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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI PRADIP KUMAR KEDIA, AM

ITA No.651/PN/2014
Assessment Year : 2004-05

Jaya Hind Investments Pvt. Ltd.,
Mumbai – Pune Road, Akurdi,
Pune – 35.
PAN : AAACJ4269R …. Appellant

Vs.

The Asstt. Commissioner of Income Tax,
Circle- 9, Pune. …. Respondent

अपीलार्थी की ओर से / Appellant by : Shri Mukesh M. Patel
प्रत्यर्थी की ओर से / Respondent by : Shri Dheeraj Kumar Jain

सुनवाई की तारीख / **Date of Hearing : 22.09.2015**		घोषणा की तारीख / **Date of Pronouncement: 24.09.2015**

<u>आदेश / ORDER</u>

PER SUSHMA CHOWLA, JM :

This appeal filed by the assessee is against the order of CIT(A)-V, Pune dated 21.01.2014 relating to assessment year 2004-05 against penalty levied under section 271(1)(c) of the Act, 1961.

2. The assessee has raised the following grounds of appeal :-

"On the facts and circumstances of the case and in law,

1. (a) The learned Commissioner of Income Tax (Appeals)-V, Pune (hereinafter referred to as CIT(A)), erred in confirming the penalty for concealment of Income in an amount of Rs.7,06,738/- on account of disallowance of Legal Charges, treating the same as disallowance u/s 14A of the Income Tax Act.

(b) The CIT(A) further erred in assuming that the penalty for concealment of income was initiated by the Assessing Officer on account of disallowance u/s14A.

(c) He failed to appreciate that the penalty was initiated and imposed by the Assessing Officer on the disallowance of legal charges u/s 40A(2)(b) of the Act, treating the payment to related party.

(d) He ought to have appreciated that imposition of penalty by the Assessing Officer was on account of not being satisfied about the reasonableness of the expenses incurred on account of legal charges.

(e) He further failed to appreciate that no penalty was imposed by Assessing Officer on disallowances u/s 14A on account of concealment or misstatement.

(f) He ought to have appreciate that all documents, necessary information and records were disclosed and placed on the record in relation to earning of exempt income and expenditure thereof.

(g) He ought to have appreciate that prior to insertion of Rule 8D, there was no methodology provided in Income Tax Act for computing the disallowance under Section 14A. Rule 8D did not exist at the time of filing Return of Income. Therefore, the question of disallowance and its qualification were debatable giving rise to difference of opinion.

He ought to have appreciate that the expenditure incurred by the Assessee Company was in the ordinary course of business, for carrying out day to day function and for meeting the compliances under various statutes. Therefore, levy of penalty is not warranted.

2. It is prayed that penalty of Rs.7,06,738/- levied u/s 271(1)(c) may be dropped.

3. Appellant craves leave to add to, alter amend or modify any of the grounds of appeal."

3. The issue raised in the present appeal is against the levy of penalty under section 271(1)(c) of the Act.

4. Briefly, in the facts of the present case, the assessee had filed return of income declaring total loss of Rs.21,00,820/-. The assessee company was an Investment Company. On the verification of the Profit & Loss Account, the Assessing Officer noted that the assessee had declared income from dividend of Rs.13.14 crores, interest income of Rs.6,999/- and redemption amount received of Rs.1056/-. The assessee against the said income had claimed expenditure of Rs.21,22,688/-, out of which Rs.19,70,000/- were paid as Legal Fees to Shri S.A. Gundecha, who was appointed as consultant/retainership. Before the Assessing Officer, the assessee claimed that the said Mr. S.A. Gundecha advised the

company whether the investment in shares of another company or not and also he advised the period for which the investment was to be held and also switching over to other investments & benefits therefrom. The future prospects and gains for such investments were also guided by him. Further, he also advised the assessee company on income-tax matters including computation of taxable income, filing of income-tax returns, preparation of appeals with CIT(A) and Tribunal and also compliance with the provisions of the Companies Act. The Assessing Officer was of the view that there was no new activity which justifies the huge payment to Shri S.A. Gundecha on retainership basis, since the assessee company was an investment company as in the earlier years. The Assessing Officer further held that the payment appeared to be excessive and unreasonable to the services rendered by him. The Assessing Officer, thus, disallowed the legal fee paid of Rs.19,70,000/- by invoking the provisions of section 40A(2)(b) of the Act. Penalty proceedings under section 271(1)(c) of the Act were initiated in respect of the aforesaid addition. Further, the assessee had claimed the dividend income of Rs.13.14 crores as exempt. The Assessing Officer in this regard observed that in view of the provisions of section 14A of the Act, the expenses relatable to such exempt income were to be disallowed. The Assessing Officer was of the view that 5% of the exempt income was to be disallowed, which works out to Rs.65,72,708/-. But the assessee had incurred total expenditure of Rs.21,22,688/- out of which Rs.19,70,000/- was already disallowed and hence balance of Rs.1,52,688/- was disallowed. No initiation of penalty under section 271(1)(c) in this regard was made by the Assessing Officer.

5. The assessee went an appeal before the CIT(A) against the assessment order passed by the Assessing Officer. The CIT(A) vide order dated 05.03.2009 was of the view that where Shri S.A. Gundecha was not a related person in terms of the provisions of section 40A(2)(b) of the Act, the Assessing Officer was not justified in invoking the said provisions of the Act. Further, where the person was

competent enough to give advice on legal matters and where he has admitted to have given the said services to the company and since the amount of Rs.19,70,000/- has been offered to tax by him which, in turn, has been accepted by the Income Tax Department, there was no justification in making the aforesaid addition of Rs.19,70,000/-. The CIT(A) vide para 4.8 noted that the major portion of the income earned by the assessee was on account of the dividend income and for making the aforesaid investment in shares of the other companies, retainership was paid to Mr. S.A. Gundecha and as per the CIT(A) the said amount directly related to the earning of the dividend income. The CIT(A), thus, held that the said expenditure of Rs.19,70,000/- merits to be disallowed under section 14A of the Act, in addition to the disallowance of Rs.1,52,688/- under section 14A of the Act. Consequent to the order passed by the Assessing Officer, penalty proceedings under section 271(1)(c) of the Act were completed by the Assessing Officer. The Assessing Officer noted that since though the addition made in the assessment order of Rs.19,70,000/- was under section 40A(2)(b) of the Act, which in turn was disallowed under section 14A of the Act by the CIT(A), but the plea of the assessee requesting not to levy of penalty, in view of the deletion of disallowance under section 40A(2)(b) of the Act, was not acceptable. In view of the Explanation 1 to section 271(1)(c) of the Act, the Assessing Officer was of the view that the assessee had deliberately and intentionally omitted to make the disallowance under section 14A of the Act, therefore, the assessee was held to have furnished inaccurate particulars of income. Consequently, penalty under section 271(1)(c) of the Act was levied on the amount of Rs.19,70,000/- at Rs.7,06,738/-.

6. The CIT(A) noted the contention of the assessee that penalty under section 271(1)(c) of the Act was initiated against an addition of Rs.19,70,000/- made under section 40A(2)(b) of the Act and since the said addition has now been upheld under section 14A of the Act and not under section 40A(2)(b) of the Act, there was no justification for levying the penalty under section 271(1)(c) of the Act. In respect of

second addition of Rs.1,52,688/- made under section 14A of the Act, the CIT(A) also noted that no penalty proceedings under section 271(1)(c) of the Act were initiated and the contention of the assessee in this regard was that logically when the addition of Rs.19,70,000/- was confirmed by the CIT(A), the same should be treated in similar manner as that of addition of Rs.1,52,688/-. The CIT(A) held that this proposition of the assessee was difficult to be accepted as the assessee has failed to explain the addition of Rs.19,70,000/- and consequently the provisions of section 271(1)(c) of the Act were applicable, as the explanation filed by the assessee has been rejected by the Assessing Officer as well as by the CIT(A). With regard to the contention of the assessee that addition of Rs.1,52,688/- made under section 14A of the Act was not considered for levy of penalty under section 271(1)(c) of the Act and therefore, the CIT(A) had clubbed this addition of Rs19,70,000/- under section 14A of the Act, the said addition should also not be considered for penalty was a difficult proposition to be accepted. Accordingly, the CIT(A) upheld the levy of penalty of Rs.7,06,738/-.

7. The assessee is in appeal against the said order of the CIT(A).

8. The Ld. Authorized Representative for the assessee pointed out that while passing the assessment order, the Assessing Officer had initiated the penalty proceedings only in respect of one of the disallowance i.e. the disallowance made under section 40A(2)(b) of the Act. No penalty proceedings were initiated in respect of the disallowance made under section 14A of the Act. The CIT(A) while deciding the quantum appeal vide para 8 had held that no disallowances was warranted under section 40A(2)(b) of the Act, but had made disallowance under section 14A of the Act at Rs.21,22,688/-. The Ld. Authorized Representative for the assessee further stated that no appeal was filed against the order of the CIT(A) as there was net loss for the year under consideration. He further objected to the levy of penalty under section 271(1)(c) of the Act, where no penalty proceedings

were initiated against the assessee and also the issue being debatable, there was no merit in the said levy of penalty under section 271(1)(c) of the Act. The Ld. Authorized Representative for the assessee also submitted that the order under appeal was assessment year 2004-05, wherein the provisions of Rule 8D of the Income Tax Rules, 1962 (in short “the Rules”) were not applicable and hence there was no basis for quantification of any disallowance under section 14A of the Act. Reliance was placed on the ratio laid down by the Delhi Bench of the Tribunal in ACIT vs. Jindal Equipment Leasing & Consultancy Services Ltd. reported in (2011) 11 taxmann.com 309 (Delhi).

9. The Ld. Departmental Representative for the Revenue pointed out that issue was not debatable and the CIT(A) had come to a finding that the said disallowance of Rs.19,70,000/- was warranted in view of the provisions of section 14A of the Act.

10. We have heard the rival contentions and perused the record. Penalty under section 271(1)(c) of the Act is attracted where the assessee has concealed its income or furnished inaccurate particulars of income. Before levying the penalty under section 271(1)(c) of the Act, the main limb of the said section are to be satisfied. The requirement of section is that satisfaction has to be recorded by the Assessing Officer or Commissioner (Appeals) or the Principal Commissioner, in the course of any proceedings under the Act, where such officer is satisfied that any person has concealed the particulars of income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, a sum which shall not be less than, but which shall not exceed three times the amount of tax sought to be evaded, by reason of concealment of particulars of his income or furnishing of inaccurate particulars of such income. The reading of section lays down that the satisfaction by the concerned officer has to be recorded in the course of any proceedings under the Act i.e. before levy of any penalty for concealment under section 271(1)(c) of the Act. The satisfaction has to be recorded by the

officer in a proceeding which is separate from the penalty proceedings. The section empowers the Assessing Officer during the course of both the assessment or re-assessment, the CIT(A) during the course of appellate proceedings, Principal Commissioner or Commissioner during the course of 263 proceedings or any proceedings which he is empowered to carry out and after recording such satisfaction, the assessee is given an opportunity to rebut the case put up by the Assessing Officer and thereafter the officer is to record a finding and come to the conclusion whether the assessee has concealed its income or furnished inaccurate particulars of income.

11. Coming to the facts of the present case, while completing the assessment under section 143(3) of the Act, the Assessing Officer had made two additions i.e. (i) on account of disallowance of Rs.19,70,000/- by invoking provisions of section 40A(2)(b) of the Act; and, (ii) on account of disallowance under section 14A of the Act. The total disallowance of section 14A of the Act was computed by the Assessing Officer at Rs.21,22,688/- i.e. equivalent to the expenditure claimed by the assessee in its Profit & Loss Account. Since Rs.19,70,000/- was part of this Rs.21,22,688/- and the same had been disallowed by invoking the provisions of section 40A(2)(b) of the Act, the disallowance under section 14A of the Act was made at Rs.1,52,688/-. The Assessing Officer in the assessment order passed on 24.11.2006 has clearly initiated the penalty proceedings under section 271(1)(c) of the Act in respect of disallowance of Rs.19,70,000/- under section 40A(2)(b) of the Act. However, in respect of the disallowance made under section 14A of the Act, no penalty proceedings under section 271(1)(c) of the Act were initiated. As pointed out by us in the para hereinabove, the CIT(A) had reversed the order of the Assessing Officer in so far as deleting the addition of Rs.19,70,000/- made by invoking the provisions of section 40A(2)(b) of the Act but the CIT(A) had held that the disallowance under section 14A of the Act is to be made at Rs.21,22,688/- and not Rs.1,52,688/-, which was made by the Assessing Officer.

12. The first issue which arises in the present appeal is that irrespective of the quantum of disallowance under section 14A of the Act, where no satisfaction was recorded by the Assessing Officer for initiation of the penalty proceedings under section 271(1)(c) of the Act and merely because the ultimate disallowance in the hands of the assessee was higher than as proposed by the Assessing Officer, can the penalty for concealment be levied by the Assessing Officer, while passing the order under section 271(1)(c) of the Act, pursuant to the order passed by the CIT(A) against the quantum additions. We find no merit in the order passed by the Assessing Officer in this regard, where no satisfaction was recorded for initiating the penalty under section 271(1)(c) of the Act in respect of disallowance made under section 14A of the Act, while completing the assessment under section 143(3) of the Act, by the Assessing Officer or while making the enhancement by CIT(A).

13. The second aspect of the issue is whether the issue of the disallowance to be made under section 14A of the Act being debatable, attract the levy of penalty for concealment under section 271(1)(c) of the Act. Though the provisions of section 14A of the Act were brought on statute on an earlier date, however, the provisions of Rule 8D of the Rules were introduced w.e.f. 01.04.2008 only. Before the insertion of Rule 8D of the Rules, no set procedure was laid down under the statute to work out the disallowance under section 14A of the Act. The disallowance made in the hands of the assessee before us is an ad-hoc disallowance, which admittedly has been accepted by the assessee because of no tax effect. But merely because an addition has been made in the hands of the assessee on a debatable issue, it cannot be held that the assessee has furnished inaccurate particulars of income in respect of the said disallowance under section 14A of the Act. Where the question of disallowance and its quantification are

contentious, which lead to inference that difference of opinion between the assessee and the authorities were bona-fide and in such circumstances, it cannot not be said that the assessee has furnished inaccurate particulars of income. Such was proposition laid down by the Delhi Bench of the Tribunal in Jindal Equipment Leasing & Consultancy Services Ltd. (supra). In view thereof, we hold that in the given such facts and circumstances of the case, there is no merit in the levy of penalty under section 271(1)(c) of the Act and we direct the Assessing Officer to delete the same. Thus, the grounds of appeal raised by the assessee are allowed.

14. In the result, the appeal of the assessee is allowed.

Order pronounced on this 24th day of September, 2015.

Sd/-	Sd/-
(**PRADIP KUMAR KEDIA**)	(**SUSHMA CHOWLA**)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे Pune; दिनांक Dated : 24th September, 2015.

सुजीत

आदेश की प्रतिलिपि अग्रेषित/Copy of the order is forwarded to :

1) The Assessee;
2) The Department;
3) The CIT(A)-V, Pune;
4) The CIT-V, Pune;
5) The DR "A" Bench, I.T.A.T., Pune;
6) Guard File.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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