

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI
BEFORE SHRI R.P. TOLANI AND SHRI T.S. KAPOOR

ITA No. 2343/Del/11

Asstt. Yr: 2007-08

Income-tax Officer,
Ward-1(2), New Delhi.

Vs. M/s Agrani Convergence Ltd.,
B-10, Essel House, Lawrence Road,
New Delhi.

(Appellant)

(Respondent)

Appellant by : Mrs. Anusha Khurana Sr. DR
Respondent by : Shri O.P. Sapra Adv.

ORDER

PER R.P. TOLANI, J.M.:

This is revenue's appeal against CIT(A)'s order dated 1-3-2011, challenging the deletion of penalty levied u/s 271(1)(c) of the Income-tax Act, 1961, relating to A.Y. 2007-08.

2. Following grounds are raised:

"On the facts and in the circumstances of the case, the Ld. CIT(A) erred on facts and in law in deleting penalty of Rs. 35,00,000/- u/s 271(1)(c) of the I.T. Act, ignoring that:

(a) the additions made in the assessment order were not owing to difference of opinion or routine disallowance to warrant the application of the verdict of Hon'ble Supreme Court in Reliance Petro Products (P) Ltd. (2010) 230 CTR 320 and Hon'ble Delhi High Court in CIT Vs. Escorts Finance Ltd. (2009) 28 DTR 293. In the assessment order it was clearly held that the claim of the assessee company of short term capital loss of Rs. 93,73,273/- is not bona fide.

(b) When the assessee company was confronted with this fact, it accepted its mistake and filed a revised computation of income vide letter dated 13-10-2009 and withdrew its claim of short term capital loss.

(c) Further, in the assessment order it was clearly held that the assessee company was not eligible to claim bad debts written off of Rs. 3,52,889/- as they were not 'debts' but 'advances' written off.

(2) The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.

3. Brief facts are: Assessee filed its return disclosing Nil income, which included current income of Rs. 88,52,163/- and short term capital loss (along with annexure) at Rs. 93,73,273/-. The assessee has carried over business losses, which were set off against the current year's business income. Assessee appended following 2 notes in the computation, annexed with the return of income:

Note:

As per the assessment order passed u/s 143(3) for the AY 2001-02, the Assessing Officer has reduced the business loss & depreciation as follows:

Business loss	:	1930914
Depreciation	:	<u>2805083</u>
		<u>4735997</u>

Against this an appeal has been filed before the CIT(A), which is still pending. The assessee has claimed carry forward of losses as per the return of income filed. Effect of additions

confirmed, if any, in the appeal will be taken on disposal of final appeal.

2. The current year business profit has been set off against the business loss of the AY 2001-02, short term capital loss Rs. 93,73,843/- along with brought forward losses of earlier years as mentioned in Annexure-K to Form 3CD is allowed to be carried forward for set off in subsequent years.

3.1. During the course of assessment proceedings, assessee filed a revised computation dated 13-10-2009, by following note:

“2. The assessee has discarded assets during the year on which there was a loss of Rs. 1,21,67,167/- as per the books of accounts. The same has been added back in the computation of taxable income. The assessee has claimed short term capital loss of Rs. 93,73,273/- in the computation of taxable income. In the depreciation chart, the same is appearing as a separate block and accordingly the same was considered as short term capital loss as the entire asset was discarded.

However, during the course of assessment proceedings, the assessee has noticed that there are certain other assets having same depreciation rate of 15% hence all assets having same depreciation needed to be grouped under one block. The assessee has reworked the depreciation allowable which is enclosed herewith. Now the allowable depreciation is worked out at Rs. 30,16,854/- as against Rs. 16,10,863/- claimed in the return. Accordingly, the assessee withdraws claim for short term capital loss of Rs. 93,73,273/-.

We would further like to submit that the assessee has not claimed any set off of short term capital loss in the subsequent years and the mistake happened through oversight and there is no malafide intent in doing so.

3.2. AO further disallowed bad debt written off amounting to Rs. 3,52,889/-. The assessment was framed accordingly. Penalty proceedings u/s

271(1)(c) were initiated qua assessee's withdrawn claim on short term capital gains and the additions on account of bad debts.

3.3. Assessee contended that:

- (i) it was running into losses and any benefit of the impugned short term capital loss was neither claimed in this year or in subsequent years. Therefore, there was no intention to evade or avoid the tax.
- (ii) Along with return of income all the relevant details were filed along with annexures and accounts, therefore, the assessee has disclosed all the material facts in respect of short term capital loss, after detection of the mistake, assessee immediately filed revised computation during the course of assessment proceedings. There was no tax payable and the penalty should not be imposed. As per the revised computation by withdrawing the short term capital loss, the depreciation claim was increased from Rs. 16,10,863/- to Rs. 30,16,854/-. Thus, the claim of short term capital loss had a consequent effect. This establishes the bona fides of the assessee.
- (iii) Apropos bad debts, the assessee was under bona fide belief that the debts were not prima facie recoverable. The disclosure was made in the return and on that basis claim of return was made. Assessee having been assessed at losses did not pursue the matter in further appeal which does not mean, the assessee is liable for penalty.
- (iv) Reliance was placed on the following:

- Narangs Hotet Private Ltd. Vs. ITO (2000) 74 ITD 190 (ITAT Mum.)(SB).
- CIT v. GIC of India (No.2) 254 ITR 204 (Bom.).
- Oman International Bank Saog 286 ITR (AT) (Mum.).
- CIT Vs. Rajendra Y. Shah SLP © no. 8364 of 2009 313 ITR 3 (St.).

3.4. AO, however, imposed the penalty holding that the revised computation was filed belatedly after the detection and assessee had not filed it by a valid revised return. Though the assessed income was nil nevertheless withdrawal of the claim of short term capital loss and claim of bad debt amounted to furnishing of inaccurate particulars of income and liable for penalty.

3.5. Aggrieved, assessee preferred first appeal where Id. CIT(Appeals) held that:

- (i) all the particulars about these claims were furnished by the assessee along with the return of income. Consequently, Hon'ble Supreme Court judgment in the case of Reliance Petro Products Pvt. Ltd. 230 CTR 320 was applicable in favour of assessee.
- (ii) Primary facts and particulars were disclosed in respect of short term capital loss; the claim was withdrawn by the assessee before assessment by filing a revised computation, which has been considered by AO. Reliance was placed on CIT Vs. Atul Mohan Bindal (2009) 225 CTR (SC) 248 for the proposition that if the issue involved was debatable one, it cannot be said that assessee furnished inaccurate e particulars or concealed any particulars of income. Further reliance was placed on Hon'ble Delhi High Court

judgment in the case of CIT Vs. Maxopp Investment Ltd. in ITA no. 379/2010 by CIT(A) and penalty u/s 271(1)(c) was deleted.

3.6. Aggrieved, revenue is before us.

4. Ld. DR relies on the judgment of Hon'ble Delhi High court in the case of Zoom Communication 327 ITR 510 for the proposition that claim which is prima facie disallowable cannot be made by the assessee and it amounts to concealment of income. Further reliance was placed on CIT Vs. Escorts Finance Ltd. 28 DTR 293. It is pleaded that Hon'ble Supreme Court in the case of UOI Vs. Dharmendra Textile Processors (2007) 212 CTR (SC) 432 has held that penalty is a civil liability and the burden for establishment of mens rea is not on the department. Assessee made wrong claim in the return and a subsequent revision thereof will not obviate the act of furnishing inaccurate particulars in the original return.

5. Learned counsel for the assessee in reply contends that:

- (i) The assessee has been running into losses; the appeal was not filed against the assessment only because there were reduced assessed losses and it was not desirable to file the appeal. This fact cannot be held against assessee so as to impose penalty.
- (ii) Assessment and penalty proceedings are separate and distinct and merely because disallowance or additions are made in the assessment, it cannot automatically lead to imposition of penalty.
- (iii) The claim of short term capital loss in the original return of income, was supported with proper disclosure of accounts and by way of notes, audited statements etc. In view thereof, it cannot be

held that the assessee furnished any inaccurate particulars or concealed any particulars.

- (iv) Hon'ble Supreme Court's judgment in the case of Reliance Petro Products (supra), has squarely held that if the primary facts are disclosed along with the return of income, no penalty u/s 271(1)(c) can be levied. No tax advantage has been derived either in the original or subsequent revised computation. Short term capital loss and the claim was initially made on the basis of professional advice and subsequently withdrawn when the mistake was understood by the assessee. AO's finding that the same was withdrawn after detection is not correct. Reliance is placed on CIT Vs. Binod Company (Patna) 122 ITR 832, for the proposition that merely because assessee's explanation is not accepted, penalty u/s 271(1)(c) is not leviable. Further reliance is placed on Hindustan Steels Ltd. 83 ITR 26 for the proposition that penalty should not be imposed only because it is lawful to do so. Assessee's income being assessed at loss figure and there being no tax advantage, the penalty was rightly deleted by Id. CIT(Appeals).
- (v) Hon'ble Supreme Court in the case of Dharmendra Textiles (supra) has ruled that the liability for penalty is strict civil liability and the same is not leviable in case where the facts of the case so warrant and assessee gives proper explanation.

6. We have heard rival contentions and gone through the relevant material available on record. It has not been disputed that the assessee had made proper disclosure about the claim of short term losses in the a/c statements and computation filed with the original return of income and along with the annexures.

6.1. The assessed income in this year and in subsequent years is in loss and the contention that no tax advantage has been claimed, has not been disputed. The withdrawal of loss under short term capital loss increased the amount of depreciation. Under these circumstances, the imposition of penalty on withdrawal of claim by way of revised computation assumes a character of technical default. In respect of bad debt also assessee filed all the primary particulars in this behalf and was under bona fide belief that the amounts having become irrevocable same were allowable as bad debts on write off. All the facts indicate that the assessee filed necessary primary particulars along with return of income. In this eventuality the Hon'ble Supreme Court judgment in the case of Reliance Petro Productgs is squarely applicable to assessee's case. A revised computation to withdraw short term capital loss claim to be carried forward which at the same time increased unabsorbed depreciation cannot be held to be liable for penalty u/s 271(1)(c). In view thereof, we are unable to agree with learned DR that ratio of judgment in the case of Zoom Communication (supra) is applicable to assessee's case, as the claims cannot be held to be ex facie bogus.

6.2. Our view further gets support from the judgment of Hon'ble Supreme Court in the case of Hindustan Steels (supra), which lays down that the penalty should not be imposed only because it is lawful to do so and that the penalty should not be imposed for technical and venial defaults. In view of these circumstances, we hold that the assessee having furnished all primary facts along with the return of income and the mistake being technical or venial in nature, assessee is not liable to be visited with penalty u/s

271(1)(c). We see no infirmity in the order of ld. CIT(Appeals), deleting the penalty in question. Order of ld. CIT(Appeals) is upheld.

6.3 In the result, revenue's appeal is dismissed.

Order pronounced in open court on 08-06-2012.

Sd/-
(T.S. KAPOOR)
ACCOUNTANT MEMBER
Dated: 08-06-2012.

Sd/-
(R.P. TOLANI)
JUDICIAL MEMBER

MP

Copy to :

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR

