

आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

**BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6584/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

Shri. Kalpesh K Shah, B/101, Eastern Court, Tejpal Road, Vile Parle (E), Mumbai 400057	बनाम/ v.	DCIT CIR 25(2) Mumbai
स्थायी लेखा सं./PAN: ANBPS6408E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri B.V Jhaveri	
Revenue by:	Shri. Manoj Kumar Singh	

सुनवाई की तारीख / **Date of Hearing** : 11.12.2018

घोषणा की तारीख / **Date of Pronouncement** : 08.02.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by Assessee, being ITA No. 6584/Mum/2016, is directed against appellate order dated 30.08.2016 in appeal no. CIT(A)-37/IT-267/ACIT-25(2)/2014-15 passed by learned Commissioner of Income Tax (Appeals)-37, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2011-12, the appellate proceedings had arisen before learned CIT(A) from the penalty order dated 30.07.2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 271(1)(c) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2011-12.

2. The grounds of appeal raised by assessee 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 Appellant's case and in law the Ld CIT(A) erred in confirming the Ld. AO's action in levying penalty of Rs 9,28,569/- by invoking provisions of section 271(1)(c) of the Income Tax Act 1961 as per the grounds stated in the order or otherwise.

2. The Appellant craves leaves to alter, amend, withdraw or substitute any ground or grounds or to add any new ground or grounds of appeal on or before the hearing.

The appellant prays this Hon'ble Tribunal to delete the addition made by the Assessing Officer, which is confirmed by the ld. Commissioner of Income Tax (Appeals) and/ or grant any other relief as your honors may deem fit."

3. The brief facts of the case are that the assessee is partner in various firms carrying on business of builder & developer. The assessee has shown income from business and from other sources during the year consideration. The addition was made by the AO in quantum assessment on account of issue of disallowance of interest expenditure of Rs. 74,85,834/- but later on the assessee filed rectification application u/s. 154 before the AO and the AO was pleased the pass an order dated 20.02.2014 wherein addition of disallowance of interest expenditure was restricted to Rs. 31,91,743/, by passing an rectification order u/s 154 by the AO , which is reproduced as hereunder:-

Name of the assessee	Kalpesh K. Shah
PAN	ANBPS6408E
Asstt. Year	2011-12
Status	Individual
Date of order	20.02.2014

ORDER U/S. 154 OF THE INCOME TAX ACT, 1961

In this case assessment u/s. 143(3) was completed on 31.01.2014 assessing the total income at Rs. 42,38,290/- thereby raising demand of Rs. 15,82,040/-.

The assessee vide letter dated 06.02.2014 has filed application for rectification u/s. 154 stating that the difference in interest of Rs. 74,85,834/- has been inadvertently disallowed whereas the interest should have been allowed as an expense against the income from business and profession. On perusal of assessment records it is noticed that the business income offered by the assessee in the return of income includes interest from partnership firms to the tune of Rs. 42,94,091/- which has already been included in the income from other sources. Hence, the contention of the assessee is found to be acceptable. The mistake being apparent from records, same is rectified u/s. 154 of the Income Tax Act, 1961 as under :

I)	Income from business [as per order u/s. 143(3)]	42,94,091/-	
Less :	Income from business already included in income from other sources	42,94,091/-	Nil
II)	Income from other sources [as per order u/s. 143(3)]		Nil
	Total Income		Nil

Rectified accordingly. Give credit for taxes paid. Charge interest as applicable. Revised DN / Challan / R.O. issued accordingly.

V. Koteswaramma 20/2/14

(V. KOTESWARAMMA)
A.C.I.T.-21(1), Mumbai.

Copy to: The Assessee.

V. Koteswaramma 20/2/14

A.C.I.T.-21(1), Mumbai.

The AO during the course of assessment proceedings has observed that the assessee has claimed deduction u/s. 57 of the Act to the tune of Rs. 1,16,53,956/- towards interest expenditure which were more than the interest income of Rs. 41,68,122/- earned by the

assessee on loans and advances for the year under consideration. The AO was of the view that on the grounds of prudence and normal practices of the businessman, no one will pay interest at a higher rate than interest earned. The AO had observed from the Balance Sheet of the assessee that it was showing loan advanced at Rs. 22.14 crores and unsecured loans raised were to the tune of Rs. 23.96 crores. Thus, it was observed by the AO that there is a little difference between loans taken by the assessee and the loans advanced by the assessee. The AO observed that the assessee has declared total interest received on loan advanced at Rs. 41,68,122/- whereas interest paid on the loans advanced was at Rs. 1,16,53,956/- which was claimed as deduction u/s. 57 of the Act. The AO was of the view that deduction u/s. 57(iii) of the Act is allowable in respect of expenses incurred to earn the income from other sources provided that such expenditure should be wholly & exclusively incurred for the purpose of making or earning of such income only. The claim of the assessee of deduction u/s 57(iii) was not allowed by the AO due to huge difference of Rs. 74,85,834/- because as per AO it clearly indicates that the assessee has paid interest at higher rate than received which as per AO is not the normal business practice and is against the principles of prudence. The alternative claim of the assessee for deduction u/s. 36(1)(iii) was also rejected by the AO as in view of AO, the assessee has failed to substantiate with documentary evidences that the loans and advances to the firms/companies in which the assessee is partner/director was wholly & exclusively utilised for the purposes of furthering the business of the assessee. The AO also invoked penalty provision and show cause notices were issued asking assessee as to why penalty provisions as are contained in Section 271(1)(c) be not invoked against the assessee. The assessee in its reply before the AO during assessment proceedings submitted, as under:-

“1. We have filed our return of income u/s. 139(1) declaring nil income.

2. In response to the notices u/s 143(2) and 142(1), we have attended from time to time and filed the requisite details and discussed the case. The order for the same has been passed on 31.01.2014. In response to the order we had filed rectification letter u/s 154 vide letter dated 06.02.2014 and the order for the same has been passed on 20.02.2014 and thereby initiating penalty proceeding u/s 271(J)(C).

3. In any case the penal provisions are not application to additions made for the reasons given in the subsequent paras

(i) As per order dated 31.01.2014, the learned AO had disallowed interest expense amounting to Rs.74,85,834/- declaring a Gross Total Income of Rs 42,94,091/-. However the order was later rectified by the assessing officer wherein the disallowance was restricted to Rs.31,91,743/- resulting in Gross Total Income of Rs.NIL.

(ii) Merely because certain additions are made to the income of the assessee, it would not justify the imposition of a penalty. It is not mandatory that penalty must be imposed in every case. Even the word "may" in section 271(1) indicates that the authority concerned has discretion to levy penalty only in case where an assessee has concealed his income deliberately.

(iii) The mere fact that an addition is made would not per se lead to the charge of concealment being proved automatically by the revenue. There is no presumption of concealment unless positively established. Therefore, on consideration of all relevant facts and circumstances of the case, there was no occasion even for initiation of proceedings u/s 271(1)(C) much less imposition of the penalty thereunder. It is therefore submitted that the penalty being devoid of merit and is liable to be annulled without any further argument.

(iv) Based on the above facts we humbly state that there was neither concealment of particulars nor there was any furnishing of inaccurate particulars in respect of filing of return looking at above facts we request that as all particulars were submitted appropriately and therefore the penalty proceedings under section 271(1)(C) of the Act should not be initiated and our reliance is placed on the following case laws to support our case :

CIT V/s Reliance Petroproducts Pvt. Ltd 322 ITR 158 the Hon 'ble Supreme Court.

The case of the assessee is squarely covered by the above decision since mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee. We therefore hereby pray to the learned A.O. to drop the penalty proceedings to meet the ends of justice".

4. The AO rejected the contention of the assessee by observing that the total interest received on loans and advances is offered at Rs. 41,68,122/- as against deduction of interest expenditure u/s. 57(iii) which was claimed at Rs. 1,16,53,946/- which is against the principle of prudence and normal business practice that assessee will pay more interest than interest earned on loans. The AO observed that the assessee failed to provide valid justification for the claim of deduction u/s 57(iii) of Rs.1,16,53,956/-. The AO also observed that the assessee has diverted interest bearing funds for non business purposes. The AO observed that the assessee has failed to submit proper reasons for not charging of interest on loans granted by it. The AO also observed that the investments were made in sister concerns and related parties which are earning tax free income and purpose of the assessee is to avoid paying tax. The AO had correctly held that the assessee has debited huge interest expenses and the said borrowed funds were diverted for non business purposes. The AO levied penalty on the assessee by invoking provisions of Section 271(1)(c) relying upon decision of Hon'ble Delhi High Court in the case of CIT v. Zoom Communications P. Ltd., reported in 40 DTR 249 (Delhi) and held that the assessee has furnished inaccurate particulars of income while no reasonable and cogent explanation has been offered in this regard by the assessee, vide penalty order dated 30.07.2014 passed by the AO u/s 271(1)(c) of the 1961 Act for AY 2011-12.

5. Aggrieved by the penalty order dated 30.07.2014 passed by the AO u/s 271(1)(c) of the 1961 Act, the assessee filed first appeal with

Ld. CIT(A) , which was dismissed by Ld. CIT(A) vide appellate order dated 30.08.2016.

6. Aggrieved by the appellate order dated 30.08.2016 passed by learned CIT(A), the assessee has now come in an appeal before the tribunal and Ld. Counsel for the assessee submitted that penalty was levied by the AO u/s. 271(1)(c) of the Act. It was submitted that earlier assessment was framed by Revenue u/s. 143(3) which was later rectified by the AO u/s. 154. Our attention was also drawn to page no. 6 of the paper book filed by the assessee wherein the rectification order dated 20.02.2014 passed by the AO u/s. 154 is placed. The said order is also reproduced in preceding para's of this order and is now not reproduce again . It was submitted by learned counsel for the assessee that total income computed was 'Nil' in the said rectification order dated 20.02.2014. It was also submitted that the assessee filed return of income declaring 'Nil' income and no attempt was made to carry forward of losses i.e. excess of expenditure over income viz. loss of Rs 31,91,743/- in the return of income filed with the Revenue and hence no loss/prejudice was suffered by Revenue. On being directed by the Bench, the assessee has filed copy of income-tax return for impugned assessment year. It was explained that the assessee filed its return of income belatedly beyond the time stipulated for filing of return of income u/s 139(1) of the 1961 Act. The assessee has also filed an affidavit dated 15.11.2018 which is placed in file wherein it has been contended that assessee has not attempted to carry forward loss of Rs. 31,91,743/-. Our attention was also drawn to para 5.9 of Ld. CIT(A).

7. The Ld. DR on the other hand referred to explanation 4(b) of Section 271(1)(c) of the Act and it was submitted that return of income was filed late and the assessee was not entitled to carry forward losses in any case due to belated return keeping in view provisions of Section 139(3). Our attention was drawn to the appellate order passed by the Ld. CIT(A) wherein the Ld. DR relied upon the order of the Ld. CIT(A).

8. We have considered rival contentions and perused the material on record. We have observed that the assessee is partner in various firms carrying on business of builder and developer. We have observed that the assessee has shown income from business to the tune of Rs. 42,94,091/- and after adjustment of losses to the tune of Rs. 42,94,091/- , the income declared was 'Nil' in the return of income filed with the Revenue. We have also observed that the assessee has advanced loans to the tune of Rs. 22,14,61,031/- and the assessee has also raised unsecured loans of Rs. 23,96,24,234/- . We have also observed that the assessee received interest income on loans advanced of Rs. 41,68,122/- and the assessee paid interest of Rs. 1,16,53,956/- on loans advanced and the same were claimed as deduction u/s 57 of the 1961 Act. Thus, as could be seen there is an excess of interest expenditure incurred to the tune of Rs. 74 85,834/- over & above interest earned by the assessee . The said interest expenses in the income-tax return filed was shown under the head 'Income from other Sources' . But while claiming set off of the said excess of interest expenditure over interest income, only interest expenditure of Rs. 42,94,091/- was adjusted against interest income to bring income chargeable to tax to 'Nil' and no attempt was made to carry forward remaining interest expenditure of Rs. 31,91,743/- . The assessee has no doubt filed return of income beyond time stipulated u/s 139(1) and in any case the said loss was not allowable to be carried forward keeping in view provisions of Section 139(3) of the 1961 Act. On direction from the Bench, the assessee has filed copy of return of income(ROI) filed with Revenue for impugned assessment year, which is placed in file. The assessee has e-filed return of income on 22.12.2011 vide E-filing acknowledgment no. 325018160021211 which is belated return of income. On perusal of the said ROI which is placed in file, it is seen that losses to be carried forward are shown as 'Nil' in the said return of income. As could be seen from ROI for AY 2011-12, in column no. 15 of 'Part B-TI – Computation of Income' of the return of income dated 22.12.2011 for AY 2011-12, the losses of

the current year to be carried forward is shown as 'Nil' . In column no. 3 'Profits and gains from business or profession' in 'Part B-TI – Computation of Income' , the income from Profits and gains from business or profession is shown at Rs. 42,94,091/- which is the 'Total' income of the assessee as shown in column no. 6 in 'Part B-TI – Computation of Income' of the said return of income and in column no. 7 'Losses of current year set off against 6' in 'Part B-TI – Computation of Income' to the tune of Rs. 42,94,091/- and hence it can be seen that although income from other sources in schedule OS –'Income from other sources' was shown to be (-)Rs. 74,85,834/- , but the same is not set off in toto against income but was set off only to the extent of income earned by assessee of Rs. 42,94,091/- . Even in schedule CYLA of the said ROI, the losses set off were shown to the tune of Rs. 42,94,091/- and losses remaining after set off were shown to be Rs. 31,91,743/- , while in schedule CFL the detail of the losses to be carried forward to future years is shown to be 'Nil'. Thus it can be seen that the assessee has made no attempt to carry forward said losses of Rs. 31,91,743/-, but so far as losses of Rs. 42,94,091/- is concerned, the same were allowed and adjusted by the AO itself while passing an rectification order dated 20.02.2014 passed u/s. 154 of the Act. No doubt the assessee filed belated return of income and keeping in view provisions of Section 139(3) of the 1961 Act in any case the said losses were not to be allowed to be carried forward to subsequent years. The assessee , however, did not made any attempt to claim carry forward of the losses on account of excess of interest expenditure incurred over interest income earned by the assessee. The AO also did not allowed the set off of excess interest expenditure over interest income to the tune of Rs. 74,85,834/- in the assessment framed u/s. 143(3) vide orders dated 31.01.2014 but later on the assessee brought to the notice of the AO vide application u/s. 154 of the interest received on loans to partnership firm in which the assessee was partner and the said interest income was shown under the head 'Income from Profit and Gain from Business or Profession'

and hence the AO adjusted interest expenditure to the tune of Rs. 42,94,091/- to bring the taxable income to 'Nil', vide rectification order passed u/s. 154 of the Act. The assessee never claimed carry forward of losses of Rs. 31,91,743/- . The assessee has also filed an affidavit before tribunal that no losses were attempted to be carried forward to subsequent year and no prejudice is caused to revenue as the income returned was 'Nil' and income finally assessed was also 'Nil'. We have also observed that while framing assessment , the AO has not brought on record any incriminating material/evidence to prove that the funds were advanced to sister concern/partnership firm in which assessee was partner due to reasons other than commercial expediency . In any case, the AO allowed the interest expenditure of Rs 84,62,213/- (Rs. 41,68,122 + Rs. 42 94,091/-) out of total interest expenditure of Rs.1,16,53,956/- incurred by the assessee and only Rs. 31,91,743/- stood disallowed by the AO, which in any case was voluntarily disallowed by the assessee itself in the belated return of income filed by the assessee with the Revenue keeping in view that the same could not have been allowed to be carried forward keeping in view provisions of Section 139(3). The AO has not brought on record any incriminating material/evidence to come to conclusion that this interest expenditure is not allowable but a general and bald averment is made by the AO while disallowing excess of interest expenditure , of advancing of loans by assessee to its sister concerns without interest wherein the AO involved principles of prudence and being against normal human conduct to incur more interest expenditure than earning interest income which on touchstone of preponderance of probabilities could be sufficient to fasten tax liability in quantum but we are presently concerned with penalty provisions as are enshrined in Section 271(1)(c) which certainly requires proof on higher pedestal . There is no averment by the AO that this excess interest expenditure of Rs. 31,91,743/- was never incurred by the assessee nor is the averment by the AO that this is a bogus claim set up by the assessee. The AO has invoked principles of prudence and

normal business conduct of the tax-payer that no businessman can pay higher interest expenditure than the interest income but the entire aforesaid conclusion arrived at by the AO is based upon conjectures and surmises without bringing on record any cogent incriminating evidences and material on record. Similarly ,it is not the case of the revenue that assessee has not incurred or not paid this interest expenditure of Rs. 31,91,743/- to the persons from whom borrowing were made. It is also not brought on record by the AO these borrowings were made for reasons other than commercial expediency but merely on conjectures and surmises, the conclusions are drawn by the AO against the assessee. It is merely averred by the AO that assessee has paid more interest on unsecured loans raised than what was earned on these loans advanced by the assessee. In our considered view , the findings of the AO may be sufficient to make disallowance in quantum on the theory of preponderance of probabilities but it is not sufficient to fasten and saddle the assessee with penalty provisions as are enshrined u/s. 271(1)(c) of the Act as it could not be said based on the factual matrix of the case that the assessee submitted inaccurate particulars of income while filing return of income with Revenue or any attempt was made by the assessee to conceal its income from Revenue to evade taxes. The decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Private Limited (2010) 322 ITR 158(SC) is relevant . In our considered view, no prejudice was caused to Revenue as in the return of income filed by the assessee with revenue, the assessee never attempted to claim carry forward of losses to the tune of Rs. 31,91,743/- and the Revenue erred in levying penalty on the assessee u/s 271(1)(c) on this ground. Moreover, there is no cogent incriminating material/evidence on record to justify levy of penalty within provisions of Section 271(1)(c) of the 1961 Act. Under these circumstances , we are of the considered view that explanation offered by the assessee is bonafide which is sufficient to take the assessee out of clutches of provisions of Section 271(1)(c) of the 1961 Act keeping in

view Explanation 1 to Section 271(1)(c) of the 1961 Act and we hereby order deletion of penalty as was levied by the AO which was later confirmed by learned CIT(A) by setting aside the appellate order passed by learned CIT(A). We order accordingly.

9. In the result, appeal of the assessee in ITA no. 6584/Mum/2016 for AY 2011-12 is allowed.

Order pronounced in the open court on 08.02.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 08.02.2019 को की गई

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 08.02.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI