REPORTABLE
IN THE HIGH COURT OF DELHI AT NEW DELHI

+ I.T.A. No. 1005/2008

Date of Hearing: 04.08.2009
Date of Decision: 24 .08.2009

#Commissioner of Income Tax Delhi-IV .....Appellant

! Through: Ms.Prem Lata Bansal with Ms.Anshul Sharma and Mr. Paras Chaudhary

Versus

$Escorts Finance Limited .....Respondents

Through Mr. R.M. Mehta

CORAM :-
***THE HON'BLE MR.JUSTICE A.K.SIKRI**
THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.
:

1. In this appeal we are concerned with the decision of the Income-Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal' for short) which has upheld the decision of the CIT (A) deleting the penalty of Rs.13,18,151/- imposed by the Assessing Officer in exercise of his powers contained in Section 271(1)(c) of the Income-Tax Act (hereinafter referred to as the 'the Act' for short). The penalty

proceedings came to be initiated by the Assessing Officer under the following circumstances:-

2. The respondent assessee filed the income tax return declaring income at Rs.1,21,03,280/- on 30.11.1996. During the assessment proceedings, the Assessing Officer noticed that the assessee had claimed deduction of Rs.21,02,228/- under Section 35D of the Act being 1/10th of Rs.2,10,22,279/- relating to public issue of shares. The Assessing Officer required the assessee to explain as to why such expenses be not disallowed as it is hit by provisions of Section 35D(2) of the Act as it is neither an investment company nor an industrial company. Assessee contended that the expenses had to be amortized as per Section 35D of the Act. However, the Assessing Officer was not convinced with the same and relying on the judgment of Supreme Court in the case of *Brook Bond India Limited* v. *CIT*, **225 ITR 798** disallowed the same treating the expenditure as capital in nature. During the assessment proceedings, the Assessing Officer further found that assessee had claimed 50% of the entertainment expenses as on account of employee's participating in the business meetings while entertaining company's guests. In earlier years, employee's participation was estimated only at 25%. Accordingly, he disallowed a

sum of Rs.1,18,247/- out of the total entertainment expenditure. Similarly, the Assessing Officer further noticed that in the return of income, assessee had declared long term capital loss at Rs.98,04,485/- and short term capital gain at Rs.17,52,855/-. The Assessing Officer required the assessee to explain as to why such long term capital loss and short term capital gain be not treated as business loss/business income and further as speculative loss and profit. The assessee submitted that there was an inadvertent error while computing such loss and gain as the indexed cost of investment had been reduced from the profit on sale of investment instead of sale consideration. The assessee filed a revised computation of capital loss and capital gain and accordingly, the Assessing Officer made an addition of Rs.6,45,070/- to the income of assessee on account of short term capital gain.

3. While framing the assessment order the Assessing Officer also decided to initiate penalty proceedings under Section 271(1)(c) of the Act and issued show cause notice for this purpose. The assessee did not give any reply. After considering the matter, the Assessing Officer passed orders dated 29.7.2005 imposing penalty of Rs.13,18,151/- on the ground that the assessee had furnished inaccurate particulars of income.

4. The assessee challenged this order by filing appeal before the CIT(A) who allowed the appeal and set aside the penalty order passed by the Assessing Officer. The CIT(A) was of the opinion that all the facts had been duly disclosed by the assessee in the return of income and therefore, it was not a case of furnishing inaccurate particulars for concealing any income chargeable to tax. He was of the opinion that in order to invoke the provisions of Section 271(1)(c) conscious concealment was necessary. No doubt, initial burden of proof was on the assessee but if that was discharged, no penalty was leviable unless the explanation is found to be fantastic or without any basis. In the opinion of the CIT(A), only a mistake had occurred on the part of the assessee in respect of the assessee in respect of Rs.6,45,070/- which was corrected by it during the course of the assessment proceedings on its own as was clear from the assessment order. Further, in the prospectus for issue of public shares it was clearly mentioned by the statutory auditor, namely, M/s. N.D. Kapoor & Co. that the expenses incurred in connection with the public issue of shares, such as underwriting commission, brokerage and other charges etc. qualify for amortization over a period of 10 years under Section 35D of the Act. Thus, it was only a question of interpretation of Section 35D as to

whether the expenses claimed by the assessee could be allowed under that Section or not and therefore, penalty could not be levied on this amount. Regarding addition on account of capital loss, as per the CIT(A) it was found to be correct. The assessee company had itself filed a revised statement for the error committed which was a bona fide mistake and therefore, there was no concealment. Qua entertainment, expenses which were restricted to 35% instead of 55% claimed by the assessee company, again it could not be said that assessee company had concealed income or had furnished inaccurate income. On this basis appeal was allowed and penalty deleted.

5. The Tribunal has upheld the order of CIT(A) on two grounds, namely:-

(a) in the assessment order the Assessing Officer had not recorded his satisfaction regarding concealment of income or for furnishing inaccurate particulars.

(b) On merits also the Tribunal opined that the error can be termed as bona fide mistake, which was corrected by the assessee of its own and the reasoning given by the CIT(A) is echoed by the Tribunal.

We may point out that in view of amendment to Clause (1B) of Section 271 retrospectively with effect from 1.4.1989. This ground is no more available to the assessee. It is for this reason the matter was argued on merits before us by counsel for both the sides.

6. Following substantial questions of law was framed by this Court while admitting the appeal on 4.8.2009:-

> "Whether ITAT was correct in law in which in deleting the penalty imposed by the Assessing Officer U/S 271(1)(c) of the Act?"

Since counsel for the parties were ready to argue the matter finally, we heard the arguments on the aforesaid issue there and then.

7. There is no quarrel about the proposition of law for invoking provisions of Section 271(1)(c) of the Act, particularly Explanation (I) thereof. This Section with the Explanation (I) reads as under:-

> "**Failure to furnish returns, comply with notices, concealment of income, etc.**,
>
> **271.**(1) If the [Assessing] Officer or the [Commissioner (Appeals)] [or the Commissioner] in the course of any proceedings under this Act, is satisfied that any person-
>
> (a) xxx

(b) xxx

(c) has concealed the particulars of his income or furnished inaccurate particulars of [such income, or].

(d) xxx

Explanation 1.-Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) such person fails to offer an explanation or offers an explanation which is found by the [Assessing] Officer or the [Commissioner (Appeals) [or the Commissioner] to be false, or

(B) such person offers an explanation which he is not able to substantiate [and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him],

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purpose of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed."

8. It is repeatedly held by the Courts that the penalty on the ground of concealment of particulars or non-disclosure of full particulars can be levied only when in the accounts/return an item has been suppressed dishonestly or the item has been claimed fraudulently or a bogus claim

has been made. When the facts are clearly disclosed in the return of income, penalty cannot be levied and merely because an amount is not allowed or taxed to income, as it cannot be said that the assessee had filed inaccurate particulars or concealed any income chargeable to tax. Further, conscious concealment is necessary. Even if some deduction or benefit is claimed by the assessee wrongly but bona fide and no malafide can be attributed, the penalty would not be levied. A fortiorari, if there is a deliberate concealment and false/inaccurate return was filed, which was revised after the assessee was exposed of the falsehood, it would be treated as concealment of income in the original return and would attract penalty even if revised return was filed before the assessment is completed. Likewise, where claim made in the return appears to be *ex facie* bogus, it would be treated as case of concealment or inaccurate particulars and penalty proceedings would be justified.

9. The main plank of attack on the part of learned counsel for the appellant was that on the facts of this case aforesaid principles are not properly applied. She was emphatic in her submission that vital aspects of the case are glossed over by the authorities below, which would clearly demonstrate that there was a deliberate concealment of

facts amounting to inaccurate particulars furnished by the assessee in its return.

10. Learned counsel for the respondent on the other hand submitted that the authorities below had taken into consideration all the material circumstances on the basis of which findings were arrived at that the mistake of the assessee was bona fide and thus, he pleaded that order of the Tribunal should not be interfered with. Both the counsel referred to various judgments most of which are taken note of by the CIT(A) as well as the Tribunal.

11. We find that action for penalty proceedings was initiated by the Assessing Officer on various grounds. First ground was predicated on the claim made by the assessee for entertainment expenses. As against 50% amount claimed by the assessee on account of the employees' participation, the Assessing Officer reduced the same to 35%. We of the opinion that the CIT(A) as well as the Tribunal rightly observed that there was no concealment of income or furnishing of inaccurate particulars. The addition was only on account of difference in estimate made by the assessee and the other estimate made by the Assessing Officer. Therefore, in so far as this claim is concerned, even

if the Assessing Officer reduced the same from 50% to 35%, that cannot attract the penalty.

12. A sum of Rs.21,02,228/- under Section 35D of the Act was disallowed by the Assessing Officer. This, according to the assessee, was made on the basis of the opinion given by the Chartered Accountants, which is clear from the prospectus for public issue of shares in which it was clearly mentioned that the assessee company would be entitled to relief under Section 35D of the Act. Expenses were incurred in connection with the public issue of shares such as underwriting commission, brokerage and other charges etc. which, as per the opinion of the Chartered Accountants, qualify for amortization over a period of 10 years under Section 35D of the Act. Submission of the learned counsel for the Revenue was that merely because information in this behalf was made available in the tax audit report, would not absolve the assessee of the penalty proceedings when such a claim was ex facie bogus. She submitted that hardly 5% returns are taken up for scrutiny under Section 143(2) of the Act and assessment is made under sub-section (3) of Section 143 of the Act. Therefore, with the hope that his/her return may not come under scrutiny and may be assessed on the basis of 'self-assessment', an assessee can venture to give wrong

information. Therefore, merely because information was available in the tax audit report would not absolve the assessee. What was to be seen was that whether the claim made was bogus.

13. We are inclined to agree with the aforesaid submission of learned counsel for the Revenue. Even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex facie bogus, it may still attract penalty provision. Cases of bogus *hundi* loans or bogus sales or purchases have been treated as that of concealment or inaccuracy in particulars of income by the judicial pronouncements (See *Krishna* v. *CIT*, **217 ITR 645**, *Rajaram* v. *CIT*, **193 ITR 614** and *Beena Metals*, **240 ITR 222**).

14. In the present case, we have to examine as to whether the claim made under Section 35D of the Act was bogus or it was a bona fide claim. The assessee pleaded bona fide, as according to it, it was based on the opinion of the Chartered Accountant. Learned counsel for the Revenue, however, submitted that a bare reading of Section 35D would reveal even to a layman that there was no scope for getting benefit of those provisions in respect of expenses incurred in connection with the public issue of shares such as underwriting commission, brokerage and other charges etc. inasmuch as certain

expenses are allowable only when they are incurred with the expansion of assessee's industrial undertakings or in connection with his setting up of a **new industrial undertaking** or **industrial unit** whereas the assessee is a finance company.

15. We are in agreement with the aforesaid submission of learned counsel for the Revenue. We fail to understand as to how the Chartered Accountants who are supposed to be expert in tax laws, could give such an opinion having regard to the plain language of Section 35D of the Act. It would be important to note that assessee has nowhere pleaded that return was filed claiming benefit of Section 35D of the Act on the basis of the said opinion. What was stated was that in the prospectus it was mentioned that as per the opinion given by the Chartered Accountants, the company would be entitled for relief under Section 35D of the Act. Therefore, it is not the case of the assessee that while filing the return it got assistance from the Chartered Accountants who opined that the aforesaid expenses qualify for amortization over a period of 10 years under Section 35D of the Act. That apart, when we find that it is not a case where two opinions about the applicability of Section 35D were possible. Therefore, it cannot be a case of a bona fide error on the part of the assessee. As has been

pointed out above, the relief available under Section 35D of the Act to a finance company is ex facie inadmissible as that is confined only to the existing industrial undertaking for their extension or for setting up a new industrial unit. It was, thus, not a 'wrong claim' preferred by the assessee, but is a clear case of 'false claim'. In *Commissioner of Income-Tax* v. *Vidyagauri Natverlal and others*, **[1999] 238 ITR 91**, Gujarat High Court made a distinction between wrong claim as opposed to false claim and held that if the claim is found to be false, the same would attract penalty. We may also take note of the following observations of the Supreme Court in the case of *Union of India and Others* v. *Dharmendra Textile Processors and Others*, **(2008) 13 SCC 369=306 ITR 277 (SC)**. In such a case it is difficult to accept the plea that error was bona fide.

16. In so far as claim of capital loss is concerned, the assessee is absolved by the authorities below on the ground that it was an inadvertent error which was corrected by the assessee itself by filing revised return and offering the same during the assessment proceedings. Admittedly, it happened while the assessment proceedings were going on and the explanation furnished by the assessee before the Assessing Officer in those assessment proceedings was that there was an inadvertent error

while computing such loss and as the index cost of investment had reduced from profit on sales instead of sale consideration. Though there may an element of doubt as to whether it was an inadvertent error on the part of the assessee or he filed the revised return only after he was confronted with the same by the AO, however, when we find that a finding of fact regarding *"inadvertent error"* is recorded by the two authorities below, we are not interfering in the matter on this aspect. It is more so when we find that while imposing the penalty the Assessing Officer has nowhere contradicted that aforesaid error was not inadvertent.

17. The issue is, thus, decided in the aforesaid manner as a result of which appeal is partly allowed. In view thereof, matter is remitted back to the Assessing Officer for determining the penalty afresh attributing the conduct relating to claim under Section 35D of the Act only as attracting penalty proceedings.

(A.K. SIKRI)
JUDGE

August 24, 2009
hp.

(VALMIKI J. MEHTA)
JUDGE