$~14

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

% **DECIDED ON: 02.07.2014**

\+ ITA 83/2014

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Ruchir Bhatia, Jr. Standing Counsel.

versus

GLOBAL ASSOCIATES ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

1. The office report indicates that the respondent/assessee was served on 22.05.2014. There is no appearance on their behalf. The Court accordingly proceeds to set them down *ex parte*.

2. The following substantial question of law arises for consideration: -

> Did the Tribunal fall into error in directing the deletion of penalty imposed upon the assessee on the ground that it had filed inaccurate particulars and was, therefore, liable under Section 271 (1) (c) of the Income Tax Act.

3. The assessee filed its return for the AY 2008-09. In a scrutiny assessment, the AO, *inter alia* was of the opinion that part of the

allowance for liquidated damages claimed in terms of clause 14 (c) of the assessee's contract with an oversees purchaser, i.e., Golden World Enterprises Limited for supply of iron ore fines, had to be disallowed. The assessee's appeals were unsuccessful. In the return filed by the assessee, an allowance was made for liquidated damages under clause 14 (c) which reads as follows: -

> *"C. Undelivered quantity for purposes of sub clause B above, would mean-*
>
> *Total quantity of the commodity agreed to be delivered under clause 2 above (i.e. 285,000 Mt) as reduced by the total actual quantity of the commodity delivered by the seller."*

4. The assessee had debited ₹17,24,24,025/- towards liquidated damages and was asked to substantiate that figure. In reply, the assessee claimed that during the relevant previous year it had incurred expenses on liquidated damages which had to be charged in profit and loss account and in this regard contended as follows: -

> *"The assessee entered into a contract with Golden World Enterprise Limited, Hong Kong ("Buyer"), to supply a total quantity of 2,85,000 WMT ± 10%, during the year 2007-08. It was agreed that individual contracts will be made for each shipment to ensure the supply is made on mutually agreed rates for each shipment. It was also provided in the agreement that should the assessee fail to comply with the terms of this clause (supply of the agreed quantity), the buyer, without prejudice to other remedies available to the buyer shall be entitled to recover, Liquidated Damages for breach of contract, computed in the manner provided in the agreement. The copy of the agreement is annexed herewith."*

5. After considering the submissions, the AO observed that the

computation of liquidated damages by the assessee was done on taking the basis of the agreed quantity to be 3 lakh MT as against the actual agreed quantity of 2,85,000 MT, i.e., an excess of 15,000 MT. This was plainly contrary to the agreement itself. The AO, accordingly, disallowed ₹1,30,53,263/- and proceeded to issue notice under Section 271 and imposed penalty in that regard. The penalty order was made on 28.06.2011. The CIT rejected the assessee's contentions that the excess deduction was due to oversight and held that the explanation was not *bona fide*. In this regard, the CIT (A) found that the addition for penalty made by the AO disclosed that the assessee had taken the minimum quantity to be supplied at 3 lakhs MT. Apart from the explanation of oversight, the assessee did nothing to dispel the view that the figure of 3 lakhs MT as a contractual quantity was nowhere reflected in any document. The ITAT upon the assessee's appeal to it directed deletion of the penalty. The Tribunal was persuaded to accept that the claim of the assessee was based on an inadvertent computation mistake through oversight.

6. We have gone through the records. To say the least, the Tribunal's reasoning which accepts the assessee's contentions with a further rationale that it could have committed a silly mistake, is unsustainable. There was no material on the record to support the assessee's return which claimed an allowance on the basis that the total quantity to be supplied was 3 lakh MT. The first explanation, i.e. that the said figure included the moisture content, is not borne out from the record; it also does not appear to be a part of any condition agreed to between the parties. The Commissioner who had occasion

to go into this aspect, found it to be untrue. On the basis of these facts, we find no infirmity with the conclusion of the AO and subsequently the Commissioner that the claim for liquidated damages on the basis that 3 lakhs MT were to be supplied, amounted to furnishing inaccurate particulars. The explanation given by the respondent assessee cannot by any stretch of imagination be termed as *bona fide* so as to escape the mischief of Section 271 (1) (c) of the Act. As a result, the impugned order is hereby set aside. The question of law is answered in favour of the Revenue and against the assessee. The appeal is accordingly allowed.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

JULY 02, 2014
/vks/