



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

+ ITA No. 211/2008

% Date of decision: 17.10.2008

COMMISSIONER OF INCOME TAX  
DELHI (CENTRAL) II ...APPELLANT  
*Through:* Mr. R.D. Jolly, Advocate.

*Versus*

USHA MARKETING (PVT.) LTD. ...RESPONDENT  
*Through:* Mr. Prakash Kumar, Advocate.

CORAM:  
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL  
HON'BLE MR. JUSTICE MOOL CHAND GARG

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|----|---|----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not?  | No |
| 3. | Whether the judgment should be reported in the Digest?                    | No |

SANJAY KISHAN KAUL, J. (Oral)

1. The respondent-company is dealing in sale and transfer of shares. In the assessment year 1986-87, the Assessing Officer permitted the conversion of certain shares from investment to stock-in-trade. In the Assessment Year 1987-88 (Assessment Year in question), the respondent-company booked certain business loss. The Assessing Officer, however, came to the conclusion



that the loss could not be treated as a business loss and this Order was upheld by the CIT(A) as also by the Tribunal.

2. The Tribunal in its Order dated 31.10.2001 in the quantum proceedings came to the conclusion that merely because the Assessing Officer in the Assessment Year 1986-87 had permitted the conversion of shares from investment to stock-in-trade could not *ipso facto* imply that the Assessment Officer for the year 1987-88 would be precluded from going into the real facts about the shares and determining whether the shares were held as investment or stock-in-trade. It was held that the shares could not be treated as stock-in-trade but had to be treated as investment.
3. The material observations of the Tribunal are that the transaction in shares which resulted in loss were not necessitated on account of any business requirement or any business decision but were the exigencies of the group companies determined by the group strategy. The respondent as an Assessee-Company was thus held as a tool of the group and the transfer of shares was made in pursuance thereto. It is in these circumstances that the loss was not held to be genuine and was held to be simply a book loss and not a real loss.



4. The present appeal arises from the impugned Order of the Tribunal dated 01.06.2007 in the penalty proceedings where the Tribunal has held that the present case is not one for imposition of penalty. The transactions which resulted in the loss have been looked into to come to the conclusion that each of the transactions was at market value, shares were transferred and money received. It is in these circumstances, that the Tribunal has observed that the explanation 1 to Section 271(1)(c) of the Income Tax Act, 1961 ('the said Act' for short) was not attracted.
5. The sub stratum of the plea of the learned counsel for the appellant/Department is that a substantial question arises in the present appeal on account of the fact that the two aforesaid Orders of the Tribunal have come to completely different conclusions on the same set of facts.
6. We are unable to accept the plea of the learned counsel for the appellant/Department for the reason that we are unable to derive the aforesaid conclusion on a reading of the two Orders. The Order in the quantum proceedings of the Tribunal shows that the only conclusion reached is that the transfer of shares could not be booked as a business loss as this was not necessitated by any business necessity but on account of a decision of the group as a whole and as a group strategy. The order of the Tribunal in the penalty proceedings has come to the



conclusion that the transactions in respect of the shares on the basis of which business loss was caused were genuine inasmuch as they were at market value and actual transfer of shares took place with the money passing. Learned counsel for the appellant/Department cannot seriously dispute that it is not as if every addition made by the Assessing Authority would result in a penalty being imposed. Unless the parameters of explanation 1 to Section 271(1)(c) of the said Act are attracted, the penalty would not be the result. The observations of the Tribunal in the impugned order which have cogently dealt with this aspect are re-produced as under:

“ No person to save a tax of 30% will choose to lose 100% of the capital. Whether the loss is allowable or not depends upon the facts of the case but whether from the same facts it can be concluded that the assessee has furnished inaccurate particulars of income so as to levy penalty under Section 271(1)(c), the answer is clearly no. The concealment can be of the particulars of income and no conclusion to be drawn from the very same particulars furnished. If on the basis of furnishing necessary particulars, adverse view is drawn i.e. to disallow the same, it does not result into penal action for levy of penalty for concealment of particulars of income. As per Explanation 1 to Section 271(1)(c), penalty is leviable only in a case where (a) such person fails to offer an explanation; or (b) offers an explanation which is found to be false or (c) 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 have been disclosed by



him. In the present case, it is seen that the assessee has offered an explanation. The same is substantiated also. The explanation offered by the assessee is not found to be false by the Assessing Officer. When the explanation was offered, the assessee filed all the relevant details of the transaction in sale of shares and debentures and when the claim was made, the same was bona fide as all the facts relating to such loss and material to the computation have been disclosed by him. Thus Explanation 1 to Section 271(1)(c) is not attracted herein. If on the facts furnished by the assessee the view adopted is that such loss is not allowable without any finding that the explanation offered by the assessee is false, the assessee cannot be visited with penalty by invoking Explanation 1 to Section 271(1)(c). Since there is no other allegation that the assessee has furnished inaccurate particulars of income except invoking Explanation 1 to Section 271(1)(c) for levy of penalty, in our opinion, since Explanation 1 is not attracted, penalty under Section 271(1)(c) is to be cancelled.”

7. We are in full agreement with the aforesaid observations of the Tribunal and thus no question of law arises in the present appeal.
8. Dismissed.

SANJAY KISHAN KAUL, J.

OCTOBER 17, 2008  
*dm*

MOOL CHAND GARG, J.