

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 109 of 2020****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

THE PRINCIPAL COMMISSIONER OF INCOME TAX-1

Versus

CLP POWER INDIA PVT. LTD.

Appearance:

MRS MAUNA M BHATT(174) WITH MR KARAN SANGHANI, ADVOCATE for
the Appellant(s) No. 1
for the Opponent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA**and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****Date : 25/02/2020****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

1. This tax appeal under Section 260A of the Income Tax Act, 1961 [for short '*The Act, 1961*'] is at the instance of the Revenue and is directed against the order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'C', Ahmedabad dated 04th October, 2019 in the ITA No.1128/AHD/2015 for the A.Y 2007-08.

2. The facts giving rise to this tax appeal may be summarized as under:-

2.1 The assessee filed its return of income declaring total income to the tune of Rs.3,32,08,724/-. In the course of the assessment proceedings, the Assessing Officer noticed that certain expenditure on account of the professional fees, travelling expenses, tender expenses etc., aggregating to Rs.4,75,07,667/- with respect to the new power projects were wrongfully claimed as the revenue expenditure by the assessee. In such circumstances, the expenditure so claimed was disallowed in the quantum proceedings. It was held to be capital in nature. The assessment under Section 143(3) of the Act came to be framed determining the total income at Rs.5,60,71,852/- after disallowance of Rs.4,75,07,667/- on account of treating the said expenditure as capital expenditure. In the aforesaid context, the penalty proceedings under section 271(1)(c) of the Act came to be initiated against the assessee. The Assessing Officer levied penalty of Rs.1,59,91,080/- under Section 271(1)(c) on the premise that the assessee had furnished inaccurate particulars of income.

2.2 The assessee being dissatisfied with the order of penalty referred to above preferred an appeal before the CIT(A). The CIT(A) allowed the appeal preferred by the assessee substantially relying on the decision of

the Supreme Court in the case of *Commissioner of Income-tax, Ahmedabad Vs. Reliance Petro Products Private Limited : (2010) 322 ITR 158 (SC)*.

2.3 The Revenue being dissatisfied with the decision of the CIT(A) preferred appeal before the Appellate Tribunal. The Appellate Tribunal concurred with the findings recorded by the CIT(A) and thereby, dismissed the appeal preferred by the Revenue.

2.4 In such circumstances referred to above, the Revenue is here before this Court with the present appeal.

3. The Revenue has proposed a solitary question of law for the consideration of this Court. The question reads thus:-

“Whether, the Appellate Tribunal has erred in law and on facts in deleting the penalty amounting to Rs.1,59,91,080/- imposed under section 271(1)(c) of the Act?”

4. The Assessing Officer in its penalty order observed as under:-

“It is pertinent to note here that it is settled position of law that such expenditure is of capital nature and as per provisions of Section 37 of the Act is not allowable as expenditure. There can be no ambiguity or difference of opinion so as to the treatment of such expenditure. The assessee is required to fill in the particular of “amounts debited to P&L A/c. To the extent disallowable u/s.37” in the return of income filed by the assessee company duly signed and verified. However, in the present case, the information filed at the relevant column by the assessee is 'nil'. The capital expenses amounting to Rs.4,75,07,667/- debited to P&L A/c., being capital in nature have not been noted there by the assessee company at the relevant column in the return of income.

It has been clearly laid down in the case of A.M. Shah Vs. CIT (discussed above) that “Every figure in the return which is set opposite to the item of income is a particular income, whether the figure is one which is stated independently of anything else that appears in the

return or the documents accompanying it or whether it is something derived from other figures elsewhere stated in such return or documents. False result may be produced by the falsity of one or more of the constituent items in the return. The words 'inaccurate particulars' would cover falsity in the final figure as also the constituent elements or items. They simply would mean inaccurate in some specific or definite respect whether in the constituent or subordinate items of income or the end result”.

It is clear and established that assessee company has filed inaccurate particulars in his return of income, as discussed in preceding paragraphs. Further, in the decision of Dharmendra Textiles Processors (noted above) it has been established that 'mens rea' or deliberate attempt is not essential for levy of penalty, if it is established that assessee has furnished inaccurate particulars or concealment of particulars of income, penalty is leivable.

The decisions relied upon by the assessee in its reply dtd.07/03/2012 have been gone through and it has been found that the ratio of the above decisions relied upon by the assessee company is as under:-

- a. Wrong claim does not amount to concealment.*
- b. There should be willful/deliberate attempt on part of the assessee to conceal income or to file inaccurate particulars of income.*
- c. Penalty cannot be levied merely on the basis of addition.*
- d. Penalty cannot be levied where addition has been made on basis of difference of opinion in interpretation of Law.*

In the present case, the issue is of filing of inaccurate particulars of income and not of concealment of particulars of income. It is pertinent to note here that Hon'ble Supreme Court in the case of Dharamendra Textiles Processors 306 ITR 277 (2008) (SC) has already laid down that penalty is a 'civil liability' thus mens rea is not essential. Thus, cases relied by assessee on this count are not applicable. It is further noted here that penalty in the present case is being levied on the basis of facts of the case and position of Law and not merely because there is an addition or disallowance of an expense. Further, in the present case, there cannot be said to be a difference of opinion.

As far as the question of findings of Hon'ble Supreme Court in the case of Reliance Petro Product Ltd. is concerned, it is noted that the assessee by not noting the expenses on account of software development i.e. purchase of software at Point No.7 of Para A-OI of ITR-6 has furnished inaccurate particulars of income. Moreover, in the said order, clear findings are being made for the levy of penalty. Thus,

this order is very much in accordance with the law laid down by Hon'ble Supreme Court.

In light of discussion held in para above, none of the cases cited by the assessee are applicable to the present case.

Had the assessee's case not been selected for scrutiny, the assessee could have been benefited by filing inaccurate particulars of income. The assessee took chance with the department. Had the revenue not detected the inaccurate particulars of income of the assessee, the assessee could have enjoyed the fruits of filing inaccurate of particulars of income and would have caused loss to the revenue.

In view of above facts and legal position discussed in para 3 (supra), the assessee is held to have furnished inaccurate particulars of income in the return of income filed by him and as per decision of Hon'ble Supreme Court in the case of Reliance Petroproduct (P) Ltd. (noted above) the liability of penalty arises.

5. *In view of the above facts, I am satisfied that the assessee has furnished inaccurate particulars of its income and is liable for penalty u/s.271(1)(c) of the Act. I, therefore, levy a minimum penalty @ 100% of the amount of tax sought to be evaded on account of filing of inaccurate particulars of income, which works out of Rs.1,59,91,080/- against the maximum penalty of Rs.4,79,73,242/- on the assessee."*

5. The CIT(A) while allowing the appeal of the assessee held as under:-

"I am inclined with appellant that on the facts & circumstances as that of appellants, the penalty u/s.271(1)(c) of the Act is not exigible on many accounts duty supported by legal preposition. These are as follows:-

(i) *The appellant claimed such expenses on the basis of audited accounts and tax audit report which has not brought out these expenditure as capital in nature. It is therefore the bonafide for the claim of such expenditure cannot be doubted or questioned.*

(ii) *All the details & materials facts were either disclosed or submitted before A.O. as and when asked for. None of these expenses were found bogus or excessive. These genuine expenses were disallowed being held as capital in nature. This preposition cannot lead to satisfaction that appellant has furnished inaccurate particulars of income.*

(iii) There are two opinions on this issue. Even Hon'ble Gujarat High Court's latest order in the case of GNFC (Supra) as relied on is in favour of appellant. This reflects that issue is contentious in nature and debatable. In view of latest order of Hon'ble Gujarat High Court, the ratio is binding on lower appeal authorities. It is therefore despite Hon'ble ITAT considered the issue against appellant, the penalty is not exigible.

(iv) Apart from ratio of Hon'ble Supreme Court order in the case of Reliance Petro Product Ltd. (Supra), there are plethora of judgment which directly dealt with the issue that if any of the revenue expenses claimed is treated as capital expenditure then penalty u/s.271(1)(c) of the Act is not exigible on such amount.

It is therefore, the satisfaction so drawn by A.O. and penalty so levied of Rs.1,59,91,080/- is neither justified nor sustainable. The A.O. is directed to delete the penalty so imposed. The appellant gets relief accordingly. All the grounds are treated as allowed.”

6. The Tribunal while affirming the aforesaid findings recorded by the CIT(A) held as under:-

“6. As noted above, the CIT(A) has observed that the expenditure incurred by the assessee has a direct and proximate nexus with the existing business operations and the loss incurred was inherent in carrying on of the business. The genuineness of expenses incurred has not been doubted per se. What is the subject matter of controversy is the nature of expenditure that is whether the expenditure incurred would acquire the character of capital expenditure or a revenue expenditure. The CIT(A) has demonstrated in its order that the issue is sufficiently debatable and there is sufficient room for entertaining a different view. Needless to say, the conclusion drawn in the quantum proceedings would not automatically apply to the penalty proceedings which are distinct in character. The assessee is entitled to demonstrate its bonafide towards claim of expenditure in penalty proceedings. It is trite that every disallowance of claim cannot lead to as an automatic consequence in the form of penalty. The confirmation of addition/disallowance in quantum proceedings is not conclusive on standalone basis. In the absence of any malafide in the action of the assessee, we see no reason to interfere with the order of the CIT(A). In the instant case, in our view, the CIT(A) has correctly applied law and deleted the penalty. We totally concur with the view expressed by the CIT(A). The Revenue could not demonstrate the lack of bonafide in the action of the assessee. The assessee with reference to several judicial precedents

has demonstrated before us that the issue as to whether expenditure in question is capital or revenue is highly debatable. Coupled with this, the substantial question of law in the quantum proceedings has also been admitted for adjudication by the Hon'ble High Court in appeal under s.260A of the Act. In this background, we see not error in the order of the CIT(A)."

7. Section-271(1)(c) reads thus:-

“271. Failure to furnish returns, comply with notices, concealment of income etc:-

(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that any person—

*(a) [***]*

(b) has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits,

he may direct that such person shall pay by way of penalty,—

*(i) [***]*

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure ;

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.”

8. A bare perusal of the provisions of section-271(1)(c) of the Act would indicate that there has to be concealment of the particulars of the income or furnishing of inaccurate particulars of the income of the assessee. As held by the Supreme Court in the case of *Reliance Petro-*

products Pvt. Ltd. [Supra], the meaning of the word "particulars" used in the Section 271(1)(c) would embrace the meaning of the details of the claim made.

9. The principal argument of Ms. Bhatt, the learned senior standing counsel appearing for the revenue is that at the time of filing of the return, the claim was made as revenue expenditure, while the Assessing Officer treated the same as the capital expenditure. According to Ms. Bhatt to this extent, the particulars furnished by the assessee could be termed as inaccurate particulars so as to attract the provisions of Section-271(1)(c) of the Act.

10. We are afraid, we are not in a position to accept the contention as canvassed on behalf of the Revenue. As held by the Supreme Court in *Reliance Petro-products Pvt. Ltd. [Supra]* unless the case is strictly covered by the provision, the assessee cannot be exposed to penalty. In short, the penalty provision cannot be invoked unless a clear cut case is made out. The Supreme Court held in the said case that making an incorrect claim by any stretch of imagination would not tantamount to furnishing inaccurate particulars. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing the inaccurate particulars. Therefore, assuming for a moment, the claim was made as revenue expenditure, but in fact, it was found to be capital expenditure that by itself would not be sufficient to arrive at the conclusion that the case is one of inaccurate particulars.

11. For the forgoing reason, we do not find any error much less an error of law said to have been committed by the appellate tribunal.

12. In the result, this appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

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