* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 25.01.2010

\+ **ITA 1097/2009**

**COMMISSIONER OF INCOME TAX** ... Appellant

- versus -

**AERO TRADERS (P) LTD** ... Respondent

**Advocates who appeared in this case:**
For the Petitioner : Ms P.L.Bansal
For the Respondent : None

**CORAM:**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR JUSTICE SIDDHARTH MRIDUL**

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? .

**SIDDHARTH MRIDUL, J**

1. This is an appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') against the order dated 4th December, 2008 of the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') in ITA No.4484/Del/2007 for the

Assessment Year 1997-98, whereby the Tribunal deleted the penalty imposed by the Assessing Officer under Section 271(1)(c) of the said Act.

2. The facts leading to the filing of this appeal are summarized as follows. The assessee company was in the business of manufacturing and exporting shoe uppers primarily to the erstwhile USSR. However, due to the disintegration of the USSR, the assessee's business reportedly went into losses and consequently no return was filed by the assessee for the year 1997-98. A notice under Section 148 was issued, in response to which the assessee filed the return declaring a loss of Rs 83,64,468/- on 29.01.2002. The assessee had, in the income tax return filed by it, attached a note stating that it was impossible for them to substantiate its claim of loss by way of any evidence as the relevant records were lying seized with the police authorities. The Assessing Officer after being unable to obtain copies of the seized documents, based his assessment order on the limited documents provided and rejected the book results declared by the assessee. He estimated the income of the assessee at Rs 61,00,000/- (rupees sixty one lakh) as against the returned loss of Rs 83,64,468/- (rupees eighty three lakh sixty four thousand four hundred and sixty eight). He also initiated penalty proceedings separately. Aggrieved therefrom the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [hereinafter referred to

as the CIT(A)], where substantial relief was granted and the total income of the assessee was estimated at Rs.1,02,980/- (rupees one lakh two thousand nine hundred and eighty).

3. Against this order the Revenue had filed an appeal before the Tribunal, who confirmed the order passed by the CIT(A).

4. After the passing of the order by the CIT(A), the Assessing Officer issued a show cause notice to the assessee as to why penalty under Section 271(1)(c) of the Act should not be levied. The assessee submitted that no penalty could be levied as the additions were made on estimate basis and that no satisfaction had been recorded by the Assessing Officer. The Assessing Officer, observing that the profit was estimated after rejection of books of accounts due to certain discrepancies, imposed a penalty on the assessee of Rs.36,41,003/- (rupees thirty six lakh forty one thousand and three), on the ground that it was a clear case of furnishing inaccurate particulars of income.

5. Against this order, the assessee filed an appeal before the CIT(A), who deleted the penalty imposed vide order dated 07.09.2007, holding that the addition made by the Assessing Officer on the basis of estimated profit

cannot be a subject matter of penalty for concealment of income. The CIT(A) further found that penalty was not imposable in view of the substantial deduction given by the Tribunal and observed as under:

> "I have considered the submissions of the assessee and perused the facts that are ruling in the instant case. There is no doubt that there are certain discrepancies noticed in the course of special audit as brought out in their report. However, such discrepancies by itself ipso facto lead to the conclusion that the assessee has concealed the income. Ultimately the AO has to resort to estimated addition only. He could not point out any specific item of any addition with any conclusive evidence. Even the addition made by the AO on estimated basis is substantially reduced by the CIT (A) after considering the various facts and figures and circumstances of the case. The said action of the CIT (A) has become final consequent to the decision of the Hon'ble ITAT in dismissing the department appeal. Resultantly the income of Rs.1,02,980/- is on the basis of estimated profit ratio only. It is not on account of any specific item of addition or disallowance. Such an addition made on the basis of guess work cannot be subjected matter of penalty for concealment of income. Penalty being a quasi criminal proceeding there is a duty cast on the AO to establish the guilt of the assessee in concealing the income or furnishing of inaccurate particulars of such income. As stated the seizure of the books of the police is not an act of the assessee. No motives can be attributed to the non-availability of books of accounts to examine and verify the various claims made by the appellant."

6. Aggrieved by this order, the revenue filed an appeal before the Tribunal. The Tribunal, after hearing the submissions made on behalf of the revenue, came to the conclusion that the CIT(A) had taken the correct

decision in deleting the penalty. The operative portion of the impugned order dated 04.12.2008 is as follows:

> "As the facts emerge the substantial quantum relief was given by the CIT (A) which has been confirmed by the Tribunal, the balance pertains to estimated rate of profit applied on the turnover of the assessee which in our view does not amount to concealment or furnishing inaccurate particulars. In our view, the CIT (A) has taken right decision in deleting the penalty which is upheld."

7. The appeal is filed against the abovementioned order of the Tribunal dated 04.12.2008. The finding arrived at by the Tribunal does not warrant interference from this Court as it is purely a finding of fact. No perversity has been pointed in such a finding. Consequently, no substantial question of law arises for consideration. As a result, the appeal is dismissed.

**SIDDHARTH MRIDUL, J**

**BADAR DURREZ AHMED, J**

**JANUARY 25, 2010**
**bp**