

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI PAWAN SING, JM

I.T.A. Nos.2276 & 4891/Mum/2016
(Assessment Years: 2008-09 & 2011-12)

DCIT, Circle-1, Ashar I. T. Park, 6 th Floor, B Wing, Room No. 22, Road No. 16Z, Wagle Industrial Estate, Thane (W)-400 604	Vs.	Konkan Irrigation Development Corporation Sinchan Bhawan, Kopri Colony, Thane (E)-400 603
PAN/GIR No. AACCK 2358 L		
(Appellant)	:	(Respondent)
Appellant by	:	Shri S. Padmaja
Respondent by	:	Shri Sudhir Dabir
Date of Hearing	:	29.08 2018
Date of Pronouncement	:	07.09 2018

ORDER

Per Shamim Yahya, A. M.:

These are appeals by the Revenue directed against the respective orders of the learned Commissioner of Income Tax (Appeals)-1, Thane ('Id.CIT(A) for short) dated 15.01.2016 pertaining to the assessment years (A.Y.) 2008-09 and 2010-11, wherein the Id. CIT(A) had deleted the penalty levied u/s. 271(1)(c) of the Income Tax Act, 1961 ('the Act' for short) amounting to Rs.23,03,31,738/- and Rs.51,01,52,093/- for the respective years for assessee's excess claim of depreciation.

2. Since the facts are identical, we are referring to facts and figures from A.Y. 2008-09.

3. Brief facts of the case are as that the assessee company is a Corporation established to perform sovereign functions of the State Government through promotion

and operation of some irrigation projects in Konkan region, command area development and schemes for generation of hydro electric energy to harness the water of Rivers allocated to the State of Maharashtra under the Water Disputes Tribunal Award and other allied and incidental activities including flood control.

4. In the course of assessment proceedings, the Assessing Officer ('A.O.' for short) noticed that the assessee company has received grants from Govt of Maharashtra towards raising of capital assets in form of dams, canals etc. It was further noticed that on the said capital assets, the assessee has claimed depreciation. Though the company has also used its own fund in the form of issue of bonds, interest income etc, however considering the fact that most of the funds have been received by the company from Govt of Maharashtra, the A.O. opined that the provisions of section 43(1) of the I.T. Act becomes applicable to the case of the assessee as far as computation of depreciation is concerned which reads as under:

“for calculating actual cost for determining depreciation means the actual cost of the assets to the assessee reduced by that portion of cost thereof if any as has been met directly or indirectly by any other person or authority.”

5. In terms of the above provision of law, the A.O. proposed to disallow proportionate depreciation. In response the assessee company has submitted details of funds raised by the assessee by way of issue of bonds, interest income, security deposits has been given along with details of funds granted by the govt of Maharashtra. The assessee argued that provisions of the section 43(1) is not applicable to the assessee's case. It has been claimed that the funds received from the govt are not in the form of grant or subsidy or reimbursement but the same were capital contribution received from

the govt of Maharashtra in view of the provisions of section 31 of the Konkan Irrigation Development Corporation Act which says as under:

"Contribution of Government to Corporation Fund : The State Got shall by appropriation duly made in this behalf, from time to time provide an aggregate sum of not less than Rs.173 crores to the corporation funds as its share of the capital required by the Corporation for the performance of the functions of the corporation under this ordinance and such contribution shall be paid in suitable installments spread over a period of five years from the date of establishment of the corporation."

6. In support of the above contention, the AR has submitted copies of the covering letters received from the govt of Maharashtra which stated that it is a capital contribution (Anshdaan) towards the Corporation fund. The Id. Counsel of the assessee has also relied upon following judicial pronouncements claiming that provisions of section 43(1) is not applicable to the assessee's case.

188 ITR 22(MAD)
188 ITR 11 (BOM)
215 ITR 834 (MAD)
234 ITR 53 (MAD) ,
210 ITR 830(SC) . ITA NO 5/NAG/2002- ITAT MUMBAI BENCH 'A')
ITA NO.101 &102/NAG/2006- ITAT NAGPUR BENCH)
ITA NO.222 & 223/NAG/2007- ITAT NAGPUR BENCH)

7. During the course of assessment proceedings, the Id. Counsel of the assessee had also claimed that during the year projects costing Rs. 956.42 crores have been handed over by Govt Maharashtra for further development to the assessee but the same have not been considered for charging of depreciation during the year for want of letter communicating date of handing/taking over of said projects which were earlier carried out by Govt of Maharashtra. Accordingly, it has been submitted that the provisions of

section 43(1) is not applicable to the assessee's case and it has been requested that the claim of depreciation may be allowed in toto.

8. However, the A.O. was not satisfied. He referred to the provision of section 43(1) and Explanation 10 as under:

Section 43(1):

"actual cost" means the actual cost of the assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority"

Explanation (10) to section 43(1):

" Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or State Government or any authority established under any law or by any other person in the form of a subsidy or grant or reimbursement (by whatever name called), then so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

9. Referring to the above, the A.O. observed that it is very clear that any amount by whatever name called if received by the Central Government or State Government has to be reduced from the actual cost of the asset. Accordingly, he proceeded to disallow the depreciation.

10. Upon this, the penalty proceedings were initiated. In the penalty order, the A.O. noted the assessee's claim that the provision of section 43(1) were not applicable. It was claimed that the funds received from the Government of Maharashtra were not in the form of issue of bonds, interest income, etc. but the same were capital received from Govt. of Maharashtra. In support of this contention, the assessee submitted that the copies of the covering letters received from Govt. of Maharashtra which stated that these were capital contribution. However, the A.O. in penalty proceedings noted that these

submissions have not been accepted by the A.O. in the assessment proceedings. Furthermore, the A.O. noted that the Id. CIT(A) has upheld the action of the A.O. regarding the application of section 43(1) read with Explanation 10, though the Id. CIT(A) had granted some relief. The A.O. negated the assessee's reliance upon the decision of the Hon'ble Apex Court in the case of *Reliance Petroproducts (P.) Ltd.* [2010] 322 ITR 158 (SC). The A.O. proceeded to levy penalty u/s. 271(1)(c) of the Act.

11. Upon the assessee's appeal, the Id. CIT(A) elaborately dealt with the issue. The Id. CIT(A) noted that the assessee does not claim depreciation in the books of accounts and computes depreciation only for the purpose of income tax. In this regard, he referred to the audit report which is as under:

“The details of depreciation allowable as per Income Tax Act, 1961 is as per Annexure “A” attached. The Depreciation chargeable on Fixed Assets is not charged in Books and assets stands overstated to that extent. Similalry, the deficit stands understated to that extent.”

12. The assessee had been claiming depreciation as per the Act in the computations. The Id. CIT(A) negated the assessee's contention that the assessee should be granted the benefit of Hon'ble Apex Court decision in the case of *P. J. Chemicals Ltd.* 210 ITR 830 (SC). In this respect, the Id. CIT(A) referred to Explanation 10 to section 43(1) of the Act. He concluded in this regard as under:

16. From a perusal of Explanation 10 to section 43(1) of the I.T. Act as reproduced above, there remains no doubt at all that when an assessee receives any funds from amongst others the State Government in the form of subsidy or grant or reimbursement by whatever name called then the same has to be reduced from the cost of the assets to arrive at the actual cost of the assets. As this explanation was brought on the statute after the judgment of the Hon'ble SC, the appellant could not have relied on the decision of the Hon'ble Supreme Court in the case of *P.J. Chemicals Ltd.*

13. However, the Id. CIT(A) found that the second explanation of the assessee regarding the bonafide and inadvertent error in not giving effect to the provisions of section 43(1) r.w Explanation 10 of the Act has been found to have a lot of merit. He proceeded to hold that since it was a capital contribution of Govt. of Maharashtra, the assessee's belief that Explanation 10 of section 43(1) is not attracted was bonafide. In this regard, the Id. CIT(A) placed reliance upon the decision of the Hon'ble Apex Court in the case of *Reliance Petroproducts (P.) Ltd.* (supra) and accordingly he proceeded to delete the levy of penalty. The concluding portion of the Id. CIT(A) in this regard can be gainfully referred as under:

17. The appellant's second explanation however regarding bonafide and inadvertent error in not giving effect to the provisions of section 43(1) r.w. Explanation 10 of the I.T. Act has been found to have a lot of merit. Initially the appellant had claimed before the AO and the CIT(A) that provisions of section 43(1) were not applicable in its case because the funds received from the Government of Maharashtra were not in the nature of grant, subsidy or reimbursement but were in the nature of capital contribution to the corporation i.e. Capital Contribution was made by the Maharashtra Government to the appellant Corporation and the Maharashtra Government continued to be the owner of the assets through the appellant which was fully owned by the Maharashtra Government. Thus according to the appellant it was not a case where the Maharashtra Government had made a grant or reimbursement etc to some third party. After the order of the CIT(A)-II dated 3,09.2013 wherein he held that provisions of section 43(1) r.w. Explanation 10 of the I.T. Act were applicable in the appellant's case, the appellant accepted this legal position and according claimed depreciation in the subsequent assessment years after giving effect to these provisions. Moreover, bonafide of the appellant cannot be doubted. As already stated above the appellant is a Government of Maharashtra undertaking and was established in terms of Konkan Irrigation Development Corporation Act, 1998. The appellant corporation was incorporated for promotion and operation of irrigation projects in Konkan region, the functions which were earlier being performed by Irrigation Department of Government of Maharashtra. The appellant is allotted expenditure-wise grants for projects for meeting day-do-day expenditures of the corporation on administrative expenses. The appellant corporation does not carry out any activity which would fetch it any revenue except for a small amount received on account of water revenue which also is

remitted to the Government. As the appellant does not have any profit making motive, therefore, the appellant cannot have any deliberate or willful design to claim excess depreciation because the same is not going to have any effect on the appellant's liability to tax. This observation is supported by the fact that the appellant had unabsorbed brought forward depreciation amounting to Rs. 360.51 crores upto assessment year 2007-08 and the depreciation claimed during the year was Rs. 109.36 crores, out of which Rs. 39.97 crores was disallowed by the AO after applying the provisions of section 43(1) read with Explanation 10 of the I.T. Act. Therefore, it cannot be said that the appellant had overstated the depreciation with any motive to lower its liability for tax. Moreover, on perusal of the Audit report Schedule-I of the Liabilities forming part of the balance-sheet it is seen that the appellant had duly disclosed government contribution for works. The depreciation chart as per Income-tax Rules was filed as per Annexure-A to the audit report. Therefore, as far as the particulars of income are concerned, it is seen that neither any inaccurate particulars of income were filed nor any particulars of income were concealed. The appellant had made a claim of depreciation which claim was not acceptable being not in accordance with law and the claim was allowed at a reduced amount after correct application of law. In this regard it is seen that the Hon'ble Apex Court in the case of Reliance Petroproducts, 322 ITR 158 (SC) has held as under –

Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(l)(c). If we accept the contention of the Revenue then in case of every Return where the claim made is not accepted by Assessing Officer for any reason, the assessee will invite penalty under Section 271(l)(c). That is clearly not the intendment of the Legislature

Therefore, keeping in view the totality of the facts and circumstances of the case as discussed above and the judgment of the Hon'ble Apex Court in the case of Reliance Petroproducts (supra), it is held that penalty u/s. 271(l)(c) of the I.T. Act was not leviable in the appellant's case as the appellant has neither furnished any inaccurate particulars of income nor has the appellant concealed any facts material for the computation of its income. The penalty levied in the appellant's case u/s. 271(l)(c) of the I.T. Act amounting to Rs.23,03,31,738/- is therefore, directed to be deleted.

14. Against this order, the Revenue is in appeal before us.
15. We have heard both the counsel and perused the records. The ld. ld. Departmental Representative ('ld. DR') relied upon the orders of the A.O. She further claimed that in

absence of necessary details, it cannot be established that the contribution by the Government was capital contribution.

16. Upon careful consideration, we note that it is the assessee's claim that the Government's contribution was capital contribution and not grant subsidy or reimbursement. In this regard, it has been noted in the order's of the authorities below that the covering letter of the contribution were produced. In the said letter it was mentioned to be capital contribution. None of the authorities below has disputed this aspect. So the claim of the Id. DR that it cannot be established that the contribution was capital contribution is liable to be rejected. The opinion of the authorities below is that section 43(1) and Explanation 10 thereto is applicable. The same reads as under:

Section 43(1):

"actual cost" means the actual cost of the assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority"

Explanation (10) to section 43(1):

" Where a portion of the cost of an asset acquired by the assessee has been met directly or indirectly by the Central Government or State Government or any authority established under any law or by any other person in the form of a subsidy or grant or reimbursement (by whatever name called), then so much of the cost as is relatable to such subsidy or grant or reimbursement shall not be included in the actual cost of the asset to the assessee:

17. Hence, they have opined that the capital contribution would also be encompassed in the term "subsidy or grant or reimbursement (by whatever name called)". Hence, assessee's plea on merits has been negated. However, the assessee's belief that in terms of the above provision of the Act it was entitled to claim depreciation out of purchases from capital contribution for Government has been found to be bonafide by the Id.

CIT(A). In this regard, the Id. CIT(A) has also referred to Hon'ble Apex Court decision in the case of *Reliance Petroproducts (P.) Ltd.* (supra).

18. In our considered opinion, there is no infirmity on the plank of the Id. CIT(A) under which he has deleted this penalty. It is settled law that the assessment proceedings and penalty proceedings are distinct. Sustenance of the additions by the Id. CIT(A) and assessee's not contesting the same before ITAT cannot be said to be adversely affecting the assessee's plea that penalty u/s. 271(1)(c) is not leviable on the facts and circumstances of the case. We further note that all the details of depreciation claim was duly made and disclosed in the computation of income. So there is no question of concealment of income or furnishing of inaccurate particulars of income. The authorities below have only denied the claim on merits on the basis that term "subsidy or grant or reimbursement (by whatever name called)" would include capital contribution. Hence, the assessee's claim has been denied. The assessee's plea that it was under a bonafide belief that asset acquired out of capital contribution cannot be said to be in violation of the Act is absolutely bonafide. It will be not out of place to mention that the authorities below opinion, that the said term would include capital contribution also, *prima facie* itself has no basis. The principal of 'ejusdem generis' would also not support such an extension of the term "subsidy or grant or reimbursement (by whatever name called)".

19. Be as it may, we are of the considered opinion that the assessee's belief that assessee was entitled for deprecation out of purchase made from capital contribution received from Government was bonafide. Hence, no case is there for furnishing of

inaccurate particulars of income or concealment of income. The Hon'ble Apex Court's decision in the case of *Reliance Petroproducts (P.) Ltd.* (supra) supports the case of the assessee. Hence, we affirm the order of the ld. CIT(A).

20. In the result, the Revenue's appeals are dismissed.

Order pronounced in the open court on 07.09.2018

Sd/-
(Pawan Singh)
Judicial Member

Sd/-
(Shamim Yahya)
Accountant Member

Mumbai; Dated : 07.09.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai