THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.01.2013

+ ITA No.415/2012

CIT ... Appellant

versus

MAK DATA LTD ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Sanjeev Sabharwal, Adv.
For the Respondent : None

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V.EASWAR, J

The following substantial question of law was framed by this Court on 11th October, 2012:-

> *"Whether the Tribunal fell into error in setting aside the order of penalty imposed by the AO and upheld by the CIT (A)?"*

2. This is an appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act' for short) and it pertains to the assessment year 2004-05. An assessment was completed upon the assessee under Section 143(3) of the Act in which an addition of ₹40,74,700/- was made

in the following circumstances. There was a survey under Section 133A on 16th December, 2003 in the course of which some documents pertaining to the assessee were found and were impounded. These documents consisted of blank transfer deeds for shares duly signed, affidavits, share application forms, copies of bank accounts, income tax returns and assessment orders of certain other companies. Those documents were forwarded to the AO assessing the present assessee who called upon the assessee to explain the contents of the documents and the genuineness of the transactions represented by them. It appears that the documents belonged to certain entities who had applied for shares in the assessee company. What the AO wanted the assessee to do was to prove the nature and source of the monies received as share capital, the creditworthiness of the applicants and the genuineness of the transactions.

3. In response to the above notice which was issued on 26th October, 2006, the assessee stated as under:-

> *"It has been stated that the company had received share application money from different entities aggregating to a sum of ₹239 lacs during the past 3 years as:*
>
> | *Assessment Year* | *Amount* |
> |---|---|
> | *2002 – 2003* | *12,00,000* |

2003 – 2004	*1,06,50,000*
2004 – 2005	*1,20,50,000*
	2,39,00,000

The company with a view to avoid litigation and buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the Income Tax Department offers to surrender a sum of ₹56.49 lacs as income from other sources.

In this context we also wish to bring on record the fact that Sh. V. K. Aggarwal, Promoter Director of the company had offered a sum of ₹1,82,51,000/- for taxation as "income from other sources" in the hands of the partnership firm M/s. Marketing Services. Sh. V.K. Aggarwal is the partner of M/s. Marketing Services and the firm is being assessed with the CIT XI, New Delhi, this income of ₹1,82,51,000/- was duly subjected to tax by CIT XI in the following manner:

Assessment Year	*Amount*
2001 – 2002	*₹48,97,000/-*
2002 – 2003	*₹40,68,000/-*
2003 – 2004	*₹92,86,000/-*
	₹1,82,51,000/-

It has also been stated that Sh. V.K. Aggarwal, Promoter-Director of the assessee company has utilized this offered sum of ₹1,82.51 lacs for inducting funds into the books of the assessee company as share application money. It has been stated further that the additional fund flow to the extent of ₹56.49 lacs (239 lacs – 182.51 lacs) which remain unexplained is now being offered for taxation by the company

as its income from other sources. Subject to the condition that the offer of the surrender is by way of voluntary disclosure without admitting any concealment whatsoever or any intention to conceal and subject to non initiation of penalty proceedings and prosecution."

It appears that thereafter the assessee filed an application before the Addl. Commissioner of Income Tax under Section 144A soliciting directions for expediting the assessment proceedings and therein it indicated its willingness to be assessed on an amount of ₹56.49 lacs as its income under the head "income from other sources". It may be noticed that this figure represents the difference between the amount of ₹239 lacs and ₹1,82,51,000/-. After certain correspondence between the AO and the Addl.CIT, a letter was issued on 27th December, 2006 containing the directions of the Addl.CIT. The entire directions are reproduced in the assessment order and is, therefore, not reproduced here for the sake of brevity. It suffices to note that before the Add. CIT the assessee would appear to have scaled down the offer from ₹56.49 lacs to ₹40.74 lacs on the ground that the peak investment should be taken at ₹2,19,50,000/- instead of ₹239 lacs as calculated earlier. The AO, on the basis of the directions of the Addl. CIT called upon the assessee to furnish the

relevant documents and information regarding the fresh offer of ₹40,74,000/-. The purpose appears to be merely to verify the reconciliation between the earlier offer of ₹56.49 lacs and the revised offer of ₹40.74 lacs. After having carried out the verification the amount of ₹40.74 lacs was added as "income from other sources" with the following narration *"As per direction of the Addl. CIT Range-6 and further discussion with the assessee's A.R. a sum of ₹40,74,000/- is treated as income from other sources"*

4. There was no appeal against the aforesaid addition by the assessee. The addition of ₹40,74,000/- thus became final.

5. Subsequently the AO initiated penalty proceedings for furnishing inaccurate particulars of its income under Section 271(1)(c) of the Act. The gist of the assessee's reply was that the amount was offered as income only to buy peace and avoid protracted litigation and with the condition that no penalty or prosecution proceedings would be launched. It was further stated that the offer was made before any investigation was carried out into the matter and, therefore, was voluntary. Several authorities were relied upon in support of the submission. However, the submissions were rejected by the AO who, by the order dated 23.4.2007,

imposed the minimum penalty of ₹14,16,600/- for furnishing inaccurate particulars of income to the extent of ₹40,74,000/-. The ultimate findings of the AO on the basis of which the penalty was imposed were as follows:-

> *"23. The reply furnished by the assessee has been considered & found to be unsatisfactory because of the following: -*
>
> *a) In the return filed by the assessee the assessee has not offered the amount of ₹40.74 lacs for taxation voluntarily.*
>
> *b) The assessee has surrendered the above amount of ₹40.74 lacs during course of assessment proceeding when the impounded material was confronted to the assessee which was impounded during course of survey u/s 133A of the IT Act, 1961 on 16.12.2003 at the business premise of Marketing Services.*
>
> *c) The assessee has furnished inaccurate particulars of its income in the return of income filed on 27.10.2004 for the year under consideration.*
>
> *d) The satisfaction was recorded at the time completing assessment proceedings u/s 143(3) of the I.T. Act, 1961.*
>
> *e) The assessee has itself surrendered for tax, the addition sum of ₹40,74,000/- which it was asked to explain the source of share application money. Moreover, admitted facts need not to be proved by the Assessing Officer, as in this case, the assessee itself*

admitted the concealment of income to the extent of ₹40,74,000/- by offering the amount for tax.

In view of the above facts and circumstances of the case, I am satisfied that it is a fit case for imposition of penalty u/s 271(1)(c) read with section 274 of the IT Act, 1961."

6. The assessee preferred an appeal to the CIT(Appeals) who rejected the submissions of the assessee and confirmed the penalty. A further appeal was preferred by the assessee to the Income Tax Appellate Tribunal ('Tribunal' for short) in ITA No.1896/Del/2010. The levy of the penalty was opposed on the ground that the surrender of income was made *suo moto* before any investigation, that there was no other evidence in the possession of the income tax authorities except the surrender, and that the levy of penalty without recording any finding on the merits of the assessee's plea was untenable. The Tribunal on examination of the facts and the rival contentions cancelled the penalty recording the following findings:-

(a) It was only after the directions of the Addl.CIT issued under Section 144A that the assessee's offer was accepted and the assessment was finalized;

(b) There was no material against the assessee to show any concealment and this fact has been admitted by the AO himself; there is not even any indication in the penalty order as to the particular credit in respect of which the penalty was being imposed;

(c) The fact that the assessee surrendered the income only when it was confronted with the documents found in the survey does not adversely affect its case.

(d) The assessee did not admit that it had concealed the income to the extent of ₹40,74,000/-; it had made it clear in the letter dated 22.11.2006 that the surrender was made without any admission of concealment or intention to conceal.

(e) The offer was made in a spirit of settlement of the dispute with the revenue and no investigation was carried out by the AO to prove concealment.

In support of the aforesaid findings the Tribunal referred to several authorities.

7. The contention of the revenue before us is that the Tribunal failed to appreciate the provisions of Explanation-1 to Section 271(1)(c) of the

Act. We think that there is force in the contention. Section 271(1)(c) provides for levy of penalty for concealing the particulars of income or furnishing inaccurate particulars of the income. Explanation-1 is as below:-

> *"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 purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."*

In the case before us the revenue is right in contending that there was absolutely no explanation from the assessee in respect of the amount of ₹40,74,000/-; when the AO called upon the assessee to produce the evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of the

transactions the assessee simply folded up and surrendered a sum of ₹56.49 lacs in its hands initially, which was later scaled down to ₹40,74,000/-. The assessee merely stated that with a view to avoid litigation and buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department, it surrendered the income under the head "income from other sources". In the absence of any explanation in respect of the surrendered income, the first part of clause (A) of Explanation 1 is attracted. It cannot be denied that the nature and source of the amount surrendered are facts material to the computation of the total income of the assessee. The Revenue is entitled to know the same and if the nature and source of the amount are not explained, it is entitled to draw the inference that the amount represents the assessee's taxable income. Though this principle was originally confined to the assessment proceedings, the Explanation has extended it to penalty proceedings also, presumably on the assumption that the furnishing of an explanation regarding the nature and source would have compromised the assessee's position. It is the assessee who has received the monies and is in the knowledge of all the facts relevant and material in relation to the receipt.

Therefore, it should be in a position to offer an explanation and disclose the material facts regarding the same. The absence of any explanation is statutorily considered as amounting to concealment of income. In the absence of any explanation regarding the receipt of the money, which is in the exclusive knowledge of the assessee, an adverse inference is sought to be drawn against the assessee under the first part of clause (A) of the said Explanation. This appears to be somewhat in the lines of Section 106 of the Evidence Act, the principle behind which has been extended to the provisions of Section 271(1)(c) of the Act.

8. We are satisfied that the Tribunal fell into error in setting aside the penalty imposed by the AO and upheld by the CIT(Appeals). We accordingly answer the substantial question of law in the affirmative, against the assessee and in favour of the revenue. The appeal of the revenue is allowed with no order as to costs.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

JANUARY 22, 2013
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