THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 17.05.2010
Judgment Delivered on: 24.05.2010

\+ **ITA 07/2010**

COMMISSIONER OF INCOME TAX ... Appellant

- versus -

ZOOM COMMUNICATION PVT LTD .... Respondents

Advocates who appeared in this case:
For the Appellant : Mr Sanjeev Sabharwal
For the Respondent : Mr Amit Dayal

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

V.K. JAIN, J.

1. This appeal is directed against the order of the Income Tax Appellate Tribunal dated 12.06.2009, passed in ITA No.1189/Del/2008, whereby it allowed the appeal filed by the assessee/respondent, against the order of the Commissioner of Income Tax (Appeals), dismissing its appeal and confirming the

penalty imposed on it under Section 271(1)(c) of the Income Tax Act (hereinafter referred to as 'the Act').

2. The assessee company, which is engaged in the business of hiring of audio and video equipments, filed return declaring income of Rs 1,21,49,861/-. The case was selected for scrutiny. It was noticed during assessment that in Schedule 9, relating to Administration and other Expenses, forming part of Profit & Loss Account, a sum of Rs 1,21,49,861/- had been debited under the head "equipment written off". It was stated by the assessee that due to oversight, this amount was not added back in computation of income and the same ought to have been adjusted in the block of assets. The aforesaid amount was added back to the income of the assessee, with its consent. It was further noticed that another sum of Rs 1 lakh had been debited under the head "income tax paid", in the above-referred Schedule relating to Administration and other Expenses. The assessee claimed that due to oversight, this amount was not added back in the computation of income. Hence, the Assessing Officer added this amount also to the income of the assessee. Penalty proceedings were also initiated against the assessee.

3. During penalty proceedings, the assessee claimed that

it had committed a bona fide mistake and all the facts material to the computation were disclosed. The Assessing Officer was of the view that there was no difference of opinion as regards disallowance of these expenses and the incorrect computation given by the assessee was an act of paying less tax than what was due from it. He was of the view that the assessee was a big company, assisted by a team of Tax Auditors and, therefore, it was a case of concealment of income as well as of furnishing wrong particulars for computation of income.

4. The Commissioner of Income Tax (Appeals) was of the view that assessee had committed serious laxity, while filing computation of income and the mistake committed by it could not be said to be bona fide. He, therefore, upheld the penalty imposed upon the assessee.

5. The Income Tax Appellate Tribunal accepted the contention of the assessee that due to oversight and bona fide mistake, the amount of income tax was not added back while filing Return of income and that no person would claim the amount of income tax as deduction, to evade payment of taxes. As regards the amount of Rs 13,24,539/- debited to Profit & Loss Account on account of equipments that had been written off, having become unusable and discarded, the Tribunal was

of the view that as per the provisions of Section 32(1)(iii) of Income Tax Act, the assessee could have claimed this amount as a deduction and merely because it had claimed the same as revenue deduction, which had been treated to be capital in nature by the Assessing Officer, could not be a basis to levy penalty under Section 271(1)(c) of the Act, when all the relevant materials relating to that issue were duly disclosed by the assessee in the course of the assessment proceedings. The Tribunal accordingly deleted both the penalties.

6. The following substantial question of law arises for our consideration in this Appeal:

> Whether the Income Tax Appellate Tribunal erred in deleting the penalty, in respect of the aforesaid two items, amounting to Rs.4.74 lacs approximately imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961?

7. Admittedly, in view of the provisions contained in Section 40(ii) of the Income Tax Act, the amount of income tax could not have been claimed as a deduction while computing income of the assessee. It is, therefore, an undisputed proposition that the assessee was not entitled to exclude the amount of income tax while computing its income for the purpose of income tax.

8. As regards the amount claimed on account of unusable and discarded assets, the Tribunal, in our view, was entirely incorrect in taking the view that the deduction claimed by the assessee was admissible to it under Section 32(1)(iii) of the Income Tax Act, though not as a revenue expenditure. Section 32(1)(iii) of the Act provides for deduction, in the case of any building, machinery, plant or furniture, in respect of which depreciation is claimed and allowed under Clause (i) and which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), of the amount by which money payable in respect of such building, machinery, furniture, together with the amount of scrap, if any, falls short of the written down value thereof. Thus, this clause would apply only in the case of machinery, plant, etc., in respect of which depreciation has been claimed and allowed under Clause (i). If the plant/machinery is such, to which the provisions of Clause (i) do not apply, no deduction in respect of such plant or machinery, etc. can be claimed under Clause (iii).

9. Clause (i) of sub-section (1) of Section 32 relates to assets of an undertaking engaged in generation and/or distribution of power. Admittedly, the assessee company was

not engaged in generation and for distribution of power, during the relevant year. Thus, the provisions of clause (i) of sub-section (1) of Section 32 do not apply in respect of the assets claimed to have become unusable and written off. Therefore, it cannot be disputed that the assessee had no justification to claim this amount of Rs 13,24,539/- as a revenue expenditure.

10. Section 271(1)(c) of the Act, to the extent it is relevant, provides for imposition of penalty in case the Assessing Officer, in the course of any proceedings under Act, is satisfied that any person had concealed particulars of his income or had furnished inaccurate particulars of such income. Explanation 1 to sub-Section (1) of Section 271 provides that where in respect of any facts material to the computation of the total income of any person, such person fails to offer an explanation or offers an explanation which is found to be false or he offers an explanation which he is not able to substantiate and fails to prove that such explanation is bonafide 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 total income of such person, as a result thereof, shall for the purpose of clause (c) be deemed to represent the

income in respect of which particulars have been concealed.

11. Thus, in case of failure of the assessee to offer any explanation or the explanation furnished by him being found false, penalty may be imposed on him. However, if an explanation is offered by the assessee, mere failure on his part to substantiate it will not be enough to warrant penalty, if the explanation is bonafide and all the facts relating to the same were disclosed by him in the Return. Explanation 1 to Section 271(1) would be inapplicable in respect of any amount added or disallowed as a result of rejection of the explanation furnished by the assessee, provided that his explanation is shown to be bonafide and all the facts relating to the same and material to the computation of his total income were disclosed by him.

12. Relying upon the decision of Supreme Court in **Commissioner of Income Tax vs. Reliance Petro Products Pvt. Ltd.:** *(2010) 322 ITR 158 (SC)*, it was contended by the learned counsel for the respondent that since the factual information in respect of the amounts wrongly included in Schedule 9 of Profit & Loss Account was disclosed by the assessee, this was not a case where penalty could be imposed under Section 271(1)(c) of the Act. In the case before the

Supreme Court, the assessee had claimed interest under Section 36(1)(iii) of the Act. The interest was paid on the loan which the assessee had utilized for purchasing some IPL shares by way of its business policies. However, the assessee did not earn any income by way of dividend from those shares. It was submitted before the Supreme Court that the assessee company was an investment company and that in its own case for the Assessment Year 2000-01 the Commissioner (Appeals) had deleted the disallowance of interest made by the Assessment Officer and the Tribunal had also confirmed the stand of the Commissioner (Appeals) for that year and it was on the basis of this that the expenditure was claimed. The Income Tax Appellate Tribunal had, however, restored the issue back to the Assessing Officer. In the appeal arising out of penalty proceedings, the Tribunal, in these circumstances, was of the view that the confirmation of disallowance by the Tribunal did not mean that the assessee had concealed the income or had filed inaccurate particulars thereof. Noticing that the assessee had given an explanation vide its letter dated March 22, 2006 giving reasons for claiming the interest as a deduction, the Tribunal was of the view that the onus shifted on the revenue to prove that the explanation offered by the

assessee was false. The Tribunal felt that the bona fides of the explanation were clearly proved from the fact that the High Court admitted the appeal of the assessee about the disallowance of the interest. The Tribunal held that if there could be two views about the claims of the assessee, the explanation offered by it cannot be said to be false. The penalty was accordingly deleted by the Tribunal. The order of the Tribunal was maintained by the High Court. It was contended on behalf of the Revenue, before the Supreme Court, that only the amount of interest paid in respect of capital borrowed for the purposes of the business or profession could have been claimed under Section 36(1)(iii) of the Act and the case before the Court was not in respect of the capital borrowed by the assessee. It was further pointed out that under Section 14A of the Act, no deduction could be allowed in respect of the expenditure incurred by the assessee in relation to income which did not form part of the total income under this Act. The attention of the Court was also drawn to Section 10(33) to show that the income arising from the transfer of a capital asset could not be reckoned as an income which formed part of the total income. The contention thus was that the claim made by the assessee was unacceptable in law.

13. The Supreme Court was of the view that under Section 271(1)(c), there has to be concealment of income of the assessee or he must have furnished inaccurate particulars of his income. The contention of the Revenue that it was a case of furnishing of inaccurate by making incorrect claim for the expenditure on interest was rejected noticing that the words "particulars" used in Section 271(1)(c) would embrace the meaning of the details of the claim made by the assessee and that the assessee before the Court had not given any such information which was found to be incorrect or inaccurate. No statement or details supplied by the assessee had been found to be factually incorrect. The Court rejected the contention that submitting an incorrect claim in law for the expenditure on interest would amount to giving inaccurate particulars of such income. The Court was of the view that by any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars.

14. After considering the meaning of "inaccurate" given in Webster's Dictionary, the Court was of the view that inaccurate particulars would mean the details supplied in the return which are not accurate, not exact or correct, not according to truth, or erroneous. It was held that making a claim which is

not sustainable in law, cannot, by itself, amount to giving inaccurate particulars.

15. It was contended before the Supreme Court that since the assessee had claimed deduction knowing that they were incorrect, it amounted to concealment of income since the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely claimed or an exaggerated amount could be claimed and since attempts of both the types reduces taxable income, both amount to concealment of particulars of one's income as well as to furnishing of inaccurate particulars of income. The contention was rejected by the Court.

16. The proposition of law which emerges from this case, when considered in the backdrop of the facts of the case before the Court, is that so long as the assessee has not concealed any material fact or the factual information given by him has not been found to be incorrect, he will not be liable to imposition of penalty under Section 271(1)(c) of the Act, even if the claim made by him is unsustainable in law, provided that he either substantiates the explanation offered by him or the explanation, even if not substantiated, is found to be bonafide. If the explanation is neither substantiated nor shown to be

bonafide, Explanation 1 to Section 271(1)(c) would come in to play and the assessee will be liable to for the prescribed penalty.

17. The assessee before us is a company which declared an income of Rs.1,21,49,861/- and accounts of which are mandatorily subjected to audit. It is not the case of the assessee that it was advised that the amount of income tax paid by it could be claimed as a Revenue Expenditure. It is also not the case of the assessee that deduction of income tax paid by it was a debatable issue. In fact, in view of the specific provisions contained in Section 40(ii) of the Act, no such advice could be given by an Auditor or other Tax Expert. No such advice has been claimed by the assessee even with respect to the amount claimed as deduction on account of certain equipment having become useless and having been written off. As noticed earlier, the Tribunal was entirely wrong in saying that Section 32(1)(iii) of the Act applies to such a deduction. It was not the contention before us that claiming of such a deduction under Section32(1)(iii) was a debatable issue on which there were two opinions prevailing at the relevant time. In fact, the assessee did not claim, either before the Assessing Officer or before the Commissioner of Income Tax(Appeals) that

such a deduction was permissible under Section 32(1)(iii) of the Act. No such contention on behalf of the assessee finds noted in the order of the Tribunal. Thus it was the Tribunal which took the view that Section 32(1)(iii) could be attracted to the deduction claimed by the assessee. It is also not the case of the assessee that it was under a bonafide belief that these two amounts could be claimed as Revenue Expenditure. The assessee, in fact, outrightly conceded before the Assessing Officer that these amounts could not have been claimed as revenue deductions. The only plea taken by the assessee before the Income Tax Authorities was that it was due to oversight that the amount of income tax paid by the assessee as well as the amount claimed as deduction on account of certain equipment being written off could not be added back in the computation of income.

18. In the case of Reliance Petro Products Private Limited(supra), the addition made by the Assessing Officer in respect of the interest claimed as a deduction under Section 36(1)(iii) of the Act was deleted by the Commissioner of Income Tax(Appeals) though it was later restored, by the Tribunal, to the Assessing Officer. The appeal filed by the assessee against the order of the Tribunal was admitted by the High Court. It

was, in these circumstances, that the Tribunal came to the conclusion that the assessee had neither concealed the income nor filed inaccurate particulars thereof. In recording this finding, the Tribunal felt that if two views of the claim of the assessee were possible, the explanation offered by it could not be said to be false. This, however, is not the factual position in the case before us. The facts of the present case thus are clearly distinguishable.

19. It is true that mere submitting a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee, but it cannot be disputed that the claim made by the assessee needs to be bonafide. If the claim besides being incorrect in law is malafide, Explanation 1 to Section 271(1) would come into play and work to the disadvantage of the assessee.

20. The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bonafide, it would be difficult to say that he would still not be liable to penalty under Section 271(1)(c) of the Act.

If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a licence to unscrupulous assessees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny and they would be assessed on the basis of self Assessment under Section 143(1) of the Act and even if their case is selected for scrutiny, they can get away merely by paying the tax, which in any case, was payable by them. The consequence would be that the persons who make claims of this nature, actuated by a malafide intention to evade tax otherwise payable by them would get away without paying the tax legally payable by them, if their cases are not picked up for scrutiny. This would take away the deterrent effect, which these penalty provisions in the Act have.

21. We find that the assessee before us did not explain either to the Income Tax Authorities or to the Income Tax Appellate Tribunal as to in what circumstances and on account of whose mistake, the amounts claimed as deductions in this

case were not added, while computing the income of the assessee company. We cannot lose sight of the fact that the assessee is a company which must be having professional assistance in computation of its income, and its accounts are compulsorily subjected to audit. In the absence of any details from the assessee, we fail to appreciate how such deductions could have been left out while computing the income of the assessee company and how it could also have escaped the attention of the auditors of the company.

22. The explanation offered by the assessee company was not accepted either by the Assessing Officer or by the Commissioner of Income Tax(Appeals). The view of Income Tax Appellate Tribunal regarding admissibility of the deduction on account of written off of certain assets, under Section 32(1)(iii) of the Act is wholly erroneous. The Tribunal has not recorded a finding that the explanation furnished by the assessee in respect of the deduction due to certain assets being written off was a bonafide explanation. The Tribunal has nowhere held that it was due to oversight that the amount of this deduction could not be added while computing the income of the assessee company.

23. As regards deduction on account of income tax paid

by the assessee, the Tribunal felt that since no person would claim the same as deduction, to evade payment of tax, the claim made by the assessee was not malafide. In the absence of the assessee company telling the Assessing Officer as to who committed the oversight resulting in failure to add this amount while computing the income of the assessee, under what circumstances the oversight occurred and why it was not detected by those who checked the Income Tax Return before it was filed and later by the auditors of the assessee company, we cannot accept the general view taken by the Tribunal. In our view, no such view could have reasonably been taken, on the facts and circumstances prevailing in this case and, therefore, the decision of the Tribunal in this regard suffers from the vice of perversity. We cannot accept the general proposition that no person would ever claim the amount of income tax as a deduction with a view to avoid payment of tax. No hard and fast rule in this regard can be laid down and every case will have to be decided considering the facts and circumstances in which such a deduction is claimed, coupled with as to whether the explanation offered by the assessee for making the claim, is shown to be bonafide or not.

24. For the reasons given in the preceding paragraphs,

we answer the question of law framed in this case in favour of the revenue and against the assessee. The Income Tax Appellate Tribunal erred in law in deleting the penalty in respect of the amount of Rs.1 lakh claimed as deduction on account of payment of income tax and the amount of Rs.13,24,539/- debited under the head 'equipment written off', in the Profit and Loss Account of the assessee. The appeal stands disposed of accordingly.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

MAY 24, 2010
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