

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

(Through Virtual Court)

BEFORE SHRI R.S.SYAL, VP AND  
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 1660/PUN/2017

निर्धारण वर्ष / Assessment Year : 2009-10

The Assistant Commissioner of Income Tax,  
Circle-10, Pune.

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Thermax Limited.  
14, Mumbai Pune Road,  
Wakdewadi, Shivajinagar,  
Pune-410 003.  
PAN: AACT3910D

.....प्रत्यर्थी / Respondent

Revenue by : Shri Subhakanta Sahu

Assessee by : Shri H.P Mahajani

सुनवाई की तारीख / Date of Hearing : 07.10.2020

घोषणा की तारीख / Date of Pronouncement : 08.10.2020

**आदेश / ORDER**

**PER PARTHA SARATHI CHAUDHURY, JM:**

This appeal preferred by the Revenue emanates from the order of the  
Ld. CIT(Appeals)-6, Pune dated 01.02.2017 for the assessment year 2009-10  
as per the following grounds of appeal on record:

*“1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the penalty levied u/s.271(1)(c) of the I.T. Act in respect of addition made on account of prior period expenses when when CIT(A) himself upheld the action of the AO in respect of the quantum addition?”*

*2. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the penalty levied u/s.271(1)(c) of the I.T. Act in respect of addition made on account of commission expenses when CIT(A) himself upheld the action of the AO in respect of the quantum addition?"*

*3. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the penalty levied u/s.271(1)(c) of the I.T. Act in respect of disallowance of foreign exchange loss when when CIT(A) himself upheld the action of the AO in respect of the quantum addition?"*

*4. "Whether on the facts and circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the penalty levied u/s.271(1)(c) of the I.T. Act in respect of disallowance made on account of professional expenses when when CIT(A) himself upheld the action of the AO in respect of 50% of the quantum addition?"*

*5. The appellant craves leave to add, amend or alter any of the above grounds of appeal.”*

2. The brief facts of the case are that the assessee company is engaged in the business of manufacturing and selling of steam boilers, heat exchangers, water treatment plant, water treatment resins, water treatment chemicals, carbon and metal film resistors related accessories and treasury operations. It is also engaged in trading in various items. The assessee filed his return of income for the assessment year 2009-10 declaring total income of Rs.3,70,78,639/-. Thereafter, the assessee filed revised return of income on 01.03.2010 declaring total income of Rs.3,69,13,43,639/-. The Assessing Officer passed assessment order u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) on 27.12.2010 determining total income at Rs.4,36,27,51,620/-. In the assessment order, the Assessing Officer made number of additions on various issues. Penalty u/s.271(1)(c) of the Act has been on the amounts in respect of additions made as under:

(i) Addition on account of negative CIP	Rs.1,32,43,000/-
(ii) Prior year expenses	Rs.12,93,616/-
(iii) Liquidated damages	Rs.13,76,37,804/-
(iv) Depreciation	Rs.1,08,45,758/-
(v) Disallowance u/s.14A	Rs.1,92,02,000/-
(vi) Sales Commission expenses	Rs.1,25,96,932/-
(vii) Legal and professional fee	Rs.13,78,24,000/-
(viii) Foreign exchange fluctuation loss	Rs.11,06,00,000/-

Thereafter, the Assessing Officer passed the penalty order u/s.271(1)(c) of the Act on 27.03.2015 levying penalty of Rs.10,55,40,630/-.

3. During the First Appellate proceedings, the Ld. CIT(Appeals) deleted the penalty levied u/s.271(1)(c) of the Act by the Assessing Officer in respect of additions made on account of (i) Prior period expenses (ii) Commission expenses (iii) Foreign exchange loss and (iv) professional expenses against which the Revenue is in appeal before us.

4. At the very outset, the Ld. DR submitted that with regard to the quantum appeal preferred by the assessee before the Pune Bench of the Tribunal in **ITA No.512/PUN/2014 and ITA No.717/PUN/2014 order dated 19.09.2019 for the assessment year 2009-10** has deleted the addition in respect of commission expenses and professional expenses.

5. We have perused the case records and heard the rival contentions. We have also considered the decision of the Pune Bench of the Tribunal in quantum appeal preferred by the assessee and at Page 6, Para 16 wherein

addition on commission expenses were deleted and the ground was allowed in favour of the assessee by observing as follows:

*“16. Ground No.6 of the assessee’s appeal is against the confirmation of sales commission @10% amounting to Rs.1,25,36,932/-. Following the view taken by the Tribunal in earlier years in deleting such ad hoc additions, except the A.Y.2006-07 for the special reasons as discussed in the Tribunal order for that year, we order to delete the sustenance of ad hoc disallowance out of the Commission expenses.”*

The legal principle follows once the quantum addition has been deleted, penalty u/s.271(1)(c) of the Act has no legs to stand. We have also perused the Ld. CIT(Appeals)’s order on this issue. Taking totality of facts and circumstances, we sustain the relief provided to the assessee by the Ld. CIT(Appeals) on this issue. Thus, **Ground No.2 raised in appeal by the Revenue is dismissed.**

6. Similarly in respect of the professional expenses, at Page 6, Para 17 of the decision of the Pune Bench of the Tribunal in quantum appeal in ITA No.512/PUN/2014 and ITA No.717/PUN/2014 (supra.), this ground was allowed in favour of the assessee by observing as follows:

*“17.Ground No.7 of the assessee’s appeal is against the confirmation of addition of Rs.6.89 crore towards legal and professional fees paid to Baker & Mckinsey LLP and others. This ground is admittedly similar to ground No.7 for the A.Ys. 2007-08 and 2008-09. Following the view in such earlier years, we allow this ground of appeal.”*

7. We have also perused the findings given by the First Appellate Authority on this issue. The present scenario is that the quantum addition in respect of professional expenses has been deleted by the Pune Bench of the

Tribunal in quantum appeal and therefore, penalty levied u/s.271(1)(c) of the Act on this issue also cannot survive. Thus, **Ground No.4 raised in appeal by the Revenue is dismissed.**

8. In respect of **Ground No. 1** i.e. prior period expenses, in the quantum appeal of the assessee, the Pune Bench of the Tribunal in ITA No.512/PUN/2014 and ITA No.717/PUN/2014 (supra.) at Page 3, Para 7, the Tribunal has dismissed this ground of the assessee and sustained the addition by observing as follows:

*“7. Ground No.2 of the assessee’s appeal is against the confirmation of addition in respect of prior period expenses amounting to Rs.12,93,616/- .Such ground has been dismissed by the Tribunal in earlier years. Following the same, we dismiss this ground of appeal as well.”*

9. **Ground No.3** pertains to foreign exchange loss and in the quantum appeal preferred by the assessee (supra.), the Pune Bench of the Tribunal on this issue has held as follows:

*“19. The facts concerning this issue are that the assessee claimed deduction of net Foreign Exchange loss of Rs.89.54 crore. The instant dispute relates to two items of loss, namely, Rs.2.18 crore on account of exchange gain/loss on account of open forward contract and Rs.8.88 crore, being, a provision against SABAH forward contract as the order was cancelled beyond the year ending. On being called upon to explain the reasons for claiming deduction in respect of these items, the assessee contended that loss of Rs.2.18 crore was on account of MTM exercise and further loss of Rs.8.88 crore was on account of ineffective hedge for its SABAH order and it was in the nature of provision against MTM loss with respect to forward contract of the said order which was cancelled. The AO took note of the Instruction No.03/2010 providing for not allowing deduction in respect of MTM loss. He further held that the loss of Rs.8.88 crore was a contingent loss as on the closing date and hence not deductible. The ld. CIT(A) echoed the assessment order on the point.*

*20. Having heard both the sides and gone through the relevant material on record, it is seen that neither the AO nor the ld. first appellate authority has disputed the fact that the first item of loss of Rs.2.18 crore*

*is on account of a transactions otherwise of revenue nature and this transaction resulted due to marking the liability to market rate as at the end of the year. The Special Bench of the Tribunal in DCIT Vs. Bank of Bahrain and Kuwait (2010) 132 TTJ 505 (SB)(MUM) has held that such loss or profit is of revenue character. After considering the adverse Instruction No.03/2010, the Hon'ble Delhi High Court in Munjal Showa Vs. DCIT (2016) 67 taxmann.com 359 (Delhi) has held that such loss/profit to be of revenue character. It further held that the CBDT Instruction cannot override the judicially settled position. In view of the foregoing, we overturn the impugned order and direct to delete the addition of Rs.2.18 crore.*

*21. As regards the loss of Rs.8.88 crore, the ld. CIT(A) has held that the loss actually happened in April/May, 2009 and hence was of contingent nature. The ld. AR harped on the fact that it was an event occurring after the balance sheet date, but affecting the profitability for the year under consideration, and hence should be allowed.*

*22. In our opinion, the authorities below have correctly viewed this transaction as not affecting the profit for the year under consideration. The contract, resulting into loss of Rs.8.88 crore, was actually cancelled in April/May of 2009, which falls in the succeeding year. Even though it is an event occurring after the balance sheet date, but it falls in the category of 'Non-Adjusting Events', for which the accounts closing before that date are not to be adjusted. Incurring of loss in a succeeding year is something quite different from marking transaction to market rate as at the close of the year. Since the instant loss of Rs.8.88 crore actually fell upon the assessee in the succeeding year, the same cannot be allowed as deduction in the year under consideration.”*

10. In these grounds i.e. **Ground No.1 and Ground No.3**, the assessee had claimed certain expenses and so far the quantum has been confirmed by the Tribunal, nonetheless, the criteria for imposing penalty u/s.271(1)(c) of the Act i.e. “concealment of income or furnishing inaccurate particulars of income”, these elements have not been proved against the assessee. The Ld. DR could not place on record any evidences whereby the condition for imposing penalty u/s.271(1)(c) of the Act could be said to have been proved in the case of the assessee. We take guidance from the decision of the Hon'ble Supreme Court of India in the case of **CIT Vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)** wherein the Hon'ble Apex Court has held that a mere making of the claim, which is not sustainable in law, by itself, will not

amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars. The relevant portion of the judgment reads as under:

*“9. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:- "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".*

*We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous. We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its Return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.”*

Reverting to the facts of the present case, the Revenue has not doubted the genuinity of the return filed by the assessee and has not said that the particular of expenses claimed in the return were not correct. The expenses were claimed and quantum additions have been upheld by the Tribunal. However, in the separate proceedings of penalty u/s.271(1)(c) of the Act when the Revenue has accepted the return of the assessee and has not brought on record any material to show that whatever stated in the return is incorrect or inaccurate, in such scenario, there is no question of imposing penalty under the said provision.

In view of the above facts and circumstances and relying on the aforesaid judgment of the Hon'ble Apex Court in the case of CIT vs. Reliance Petro Products Pvt. Ltd. (supra), we are of the view that on these grounds,

penalty u/s.271(1)(c) of the Act cannot be levied. Thus, **Ground No.1 and 3 raised in appeal by the Revenue are dismissed.**

11. In the result, **appeal of the Revenue is dismissed.**

Order pronounced on 08<sup>th</sup> day of October, 2020.

Sd/-  
**R.S.SYAL**  
**VICE PRESIDENT**

Sd/-  
**PARTHA SARATHI CHAUDHURY**  
**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 08<sup>th</sup> October, 2020.

SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-6, Pune.
4. The Pr. CIT-5, Pune.
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	07.10.2020	Sr.PS/PS
2	Draft placed before author	07.10.2020	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		