

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No. 102 of 2016 (O&M)
Date of decision: 21.7.2017

Pr. Commissioner of Income Tax-2, Chandigarh

.....Appellant

Vs.

M/s International Institute of Neuro Sciences and Oncology Limited

.....Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL

Present: Ms. Urvashi Dhugga, Sr. Standing Counsel for the appellant-revenue.

Mr. B.M.Monga, Advodcate with Mr. Rohit Kaura, Advocate for the respondent-assessee.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA No.102 and 105 of 2016 as according to the learned counsel for the parties, both the appeals are against the common order dated 12.10.2015, Annexure A.4, passed by the Tribunal in cross appeals filed by the assessee and the revenue. The facts are being extracted from ITA No.102 of 2016.

2. ITA No.102 of 2016 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 12.10.2015, Annexure A.4, passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (in short, "the Tribunal"), in ITA No.1242/Chd/2012 for the assessment year 2005-06, claiming following substantial questions of law:-

"i) Whether on the facts and in the circumstances of the case, the order of the Hon'ble ITAT is perverse in deleting the penalty only by referring to the provisions of Section 115JB

of the I.T. Act and by holding that as the assessee is being assessed under section 115JB of the Act, penalty under Section 271(1)(c) of the Act cannot be levied whereas in the instant case the income tax payable on total income as computed by the Assessing Officer under normal provisions is more than the tax payable on book profit under section 115JB of the Income Tax Act, 1961?

ii) Whether on the facts and in the circumstances of the case and in law, the learned ITAT was right in deleting the penalty levied under section 271(1)(c) on addition of ₹ 22,17,853/- on account of wrongly claimed expenses by the assessee and against the express mandate of the Act?

In ITA No.105 of 2016, besides question No.(i) raised in ITA No.102 of 2016, the following additional questions of law have been claimed by the revenue:-

- i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the penalty levied on account of addition of ₹ 1,22,35,474/- made by the Assessing Officer under section 40(a)(ia) for the assessment year 2005-06 whereas the assessee has failed to deposit the tax deducted prior to 28.2.2005 on or before 31.3.2005 as per provisions effective for assessment year 2005-06 as amended by the Finance Act 2008 effective from April 2005?
- ii) Whether on the facts and in the circumstances of the case, Hon'ble ITAT is right in deleting the penalty levied on account of commission to doctors in view of the provisions of Section 69C of the Income Tax Act, 1961?

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.102 of 2016 may be noticed. Assessment was completed under section 143(3) of the Act on 24.12.2007 at an

income of ₹ 2,38,00,717/- by making various additions. Subsequently, the Assessing Officer levied the penalty under section 271(1)(c) of the Act of ₹ 70,00,000/- vide order dated 28.3.2011 on the following additions:-

- i) Penalty levied on addition of ₹ 1,22,35,474/- under section 40(a)(ia) of the Act on account of late deposit of TDS;
- ii) Penalty levied on addition of ₹ 11,13,777/- on account of payment made through credit cards;
- iii) Penalty levied on disallowance of ₹ 5,10,625/- (wrong claim of depreciation of ₹ 4,08,250/- on plant and machinery and computer plus wrong claim of corresponding interest of ₹ 1,02,375/- on loan);
- iv) Penalty levied on disallowance of ₹ 5,50,349/- (wrong claim depreciation of ₹ 3,62,500/- on plant and machinery and office equipment and wrong claim of corresponding interest of ₹ 1,87,849/- on loan);
- v) Penalty levied on disallowance of ₹ 43,102/- (wrong claim of depreciation on furniture and wrong claim of corresponding interest on loan);
- vi) Penalty levied on addition of ₹ 62,862/- under section 40A(3) of the Act;
- vii) Penalty on addition of ₹ 1,87,976/- on account of employee's contribution to provident fund/other funds under section 2(24)(x) read with Section 36(1)(va) of the Act;
- viii) Penalty on addition of ₹ 21,75,771/- on account of commission paid to the doctors.

Against the order passed by the Assessing Officer, the assessee preferred appeal before the Commissioner of Income Tax (appeals) [CIT(A)]. Vide order dated 17.10.2012, Annexure A.3, the CIT(A) partly allowed the appeal by deleting the penalty levied in respect of additions at No. (i), (vi), (vii) and (viii) and confirming in respect of additions No.(ii), (iii), (iv) and

(v). Not satisfied with the order, both the revenue and the assessee filed appeals before the Tribunal. The Tribunal vide consolidated order dated 12.10.2015 allowed the appeal filed by the assessee and dismissed the one filed by the revenue holding that the income was assessed under section 115JB of the Act and hence the penalty under Section 271(1)(c) of the Act could not be levied. Reliance was placed on the judgment of this court in ***CIT-I, Ludhiana vs. M/s Vardhman Acrylics Limited, Chandigarh Road, Ludhiana*** in ITA No.346 of 2013 decided on 4.8.2014 wherein it was held that the assessment having been made under the provisions of MAT under Section 115JB of the Act, penalty under Section 271(1)(c) of the Act could not be levied on addition and disallowance made in regular income. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. The primary issue that arises for consideration in these appeals is whether an assessee is liable for penalty under Section 271(1)(c) of the Act in respect of individual disallowances especially when it is being taxed under Section 115JB of the Act.

6. The matter is no longer res-integra. The question regarding levy of penalty under Section 271(1)(c) of the Act where tax was paid on the basis of book profits determined under Section 115JB of the Act was decided by this Court in ***M/s Vardhman Acrylics Limited's*** case (supra) holding that no penalty under Section 271(1)(c) of the Act was leviable on any amount of expenses claimed by the assessee. The relevant observations read thus:-

“5. The issue relating to levy of penalty under Section 271(1)(c) of the Act where tax was paid on the basis of book profits determined under Section 115JB of the Act was considered by

the Delhi High Court in *CIT vs. Nalwa Sons Investments Limited*, (2010) 327 ITR 543. It was held that where the book profits were determined under section 115JB of the Act any amount of expenses claimed would not render the assessee liable to penalty under section 271(1) (c) of the Act on account of false claim of expenses. The relevant observations of the Delhi High Court read thus:-

“The question, however, in the present case, would be, as to whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded. Under the scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the “book profits” computed under section 115JB of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, “book profits” are deemed as the total income of the appellant in terms of section 115JB of the Act.”

It was also recorded:-

“No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under section 115JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under section 115JB of the Act. Hence when the computation was made under section 115JB of the Act, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all.”

We are fully in agreement with the view expressed in the aforesaid pronouncement.”

7. Adverting to the facts of the present case, a perusal of the order passed by the Tribunal shows that it was pleaded before the Tribunal on behalf of the assessee that tax had been assessed under section 115JB of the Act since there were unabsorbed losses and depreciation related to earlier years. The tax was levied under the provisions of MAT under Section 115JB of the Act. Reliance was placed on the judgment of this Court in *M/s Vardhman Acrylics Limited's* case (supra) wherein it was held that the assessment having been made under the provisions of MAT under Section 115JB of the Act, penalty under Section 271(1)(c) of the Act could not be levied on additions and disallowances made in regular income. After examining the findings recorded by the CIT(A) and the material available on record, the Tribunal came to the conclusion that the ratio of the judgment in *M/s Vardhman Acrylics Limited's* case (supra) was applicable to the case of the assessee. Thus, the total penalty levied by the Assessing Officer under section 271(1)(c) of the Act was deleted. The relevant findings recorded by the Tribunal read thus:-

“8. We have heard the learned representatives of both the parties, perused the findings of the authorities below and considered the material available on record. From the documents filed by the learned counsel for the assessee we see that the assessee had gone in appeal till the stage of ITAT against the quantum order of the relevant assessment year, which was decided by the Chandigarh Bench of the ITAT on 24.7.2014 in ITA No.409 of 2010. Even the appeal effect order placed on record giving effect to the order of the ITAT shows that the regular income has been computed as nil. Since there were brought forward losses and depreciation, the return was filed declaring the income under the MAT and

even after appeal effect, the income assessed under section 115JB of the Act, the ratio laid down by the Hon'ble Jurisdictional High Court of Punjab and Haryana High Court in the case of *M/s Vardhman Acrylics Limited* (supra) is squarely applicable to the case of the assessee. The Hon'ble Punjab and Haryana High Court has relied upon the decision of the Delhi High Court in the case of Nalwa Sons Investments Limited (supra) whereby it has been held as under:

‘Under the scheme of the Income Tax Act, 1961, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is computed with the prescribed percentage of the book profits computed under Section 115JB of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise the book profits are deemed as the total income of the assessee in terms of Section 115JB of the Act. Where the income computed in accordance with the normal procedure is less than the income determined by legal fiction namely the book profits under section 115JB of the Act and the income of the assessee is assessed under section 115JB and not under the normal provision, the tax is paid on the income assessed under section 115JB of the Act, concealment of income would have no role to play and would not lead to tax evasion. Therefore, penalty cannot be imposed on the basis of disallowance or additions made under the regular provisions.’

5. In view of the above, we find that the assessee being assessed under section 115 JB of the Act, the penalty under Section 271(1)(c) of the Act cannot be levied. In view of this, the total penalty levied by the Assessing Officer under section 271(1)(c) of the Act is hereby deleted.”

8. Learned counsel for the revenue has not been able to show any illegality or perversity in the findings recorded by the CIT(A) as well as the Tribunal warranting interference by this Court. Thus, no substantial question of law arises. Consequently, both the appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

July 21, 2017
‘gs’
Whether speaking/reasoned
Whether reportable

(Amit Rawal)
Judge
Yes
Yes