IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'D' NEW DELHI

ITA Nos.3808-3809/Del/2010
Assessment Years: 1999-00 & 20001-2002

ASST COMMISSIONER OF INCOME TAX
CIRCLE-4(1), NEW DELHI

Vs

M/s JINDAL EQUIPMENT LEASING & CONSULTANCY SERVICES LTD
NAJAFGARH ROAD, NEW DELHI
PAN NO:AAACJ0091P

C L Sethi, JM and K G Bansal, AM

Dated: April 21, 2011

ORDER

Per: K G Bansal:

Both these appeals of the revenue are directed against the consolidated order passed by the CIT(A)-VII, New Delhi, on 27.09.2007, in which penalties levied by the Assessing Officer u/s 271(1)(c) of the Income-tax Act, 1961, (the Act), have been deleted. Identical grounds have been taken in these appeals. The penalty amounts to Rs.1,01,14,199/- for assessment year 1999-00 and Rs.45,44,158/- for assessment year 2001-02. The appeals were argued in a consolidated manner by the learned DR and learned counsel for the assessee. Therefore, a consolidated order is passed.

1.1 For the sake of ready reference, the grounds taken in the appeal for assessment year 1999-00 are reproduced below:-

1.) The order of the learned CIT(A) is erroneous & contrary to facts and law.

2.) On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the penalty of Rs.1,01,14,199/- levied by the Assessing Officer u/s 271(1)(c) of the Act.

2.1) The learned CIT(A) has erred in ignoring the fact that the assessee furnished inaccurate particulars of the income and concealed taxable income by claiming non-allowable expenses incurred for earning exempt income u/s 10(33) of the Income-tax Act.

3. The appellant craves leave to add, to alter, or amendment any grounds of the appeal raised above at the time of hearing.

2. We are initially proceeding with the facts of assessment year 1999-00. The assessee-company had filed its return on 29.11.1999 declaring total loss of Rs.4,29,29,740/-. The return was processed u/s 143(1) on 24.02.2000. It filed the

revised return, declaring the same loss, which was also processed on 28.03.2001. Thereafter, statutory notices were issued for scrutinizing the return.

2.1 It was found that the assessee is engaged in the business of dealing in shares and securities, investment therein and advancing loans. It was further found that the assessee company has received dividend income, which is not includible in the total income by dint of the provision contained in section 10(33) of the Act. The assessee had paid interest on borrowed capital employed for investment in shares on which dividend income has been received. The assessee was required to furnish the working of such interest. However, the same was not filed. Therefore, an amount of Rs.74,87,662/- was worked out as relatable to the interest expenditure incurred for earning the dividend on a proportionate basis. It may be mentioned that the assessee had paid total interest of Rs.4,20,44,960/- in this year. The capital employed in acquisition of shares amounted to Rs.41,52,39,133/- and the total capital employed amounted to Rs.63,51,43,163/-. Apart from this, administrative expenses were also allocated to the dividend income at Rs.4,10,049/-. Thus, the total loss was computed at Rs.1,40,32,028/-. Penalty proceedings were also initiated u/s 271(1)(c) of the Act. These proceedings were disposed off on 09.11.2009 by levying minimum penalty of Rs.1,01,14,199/-. While doing so, reliance was placed on the provisions contained in Explanation 1 of section 271(1)(c) and it was held that the explanation tendered by the assessee is not bona fide, which has also not been substantiated. Thus, the claim was an attempt to evade tax.

3. The matter was agitated before the learned CIT(A) in quantum appeal. It was inter alia submitted that the expenditure has been incurred in the course of the business of the assessee of investing and dealing in shares and securities. The business is an indivisible business and for computation of its income all expenses have to be allowed. Therefore, the principle of apportionment of interest or expenditure is not applicable. It was further submitted that it would be incorrect to say the dividend income is tax-free. The Statute has merely changed the methodology of the taxation of the dividend income with a view to develop capital markets. The assessee has also been earning income by way of capital gains on transfer of shares. Coming to the provisions contained u/s 14A, it was submitted that the words “in relation to income” employed therein, signify direct or proximate relationship between the expenditure and the income. These words cannot be equated with the words “attributable to”. The learned CIT(A) considered the facts of the case and submissions made before him. It has been held that the expenses relating to earning the income, which does not form part of the total income, have to be disallowed. Relying on various case laws, the disallowance made by the Assessing Officer on the proportionate basis has been held. It appears that no further appeal has been filed by the assessee against this order.

3.1 Coming to the levy of the penalty, it has been mentioned that the assessment proceedings and penalty proceedings are different. The findings in assessment proceedings are not conclusive for levy of the penalty. The position of substantive law regarding penalty is that initial burden to rebut the presumption of Explanation 1 is on the assessee. This can be rebutted by showing his bona fides by an explanation. Therefore, mere disallowance or addition is not sufficient for the levy of the penalty. The assessee had made only a claim in regard to deduction of expenses. This claim was not found to be legally acceptable. However, the assessee had disclosed all material facts. Therefore, the claim cannot amount to furnishing of inaccurate particulars of income. Thus, the levy for both the years was deleted.

4. Before us, the learned DR relied on the order of the Assessing Officer while the learned counsel for the assessee relied on the order of the learned CIT(A). The facts regarding insertion of section 14A in the Act and filing the return of income also came up for discussion.

4.1 Having considered the rival arguments, it is found that section 14A had been inserted in the Act by the Finance Act, 2001, retrospectively w.e.f. 01.04.1962. The return of income for this year had been filed on 29.11.1999, i.e. prior to the retrospective insertion of this section. The provision, as originally inserted by the Finance Act, 2001, reads as under:-

"For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act."

4.2 From the history of the provision, it is clear that at the time of filing the return, this provision did not exist on the Statute Book, although, it was later on inserted retrospectively w.e.f. 01.04.1962. Thus, at the time of filing of the return the assessee could not have been expected to make any disallowance in terms of the provision. Even the revised return was filed prior to insertion of this provision as seen on the basis of facts on record that the revised return was processed on 28.03.2001. Therefore, the assessee could not have taken the provision into account while filing even the revised return. Prior to the insertion, there was a genuine difference of opinion as to whether expenditure related to exempt-income could be disallowed if the same has been incurred for the purpose of the business of the assessee. The general trend of the decisions had been that if any expenditure has been incurred wholly and exclusively for the purpose of business, a part thereof could be disallowed by allocating the same towards earning of the exempt-income. It is an accepted principle of law that concealment of income or furnishing of inaccurate particulars of income occurs when the return is filed. In this case, the return has been filed in time as per section 139(1) of the Act. On the date of filing the return, no fault can be attributed for the assessee for not disallowing any part of the expenditure incurred in the course of business by allocating it to the exempt income. The position in regard to assessments is different, namely, that the question of allowance or disallowance has to be decided on the basis of law existing at the time of making it. Therefore, even if the disallowance has been confirmed in appeal, that by itself does not lead to the charge of concealment of income or furnishing inaccurate particulars of income. Otherwise all the facts regarding incurring of expenditure have been disclosed by the assessee in the return or in the course of assessment proceedings. Therefore, there has been no suppression of facts. In view thereof, we are of the view that the levy of the penalty by the Assessing Officer was not justified on this ground alone and, therefore, the learned CIT(A) was right in deleting the penalty. We will deal with other grounds while deciding the appeal for assessment year 2001-02.

5. Coming to the facts of assessment year 2001-02, the admitted position is that the return was filed on 31.10.2001 declaring loss of Rs.1,07,34,986/-. This date falls subsequent to the insertion of section 14A in the Act. While computing the total income, the Assessing Officer disallowed interest of Rs.1,09,77,252/- and other expenses at Rs.5,12,401/-, on a proportionate basis. The total income was computed at Rs.7,54,667/-. This amount was set off against the brought forward loss to the extent it could be absorbed in the income of this year. Thus, the total income was

finally determined at nil. As mentioned earlier, the penalty was levied on the ground that the assessee's explanation is not bona-fide and it has failed to substantiate the Explanation. The learned CIT(A) has deleted the penalty by mentioning that the assessee had raised only a legal claim regarding deduction of expenses and all material facts had been disclosed.

5.1 Before us, the learned counsel relied on the decision of 'F' Bench of Delhi Tribunal in the case of Nalwa Investments Limited, in I.T.A. No.3805/D/2010 for assessment year 2005-06, dated 29.10.2010, a copy of which has been placed before us. In this case interest expenditure of Rs.95,00,000/- and other expenses of Rs.11,70,941/- had been disallowed by taking recourse to the aforesaid provision and by relating these expenses to the earning of dividend income. Penalty was also levied u/s 271(1)(c) of the Act by invoking the provision contained in Explanation 1 to section 271(1)(c). The penalty was deleted by the learned CIT(A) by holding that the disallowance is contentious in nature. Various arguments were made before the Tribunal. The learned counsel for the assessee placed reliance on the decision in the case of *CIT Vs. Late Shri G.D. Naidu and Others (1987) 165 ITR 63 (Madras); CIT Vs. Calcutta Credit Corporation (1987) 166 ITR 29 (Calcutta); CIT Vs. Ajaib Singh and Company (2002) 253 ITR 630 (P&H) CIT Vs. Harshvardhan Chemicals & Minerals Ltd. (2003) 259 ITR 212 (Rajasthan)* and *T. Ashok Pai Vs. CIT, 292 ITR 11 (Supreme Court)*. The Tribunal also considered the decision of Hon'ble Delhi High Court in the case of *CIT Vs. Zoom Communications Pvt. Ltd., (2010) 191 Taxman 179* and that of the Apex Court in the case of *CIT Vs. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158*. finally, the appeal of the revenue was dismissed by recording the following findings:-

"5. We have considered the facts of the case and submissions made before us. The facts of the case are that the assessee claimed payment of bank interest and charges amounting to Rs.1,10,02,323/-. Certain other expenses were also claimed. Besides interest income of Rs.14,38,977/-, the assessee earned dividend income on investment in shares. Such investment amounted to Rs.1,19,90,011/-. The dividend income was not liable to be taxed in view of the provisions contained in section 10(34) of the Act. The AO was of the view that the net interest of Rs. 95,63,346/-, demat charges of Rs. 60/- and proportionate expenses amounting to Rs. 11,70941/- were not deductible in computing the total income by dint of the provision contained in section 14A, as such expenses related to earning of tax-free income. The explanation of the assessee was twofold –(i) the assessee was primarily holding shares in selected companies of Jindal group with the intention to acquire and retain controlling stake in them, and (ii) the computation of disallowance u/s 14A involves considerable debate and two views are always possible. On careful consideration of various cases relied upon by the assessee, it is found that three major propositions arise therefrom –(a) penalty proceedings are quasi-criminal in nature and, therefore, it is for the revenue to establish contumacious conduct on the part of the assessee; (b) if all facts in respect of a claim have been furnished fully and correctly and no falsity is found therein, then, the claim made on the basis of such facts does not lead to inference of concealment of income and (c) the penalty is not leviable when there is honest difference of opinion between the assessee and the authorities in respect of admissibility of a claim.

5.1 In so far as proposition at (a) above is concerned, the same stands displaced by the decision of Hon'ble Supreme Court in the case of Union of India Vs. Dharmendra Textile Processors (2008) 306 ITR 27. It has been held in this case that the penalty

is levied for compensating the revenue on account of a wrong claim made by the assessee and it is civil in nature. Coming to the proposition at (b) above, claim of interest and expenditure finds a mention in the profit and loss account. As such no further facts have been furnished. No computation of disallowance was made u/s 14A as no disallowance was made in the return of income. However, the accounts have been audited and the return was accompanied by the tax audit report. The latter did not suggest any disallowance u/s 14A. Therefore, it can be inferred that all expenses were claimed in full as the auditors did not suggest disallowance of any part of the expenditure relating it to the dividend income. Thus, it can be concluded that the claim was made on the basis of tax audit report. There is no allegation by the AO that there was any collusion between the auditor and the assessee to enhance the loss in the return of income by ignoring the provision contained in section 14A. Therefore, it can be said that the assessee has furnished an explanation which is bona fide. In regard to proposition at (c) above, the finding of the ld. CIT(A) is that the disallowance is disputable. The section, as it existed at the time of filing the return, does contain a provision for disallowance of expenditure which is related to non-taxable income. Therefore, it is expected of any assessee to attempt at segregating expenditure which is related to such a claim. No attempt has been made in this behalf. However, it is also a fact that such segregation is beset with lot of problems as the issue has finally been laid to rest by introduction of Rule 8D in the Income-tax Rules in the year 2008. The assessee did not have benefit of this rule when it filed the return of income. Therefore, even in absence of any attempt on the part of the assessee, it can be said that questions of disallowance and its quantification are quite disputable and can lead to bona fide difference in opinion between the assessee and the authorities. In such a situation, the levy of penalty will not be justified."

5.2 On the other hand, the learned DR relied on the order of the Assessing Officer.

6. We have considered the facts of the case and rival submissions. We find that the assessee had claimed expenditure, which was incurred in the course of business, a part of which was disallowed by the Assessing Officer on a proportionate basis by allocating it towards the earning of dividend income. The facts are in pari-materia with the facts of the case of Nalwa Investments Limited (supra), in which the penalty pertained to a subsequent year, being assessment year 2005-06. The provision contained in section 14A was applicable to the assessee. It was *inter alia* mentioned that allocation of expenses is beset with a lot of problems and the issue was laid to rest by introduction of Rule 8D, in the year 2008. Therefore, even in absence of any attempt on the part of the assessee to segregate the expenditure, it can be said that the questions of disallowance and its quantification are contentious, which leads to the inference that the difference of opinion between the assessee and the authorities is *bonafide.* Respectfully following this decision, it is held that the learned CIT(A) was right in deleting the penalty.

7. In result, both the appeals are dismissed.

(This order was pronounced in open court on 21.4.2011.)