

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ "ए", अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
" A " BENCH, AHMEDABAD

सुश्री सुचित्रा काम्बले, न्यायिक सदस्य एवं
श्री मकरंद वसंत महादेवकर, लेखा सदस्य के समक्ष।
BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
AND
SHRI MAKARAND V. MAHADEOKAR, ACCOUNTANT MEMBER

आयकर अपील सं/ITA No.1411/Ahd/2019
निर्धारण वर्ष /Assessment Year : 2010-11

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| Swaminarayan Co-op. Bank Ltd. 1, Ashok Chambers Opp. Pathak Gate Police Station Madanzampa Road Vadodara 390 001 (Gujarat) | बना म/ v/s. | The ACIT Circle-3(1) Ahmedabad |
| स्थायी लेखा सं./PAN: AAAAS 1932 N | | |
| अपीलार्थी/ (Appellant) | | प्रत्यर्थी/ (Respondent) |
| Assessee by : | Shri Ashish Kanabar, AR | |
| Revenue by : | Shri Ashok Natha Bhalekar, Sr.DR | |

सुनवाई की तारीख/Date of Hearing : 07/08/2024
घोषणा की तारीख /Date of Pronouncement: 9/08/2024

आदेश/ORDER

PER SHRI MAKARAND V. MAHADEOKAR, AM:

This appeal is filed by the Assessee as against the order dated 08/07/2019 passed by the Commissioner of Income-tax (Appeals)-3, Vadodara [hereinafter referred to as "the Ld.CIT(A)" in short] arising out of the penalty order dated 27/02/2019 passed by the Assessing Officer (AO) under section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") relevant to the Assessment Year (AY) 2010-11.

Facts of the case:

2. The Assessee is a Co-operative Bank stated to be in liquidation. The Reserve Bank of India (RBI) had issued directions u/s.35A of the Banking Regulation Act, 1949 imposing some restrictions. According to these restrictions, the Bank, without prior approval in writing from the RBI, was not allowed to grant or renew loans and advances, make any investments, incurred any liability including borrowing of funds, acceptance of fresh deposits, etc. The RBI vide its order no. UBD.CO.NSB/LC-74/12.03.995/2004-05 dated 02/06/2005, cancelled the license granted to the bank to carry on banking business in India. The assessee filed its Income Tax Return for AY 2010-11 on 07/10/2010, declaring income of Rs.1,21,94,779/- under the head of "income from business or profession". After claiming set off of brought forward business loss of AY 2003-04 to the extent of income available, the gross total income was worked out at Rs.NIL.

2.1. The case was selected for scrutiny by issuing notice u/s.143(2) of the Act. Notices u/s.142(1) were issued and assessee filed replies to the said notices. During the course of assessment proceedings, the AO observed that the assessee has not filed return of income for the period from A.Y. 2003-04 to A.Y. 2008-09. The AO asked to furnish the proof of filing of return of income, but the assessee could not submit the same except for the A.Y. 2003-04. The assessee was given opportunity to show cause as to why the claim of set off of brought forward losses should not be rejected. In reply thereto, the assessee stated that - "the business of the bank is not closed but it is under liquidation and its co-operative status is not lost. The bank is winding up and earning interest on advances due and therefore unabsorbed losses and depreciation should not be rejected."

2.2. The AO, not being satisfied with the reply of the assessee, passed order rejecting the claim for set off of brought forward business loss of AY 2003-04 against the income to the extent of Rs. 1,21,94,779/- The AO also initiated the penalty proceedings u/s 271(10)(c) for furnishing inaccurate particulars and concealment of income.

2.3. The assessee filed an appeal before the Ld.CIT(A) against the order passed u/s.143(3) of the Act, who confirmed the disallowance of set off against the brought forward losses. The assessee filed an appeal before the Tribunal. The Tribunal dismissed the appeal due to non-prosecution.

2.4. The AO issued show-cause notice u/s.274 r.w.s. 271(1)(c) of the Act on 17-12-2018. In reply thereto, the assessee submitted that -

"It may be noted that there was no failure on the part of the appellant to disclose truly and fully all material facts. The crucial fact that the banking license of the petitioner has been cancelled by the Reserve Bank of India was disclosed in the original return itself.

Further it is conveyed that the banking business is not closed but is only under liquidation withdrawal of license of not mean that the business is closed. The existing business has to be wound up by continuing business activities. Its status of being as cooperative has not been lost. Our appellant is in the process of winding up and is in the stage of earning interest income on the advance dues made. And hence therefore requested to allow the set up of the business loss against the income earned in the relevant year.

The Ld AO has erred in disallowing the set off of unabsorbed loss of the A.Y. 2003-04 to the extent of the income earned in the relevant A.Y. 2010-11 of Rs.1,21,94,779/- on the ground that the appellant has concealed the particulars of income of furnished inaccurate particulars of such income.

During the year under consideration our client was engaged in carrying of the banking business and has offered income from interest on advances to the members

and interest on FDR as business income only for DICGC 9 (Deposit Insurance and Credit Guarantee Corporation) with the nationalized banks. Our client was made eligible for insurance of their deposits under the deposit insurance Credit Guarantee Corporation Act, 1961 under section 3 of the DICGC Act, which would protect the interests of small depositors.

The appellant has claimed set off o/c losses and depreciation which is not granted in the AO on the plea that the IT returns for same subsequent assessment years are not fled and hence there is no continuity to ascertain the status of loss for A.Y. 2003-04 finding of AO is that appellant has not filed ITR for A.Y. 2004-05 to 2008-09 could not be compiled with us the bank in under liquidation and al records are misplaced to prove ITR filed by the appellant. In its absence also Loss of A. Y. 2003-04 ought to have been set off as claimed by appellant.

It is therefore requested that there is no concealment of income and there is no concealment of furnishing the information along with the return. The disallowance being a technical disallowance of a liability of unabsorbed losses and depreciation only and therefore the same cannot be treated as concealment for the present proceeding initiated by you w/s 271(1)(c).

Under the circumstances requested to the drop the penal proceeding us 271(1)(c) and do not create unnecessary demand particularly when the bank is under liquidation and the principle outstanding tax is also not recoverable."

2.5. The AO not considering the submission of the assessee acceptable, levied the 100% penalty of tax sought to be evaded.

2.6. The assessee preferred an appeal before the Ld.CIT(A) against the penalty order. During the appellate proceedings, the assessee stated that the deduction u/s.80P(2)(i) of the Act should have been allowed by the Ld.CIT(A) in the quantum appeal, when all the interest details were provided, and reliance was placed on the decision of **State Bank of India Vs. CIT (72 taxmann.com 64)**. The assessee also placed reliance on the decision of **Hon'ble Apex Court in the case of Reliance Petroproducts Ltd. (2010) 322 ITR 158(SC)**. However, the Ld.CIT(A) dismissed the appeal of

the assessee, after confirming the penalty concluding that the assessee has wrongly claimed set off of unabsorbed brought forward losses of A.Y. 2003-04 when no returns of income were filed for the A.Y. 2004-05 to A.Y. 2008-09. He also concluded that the decision of Hon'ble Apex Court in case of **Reliance Petroproducts Ltd. (supra)** is misplaced.

3. Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before us with following grounds of appeal:

Assessing office has wrongly levied penalty u/s.271(1)(c). A.O. has not considered that due to technical reasons set off of losses claimed were not granted which no way leads to conclusion that particulars of income were concealed.

Your appellant request leave to add or amend to substitute all or any of the ground of appeal at or before the hearing of appeal.

3.1. The assessee submitted following revised grounds of appeal before us:

- "1. Merely because the assessee has made certain claims, which were not accepted or were not acceptable to the revenue, that itself does not attract the penalty u/s 271(1)(c).*
- 2. No penalty under section 271(1)(c) can be levied when all necessary facts were disclosed and there is no concealment.*
- 3. Notice issued under section 274 r.w.s. 271(1)(c) of the act is not in accordance with law and therefore not sustainable.*
- 4. The amount of interest income net off expenses Rs.1,21,94,779/- is not an income of the assessee and therefore the same cannot be made subject matter of tax in the hands of the assessee."*

3.2. The assessee submitted following in support of its revised grounds of appeal:

“On the facts and circumstances of the case and in law, the Ld. CIT (A) erred making the conclusion that there was a concealment and within the default meaning of section 271(1)(c) and in confirming penalty of Rs. 36,58,434 levied by the Assessing officer. The appellant sincerely prays to consider the ground and above delete the penalty of Rs. 36,58,434/-. In a similar and identical case, The Visnagar Nagrik Shahakari Bank Ltd. v/s D.C.I.T, the Hon'ble Gujarat High Court as well as The Income Tax Appellate stated that, when income itself is not a subject matter of tax, the question of concealment and default within section 271(1)(c) does not arise.

In the present case the assessee has disclosed all the necessary facts fully and truly in its ITR. The assessee has worked out its total income of Rs.1,21,94,779/- and after claiming the set off of b/f losses of AY 2003-04 the income worked out as NIL. Therefore, the Ld. ITO has erred in concluding that the assessee has concealed particulars of income only to evade tax.

From the notice u/s 274 r.w.s 271(1)(c) dated 19/03/2013, is not identifiable as to why the penalty is initiated, whether it is for furnishing inaccurate particulars of income or for concealment of income as the AO has issued printed form of notice without striking off irrelevant portion of the notice.

The amount of interest income net off expenses Rs.1,21,94,779/- is not an income of the assessee as the assessee being a bank under liquidation transfers its entire receipts from interest amount net off expenses to DICCI as a repayment of payment made by the DICCI on behalf of the assessee to the depositors. Therefore, the same cannot be made subject matter of tax in the hands of the assessee, as the said income is not chargeable to tax in the hands of the assessee. Therefore, there is no liability of tax in the hands of the assessee. When income itself is not a subject matter of tax, the question of concealment and default within section 271(1)(c) does not arise, therefore as on the facts of the case and law, the CIT (A) erred in confirming the penalty of Rs. 36,58,434/-levied by the Ld. AO.”

4. On the grounds of appeal, the Ld.Authorised Representative (Ld.AR) of the assessee stated that the interest income under consideration is earned by the liquidator on the fixed deposits placed out of recovery made from the borrowers. The Ld.AR also submitted that the bank has received money from DICGCI as settlement of claim and as per the term of settlement of

claim more specifically in terms of Section 21(2) of the DICGC, Act 1961, the liquidator was required to repay to the corporation, as soon as the amount is realised in his hand. The Ld.AR further stated that there was an overriding title on its income in favour of DICGC and hence to that extent, it is not the income of the assessee. The assessee placed copy of Claim Settlement letter from DICGC to support its claim.

5. The Ld.Departmental Representative (Ld.DR), however, argued that the assessee has made false claim of set off of brought forward losses when it had not filed its return of income for subsequent years and therefore to the extent of income not disclosed it's a case of concealment of income. He placed reliance on the orders of lower authorities.

6. We have heard the rival contentions, perused the material available on records and noted that there was no failure to disclose material facts, as the cancellation of the banking license by the RBI was disclosed in the original return. We also note that the banking business was under liquidation, the cooperative status was intact, and the bank continued to earn interest on deposits placed out of funds realised from the borrowers and claimed the set-off of brought forward losses. We also note that the quantum appeal before the Tribunal against the order of the Ld.CIT(A) was dismissed for non-prosecution and the assessee had no opportunity to argue on the merits. We further note that the penalty is based on a technical disallowance of set-off claims, not on concealment or inaccurate particulars of income. We also note that the AO failed to specify whether the penalty was for concealment or inaccurate particulars in the notice issued under section 274 r.w.s. 271(1)(c) of the Act.

6.1. The assessee argued that the interest income was not taxable as it was diverted at source to DICGC (Deposit Insurance and Credit Guarantee Corporation) due to overriding title. This is supported by the decision of Co-ordinate Bench in the case of **The Visnagar Nagrik Sahakari Bank Ltd. (ITA No. 2251/Ahd/2015)**, which held that income received by a bank under liquidation is diverted at source towards liabilities of DICGC and is not taxable in the hands of the bank.

6.2. It is held in many judicial precedents that the penalty notice must clearly specify whether it is for concealment of income or furnishing inaccurate particulars. A vague notice vitiates the penalty proceedings. We have also considered that the assessee relied on the decision of **Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd.(supra)**, before CIT(A) in quantum appeal, where it was held that merely making a claim that is not sustainable does not amount to furnishing inaccurate particulars of income.

6.3. The penalty proceedings are separate from the quantum proceedings. This principle has been upheld in various judicial pronouncements. It is also held that the findings in the assessment proceedings are not conclusive in the penalty proceedings.

6.4. In light of the above findings and considering the judicial precedents, without going into the merits of revised Ground No.4, brought forward losses and its set off, we conclude that the penalty levied under section 271(1)(c) of the Act is not justified. The assessee has disclosed all material facts and there was no intention to conceal income or furnishing inaccurate

particulars. Thus, the appeal of the assessee is allowed, and the penalty of Rs.36,58,434/- is deleted.

7. In the result, the appeal of the Assessee is allowed.

Order pronounced in the Open Court on 9 August, 2024 at Ahmedabad.

**Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

**Sd/-
(MAKARAND V. MAHADEOKAR)
ACCOUNTANT MEMBER**

अहमदाबाद/Ahmedabad, दिनांक/Dated 9/08/2024

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-3, Vadodara
5. विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण ,राजकोट/DR,ITAT, Ahmedabad,
6. गार्ड फाईल /Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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