

2. We heard the parties and perused the record. The assessee has raised grounds on legal issues and also on merits. We prefer to adjudicate the grounds urged on merits. The assessee is engaged in business of developing online and offline games softwares in its 100% export oriented STPI unit. The assessment of the year under consideration was completed by the Assessing Officer under Section 143(3) of the Act on 31.12.2013, wherein he made following three additions :-

	Issue	Disallowance as per order u/s 143(3)
1	Disallowance of claim of deduction u/s 10A	Rs.53,17,433/-
2	Disallowance u/s 40(a)(ia)	Rs.53,90,600/-
3	Disallowance of capital expenditure u/s 37(1)	Rs.5,84,698/-
	Total	Rs.112,92,731/-

The Assessing Officer initiated penalty proceedings under Section 271(1)(c) of the Act for furnishing of inaccurate particulars of income in respect of above said three additions. After hearing the assessee, the Assessing Officer levied a penalty of Rs.38,40,000/- under Section 271(1)(c) of the Act. Since the assessee did not appear before the Ld. CIT(A), he confirmed the penalty levied by the Assessing Officer.

3. We noticed earlier that the Assessing Officer has levied penalty on three disallowance made by him. First disallowance relates to rejection of deduction claimed under Section 10A of the Act amounting to Rs.53.17 lacs. A perusal of the penalty order would show that the disallowance of claim made under Section 10A

of the Act has been made on account of non-filing of mandatory Audit Report in Form 56F of the Act and also for claiming deduction under Section 10A of the Act before set-off of brought forward losses/unabsorbed depreciation. Thus, it is a case of rejection of a claim on technical reasons and also on account of difference of opinion between the assessee and the Assessing Officer on the methodology of computation of deduction. None of the particulars given in the financial statements were found to be inaccurate. Hence, these facts would not lead to a case of furnishing of inaccurate particulars of income. This deduction has not been claimed by the assessee as an expenditure in the Profit & Loss Account, but has been claimed only in computation of total income. Since this deduction is allowed as an incentive to promote exports, the Hon'ble Delhi High Court in the case of *ACIT vs BSL Software Ltd., (2012) 20 taxmann.com 408* has held that where claim for deduction was made under Section 10A of the Act on the basis of certificate of Accountant which was *bona fide* and the required facts relating thereto were furnished, then assessee could not be held to be liable for penalty. Accordingly, we are of the view that the Assessing Officer was not justified in levying penalty under Section 271(1)(c) of the Act on the disallowance of claim of deduction under Section 10A of the Act.

4. The next disallowance on which penalty was levied by the Assessing Officer relates to disallowance made under Section 40(a)(ia) of the Act amounting to Rs.53,90,600/-. The Assessing Officer noticed that the Tax Auditor has reported that the assessee has not deducted tax at source on an amount of Rs.90.20 lacs and the same is inadmissible under Section 40(a) of the Act. However, the assessee had made a disallowance of Rs.41.96 lacs only in the return of income.

Further, upon examination of the various expenses claimed by the assessee, the Assessing Officer noticed that assessee is liable to deduct tax at source on the payments made towards Audit fee, Professional fee, Consultancy charges and Software development charges aggregating to Rs.5.66,398/-. Accordingly, the Assessing Officer disallowed a sum of Rs.53,90,600/- under Section 40(a)(ia) of the Act for non-deduction of tax at source. The Assessing Officer also levied penalty under Section 271(1)(c) of the Act for furnishing inaccurate particulars of income.

5. We heard the parties on this issue. This is also a case where the disallowance is required to be made in view of legal fiction provided in Section 40(a)(ia) of the Act, i.e. when the assessee has failed to deduct tax at source on certain payment, the relevant expenditure is liable to be disallowed. Hence, the statutory disallowance made as per the legal fiction inserted in the Act would not result in furnishing of inaccurate particulars of income. We find support in this regard from the decision rendered by co-ordinate bench of the Tribunal in the case of Tanushree Basu vs ACIT, ITA No. 2922/Mum/2012 dated 22.05.2013. Accordingly, we hold that the Assessing Officer was not justified in levying penalty on this disallowance.

6. The last addition on which penalty was levied relates to disallowance of expenditure of Rs.5,84,698/- claimed by assessee holding the same as 'capital expenditure'. The Assessing Officer noticed that the assessee has incurred a sum of Rs.5,84,698/- for increasing its Share Capital and claimed same as 'Revenue expenditure'. The Assessing Officer treated the same as 'Capital expenditure' by

placing reliance on the judgment rendered by the Hon'ble Supreme Court of India in the case of *Brooke Bond India Ltd. vs CIT, 225 ITR 798 (SC)* and levied penalty under Section 271(1)(c) of the Act for furnishing inaccurate particulars of income.

7. We heard the parties on this issue and perused the record. In our view, it is a case where assessee has made a claim and same has been disallowed as, according to the Assessing Officer, the said expenditure is capital in nature. First of all, the decision taken by the Assessing Officer is a debatable one and hence no penalty could be levied on such a debatable issue. The Hon'ble Apex Court in the case of *CIT vs Reliance Petroproducts (P.) Ltd., 322 ITR 158 (SC)* has held that mere making of a claim which is not sustainable in law by itself will not amount to furnishing of inaccurate particulars of income. Accordingly, we are of the view that the Assessing Officer was not justified in levying penalty on this disallowance also.

8. In view of the foregoing discussions, we are of the view that penalty under Section 271(1)(c) of the Act cannot be levied on all the three disallowances made by the Assessing Officer. Accordingly, we set-aside the order passed by the Ld. CIT(A) and direct the Assessing Officer to delete the penalty levied under Section 271(1)(c) of the Act for the year under consideration.

9. We have noticed earlier that the assessee has also raised certain legal grounds. However, since we have deleted the penalty on merits, we do not find it necessary to adjudicate the legal grounds, as the same has become academic in nature.

10. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 10th May, 2023.

Sd/-
(Ms. KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai, Date : 10th May, 2023

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Copy to :

- 1) The Applicant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "E" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai