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

+ **ITA 480/2012**

% Date of Decision: 29th July, 2013

CIT Appellant
Through Mr. Rohit Madan, Advocate.

versus

HCIL KALINDEE ARSSPL Respondent
Through None.

+ **ITA 481/2012**

CIT Appellant
Through Mr. Rohit Madan, Advocate.

versus

HCIL ARSSPL TRIVENI (JV) Respondent
Through None.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (Oral)

1. These two appeals by the Revenue arise out of a common order of Income Tax Appellate Tribunal dated 25.11.2011 in the case of M/s. HCIL ARSSPL TRIVENI (JV) vs. ACIT and M/s. HCIL KALINDEE ARSSPAL (JV) vs. ACIT. The appeals

relate to Assessment Year 2007-2008.

2. By order dated 30.10.2012, the following substantial question of law was framed in these two appeals.

“Whether the ITAT erred in law and on merits in deleting the penalty levied u/s 271 (1) (c) of the Income Tax Act, 1961?”

3. The respondent assessee had claimed deduction under Section 80IA of the Act. They had also filed a copy of Form No.3CB and 3CD and Form No.10CCB in support. In the regular assessment proceedings, the Assessing Officer collected details from M/s. Rail Vikas Nigam Ltd and M/s. Rites Ltd. and came to the conclusion that HCIL ARSSPL TRIVENI (JV) had not executed the work but had given sub-contract to M/s. HCIL. Respondent assessee M/s. HCIL Kalindee ARSSPL similarly had not done any work but sub-contracted the work to M/s HCIL and M/s Kalindee Rail Nirman Project Ltd.

4. The aforesaid factual position was put to the respondent assessee and they were asked to reply and explain. Reply furnished was not accepted by the Assessing Officer, who also relied on Explanation to sub-Section 13 of Section 80IA of the Act which stipulates that the Section 80IA is not applicable to an assessee engaged in the execution of works contract.

Deduction under Section 80IA was denied and an addition of Rs.70,07,615/- and Rs.41,83,622 was made in the case of M/s. HCIL Kalindee ARSSPL (JV) and HCIL ARSSPL Triveni (JV) respectively. The assessee accepted the quantum order and did not file any appeal. Additions made attained finality.

5. Concealment penalty proceedings under Section 271(1)(c) were initiated and penalty of Rs.23,02,665/- imposed on M/s. HCIL Kalindee ARSSPL (JV) and Rs.13,52,107 on M/s. HCIL ARSSPL Triveni (JV), were upheld by the CIT (Appeals). They specifically rejected the contention that the assessee had acted bonafidely and were not liable as they had relied upon opinion in view of the forms which had been filled up by the Chartered Accountant.

6. The Tribunal in the impugned order dated 25.11.2011 while deleting the penalty has held:-

“7.4 In the light of aforesaid observations of the Hon’ble Apex Court, what is to be seen in the instant case, is whether the claim for deduction u/s 80IA of the Act, on the basis of certificate of the accountant, made by the assessee was bona-fide and whether all the material facts relevant thereto have been furnished and once it is so established, the assessee cannot be held liable for concealment penalty u/s 271 (i) (c) of the Act. The Assessing Officer has not been able to establish that the claim

of the assessee for deduction under section 801A of the Act was not bona fide. A mere rejection of the claim of the assessee by relying on difference interpretations does not amount to concealment of the particulars of income of furnishing inaccurate particulars thereof by the assessee. Hon'ble Apex Court in CIT V. Reliance Petroproducts (P) Ltd. [2010] 322 ITR 158/189 Taxman 322, after considering various decisions including Dilip N. Shroff v. Jt. CIT [2007] 291 ITR 519/161 Taxman 218 (SC) and Union of India V. Dharmendra Textile Processors [2008] 306 ITR 277/174 Taxman 571 (SC) concluded that a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars. Following this decision, Hon'ble jurisdictional High Court in M/S Dharpal Premchand (Supra) upheld the cancellation of penalty levied in relation to incorrect claim of deduction u/s 801A & 801B of the Act. Mere disallowance of a claim will not amount to filing of inaccurate particulars of income. It can at best be a "wrong claim" not a "false claim". In such circumstances, Hon'ble Delhi High Court held in the case of Commissioner of Income-Tax vs Bacardi Martini India Limited, 288 ITR 585 (Del) that no penalty was leviable. In the case under consideration, there is nothing to suggest that the assessee furnished any inaccurate particulars or concealed the particulars. Admittedly, the claim for deduction u/s 801A was duly supported by the certificate of the chartered accountant in the prescribed form. In these circumstances no fault can be found with the claim of the assessee that it had claimed the deduction in a bona fide manner. In somewhat similar circumstances. Hon'ble Punjab and Haryana High Court cancelled the penalty levied in respect of disallowance of deduction u/s. 801 in the case of CIT Vs SD Rice Mills, 275 ITR 206 (P & H). Similar view was taken in ACIT Vs. Arisudana Spinning Mills Ltd., 19 DTR.1 (Chd) and Model

Footwear P Ltd. Vs. ITO, 124 ITD 353(Del.). Moreover, mere fact that the report prepared by the CA in the form 10 CCB was not in accordance with the provisions of section 801A(7) of the Act, was not enough to hold that the mistake was not bona fide. This view is supported by the decision in the case of CIT Vs. Deep Tools Pvt. Ltd., 274 ITR 603 (P&H), where in also levy of penalty was held to be unjustified. In CIT Vs. Caplin Point Laboratories Ltd., 298 ITR 524 (Mad) Hon'ble High Court while adjudicating the levy of penalty in relation to incorrect claim for deduction u/s 80 HHC & 801 of the Act held in the light of aforesaid decision of the Hon'ble Apex Court in Dilip N. Shroff (supra) that a mere rejection of the claim of the assessee by relying on different interpretations does not amount to concealment of the particulars of income furnishing inaccurate particulars of income by the assessee.”

7. Penalty provisions are not criminal and do not require culpable mens rea. Whether or not the assessee had acted malafidely is not the relevant question to be asked and answered. The relevant question to be asked and answered is whether the assessee has discharged the onus and satisfied the conditions mentioned in Explanation 1 to Section 271(1)(c) of the Act.

The said explanation reads as :

“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 falls 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 bone 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.”

8. Penalty under Section 271(1)(c) of the Act is imposed when an assessee has concealed his income or furnished inaccurate particulars. In terms of the explanation quoted above, we have to examine whether the case falls within sub-clause (A) or (B) and the effect thereof. Sub-clause (A) applies when the assessee fails to furnish any explanation or when an explanation is found to be false. In the present case, sub-clause (A) would not be applicable as assessee has furnished an explanation, and the explanation has not been found to be “factually” false. The assessee had made a wrong claim for deduction under Section 80IA and, therefore, had furnished inaccurate particulars as the claim was not admissible. Sub-clause (B) of the explanation is, therefore, applicable and we have to examine the two conditions whether: (1) The assessee has been able to show that the explanation was bonafide; and (2) Facts and material relating to computation of his income had been disclosed.

9. Onus of establishing that the assessee satisfied the two conditions is on him i.e. the assessee. We shall examine the first condition i.e. whether the explanation of the assessee was bonafide. The second condition is satisfied.

10. In the present case, we note that Tribunal has proceeded on the premise that the claim for deduction under Section 80IA of the Act was duly supported by the Chartered Accountant's Certificate and prescribed forms signed by the Chartered Accountant. For claiming deduction under Section 80IA of the Act, filing of certificate and forms signed by the Chartered Accountant is mandatory and a requirement of law. All returns, where deduction under Section 80IA is claimed, must have such certificates and forms. Mere filing of the said forms/certificate cannot absolve and protect an assessee who furnishes in-accurate particulars. If the explanation and the reasoning of the Tribunal is accepted, then in all cases where a form/certificate is furnished by the Chartered Accountant but a wrong claim of deduction is made, no penalty under Section 271(1)(c) can be imposed. Merely because the assessee complies with the statutory procedural requirement of filing the prescribed form and certificate of the Chartered Accountant, cannot absolve the assessee of its liability if the act or attempt in claiming the

deduction was not bonafide.

11. Two reasons were given by the Assessing Officer why the claim for deduction under Section 80IA of the Act was rejected and should be denied. The first reason was that the respondent assesseees were involved in works contracts and Explanation to Section 80IA (13) stipulates that benefit under the said Section was/is not available to a contractor carrying on works contract. The said “clarificatory” explanation was inserted by the Finance Act, 2007 with retrospective effect from 01.04.2000. The CIT (Appeals) in the first appellate order has specifically mentioned that the Finance Act, 2007 received the Presidential assent on 11.05.2007 [(2007) 291 ITR (St.) 1]. The returns of income were filed by M/s. HCIL Kalindee ARSSPL (JV) and M/s. HCIL ARSSPL Triveni (JV) on 01.11.2007. An amendment of this nature invariably attracts attention and is seldom missed. Such amendments become topic of discussion and conversation in the professional circles. To show and establish bonafides, the assesseees had to show some more “tangible material” or basis as to why a clear statutory provision which excludes works contracts was ignored.

12. We are not stating or holding that penalty for concealment

can be imposed and is justified merely because interpretation or claim of the assessee is rejected. For interpretation and understanding tax laws assessee necessarily and do rely on professional or expert opinion and they cannot be subjected to penalty when the assessee discharges the onus that the claim was bonafide [see *Devsons Logistics Pvt. Ltd. vs. CIT* (2010)329 ITR 483 (Del.) and decision of this court dated 28th May, 2013 in ITA 804/2011 titled *Shervani Hospitalities Ltd. vs. CIT*]. The Act i.e. the Income Tax Act, 1961 is one of most vexed and complicated legislation. It has been subjected to numerous amendments from time to time. It requires highest degree of interpretative skills and divergent views on interpretation of tax provisions have been subject matter of plethora of judgments. It is not necessary that there should be uniformity or consistency of opinion on aspects of law. Law does not postulate that an assessee must accept an interpretation against him, even when a favourable view is credible and tenable. Penalty of concealment cannot be imposed because the assessee has taken a particular stand or had preferred an interpretation which was plausible and reasonable, but has not been accepted, unless the assessee had not disclosed facts before the authorities. Such cases have to be distinguished from cases where the claim of the assessee is

farfetched. Dubious and fanciful claims under the garb of interpretation, are a mere pretence and not bonafide.

13. It is not the case of the respondent assessee that there were conflicting decisions of High Court or there was a recent decision of the Supreme Court which had escaped attention or was not understood or an appeal or review etc. was pending before the Supreme Court. The explanation added was clear and categorical. The Tribunal has not referred to the Explanation to Section 80IA as to why and on what basis divergent interpretations were possible. Absurd or illogical interpretations cannot be pleaded and become pretence and excuses to escape penalty. "Bonafides" have to be shown and cannot be assumed. In the present case, the respondents have not been able to discharge the said onus and establish that they had acted bonafidely.

14. We also notice that the Tribunal has not dealt with the second reasoning given by the Assessing Officer to make the said addition; that the assessee had not carried out the work but had sub-contracted the same to a third party/parties.

15. In view of the aforesaid position, we answer the question of law in affirmative i.e. in favour of the Revenue and against

the respondent assessee. Order of the Tribunal deleting penalty is held to be contrary to law. Penalty imposed is upheld.

The appeals are disposed of. No costs.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

JULY 29, 2013
st/kkb