

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH 'D' NEW DELHI**

**BEFORE : SHRI C.M. GARG, JUDICIAL MEMBER &
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 2704 & 2705/Del./2013
Asstt. Year : 2003-04 & 2004-05**

A.C.I.T., Central Circle 23,
New Delhi.

vs.

Kurele International,
113/127, Swaroop Nagar,
Kanpur.

[PAN: AADFK4488K]

(Appellant)

(Respondent)

Appellant by : Sh. Ankur Garg, CIT/DR
Respondent by : Sh. Akarsh Garg, Advocate

Date of hearing : 16.03.2016
Date of pronouncement : 28.04.2016

ORDER

Per L.P. Sahu, Accountant Member:

These are appeals filed by the Revenue against the orders of CIT(A)-XXXIII, New Delhi dated 04.02.2013 for the assessment years 2003-04 & 2004-05, challenging the levy of penalty u/s. 271(1)(c) of the IT Act. The penalty imposed in both the years are Rs.24,24,136/- and Rs.14,67,125/- respectively. Since the facts and grounds involved in both these appeals are identical, hence, for the sake of convenience and brevity, both the appeals are being disposed of by this consolidated order. We first take up the appeal for

the assessment year 2004-05, wherein following grounds have been raised by the Revenue :

"1. On the facts and in the circumstances of the case, the CIT(A) has erred in cancelling the penalty of Rs.14,67,125/- imposed by the A.O. under section 271(1)(c) of the Income tax Act, 1961.

2. That the order of the CIT(A) is erroneous and is not tenable on facts and in law."

The grounds raised in appeal for A.Y. 2003-04 are also same except the difference in quantum of penalty.

2. The brief facts of the case are that a search and seizure operation was carried out at the premises of the assessee on 19/01/2009. Thereafter, in response to notice under section 153A issued on 30.11.2009 the assessee filed its return of income on 09.02.2010 declaring a loss of Rs.40,89,547/-. Subsequently it was assessed under the provision of section 153A/143(3) of the Act on 30/12/2010, at income of Rs. Nil. During the assessment proceedings, addition of Rs.40,89,547/- was made and penalty proceedings under the provisions of section 271(l)(c) were initiated. The assessee submitted reply dated 16.05.2011 to show cause notice dated 18.04.2011. The relevant portions of the reply of assessee read as under :

" On perusal of aforesaid 'observation' of Assessing Officer and 'chronology of events'. It is apparent that the loss surrendered by the

assessee firm was not on account of any incriminating material found during search or as a result of any evidence brought on record by the Assessing Officer, that the claim forgone was the concealed income of assessee. From the facts, it is evident that Assessing Officer made the disallowance only to the extent of loss declared in the return filed solely due to surrender made by the assessee firm during the course of assessment. From the discussion made in the assessment order it is abundantly clear that no specific item of expenditure was disallowed or added in the present case. There is no discussion in the assessment order that the assessee had concealed the particulars of income and furnished wrong statement or even Assessing Officer has found out any adverse material so as to justify addition.

In the light of aforesaid facts, simply because the assessee surrendered its right to brought forward ad set-off of loss, it cannot be even inferred that there is concealment of income or furnishing of inaccurate particulars of income by the assessee, therefore, penalty under section 271(l)(c) is not leviable in the facts and circumstances of the present case. Even, on an application of concept of promissory estoppels' no penalty is imposable in the present case.

Without prejudice to the submission made above, it is further submitted that in view of settled legal position that finality of assessments already completed cannot be disturbed lightly and addition under section 153A can only be made on the basis of incriminating material found during or after search. Whereas in the present case' no such material existed at all nor has been pointed out or even referred to while making the disallowance. Therefore, even on merits the said addition is not sustainable and accordingly under the circumstances even initiation of penalty is bad in law."

3. The AO was not satisfied by the reply of assessee and levied penalty u/s. 271(1)(c) of the Act observing that the assessee was asked to produce bills and vouchers of expense claimed by it in its P&L a/c. but the assessee had forgone the claim of loss of Rs.40,89,547/- and no appeal against this addition has been filed nor has proved its bonafide intention.

4. The assessee challenged the penalty order in appeal before the Id. CIT(A), who after considering the detailed submissions of the assessee reproduced in the impugned order, cancelled / deleted the penalty imposed vide the impugned order observing as under :

"I have considered the penalty order u/s 271(l)(c), written submission and paper book filed during appellate proceedings. Ld. AR first argument is that the assessment of the appellant was already completed u/s 153A on 18.12.2007, where no addition was made. Subsequently in second round of assessment no fresh facts either due to search or by the efforts of Assessing Officer has been brought on record to make the addition. In second round of search assessment u/s 153A, the appellant has complied all the requirements/details during assessment proceeding. Copy of detailed filed during assessment proceedings dt. 22.11.2010 is part of the paper book where the appellant has given point wise reply of al 22 queries numbered as R 1 to R 22. In fact, vide reply dated 29.11.2010, the appellant has given further details on capital account, unsecured loan and payment of TDS payable. Vide submission dated 22.11.2010. the appellant has given detailed comparative working of gross profit for last 3 years, i.e. F.Y.J2001-2002, 2002-03 and 2003-04 and explained the reason for fall in Gross profit.

The books of accounts are audited and there is all statutory compliance, such as TDS etc on expenses. Suddenly on last moment of assessment proceedings, the appellant files the letter dt. 27.12.2010 at the contents of which are reproduced as under:-

"Sub: Assessment proceedings under section 153A for the assessment year 2004-05

Reference assessment proceedings and discussion held with the undersigned, it is hereby clarified that loss of Rs. 40,89,547/- stand assessed and determined in respect of A. Y. 2004-05, and the said loss could not be set-off by us even in subsequent years due to future losses incurred in the business carried on by us and finally the whole business was discontinued in the year ending 31.03.2009 relevant to assessment year 2009-10.

In view of the aforesaid, factual position and assurance given by your goodself and to buy peace of mind and to give quitous to the whole issue, we do hereby agree to forego our claim of brought forward and set-off in subsequent years with a condition that no penal action on this score shall be taken. "

Ld AR has -argued that in this letter nowhere, the partner of appellant states that he can not produce bills and voucher in support of its returned loss, what he says that he has not been able to set-off of losses in subsequent years and business of the firm in discontinued in year ending on 31-03-2009, therefore, he wants to forgo the claim of carry forward of losses to subsequent years, provided that no penal action will be taken as assured by the Assessing Officer. He further argued that there is no so cause letter for addition on account of non production of bills and vouchers, so that, the so called surrender can be attributable to said non production of bills. Further, he argued that in Trading P&L a/c of Leather & Garment Division, there is claim of expense for more than crores of rupees why to the extent of claim of loss was added if no bills and vouchers were produced. Therefore, he made strong argument that the right to forgo the loss to subsequent years was not voluntarily as is was not effecting the appellant as the same could not be set-off in subsequent years and business was subsequently closed. Therefore, such carry forward of loss was infructuous.

I have considered these argument of Ld AR and perused the assessment order and penalty order. The Assessing Officer has linked the right to forgo the carry forward of the loss of the year to non availability and non production of bills and vouchers without any basis. In the letter of so called surrender, the reason is not non production of bills and vouchers without any basis. A plain reading of appellant letter reveals that as the loss could not be set-off in subsequent years and now business is closed, he did not press for carry forward of infructuous Loss. Keeping in view of entirety of facts and circumstances, I am of the considered view that it is not a case of concealment of income or filing inaccurate particulars of income. Hence, penalty levied u/s 271(l)(c) can not be sustained. Case laws relied upon by the Assessing Officer is in my view are not applicable to the present facts of case as the addition made itself is on the basis of right to forgo the claim of loss not because on non production of bill or vouchers but the same has remained unutilized in subsequent years and the business is closed. Therefore, the question of mensrea or penalty being civil liability does not arise.

Considering all the facts and circumstances of the case, I hereby cancel the penalty imposed u/s 271(l)(c) of I.T. Act.”

5. The ld. DR relied upon the order of the AO whereas the ld. Counsel for the assessee reiterated the submissions made before the authorities below as noted above.

6. Having considered the rival submissions and perused the impugned order, we find that there is no justification to interfere with the order of the ld. CIT(A), who has passed a very reasoned order. The department could not be able to rebut the findings reached by the ld. CIT(A) after considering various decisions including the decisions relied upon by the Assessing Officer. It has been found on record that the assessee had forgone the claim of loss not on account of alleged non-availability and non production of bills and vouchers, but due to the fact that the assessee was not able to set off the carry forward losses in subsequent years and the business stood closed in subsequent year ending on 31.03.2009. Therefore, the claim of assessee of brought forward loss, in this situation, having become infructuous, the assessee surrendered the same. Under these circumstances, the ld. CIT(A) appears to have committed no error while holding that this is not a case of either concealment of income or furnishing of inaccurate particulars of income. We, therefore, are not inclined to interfere with the order of the ld. CIT(A) cancelling the penalty

imposed by AO. As a consequence, the appeal of the Revenue deserves to be dismissed.

7. In view of the above discussion, the appeal of the Revenue for A.Y. 2003-04 also has no merit, as the facts, circumstances, arguments of both the parties and findings of the authorities below are same. Therefore, our decision in appeal for A.Y. 2004-05 will equally apply to the appeal for A.Y. 2003-04. Accordingly, the appeal of the Revenue for A.Y. 2003-04 also is liable to be dismissed.

8. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 28.04.2016.

Sd/-

(C.M. GARG)
Judicial Member

Sd/-

(L.P. SAHU)
Accountant Member

Dated : 28.04.2016

*aks/-

Copy of order forwarded to:

(1) *The appellant*
(3) *Commissioner*
(5) *Departmental Representative*

(2) *The respondent*
(4) *CIT(A)*
(6) *Guard File*

By order

Assistant. Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi