



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

% *Reserved on: 6th November, 2012*
Date of Decision: 6th December, 2012

+ **ITA 1855/2010**

COMMISSIONER OF INCOME TAXAppellant
Through: Mr.Sanjeev Sabharwal, Sr. Standing
Counsel with Mr.Puneet Gupta,
Standing Counsel.

Versus

MORGAN FINVEST PVT LTD.Respondent
Through: Mr.Ajay Vohra, Ms.Kavita Jha &
Mr.Somnath Shukla, Advs.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

This is an appeal filed by the CIT under Section 260A of the Income Tax Act, 1961 (Act, for short).

2. Admit.
3. The following question of law is framed:-

“Whether the Tribunal erred in law in deleting the penalty of ₹14,46,239/- imposed by the assessing officer under Section 271(1)(c) of the Income Tax Act, 1961 and confirmed by the CIT (Appeals)?”



4. The appeal relates to the assessment year 2005-06. The assessee, respondent herein, is a private limited company engaged mainly in the business of investment and to undertake and transact financial services. It filed its return of income declaring 'nil' income and the same was processed under Section 143(1). It was later picked up for scrutiny and notice under Section 143(2) was issued. It was noticed by the assessing officer in the course of the assessment proceedings that the assessee-company had claimed depreciation of ₹39,52,300/- in respect of a property at No.3, Eastern Avenue, Maharani Bagh, New Delhi. The property was purchased on 29.4.2004 for ₹3.5 crores from one Smt.Heminder Kumari, on which stamp duty and taxes of ₹25 lakhs were also paid. The sale deed executed on 29.4.2004 was registered. It would appear that the assessee had raised a loan in order to acquire the property. It was further noticed by the assessing officer that the property was sold by the assessee on 18.9.2004 to a company, viz. Hindustan Udyog Limited for a consideration of ₹4.5 crores. An agreement of sale was executed on the said date; possession of the property was however, not given, nor was any sale deed executed and registered. The assessing officer found on examination of the facts that the property was residential in nature and had not been put to use for the purpose of the assessee's business. He sent his Inspector to make local inquiries about the ownership of the property. The Inspector was informed by the caretaker that the property remained vacant since it was sold by the original owner i.e. Smt.Heminder Kumari. He was further informed by the caretaker that one Smt.Ritu Aggarwal of Kolkata was the present owner of the property. According to the information furnished by the caretaker, this lady lived in Kolkata and came to Delhi twice or thrice to inspect the property. From these facts the assessing officer concluded that the assessee had kept the property



with it only for four months or so and had entered into an agreement to dispose of the same, which indicated a motive to earn short-term gains and not any intention to use the property for the purpose of the business. He also noticed that the building cost on which depreciation was claimed included the cost of land on which no depreciation was allowable under the Act. On this basis, the assessing officer held that the property had not been used by the assessee for the purpose of its business and, therefore, no depreciation was allowable under Section 32 of the Act. He, therefore, did not allow the depreciation. It may be added that in course of the assessment proceedings, the assessee informed the assessing officer that Smt.Ritu Aggarwal was one of the directors of the assessee-company and reported as such in the list of directors.

5. The assessee did not file any appeal against the non-allowance of the depreciation.

6. The assessing officer thereafter initiated proceedings for the levy of penalty for concealment of income under Section 271(1)(c) of the Act. The assessee's explanation was called for and after considering the same, the assessing officer, came to the conclusion that the assessee by claiming depreciation in respect of a property which was not used for business purpose and by including the cost of land in the claim of depreciation, though no depreciation is allowable under the Act on the land, had not only concealed its income but also furnished inaccurate particulars thereof. He accordingly imposed the minimum penalty of ₹14,46,239/- by order dated 30.6.2008.

7. The assessee challenged the levy of penalty in appeal before the CIT(Appeals) and contended that the property was acquired for the purpose of



the business but later it was not found suitable for commercial activities because of prevailing local conditions and was therefore sold after four months. It was also pointed out that even after disallowance of the claim of depreciation, the assessment resulted in a loss and thus there was no motive or intention to claim any undue tax benefit. It was submitted that all the particulars regarding the acquisition and use of the property were on record and the claim of depreciation was made as per the Income Tax Rules, that the claim was thus bona fide and that mere disallowance of the claim in the assessment does not automatically lead to the conclusion that the assessee either concealed its income or furnished inaccurate particulars thereof. In support of these submissions, the assessee relied on several authorities.

8. The CIT(Appeals) noted that the fact that the assessee bought and sold the property in quick succession and held it for a short period of about four months or so, that it did not invest its own funds but raised a loan of ₹3.5 crores from its sister concern M/s. Morgan Security and Credits Pvt. Ltd. and the further possibility that the arrangements for the sale of the property would have been taken much before the date on which the agreement to sell was executed, given the fact that property sales take time to get finalized, were all indicative of the intention of the assessee to make a surplus or profit by selling the property and not to use the property for its business. He held that thus it was never the assessee's intention to use the property for its business and, therefore, the claim of depreciation was not bona fide. According to him, the field inquiries carried out by the assessing officer through the Inspector also supported the above conclusion. The CIT(Appeals) further held that in the light of the above position, the claim of the assessee that full disclosure was made in



the depreciation chart did not matter; he nevertheless noticed that the assessee had not mentioned the fact that the property was agreed to be sold under an agreement dated 18.09.2004, in the depreciation chart. He further found that even in the balance-sheet as on 31.3.2005, the property was continued to be shown as a fixed asset at the value of ₹3,89,52,819/-. He thus confirmed the levy of penalty.

9. The assessee preferred a further appeal to the Income Tax Appellate Tribunal ('Tribunal', for short) in ITA No.261/Del/2009. The Tribunal found it fit and proper to cancel the penalty on the following reasoning:-

“4. We have heard the rival contentions and perused the facts of the case. The only dispute raised by the AO in the assessment framed was that the building was not used for the purpose of business and same was acquired on 29.4.2004 and was sold on 18.9.2004 through an Agreement to sell. Therefore, the claim of the depreciation is not allowable since the asset has not been put to use during the year. Whereas the learned counsel for the assessee Shri R.S. Singhvi, CA pointed out at Pages 17 to 21 of the Paper Book in specific Page 19 Para 3 of the Agreement to Sell where it is specifically mentioned in the said agreement that the consideration of Rs. 1.50 crore will be paid by the intending vendee to the intending vendor on or before 31.3.2006 or till such further time as discussed and mutually agreed by both the parties and the Sale Deed will be executed and registered by the parties and possession of the demised premises handed over to the vendee immediately thereafter. Therefore, the observation of the AO that through Agreement to Sale placed at Pages 17 to 21 of the Paper Book, the property has been sold during the year is without any basis. Shri Singhvi also pointed out PB Page 7, copy of balance-sheet where the property has been reflected under the head “Fixed assets” and not as investment. The assessee company does not own any other property and the property had been purchased for the purpose of business activities but the same



was not found suitable for commercial activities and therefore, the same was sold in the following years. We are convinced with the arguments made by the learned counsel for the assessee. The explanation submitted appears to be bona fide and all the facts were on record and nothing has been concealed therein. Penalty proceedings and the assessment proceedings are separate proceedings. Though the disallowance of depreciation has been made in the assessment proceedings but the explanation submitted in the penalty proceedings appears to be satisfactory and bona fide that the assessee had acquired the premises for the business purposes for claim of depreciation. Mere disallowance in the assessment proceedings will not lead to the penalty under section 271(1)(c) of the Act. Reliance has been placed on the following decisions:

(1) Addl. CIT vs. Delhi Cloth & General Mills Co. (1986) 157 ITR 822 (Del); &

(2) CIT vs. Ajaib Singh & Co. (2002) 253 ITR 630 (P&H).

In the circumstances and facts of the case and the decisions relied upon the learned CIT(A) is not justified in confirming the penalty imposed by the AO.

The same is directed to be cancelled. Thus Ground Nos. 1 (i) to 1(iii) of the assessee are allowed.”

10. The Revenue is in appeal. It is contended on its behalf that the order of the Tribunal is unreasonable and the finding of the Tribunal that the property was purchased for the purpose of the business was without any basis; the further observation of the Tribunal that the explanation of the assessee appears to be bona fide and that all the facts were on record and nothing was concealed is equally untenable. It is contended that this is not a case of a mere wrong claim which was disallowed in the assessment, but was a deliberate and false



claim and the falsehood was in the knowledge of the assessee, as the facts marshalled by the assessing officer and the CIT(Appeals) would show. It is pointed out that the property was a residential premises and there was no proof of its use for the purpose of the assessee's business. The assessee even claimed depreciation on the cost of land though land is not a depreciable asset under the Act. It is contended that despite the concurrent findings of the income tax authorities as to the culpability of the assessee and in the absence of any material to the contrary, the Tribunal was clearly in error, and at any rate took an irrational view, in cancelling the penalty.

11. On the other hand, it was contended on behalf of the assessee that the property was not transferred in the relevant previous year, that it continued to remain with the assessee till 2006 as found by the Tribunal, that thus the condition of Section 32 that the property should be owned by the assessee was fully satisfied and even the assessing officer had accepted the same, by observing in the "office note" appended to the assessing order, that the question of capital gains will be examined in the assessment year 2006-07. Reference was invited to the judgment of the Supreme Court in *Mysore Minerals Ltd. vs. Commissioner of Income Tax*, (1999) 239 ITR 775. As far as the other condition, namely, the user of the property for the purpose of the assessee's business is concerned, it was submitted that Smt.Ritu Aggarwal, the director of the assessee-company, used the property for her residence and thus this condition also stood satisfied. It was contended that ultimately the assessment resulted only in a loss despite the disallowance of depreciation and this was indicative of the fact that the assessee could not have had any intention to conceal its income or furnish inaccurate particulars thereof. According to



learned counsel for the assessee, the claim of depreciation was bona fide; at any rate there was full disclosure of all material particulars and merely because the assessing officer took a different view of the facts, the conclusion that the assessee concealed its income did not automatically follow. Strong reliance is placed on the judgment of the Supreme Court in *CIT vs. Reliance Petroproducts (P.) Ltd.*, (2010) 322 ITR 158.

12. We find it difficult to agree with the contentions of the learned counsel for the assessee. Even if it is assumed for the sake of argument that the assessee continued to remain the owner of the property throughout the year, the other condition of Section 32, that the property should have been used for the purpose of the assessee's business has not been satisfied. There is no proof that Smt. Ritu Aggarwal, the director, resided in the property and it was only a claim made before us by the learned counsel for the assessee in the course of the arguments. The assessing officer has rightly brought out in the assessment order that having regard to the short period during which the assessee held the property, which it had acquired with the use of borrowed funds, an intention to make a quick profit on the property deal cannot be ruled out. In this background, and considering the fact that there is no evidence to show use of the property during the relevant previous year for the purpose of the assessee's business, it is clear that the claim of depreciation was not bona fide. Moreover, it is not denied that while claiming depreciation, the cost of the land was also included, contrary to the provisions of the Act under which no depreciation is allowable on land. This position is well settled after the judgment of the Supreme Court in *CIT vs. Alps Theatre*, (1967) 65 ITR 377 (SC). This also shows that the claim was far from bona fide. The amount of depreciation claim



is ₹39,52,300/- which is substantial. The complete lack of any evidence to show that the property was used for the purpose of the assessee's business and the attempts made by the assessee to show to the contrary are indicative of the frivolous nature of the claim.

13. The judgment of the Supreme Court in *Reliance Petroproducts* (supra) cited on behalf of the assessee has been explained and distinguished by the Division Bench of this Court in *CIT vs. Zoom Communications P. Ltd.*, (2010) 327 ITR 510 (Del). This is not a case where all the correct particulars relating to the claim were furnished and a claim for relief or allowance was made on that basis, which was not accepted by the assessing officer who did not question the particulars relating to the claim, but merely took a different view on the very same particulars. This is a case where questionable details and particulars relating to the claim were furnished by the assessee and such details were so fundamental to the genuineness and bona fide of the claim that the mere furnishing of those particulars made the claim vulnerable. In this background, we are wholly unable to countenance the observations of the Tribunal that the assessee had purchased the property for the purpose of its business and sold it in the following year when it found the property not suitable for its commercial activities. We are also unable to subscribe to the view of the Tribunal that the explanation submitted by the assessee "appears to be bona fide and all the facts were on record and nothing has been concealed therein". The Tribunal failed to appreciate the claim of the assessee for what it is. It completely missed the fact that there was no evidence to show that the property was used for the purpose of the assessee's business during the relevant previous year. We find considerable justification for the criticism levelled by the learned Standing



Counsel against the decision of the Tribunal to cancel the penalty without meeting any of the findings recorded by the income tax authorities.

14. In the result we answer the substantial question of law in the affirmative, in favour of the revenue and against the assessee.

15. The appeal of the revenue is accordingly allowed with no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

DECEMBER 06, 2012
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