

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "A" BENCH NEW DELHI)**

BEFORE AMIT SHUKLA, JUDICIAL MEMBER

&

SHRI O.P. KANT, ACCOUNTANT MEMBER

**ITA No. 4422/Del./2014
Assessment Year: 2002-03**

DCIT Circle-1 (1), New Delhi	Vs.	American Express India Pvt. Ltd. Metropolitan Saket, 7th Floor, Office Block, District Centre, Saket, New Delhi
(Applicant)		(Respondent)
(PAN: AAACA6163F)		

Revenue by: Shri R.C. Danday, Sr. DR

Assessee by: Shri Nageshwar Rao, Advocate

Date of hearing	13/09/2017
Date of pronouncement	06/10/2017

ORDER

PER AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid appeal has been filed by the Revenue against the impugned order dated 20.05.2014 passed by the Id. CIT (Appeals)-IV, New Delhi in relation to the penalty proceedings u/s 271(1)(c) for the A.Y. 2002-03. In the grounds of appeal the sole ground raised by the revenue reads as under:-

"1. On the facts and in the circumstances of the case, the Id. CIT (A) has erred in deleting the penalty of Rs.54,37,000/- imposed u/s 271 (1)(c) of the 1.1.Act, 1961, ignoring the fact that patently a wrong claim has been made by the assessee of treating the interest on Income Tax Refund as income derived

from the export of articles or things or computer software by a hundred percent export oriented undertaking and thereby it amounts to filing inaccurate particulars of Income.

2. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

2. The brief facts qua the issue relating to levy of penalty are that the assessee company is 100% Export Oriented Unit which is engaged in the business of financial accounting data processing for its various customers including American Express World Wide. The assessee's unit is entitled for tax deduction u/s 10B, since A.Y. 1996-97 to 2005-06. The assessee in its computation of income while claiming of deduction u/s 10B has netted the interest earned on income tax refund of Rs. 1,52,92,404/- against the interest paid. In response to show cause notice issued during the course of assessment proceedings, the assessee had given detailed explanation and reply which can be summarized in the following manner:-

(i) Netting of interest income against interest expenditure is to be allowed in view of decisions of Tribunals which was quoted by the assessee.

(ii) Since the income tax demand was created which was on account of interest also for which assessee had to pay interest on overdraft facility. Therefore, the interest earned on Income Tax Refund is linked to the business of the assessee company.

(iii) It was further argued that for exemption U/s 10B it is not required that the profit is to be derived from the business.

(iv) Various decisions relating to Section 80HHC on this issue were referred and it was argued that sections 80HHC and 10B are pari- material and it was further submitted that sec 80HH/80I are different from sections 80HHC and 10B.

3. The Ld. Assessing Officer held that the demand of income tax is required to be paid by the assessee, whether from its own fund or from OD facility, is not material and it cannot be netted with the interest paid by the assessee company for the purpose of its business activities, because the interest on income tax refund has not been earned in the course of business activities of the assessee company and same cannot be reckoned to have been derived from the business of the undertaking. The Assessing Officer held that interest income falls under the head, 'income from other sources' and therefore, cannot be netted. The total interest accrued to the assessee during the year was Rs. 1,64,62,391/- and the assessee had netted interest income of Rs. 1,52,29,404/- against the interest paid. Thus, the Assessing Officer held that the whole interest income of Rs. 1,64,62,391/- is to be treated as income under the head of income from business. He added the netted interest income of Rs. 1,52,29,404/-.

4. In the quantum appeal the Learned CIT (Appeals) had deleted the said addition after observing and holding as under:-

“21.1. I have carefully considered the submissions made by the appellant, and the decision of the Hon’ble ITAT in appellant’s own case for Assessment Year 1996- 97. Respectfully following the above order of the IT AT, the ground of appeal is allowed. Accordingly, the interest on income-tax refund of Rs. 1,52,29,404/- is to be netted off against the interest payment of Rs. 1,85,09,964/- and since the interest received by the Appellant is less than the interest expense for the year under appeal, no part of the interest on income-tax refund of Rs. 1,52,29,404/- is to be excluded while computing profits of business eligible for deduction under section 10B of the Act.”

5. However in the second appeal filed by the department before the Tribunal, the said relief granted by the Ld. CIT(Appeals) was reversed and the addition was sustained, after holding that the interest earned on income tax refund is to be taxed under the head 'income from other sources' and hence was not eligible for deduction u/s 10B.

6. Now the Id. Assessing Officer has levied the penalty on this netting of the interest amount received on income tax refund from interest paid to the bank, after discussing various judicial decisions rendered in the context of *Explanation 1* and also the judgment of Hon'ble High Court in the case of **CIT vs. Zoom Communications Pvt. Ltd. and CIT vs. Mak Data Ltd.**

7. The Ld. CIT (Appeals) has deleted the said penalty after observing and holding as under:-

“6. I have carefully considered the submissions of the appellant and perused the order passed by the AO. I find merit in the submission of the Id. AR that since adequate disclosures regarding the claim of deduction u/s 10B on interest on income-tax refund were made in the notes to computation of income filed with the return of income for the subject year, therefore it cannot be said that the appellant has concealed the particulars of income. The penalty cannot be levied merely because a claim has been made even if the claim is found to be incorrect by the assessing authority. There is no averment in the order that any false claim or wrong fact has been furnished by the assessee. The issue is only as to whether deduction u/s. 10B is admissible on interest income or as to whether interest income forms a part of “profits of business” or netting off interest income with interest expense is allowed. Accordingly, where two views are possible, difference of opinion between the assessing officer

and the appellant by itself, cannot expose the latter to penalty. Considering the facts and circumstances of the case as well as judicial pronouncements on the issue relied upon by the appellant, I am of the view that penalty cannot be levied merely because of rejection of a bona fide claim of the appellant since the assessment proceedings are different from penalty proceedings. It has been held by various Courts that where an assessee genuinely makes a claim after disclosing necessary material facts, there is no "concealment or furnishing of inaccurate particulars" even if the claim is rejected. I find that the similar issue arose for my consideration in the appellant's own case for the A.Y. 2003-04. I have decided this issue in the favour of the appellant vide my appeal order dated 12.8.2013. I find that the facts of the case during this year are similar to the facts of the case in the A.Y. 2003-04. In view of the above discussion, I am of the view that the penalty levied by the AO cannot be upheld and the same is deleted. Grounds of appeal are allowed."

8. Before us the Ld. DR first of all relied upon various judgments of Hon'ble Supreme/ High Court rendered in the context of levy of penalty u/s 271(1)(c) without even addressing us as to in what manner these judgments are relevant on the facts of the case. For the sake of ready reference case laws relied upon by him are reproduced here under:-

"1. CIT Vs Moser Baer India Ltd. (184 Taxman 8 (SC)/2009 315 ITR 460 (SC)/(2009) 222 CTR 213)

2. CIT Vs Gold Coin Health Food (P.) Ltd (172 Taxman 386 (SC)/(2008) 304 ITR 308 (SC).

3. Union of India v. Dharamendra Textile Processors (2007) 295 ITR 2441

4. *MAK Data P. Ltd vs. CIT T38 taxmann.com 448 (SC)/2013l 358 ITR 593 (SC)/2013 263 CTR 1.*
5. *B.A. Balasubramaniam & Bros. Co Vs CIT [116 Taxman 842, 236 ITR 977, 157 CTR 556].*
6. *CIT vs Gates Foam & Rubber Co [91 ITR 467] CIT vs India Seafood [105 ITR 708]*
7. *Steel Ingots Ltd vs. CIT T296 ITR 228]*
8. *CIT Vs Escorts Finance Ltd [183 Taxman 453 (Delhi)/[2010] 328 ITR 44 (Delhi)/[2009] 226 CTR 105]*
9. *CIT Vs R.M.P. Plasto (P.) Ltd [184 Taxman 372 (SC)/[2009] 313 ITR 397 (SC)/[2009] 227 CTR 635]*
10. *CIT Vs Zoom Communication (P.) Ltd. [191 Taxman 179 (Delhi)/[2010] 327 ITR 510 (Delhi)/[2010] 233 CTR 465]*
11. *K.P. Madhusudhanan Vs CIT 2001 118 Taxman 324 (SC)/[2001] 251 ITR 99 (SC)/[2001] 169 CTR 489 (SC)].”*

He further submitted that penalty has rightly been levied by the Assessing Officer, because interest on income tax refund can never be treated or can be held as income from business activities or profits derived from the undertaking. Accordingly, the penalty levied by the Assessing Officer should be confirmed.

9. On the other hand, the Ld. Counsel for the assessee submitted that in the annual report itself, the assessee had given the justification for such netting of interest which was based on certain decisions. Therefore, at the time of making the claim in the return, assessee had bona fide belief based on judicial precedents. Such bona fide belief was accentuated by the fact that the first appellate authority in the quantum proceedings had accepted the assessee's

contention and deleted the addition made by the Assessing Officer. Thus in such a situation it cannot be held that the assessee can be liable for penalty u/s 271(1)(c) for 'furnishing of inaccurate particulars'. Lastly, he submitted that exactly on same issue and on similar set of facts, this Tribunal in the case of M/s. Millennium International vs. ACIT in ITA no. 4956/Del/2010 vide order dated 8.8.2013 had deleted the penalty.

10. We have heard the rival submissions and also perused the relevant findings given in the impugned order as well as material referred to before us. The subject matter of levy of penalty is claimed of netting of interest of Rs. 1,52,29,404/- which was on account of interest on income tax refund. In the notes of the statement of total income the assessee had giving following note:-

"The company's appeal for Assessment Year 1996-97 was disposed off during the previous year relevant to present assessment year on 7th Jan' 2002 wherein the Assessing Officer was directed to treat the income as exempt under Section 10B and pass consequential order. In terms of the direction of the IT AT the Assessing Officer vide his order dated 22nd July, 2002 (much after close of the year) recomputed the income at NIL & computed a total sum of Rs. 80,792,340 (including interest of Rs.16,462,391) as refundable. Out of the said sum of interest, a sum of Rs.15,229,404 has been credited in the books of account having accrued during the year. Since the tax demand had arisen due to the department not accepting that the company is entitled to exemption under Section 10B and the company had borrowings over the period of the payment of this tax demand, no net interest is earned, and the interest received on the consequential refund is in the course of business being carried on by the assessee and is derived from die only Export Oriented Unit of the company. In this connection we also refer to the decision in the case of Commissioner of Income Tax v. Haribhai

Estate (P) Limited (referred in 162 CTR1) wherein the interest was held to be income from business.

Further, in any case it is submitted that the company became entitled to receive the interest only after the passing of the order by the Assessing Officer on 22nd July, 2002 and therefore, the same cannot be said to be taxable in the previous year relevant to present assessment year.”

7. Thus, the assessee had furnished and disclosed the entire particulars of the claim for netting of the interest and also the said claim was backed by the aforesaid note. As discussed above, in the first appeal, first appellate authority had allowed the netting-off of the interest, while computing the profits of business eligible for deduction u/s 10B. This order of the first appellate authority has been reversed by the Tribunal by holding that interest receipt from the department on the income tax refund, does not have any direct nexus with the business of the assessee and it cannot be linked with the business of the assessee. Therefore, it cannot be netted off with the other interest payment. Though this issue has been decided against the Tribunal in the quantum proceedings, however, in the penalty proceedings, one has to see, whether at the time of making the claim at the time of filing of return of income the assessee had any bona fide belief based on certain judicial precedence or not. Here in this case, such a bona fide belief has been accentuated by the fact that the Ld. CIT (Appeals) had allowed such netting off and decided the issue in favour of the assessee. Under these facts it cannot be held that the assessee had furnished any inaccurate particulars of income so as to warrant levy of penalty u/s 271(1)(c) read with *Explanation 1*. If a claim made by the assessee has been allowed at one stage and later on has been disallowed, ostensibly, the assessee

can said to have some bona fide belief for making such a claim. More so when the assessee had paid huge income tax demand in the earlier years for disallowance of claim of deduction u/s 10B, out of borrowed funds for which it has paid huge interest and when the interest on such refund was made the assessee had netted-off on the ground that it is relatable to its activities of EOU. Thus, we hold that under these facts and circumstances the deletion of penalty by the Learned CIT(Appeals) is justified and the same is affirmed and the grounds raised by the revenue is dismissed.

8. In the result, appeal filed by the revenue is dismissed.

Order pronounced in the open court on 06.10.2017.

Sd/-

**(O.P. KANT)
ACCOUNTANT MEMBER**

Sd/-

**(AMIT SHUKLA)
(JUDICIAL MEMBER)**

Dated: 06.10.2017

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Copy forwarded to:

- 1) Appellant
- 2) Respondent
- 3) CIT
- 4) CIT (Appeals)
- 5) DR: ITAT

ASSISTANT REGISTRAR

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