with the Revenue and was not accepted by the authorities below in quantum proceedings which was later confirmed by the learned CIT(A) and the Tribunal in quantum assessments . The case of the assessee-firm is squarely covered by the decision of Hon'ble Supreme Court in the case of CIT v. Reliance Petroproducts Private Limited(supra) .

In our considered view based on peculiar facts and circumstances of the instant case, the penalty of Rs.8,36,850/- so levied by the AO and confirmed/sustained by the learned CIT(A) is not sustainable. We have duly considered the case laws relied upon by the Revenue but the same did not advance the case of the Revenue. Hon'ble Supreme Court in the case of UOI v. Dharmendra Textile Processors(supra) has laid down that mens rea is not relevant in penalty proceedings but at the same time each and every omission or mistake of the tax-payer in filing of the return of income or filing of claim which is not accepted by the Revenue will not make the tax-payer exigible to penalty if the tax-payer comes out with an bonafide and plausible explanation will not make the tax-payer exigible to penalty u/s 271(1)(c) of the Act as laid down by Hon'ble Supreme Court in Reliance Petroproducts Private Limited(Supra). Similarly, the decision of Hon'ble Delhi High Court in Zoom Communications Private Limited(supra) is not applicable as the assessee firm in the instant case has come out with bona-fide and plausible explanation which is not controverted by the Revenue . The assessee- firm in the instant case has come out with plausible and bonafide explanation that for intervening short period of time, available surplus funds were kept with sister concerns at rate of interest @6-9% p.a. as against the borrowings at 12%p.a. and hence as per the facts emerging from the records and contentions of the assessee-firm which has remained uncontroverted by the Revenue, it could not be held that it falls under illegitimate or impermissible tax planning and in any case we are in the instant appeal considering and deciding the levy of penalty u/s 271(1)(c) of the Act , while in the quantum proceedings it is the admitted position by the assessee-firm that it has accepted the Tribunal decision rendered against the assessee-firm in ITA no 424/Mum/2009 dated 17-07-2015 which has attained finality. Thus based on our above discussions and reasoning, we order deletion of penalty of

Rs.8,36,850/- levied against the assessee-firm by the AO and as sustained by the learned CIT(A). We order accordingly

11. In the result, the appeal filed by the assessee-firm in ITA NO. 8644/Mum/2011 for the assessment year 2005-06 is allowed.

Order pronounced in the open court on 3<sup>rd</sup> May , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 03-06-2016 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 03-06-2016

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व.नि.स./ R.K., Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "E" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai