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

\+ **ITA No.944 of 2011**

Reserved on : 30th November, 2011.
% **Date of Decision** : 13th January, 2012.

KANCHENJUNGA ADVERTISING P.LTD. ……..Appellant
Through Mr.S.Krishnan, Advocate.

VERSUS

COMMISSIONER OF INCOME TAX-I …..Respondent
Through Mr. N.P.Sahni, Standing Counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

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

R.V. EASWAR, J.:

This is an appeal filed by the assessee under Section 260A of the Income Tax Act ("the Act", for short) against the order of the Tribunal dated 21st January, 2011 in ITA No.81/Delhi/2010 relevant to the assessment year 2000-01.

2. On 30th November, 2011, the following substantial question of law was framed:-

> "Whether the Income Tax Appellate Tribunal was correct in upholding the order of penalty for concealment under Section 271(1)(c) of the Income Tax Act, 1961?"

3. The facts leading up to the levy of penalty may be noticed in brief. The assessee is a domestic company. In respect of the year under appeal, it filed a return of income on 27th November, 2000 declaring income of Rs.1,43,40,680/-. The return was first processed under Section 143(1), but was thereafter selected for scrutiny and notice under Section 143(2) was issued. The assessee participated in the enquiry and submitted the details called for. In the course of the assessment proceedings, the assessing officer noticed that an amount of Rs.2,38,32,392/- was claimed by way of bad debts as a deduction. He, therefore, called upon the assessee to explain why the claim should not be disallowed as was done in the assessment year 1990-2000 wherein bad debts of Rs.75 lacs had been disallowed. The assessee explained that in the assessment year 1999-2000 there were no documents to substantiate that the debts had become irrecoverable and bad, whereas in the year under appeal the assessee was in possession of all the documents to substantiate the claim. It was submitted that out of the total amount of bad debts claimed as a deduction, a sum of Rs.2,10,34,000/- represented the principal amount and Rs.22,65,867/- represented interest offered for taxation in various years and another sum of Rs.5,32,325/- represented lease rent which was offered for taxation in various years. In support of the claim for

deduction, it was further pointed out by the assessee that it was in the business of money lending for more than 10 years and from the assessment year 1989-90 to the assessment year 1998-99 it had lent a total amount of Rs.41,97,02,612/- and offered an aggregate amount of Rs.8,17,39,297/- as interest for taxation. It was also pointed out that the assessee had been showing the business as money lending/finance in its return, tax audit report and Memorandum and Articles of Association. As regards the query raised by the assessing officer relying upon the assessment of the earlier year, the assessee submitted that even in that year the assessee's claim that it was carrying on the business of money lending was not rejected.

4. The assessee, in support of the claim for deduction of bad debts, furnished copies of the loan agreements with each of the parties, the correspondence that took place and the particulars about action taken under Section 138 of the Negotiable Instruments Act. This is recorded in paragraph 6 of the assessment order. It has further been recorded therein that all the bad debts had been written off in the assessee's books of accounts.

5. In the aforesaid background, the assessing officer took up for consideration the assessee's claim for deduction of Rs.50 lacs as bad debts in the account of M/s Dimension Investments and Securities Ltd. (DISL, for short). The amount was deposited by the assessee with the above company as share application money. However, no shares were allotted

to the assessee and, therefore, the assessee chose to exercise the option of converting the share application money into loan. This option was exercised by the assessee by writing a letter on 6th July, 1998 to DISL stating that since the shares were not allotted, the assessee was exercising its option to convert the share application money into a loan bearing interest at 22% compounded quarterly, w.e.f. 23rd February, 1998. However, there was no response from DISL. It appears that the assessee company thereafter sought legal opinion from its advocate who stated that the assessee should make efforts to get an acknowledgement of the debt from DISL as to the non-allotment of the shares even after receiving share application monies. Thereafter the assessee wrote off the amount of Rs.50 lacs as DISL had not even acknowledged the amount as a debt and the assessee was left with no chance of recovery.

6. When these facts were brought to the notice of the Assessing Officer, it would appear that the assessing officer raised a query as to how the amount can be allowed as a bad debt when DISL did not even acknowledge the debt. In fact, he appears to have taken the view that the loss of share application money amounted simply to a loss of investment, in other words, a capital loss. At this juncture, the assessee put forth an alternative plea by letter dated 21st January, 2003 that if the claim of bad debt was not allowable, the deduction may be allowed under Section 28 itself or as a capital loss, presumably under Section 45 of the Act, as the assessee was not allotted shares against the application money.

7. The assessing officer rejected the main claim as well as the alternative claim. According to him the assessee was not in the business of buying and selling shares and the shares were acquired only as an investment. Therefore, the loss of investment was not a revenue loss. He also did not accept the assessee's alternative plea that the loss was allowable as a capital loss under Section 45. According to him, Section 45 required that there should be a capital asset and the same should have been transferred by the assessee. In his view, both these requirements were missing in order to sustain the claim under Section 45. He posed to himself a query as to whether the right to receive shares on allotment constituted a capital asset and answered the same by opining that such right cannot be treated as a capital asset under Section 2(14) of the Act. As regards the assessee's plea that there was a transfer of the capital asset, the assessing officer took the view that according to the assessee the option to convert the share application money into a loan was exercised by the assessee w.e.f. 23rd February, 1998 which date fell in the accounting period ended on 31st March, 1998 relevant to the assessment year 1998-99 and not in the previous year relevant to the assessment year under appeal and, therefore, even if it is reckoned that there could have been relinquishment or extinguishment of a right of the assessee to get the shares allotted in his name, such extinguishment or relinquishment did not take place in the previous year relevant to the assessment year under appeal. In this view, he also rejected the alternative plea of the assessee.

8. The assessee carried the matter in an appeal to the CIT(Appeals) and before him, in addition to the facts and documents filed at the time of the assessment proceedings, the assessee also filed the status report submitted by the Director to the assessee's Board of Directors, on the basis of which the amount in the account of DISL was written off, balance sheets etc and contended that its claim for allowance of the bad debt should be allowed. Reliance was also placed on the judgment of the Supreme Court in 84 ITR 48(sic) and that of the Patna High Court in 88 ITR 492(sic).

9. The CIT(Appeals), after considering the matter in some detail recorded the following findings:-

(a) The investment by way of share application monies was made in DISL by application dated 8th September, 1997.

(b) Since upto 23rd February, 1998 DISL did not allot the shares, the assessee wrote to DISL on 6th July, 1998 for conversion of the money into a loan. This was a measure of prudence, taken in order to earn interest on the amount till the shares are allotted.

(c) Even after the letter dated 6th July, 1998, there was total silence on the part of the DISL and finding the position of the company unsound, the Director of the assessee recommended the write off of the amount which was accepted by the assessee-company on 25th March, 2000.

(d) The director's report reveals that the assessee was entertaining the hope that the shares would be allotted and listed in premier stock exchanges and would fetch a high price on their sale. Right from 1997, the motive of the assessee was to earn profits on the investment, once the shares were listed in the stock exchange.

(e) Though initially the investment was on capital account, it got converted in to a loan from 23rd February, 1998. It is a case of a business transaction having turned sour and a case of loss of money advanced in the course of business.

(f) The assessing officer had not disagreed with the assessee's claim that it was engaged in the money lending business and the profits from such business have earlier been returned for taxation.

(g) In the earlier year, the CIT(Appeals) allowed the assessee's claim of bad debt.

10. On the basis of the above findings, the CIT(Appeals) allowed the assessee's claim and directed the assessing officer to allow the claim of bad debts. He observed further that as and when the assessee makes recoveries in the subsequent years, they can be brought to tax under Section 41(1). The alternative claim regarding capital loss was however rejected.

11. The revenue preferred an appeal to the Tribunal in ITA No.3938/Delhi/2003 challenging the order of the CIT(Appeals). By order

dated 4th January, 2008, the Tribunal accepted the appeal. The tribunal recorded the following findings:-

(a) Clause 10 of the Memorandum of Association relied upon by the assessee did not authorize it to deal in shares. It only authorised the assessee to invest and deal with surplus monies which were not immediately required for the business. Inter corporate deposits made by the assessee can in no case to be treated as financial or money lending activity.

(b) Clause 20 of the Memorandum of Association which authorized the assessee to advance a loan also did not advance the assessee's case because the deposit of Rs.50 lacs as share application money and the subsequent failed attempt of the assessee to get the same converted into loan would not amount to monies being lent in the ordinary course of money lending business.

(c) The loan has not been taken into account in computing the income of the assessee for any of the earlier years, a condition which is required to be satisfied as per Section 36(2)(i) of the Act in order to obtain deduction as a bad debt.

(d) The deposit of Rs.50 lacs as share application money was made to acquire a capital asset and did not represent monies lent

in the ordinary course of advertising, financing or money lending business.

On the basis of the above findings, the Tribunal allowed the appeal filed by the revenue, reversing the order of the CIT(Appeals).

12. The assessee carried the matter in appeal before this Court in ITA No.1155/2008 which was disposed of by judgment dated 18th November, 2010, a copy of which has been filed before us. This Court affirmed the order of the Tribunal passed on 4th January, 2008.

13. After the order passed by the Tribunal, proceedings for the imposition of the penalty under Section 271(1)(c) of the Act were initiated on the ground that the assessee furnished inaccurate particulars by claiming the deduction of Rs.50 lacs as a bad debt. It was represented before him that the deduction was claimed under the bonafide belief that it was allowable. This explanation was rejected and the Assessing Officer observed that having regard to the provisions of Section 36(1)(vii) of the Act, it must be held that the assessee knowingly claimed a capital loss as expenditure of revenue nature and thus furnished inaccurate particulars of income. Accordingly, by order dated 26th September, 2008 he imposed a penalty of Rs.19.25 lacs on the assessee.

14. The assessee carried the matter in appeal to the CIT(Appeals). The CIT(Appeals) cancelled the penalty by observing that regarding the allowability of the assessee's claim for deduction of the bad debt, there

was a difference of opinion at different levels. The Assessing Officer had disallowed the claim, but the CIT(Appeals) allowed the same. However, the Tribunal on revenue's appeal reversed the decision of the CIT(Appeals). The assessee merely made an incorrect claim which does not amount to furnishing of inaccurate particulars. It had filed all relevant details along with the return of income in the course of the assessment proceedings and the claim was also made on a bonafide belief that it was allowable. The assessing officer, it was observed, did not bring on record any material which could establish that the assessee had made a false or inflated claim for deduction. There was only a difference of opinion regarding the allowability of the claim. In these circumstances, the CIT(Appeals) held that no penalty was imposable and accordingly cancelled the same.

15. The revenue carried the matter in appeal to the Tribunal in ITA No.81/Delhi/2001 which was disposed of by the Tribunal by order dated 21st January, 2011, which is the impugned order. The Tribunal, for the reasons stated in its order, allowed the appeal of the revenue and restored the penalty.

16. It is a well settled position that assessment proceedings and penalty proceedings are different in nature and that the findings given in the assessment proceedings, though may constitute good evidence, cannot constitute conclusive evidence for the purposes of levying penalty. (please see ***CIT v. Anwar Ali (1970) 76 ITR 696, CIT v. Khoday***

Eswarsa and Sons (1970) 83 ITR 369, and Anantharam Veerasinghaiam & Co. v. CIT (1980)123 ITR 457). It is also well settled that for the purpose of Section 271(1)(c) of the Act, the mere making of an incorrect claim does not amount to furnishing of inaccurate particulars of income. Where the assessee has submitted all the material and relevant facts relating to the claim and has made a complete disclosure, but takes a legal contention or position that a particular receipt is not taxable as income or that a particular expenditure or loss is allowable as deduction, the mere fact that the Assessing Officer took a different view of the allowability of the expenditure or loss or the taxability of the receipt, without anything more and without unearthing any new material or fact kept back by the assessee, cannot invite penalty on the ground of furnishing inaccurate particulars of income. Reference in this connection may be made to the following judgments:-

1. Cement Marketing Co. of India Ltd. v. Asst. Commissioner of Sales Tax, (1980)124 ITR 15 (SC)

2. ITO v. Burmah Shell Oil Storage & Distributing Co. of India Ltd. (1987)163 ITR 496 (Cal)

3. Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Income Tax (1986)157 ITR 822 (Del)

4. CIT v. G.D.Naidu (1987) 165 ITR 63 (Madras)

17. In a series of judgments, this Court has affirmed the aforesaid legal position and these judgments are :-

1. CIT v. Bacardi Martini India Ltd. (2007) 288 ITR 585
2. CIT v. Nath Bros. Exim International (2007) 288 ITR 670
3. CIT v. International Audio Visual (2007) 288 ITR 570

18. In ***CIT v Reliance Petroproducts P. Ltd (2010) 322 ITR 158***, the Supreme Court explained the meaning of the term "furnishing of inaccurate particulars". It was observed that "inaccurate particulars" means 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 furnishing of inaccurate particulars. It was further held that by no stretch of imagination can it be held that making an incorrect claim in law would tantamount to furnishing of inaccurate particulars, provided the statement or details supplied by the assessee had not been found to be factually incorrect.

19. Explaining the above decision, a Division Bench of this Court in ***CIT v Zoom Communication P. Ltd. (2010) 327 ITR 510*** held as follows:

> "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."

It was further observed by this Court as under:

"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.

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."

20. In the above case before this Court the assessee claimed deduction of income-tax paid even though such deduction was statutorily prohibited. The assessee also claimed write off of equipment as revenue loss. Both the claims were found to be so untenable as to fall within the mischief of the expression "furnishing of inaccurate particulars". A line of distinction thus appears to have been drawn in Zoom Communication (supra) so as to prevent misinterpretation of the view taken by the Supreme Court in Reliance Petroproducts (supra). In our view, the present case falls within the ratio of the judgment of this court in Zoom Communications (supra) and not under that of Reliance Petroproducts (supra), as the following discussion would show.

21. The applicability of the well settled legal position stated as above is however, conditioned by the particular facts of each case. Keeping in view the legal position, if we look at the conduct of the assessee before us, there can be no doubt that it had submitted some of the details with regard

to the claim of bad debt of Rs.50 lacs. It did furnish the Memorandum of Article of Association, the copy of the letter dated 6th July, 1998 written to DISL converting the share application money into loan, copy of the Director's report recommending the write off of the debt, copies of the loan agreements between the assessee and various parties and so on. It had also raised a plea before the Assessing Officer that it was carrying on the business of money lending for more than 10 years during which it had lent an aggregate amount of Rs.41.97 crores from the assessment year 1989-90 to the assessment year 1998-99 and had offered an aggregate interest income of Rs.8.17 crores for these years. It had also pointed out that in the assessment year 1999-2000 also a similar claim had been made but it was not rejected on the ground that the assessee was not carrying on any money lending business. However, the assessee did not bring to the notice of the assessing officer that no interest from the amount of Rs.50 lacs advanced to DISL had been offered and assessed to income tax in any of the earlier previous years. The assessee was under duty to do so and the omission to bring this vital fact to the notice of the Assessing Officer makes the particulars filed in support of the claim inaccurate. The assessee was particularly under a duty to explain as to why despite allegedly writing to DISL on 6th July, 1998 that it had exercised the option to convert the share application money into a loan bearing interest at 22% compounded quarterly, no interest was charged from DISL. Since this letter was allegedly written on 6th July, 1998 stating that the option would be taken as exercised from 23rd February, 1998, the assessee was under a

duty to point out to the Assessing Officer whether any interest was charged in accordance with the letter and included in the returns for the assessment years 1998-1999, 1999-2000 and 2000-2001. In case the assessee did not take into account the interest on accrual basis, despite following the mercantile system of accounting, the reason why it did not do so should also have been explained to the Assessing Officer. The assessee failed to do so. This creates a grave doubt about the genuineness of the intention of the assessee as expressed in its letter dated 6.7.1998. Thus the onus placed on the assessee to make full disclosure of all relevant facts remains undischarged.

22. The Tribunal in its order dated 4th January, 2008 recorded a finding in paragraph 9 to the following effect:-

> "We also find that the amount has also not been taken into account in computing the income of the assessee of the previous year relevant to the assessment year (under) consideration of an earlier previous year."

It was open to the assessee to show that the debt had been taken into account in computing the income of the earlier year or years or of the year under consideration, even in the penalty proceedings. However, no material was brought by the assessee in the course of the penalty proceedings or even in the course of the hearing of the appeal before us to show that the debt had been taken into account in the manner required by Section 36(2)(i) of the Act. When one of the important conditions for the

allowability of bad debt was not satisfied and the same was within the knowledge of the assessee, it was duty bound to disclose the same in order to show its bonafide. The particulars furnished by the assessee were thus not complete, and were, therefore, inaccurate.

23. In the course of its order dated 4th January, 2008 in the quantum proceedings, the Tribunal has observed that the amount of Rs. 50 lacs paid as share application money, which was subsequently converted into loan, cannot amount to monies lent in the ordinary course of money lending business of. It was also observed that even if it is assumed that the money was converted into a loan, at best it can only be an inter-corporate deposit or loan which cannot constitute a loan advanced in the ordinary course of the business of the money lending. It is also a fact, which the assessee has not been able to disprove throughout, that though it had intimated its intention to convert the share application money into a loan, there was no acceptance from DISL. Therefore, it is only a unilateral act of the assessee to convert the amount of the share application monies into loan. If it is a loan, the assessee in terms of its letter to DISL ought to have shown interest accrued in the profit and loss account and as per the Act. Since in fact no interest was charged, the amount continued to remain as share application money. If it is not in fact a loan then there is no question of charging any interest. If no interest was charged the amount cannot be considered as a money lending advance since the essence of money lending business is the charging of interest. It follows that the

conditions laid down in Section 36(2)(i) do not stand fulfilled. In light of this position, the furnishing of the director's report, the actual write off, filing of balance sheets, memorandum and articles of association etc. have no relevance to the claim of the assessee.

24. All the relevant facts were within the knowledge of the assessee. Despite that it did not place the crucial fact before the departmental authorities. Not being able to convince them on the question of bad debt the assessee took an alternative plea that the write off of the debt should be allowed as a capital loss, presumably under Section 45. When the Assessing Officer called upon the assessee to spell out what was the capital asset involved and whether there was a transfer of the capital asset, the assessee could not put forth any convincing reply. Even the CIT(Appeals) did not accept the assessee's plea that it was a capital loss allowable under Section 45, against which the assessee did not file any appeal to the Tribunal. This only shows that the alternative plea was an act of despair.

25. The aforesaid discussion would show that even an independent appraisal of the entire material on record in the course of the penalty proceedings would establish that the assessee had furnished inaccurate particulars of income. It is not a case of the assessee having filed all the relevant facts relating to the claim and taking a legal contention or position with which the departmental authorities have not agreed. It appears to us to be a case where the assessee failed to furnish the

complete facts relating to the claim before the Assessing Officer. There was lack of bonafide on the part of the assessee.

26. For the above reasons, we are satisfied that the order of the Tribunal passed on 21st January, 2011 restoring the penalty does not merit any interference. The substantial question of law is answered in the affirmative and the appeal of the assessee is accordingly dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

January 13, 2012
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