



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

ITA 1582 OF 2010

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Judgment reserve on: 12.7.2011
Judgment delivered on: 03.8.2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through: Mr. M.P. Sharma, Sr. Standing
Counsel.

VERSUS

BRAHMAPUTRA CONSORTIUM LTD. . . .RESPONDENT

Through: Mr Satyen Sethi Advocate with
Mr. A.T. Panda, Advocate.

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The penalty imposed by the Assessing Officer under Section 271 (1) (c) of the Income-Tax Act (hereinafter referred to as 'the Act') and confirmed by the CIT (A) has been deleted by the Tribunal vide impugned orders dated 13th August, 2009. Aggrieved by this order of the Tribunal, the present appeal is preferred by the Revenue.



2. We may first give the narration of the facts which have led to the imposition of penalty on the assessee. The case pertains to the assessment year 2001-02 for which year the respondent/assessee had filed its return declaring loss at ₹93,74,724/-. During the assessment proceedings, the Assessing Officer noticed that the assessee had claimed the following deduction/expenditure:-

- (i) the fee of ₹ 1.59 lacs paid to the Registrar of Companies (ROC) for increasing authorized capital as revenue expenditure, treating the same as revenue expenditure, the Assessing Officer disallowed the same following the judgment of Supreme Court in 225 ITR 792.
- (ii) The assessee had shown addition of ₹ 28,53,130/- in building. However, supporting vouchers/evidence could not be produced. Accordingly the Assessing Officer estimated addition at ₹20,00,000/- and allowed depreciation at 5% on this amount. In the process, claim of ₹42,656/- was disallowed as excessive.
- (iii) The assessee had claimed depreciation @ 40% on earth moving equipment which consisted of excavators and tippers. As per the rules, only tippers were eligible for higher rate of depreciation at 40% and not excavators. When the assessee was confronted with this, it revised its claim, claiming 25% of depreciation instead of 40%. This



resulted in disallowance of excess depreciation in the sum of ₹ 65,89,097/-.

3. All the aforesaid disallowances were accepted by the assessee. At the same time, while passing the assessment order, the Assessing Officer, also initiated penalty proceedings. Show cause notice was given in this behalf which was replied to by the assessee. Finding the reply as unsatisfactory, the Assessing Officer imposed penalty of ₹ 26,29,147/- under section 271 (1)(c) of the Act holding that the assessee had made wrong claim of excess depreciation on plant and machinery as well as on building and also on the wrong claim of deduction of fee paid to ROC for increase of authorized share capital as revenue expenditure. While doing so, the Assessing Officer rejected the contention of the assessee that the assessee had, by mistake claimed depreciation of 40% on tippers and excavators and since it had itself revised the computation, it was a bona fide error. The Assessing Officer took the view that the assessee revised its computation only when the wrong claim of depreciation was discovered by the AO, that too, when it could be discovered after proper enquiry and scrutiny of the details. The Assessing Officer further recorded in his order that only when the assessee was confronted with the facts and specifics queries were raised vide orders dated 31st March, 2004 that the assessee accepted the position and revised the claim and,



therefore it was clearly a case of furnishing of inaccurate particulars for the claim of excessive depreciation.

4. The Assessing Officer also held the view that in so far as addition to the building is concerned, claim was made without supporting evidence and, therefore, the Assessing Officer had to allow the depreciation on estimated cost only. The excessive depreciation on that account also was thus treated as a false claim.

5. Insofar as claim for deduction of fee paid to ROC is concerned, as per the Assessing Officer this fee was paid for increase of authorized share capital which could not be treated as revenue expenditure in view of the categorical judgment of the Apex Court in ***PSIDC Ltd. Vs. Commissioner of Income Tax***, 225 ITR 792 and, therefore, the claim was palpably false.

6. The CIT (A) concurred with the aforesaid approach of the Assessing Officer holding that in view of Explanation-I to Section 271 (1) (c) of the Act disallowances of above claims deem to be the income in respect of which particulars had been concealed by the assessee within the meaning of Section 271(1)(c) of the Act and consequently the assessee was liable for penalty. According



to the CIT (A) it also amounted to furnishing of inaccurate particulars of income.

7. The aforesaid approach of the Assessing Officer and CIT (A) has not found favour with the Tribunal. According to it, insofar as disallowance of part depreciation on building is concerned, it was merely on account of estimated cost of building which did not call for any penalty. In respect of penalty on the wrong claim qua payment of fee to the ROC, the penalty has been deleted on the ground that explanation given by the assessee could not be called *mala fide* and no particulars were concealed in this behalf. The Tribunal accepted the explanation of the assessee that it was claimed as revenue expenditure by placing reliance on several judicial pronouncements, and therefore, the claim was not *mala fide*.

8. Likewise, regarding the claim for depreciation, according to the Tribunal, it was a case of bona fide mistake as the assessee had claimed depreciation treating the earth moving equipment to be one block assets consisting of tippers and excavators and claiming depreciation @ 40% on the entire block of earth moving equipment. When the assessee found, during the course of assessment proceedings, that it was infact entitled to depreciation



@ 25% on excavators, the assessee accepted the said mistake immediately and revised the claim of depreciation by reducing it. The explanation was accepted as genuine and *bona fide* resulting into deleting of penalty on this count as well.

9. We may state at the outset that entire thrust of argument of the counsel for the appellant was to justify the penalty imposed on wrong claim of depreciation at higher rate on excavators. It was argued that the Schedule clearly provides that on excavators the depreciation allowable is at 25% and it is tippers on which depreciation is to be allowed is 40% by mixing the acquisition cost of tippers with excavators, the assessee had claimed depreciation at 40% on both excavators and tippers which was contrary to the specific provisions and thus Explanation-I to Section 271 (1)(c) clearly attracted as it would amount to giving inaccurate and false particulars and concealing material particulars for higher claim.

10. There cannot be dispute about the aforesaid provisions allowing depreciation @ 25% on excavators. However, the circumstances under which the claim was made at 40%, shows that it was a genuine and bona fide which was directed by the assessee. In this year, the assessee had acquired new excavators and tippers for a total sum of ₹1,78,75,260/- and ₹6,36,88,865/-



respectively. All block of assets were termed as 'earth moving equipments' and taken in the profit and loss account under the aforesaid head. The cost on tippers was much higher on which depreciation was rightly claimed at 40%. However, since the entire block consisting of excavators and tippers was taken under the head 'earth moving equipment', the explanation given by the assessee was that inadvertently, in respect of excavators the depreciation was claimed at 40% instead of 25%. This explanation has been accepted as genuine and *bona fide* by the Tribunal which is the final fact finding authority. In ***CIT Vs. Escorts Finance Ltd.*** (2010) 328 ITR 44 this Court has held that deletion of penalty on the ground of inadvertent error is a finding of fact. Infact, the Assessing Officer did not even contradict the plea of the assessee that excess claim of depreciation was not an inadvertent error.

11. That apart, other element present in this case gives a strong indication that the error was genuine and *bona fide*. Return for the assessment year in question was filed declaring loss of ₹ 93,74,724. Assessment was also completed at loss of ₹ 23,33,321/-. Therefore, excess claim of depreciation was not advantageous to the assessee. Had depreciation been claimed @ 25%, it would have resulted in higher depreciation in the succeeding years which would, , have consequently reduced the



total income of succeeding years. It indicates that excess claim of depreciation was not a device, rather it was an inadvertent error.

12. Thus by making claim of depreciation at higher rate in this year, where the income tax return was at loss, the assessee did not gain any mileage. On the contrary, it was better for him to claim depreciation @ 25% in this year resulting into higher written down value in the next year for claim of depreciation of a higher amount on higher written down value thereby reducing the tax liability.

13. The Assessing Officer was not correct in holding that submitting inaccurate claim would amount to giving inaccurate particulars. Such a contention of the Department is specifically rejected by the Supreme Court in a recent judgment in the case of **CIT Vs. Reliance Petroproducts Pvt. Ltd.** (2010) 322 ITR 158.

14. We are, thus, of the opinion that no substantial question of law arises in this appeal which is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

AUGUST 3, 2011

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