

**IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM**

**ITA No.4343/Mum/2015
(A.Y:2011-12)**

Dy. Commissioner of Income Tax, Circle 14(3)(1) 455 Aayakar Bhavan, M.K. Marg Mumbai-400020	Vs.	Thyrocare Technologies Ltd. D-37/1 TTC MIDC Turbhe Mumbai – 400073 PAN No. AABCVT2577P
Appellant	..	Respondent

Revenue by	..	Shri. Ravikiran, DR
Assessee by	..	Miss Dinkle Hariya, AR

Date of hearing	..	17-05-2017
Date of pronouncement	..	24-05-2017

ORDER

PER MAHAVIR SINGH, JM:

This appeal by the Revenue is arising out of the order of CIT(A)-22, Mumbai, in appeal No. CIT(A)-22/IT/391/2014-15 dated 23-04-2015. The Assessment was framed by DCIT Circle 14(3)(1), Mumbai for the A.Y. 2011-12 u/s 143(3) of the Income Tax Act, 1961 (hereinafter ‘the Act’). The penalty was levied by ACIT Circle-10(2), Mumbai for the AY 2011-12 vide order dated 28-08-2014.

2. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the levy of penalty by the AO u/s 271(1)(c) of the Act for due diligence and professional consultancy amounting to Rs. 71,81,942/-. For this Revenue has raised following ground: -

“1. On the facts and in the circumstances of the case and in law the ld. CIT(A) in cancelling the penalty although the provisions of explanation 4 of section 271(1)(c) are clearly attracted in the case of the assessee.”

3. Briefly stated facts are that the assessee filed his return of income on 15-09-2011 declaring total income of Rs 39,60,77,503/-. The AO noted that expenditure incurred on issuance of CCDs i.e. consultancy charges paid during the year for due diligence and professional consultancy are in the nature of

capital expenditure and hence the total amount of Rs. 71,81,942 was disallowed under section 37(1) of the Act and added to the total income. The AO started the penalty proceedings u/s 271 (1) (c) of the Act and levied the penalty for furnishing of inaccurate particulars of income u/s 271 (1)(c) of the Act. Aggrieved, assessee preferred appeal before CIT(A). The CIT(A) deleted the penalty on merits by observing in Para 2.3 as under: -

“2.3 I have considered appellant's submissions and penalty order of the A.O. The appellant had issued compulsorily convertible debentures on Which it 'had incurred an 'expenditure of Rs.71,81,942/- towards due diligence and professional consultancy.The A.O. considered this as capital expenditure and disallowed the expenditure claimed by the appellant, later levied penalty, u/s.271(1)(c) on the ground that inaccurate particulars of' income were filed by the appellant. In appellant's submission's the appellant states that the expenditure incurred:' for the issuing of compulsorily convertible debentures are held to be revenue in nature-- by, Hon'ble Rajasthan High.' Court in the case of CIT vs. Secure Meter Ltd. 321 ITR 611 and CIT vs. ITC' Hotels Ltd. 344 ITR 109 by Karnataka High Court. The appellant contends where the High Courts have held that expenditure disallowed by the A.O. is revenue expenditure and allowable in nature, hence, there are two views in this issue. One issue considered by the A.O. and the other issue that the expenditure incurred is revenue expenditure as held by the Rajasthan High Court and Karnataka High Court. Hence, this issue is debatable in nature. I consider the submissions of, the appellant. In view of the above two High Court base decisions, this issue becomes debatable. If the issue becomes debatable then the penalty cannot be levied in view of the Bombay High Court decision in the case of CIT vs. Yahoo India (P) Ltd. 216 Taxmann 66 (Bom), Delhi High Court decisions in the case of DCIT vs. Shivalik Ltd. (2011) 15

Taxmann.com 341 (Delhi), Punjab & Haryana High Court decision in the case of CIT vs. Gurdaspur Co-operative Sugar Mills Ltd; (2013) 354. ITR 27 (P&H). Hence, in view of the above decisions as this issue is debatable in nature, penalty levied by the A.O. is cancelled. This ground of appeal is allowed.”

Aggrieved, revenue is in appeal before Tribunal.

4. We have heard rival contentions and gone through facts and circumstances of the case. We find from the facts of the case that the assessee had issued compulsorily convertible debentures on Which it had incurred an expenditure of Rs.71,81,942/- towards due diligence and professional consultancy but the AO considered this as capital expenditure and disallowed the same and also levied the penalty u/s 271(1)(c) of the Act. We are of the view that the debentures whether convertible or non convertible are in the nature of loan at the time of their issuance and any expenditure incurred on issue of such debentures or bonds had to be regarded as part of the borrowing cost and have to be allowed as a deduction and as a revenue expenditure as held by Hon'ble Rajasthan High Court in the case of CIT vs. Secure Meter Ltd. 321 ITR 611(Raj) and Hon'ble Karnataka High Court in the case of CIT vs. ITC Hotels Ltd. 344 ITR 109(Karn). Once, the two high courts are in favour of assessee holding the Revenue in nature, the issue becomes highly debatable and two views are possible. Once two views are possible the penalty cannot be levied for furnishing of inaccurate particulars of income in view of the decision of Hon'ble Bombay High Court in the case of CIT vs. Yahoo India Pvt. Ltd. (2013) 216 Taxman 66 (Bom). Hence, we are of the view that the CIT(A) has rightly deleted the penalty and we confirm the order of CIT(A). This appeal of Revenue is dismissed.

5. **In the result, all the appeal of Revenue is dismissed.**

Order pronounced in the open court on 24-05-2017.

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 24s-05-2017
Sudip Sarkar /Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT (A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//
BY ORDER,
Assistant Registrar
ITAT, MUMBAI