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

Decided on: 10.03.2014

\+ **ITA 51/2014**

SPECIALITY FOOD INDIA PVT. LTD. ……Appellant
Through: Sh. Ajay Vohra with Ms. Kavita Jha, Advocates.

Versus

COMMISSIONER OF INCOME TAX ……Respondent
Through: Sh. Sanjay Kumar, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)
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1. Following question of law arises for consideration:

> *"Whether the Income Tax Appellate Tribunal (ITAT) in the given facts of this case was justified in reversing the order of the CIT(A) cancelling the penalty imposed upon the assessee under Section 271(1)(c) of the Income Tax Act?"*

2. The assessee was engaged in composite business of manufacture and trading in foodstuff for human and animal consumption. Apparently, it had stopped its manufacturing activities in 2000. During the relevant AY 2003-04, it claimed depreciation of

₹37,95,956/- in respect of its plant and machinery. The depreciation so claimed was disallowed and the matter achieved finality. In these circumstances, the penalty proceedings for concealment of income under Section 271(1)(c) were drawn and the Assessing Officer (AO) sought to recover ₹13,95,014/-, being 100% of the tax sought to be evaded, by order dated 31.03.2008. The AO's order was set-aside by CIT (Appeals), who held that the depreciation claim could be considered as debatable and applying the ratio of *CIT v. Reliance Petroproducts (P) Ltd.* 2010 (322) ITR 158, directed cancellation of the penalty. The Commissioner (Appeals) distinguished this Court's decision in *CIT v. Zoom Communication Pvt. Ltd.* (2010) 327 ITR 510 and cancelled the penalty. The Tribunal has reversed the findings of the Commissioner (Appeals) holding that in terms of Clause 32 of Form 3CD, there was no production and that in these circumstances, the claim for depreciation was completely unwarranted given the fact that there was no manufacturing activity. Learned counsel for the assessee urges that the view of the Tribunal is erroneous since the CIT(A)'s order is fairly well reasoned on the issue. Besides, it was urged that the assessee did in fact engage subsequently in manufacturing activity which was apparent on record and taken into consideration.

3. Having regard to these circumstances, the assessee could not be said to be lacking in bonafide when it made the claim for depreciation because at that stage, its intention to abandon the manufacturing activity was not in fact crystallized. Learned counsel also relied upon

the decision of a Division Bench of this Court reported as *Addl. CIT v. Rajindra Flour and Allied Industries P. Ltd.* (1981) 128 ITR 402 in this regard. Learned counsel for the Revenue raised the submission and urged that the Tribunal's impugned order does not call for any interference and is a well-reasoned one. It is submitted that the intention of the assessee not to carry-on manufacturing activity was in fact borne out not only in the order in question but also in subsequent orders and that the claim for depreciation was inherent and known. Thus, it attracted Section 271(1)(c).

4. The CIT (Appeals), in the order, while determining the bona fide of the assessee held as follows:

> *"6.6 As per the appellant, the claim for depreciation for correctly made in the return as (i) as activity of manufacturing of food products, was only temporarily suspended and (ii) it had income from trading activity which was in the nature of business income, therefore the business activity was been carried on. The appellant found adequate support in judicial precedents for making the claim of depreciation in such circumstances (as referred to in para 6.2 supra). The view taken by the AD and as upheld by the appellate authorities is on account of difference of opinion on interpretation of facts and application of law thereon. In the instant case the appellant has offered an explanation (manufacturing activity not carried out during the year but in later years production shifted to animal food products thus only temporary lull., business only downsized, depreciation claimed only on the ground retained fixed assets), the explanation given by the appellant has not been found to be malafide, the judicial rulings relied upon by the appellant did give it sufficient reason to believe that its claim for the depreciation was a bonafide one. In the*

return of income the appellant had disclosed that its long term business strategies were being revived and that it had losses, the sale of part of fixed assets (2/3rd) was also disclosed.

6.7 On almost similar issue of claim of lull in business/discontinuance of business/admissibility of depreciation when business not wound up/when company not wound up etc. there are a plethora of judgments both in favour as well as against the assessee's as has been demonstrated in the submissions of the ld. Counsel referred to in para 6.2 supra. When a claim made in the return of income is disallowed on account of the issue being debatable, there being difference of opinion between the AO and the assessee on account of varying factual and legal interpretations which can be settled only by the higher judicial courts, then making of such a claim in the return of income will not amount to filing of inaccurate particulars of income as has been held by the Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. 322 ITR 158:-

"We do not agree) as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves) were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason) the assessee will invite penalty under Section 271(1)(C). That is clearly not the intendment of the Legislature II".

6.8 Similarly the Delhi High Court in the case of Zoom Communications Pvt. Ltd. 327 ITR 510 has observed that

> *if the assessee has not concealed any material fact or the factual information given by the assessee has not been found to be incorrect, the assessee will not be liable to imposition of penalty u/s 271(1)(c) even if the claim made by the assessee is unsustainable in law, provided that the assessee substantiates the explanation offered by it or the explanation even if not substantiated is found to be bonafide. This judgement applies squarely in the case of the appellant as all material facts have been disclosed in the return of income and the explanation given for claiming the expenditure as revenue expenditure is a bonafide one (rulings in favour of the appellant on the issue of depreciation).*
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> *XXXXX XXXXXX XXXXXX"*

5. In this case, it is evident from the above discussion that the CIT (Appeals) was persuaded to hold that the assessee did not indulge in deliberate furnishing of inaccurate particulars and there could be arguably a debatable issue on this aspect.

6. A close analysis of reasoning of the CIT(A) in fact makes the question debatable. Given the debatable and intensely factual nature, the Tribunal should not have second-guessed, at the second appellate stage as it were, having regard to the settled position in law and particularly the judgment of this Court in *Rajindra Flour Mills (supra).* The question as to whether abandonment of the business in fact occurred, is one of intention which is to be judged from the surrounding circumstances of each case. The claims of depreciation is also to be viewed in the light of the "block of assets" concept introduced w.e.f. the assessment year 1988-89; it is a matter of debate whether the existence of the machinery is still necessary to sustain the

claim for depreciation or it is enough that the "block of assets" continues.

7. For the above reasons, we are of the opinion that the Tribunal fell into error in reversing the order of the CIT(A). The order is accordingly set-aside. The question of law is accordingly answered in favour of the assessee. The appeal is allowed.

S. RAVINDRA BHAT
(JUDGE)

R.V.EASWAR
(JUDGE)

MARCH 10, 2014
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