

**आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'SMC' अहमदाबाद ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"SMC" BENCH, AHMEDABAD**

*(Convened through Virtual Court)*

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER  
& SMT. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 1234/Ahd/2018

(निर्धारण वर्ष / Assessment Year : 2012-13)

<b>Electron Colour Chem Pvt. Ltd.</b> 408, Balaji Estate, Narol Isanpur Highway, Narol, Ahmedabad	<b>बनाम/</b> Vs.	<b>Income Tax Officer</b> Ward - 2(1)(1), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACE7479G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से /Appellant by :	None
प्रत्यर्थी की ओर से / Respondent by :	Shri Vidhyut Trivedi, Sr.D.R.

सुनवाई की तारीख / Date of Hearing	07/09/2020
घोषणा की तारीख /Date of Pronouncement	12/10/2020

**आदेश/ORDER**

**PER PRADIP KUMAR KEDIA - AM:**

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Tax (Appeals)-2, Ahmedabad ('CIT(A)' in short), dated 05.04.2018 arising in the penalty order dated 24.03.2017 passed by the

Assessing Officer (AO) under s. 271(1)(c) of the Income Tax Act, 1961 (the Act) concerning AY. 2012-13.

2. When the matter was called for hearing, none appeared for the assessee. It is observed that notice of hearing was properly served on the assessee and the representative of the assessee was put to the notice of hearing. The matter was accordingly proceeded *ex parte* in the absence of the assessee.

3. The grounds of appeal raised by assessee read as under:

- “1. The ld CIT(Appeals) erred both in law and on facts in confirming the penalty of Rs.9,54,528/- levied under section 271(1)(c) of the Income tax Act, 1961 in respect of disallowance of interest expenses when there is neither concealment of particulars nor inaccurate particulars of income for bonafide claim of interest expenses. The ld CIT (Appeals) ought to have accepted the plea raised and deleted penalty.*
- 2. The ld CIT(Appeals) erred in law and on facts in confirming the illegal and invalid order levying penalty u/s 271(1)(c) when the appellant had furnished reply and explanation in response to show cause notice before the date of penalty order while AO levied penalty on the ground that no reply was furnished and thus order suffered from vice of application of mind as held by jurisdictional High Court. The order passed be cancelled in view of judgment of Gujarat High Court.*
- 3. The ld CIT(Appeals) grievously erred in law and on facts in confirming the order levying penalty on the ground that non charging of interest on brought forward balance in the account of advancee amounted to furnishing of inaccurate particulars ignoring the fact that assessment and penalty proceedings are distinct and independent, and there was no false claim made when all particulars were duly furnished. It be so held now*
- 4. The ld CIT(Appeals) erred in law and on facts in confirming penalty levied by relying on decisions not relevant to the facts and ignoring judgments relevant to fact of the appellant's case. It be so held now and order passed be cancelled.”*

4. Briefly stated, the assessee company is engaged in trading of textile chemicals. The assessee filed return of income declaring a total income of Rs.9,50,890/-. In the course of scrutiny assessment, it was *inter alia* noticed by the AO that assessee company had claimed interest expenses of Rs.65,38,344/- under s.36(1)(iii) of the Act on money borrowed by it. The AO also simultaneously found that the assessee company had also advanced certain funds to its associate, namely, M/s. Laser Exports Pvt. Ltd. free of interest. After analysis of facts, the AO disallowed proportionate interest expenses of Rs.27,25,150/- attributable to interest free advances on the ground that interest paid on borrowed funds have been diverted towards interest free advances resulting in reduction of taxable income. On this disallowance of interest expenses attributable to interest free advances, the AO also imposed penalty under s.271(1)(c) of the Act on alleged 'furnishing or inaccurate particulars of income' by claiming non-genuine interest expenses to suppress the income. A penalty of Rs.9,54,528/- was accordingly quantified on the disallowances made towards interest etc.

5. Aggrieved, the assessee preferred appeal before the CIT(A) challenging the legitimacy of imposition of penalty. The CIT(A), however, did not find any merit in the grievance of the assessee *qua* penalty on interest disallowance and accordingly confirmed the action of the CIT(A) in following terms:

**“3.3 Decision:-**

*I have carefully considered the facts of the case, the penalty order and the written submission of the appellant. The AO has levied penalty U/S. 271(1)(c) of Rs.9,58,528/- for furnishing inaccurate particulars of income in respect of disallowance of interest u/s. 36(1)(iii) of Rs.27,25,150/- and disallowance of sales promotion expenses of Rs.3,63,9367-. The AO has disallowed interest u/s. 36(1)(iii) of Rs.27,25,150/- as appellant has given interest free advance to M/s. Laser Exports Pvt. Ltd. of Rs.2,69,52,923/-. The AO has clearly established that borrowed*

*fund has been used to make interest free advance. The appellant in quantum appeal has also withdrawn the ground on the ground that due to their personal dispute with M/s. Laser Exports Pvt. Ltd., data is not available. The appellant during the penalty proceedings has submitted that penalty is not justified for the reason that appellant has furnished all details and information called for as regard to disallowance of interest expenses of Rs.27,25,150/- and relied upon various case laws. The appellant's submission is not correct as appellant neither during the quantum proceedings or appellate proceedings has been able to furnish any evidence for the interest free advance to M/s. Laser Exports Pvt. Ltd. The case laws relied by the appellant are not relevant to the facts of the case. Therefore, AO was justified to levy penalty for furnishing of inaccurate particulars of income in respect of disallowance of interest u/s. 36(1)(iii) of Rs.27,25,150/-.*

3.4. *The Honourable Supreme Court in the case of K.P.*

*Madhusudan Vs. CIT (2001) 251 ITR 99, has held as under:-*

*"The Explanation to section 271(1)(c) is a part of section 271. When the ITO or the AAC issues to an assessee a notice under section 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation where the total income returned by the assessee is less than 80 per cent of the total income assessed under section 143 or 144 or 147, reduced to the extent therein provided, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice under section 271 put to notice that if does not prove, in the circumstances stated in the Explanation that his failure to return his correct income was not due to fraud or neglect, he shall be deemed to have concealed the particular^ of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No express invocation of the Explanation to section 271 in the notice under section 271 is necessary before the provisions of the Explanation therein are applied.*

*The High Court was, therefore, justified in reversing the Tribunal's order cancelling the penalty under section 271(1)(c)."*

3.5. *The Hon'ble Supreme Court in the case of Union of India vs. Dharmendra Textiles Processors, 174 Taxman 571/306 ITR 277-, has held as under:-*

*"It is of significance to note that the conceptual and contextual - difference between section 271(1)(c) and section 276C of the Income-tax Act was lost sight of in Dilip N. Shroff's case (supra)*

*The explanation appended to section 271(1)(c) of the Income tax Act entirely indicates the elements of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff's case (supra) has not considered the effect and relevance of section 276C of the Income tax Act. Object behind the enactment of section 271(1)(c) read with the explanation indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as in the case in the - matter of prosecution under section 276C of the Income-tax Act."*

3.6. *The Honourable jurisdictional High Court in its decision in the case of Commissioner of Income tax Vs. Subhash Trading Co. [86 Taxmann. 30] (Gujarat) has upheld the penalty as under:-*

*"So long as presumption raised in favour of the revenue under the Explanation to section 271(1)(c) stood unrebutted and was operative the revenue need not lead any evidence to reach a positive finding that there was concealment of income of the previous year by the assessee but no soon the presumption raised under the Explanation stood rebutted, the revenue authorities must record a positive finding independent of presumption about concealment of income of the previous year which the assessee had concealed or particulars of which had been inaccurately furnished by him. As in the instant case the assessee's burden to rebut the presumption raised by the revenue stood discharged on the basis of the material available on record, the Tribunal was right to hold that penalty need not be sustained under section 271(1)(c) in absence of any evidence to conclude positive finding that there was concealment of the income."*

3.7. *The law relating to penalty was amended w.e.f. 01.04.1976 and original Explanation 1 of section 271(1)(c) was replaced by the present one. After this amendment, the revenue is not required to prove that assessee is guilty of any fraud or has committed a willful neglect i.e. mens rea is not to be proved by the revenue. As per the present Explanation 1, if the assessee offers an*

*explanation in respect of any facts, material to the computation of total income which he is not able to substantiate and fails to prove that such explanation is bonafide and that all the facts relating to the same and material to the computation of his total income has been disclosed by him then the amount added are disallowed in computing the total income of such person as a result thereof shall be deemed to represent the income in respect of which" inaccurate particulars-have been filed.*

*3.8. In view of the above, penalty levied by the AO is found to be correct and justified and the same is **confirmed**.*

*3.9. As regard to penalty on disallowance of sales promotion expenses of Rs.3,63,936/-, the AO has made the disallowance on the estimate @ 40% and same has been reduced by the CIT(A). As the disallowance is based on purely estimate and assumptions, penalty is not leviable on amount of Rs.3,63,936/-.*

*The ground of appeal is **partly allowed**."*

6. Further aggrieved, the assessee preferred appeal before the Tribunal.

7. We have heard the representative of the Revenue on the challenge made by the assessee in its appeal and perused the orders of the authorities below. The controversy involves imposition of penalty u/s.271(1)(c) of the Act on disallowance on estimated interest expenses in proportion to the corresponding interest free advances given by the assessee. We straightway note that in order to attract penalty u/s.271(1)(c) of the Act, it is necessary that there must be concealment by the assessee of the particulars of his income or furnishing of inaccurate particulars. The disallowance of certain expenditure on estimated basis actually incurred on the grounds of lack of commercial expediency is neither concealment of any particulars of income per se nor furnishing of inaccurate particulars as such. Needless to say, before penalty can be imposed, the entirety of circumstances must reasonably point to the conclusion that the disputed amount represents income and the assessee has

concealed the particulars thereof or furnished inaccurate particulars. The AO in the instant case has disallowed a portion of interest expenditure on proportionate basis on the ground that assessee has lent money without charging interest. It is not the case of the AO that assessee has in fact not incurred any interest expenditure as claimed. A conspectus of the Explanation – 1 to Section 271(1)(c) of the Act makes it clear that the statute visualized the assessment proceedings and penalty proceedings to be wholly distinct and independent of each other. While the AO may be justified in making estimated disallowance in quantum proceedings, such disallowance of expenses, that too on estimated basis, could not automatically fall within mischief of Section 271(1)(c) of the Act. While a claim towards expenditure may not found acceptable in quantum proceedings, such disallowance cannot invite tax burden by way of penalty. When all material facts relevant to the said claim were placed on record, the presence or absence of commercial instinct in a given case is a matter of inference. Such adverse inference against assessee would not attract imposition of penalty. The claim of expenditure towards interest made, at best, be taken as erroneous claim by the assessee. Such claim made in a bonafide manner cannot lead imposition of penalty. Although such claim may not be maintainable for the purposes of quantum proceedings, however, in the absence of any falsity *per se* in such claim, making an incorrect claim for deduction is not at par with concealment or inaccurate particulars of income.

8. We also take note of the decision of the Hon'ble Bombay High Court in the case of CIT vs. Dalmia Dychem Industries Ltd. Income Tax Appeal No. 1396 of 2013 judgment dated 06.07.2015 to observe that the penalty cannot be imposed unless the action of the assessee *per se* is dishonest, malafide and amounting to concealment

of facts. There, being no concealment of fact *per se*, imposition of penalty is not justified. The penalty, in our view, is clearly not maintainable in the absence of any contumacious or dishonest conduct. Consequently, we set aside the order of the CIT(A) and direct the AO to delete the penalty imposed on disallowance of estimated interest expenditure.

9. In the result, appeal of the assessee is allowed *ex parte*.

**This Order pronounced on 12/10/2020**

Sd/-  
(MADHUMITA ROY)  
JUDICIAL MEMBER  
Ahmedabad: Dated 12/10/2020

Sd/-  
(PRADIP KUMAR KEDIA)  
ACCOUNTANT MEMBER

True Copy

*S. K. SINHA*

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद /  
DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण, अहमदाबाद ।