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

% ***Date of decision: 24.03.2021***

\+ **ITA 11/2019**

THE PR. COMMISSIONER OF INCOME TAX - CENTRAL -3
.....Appellant

Through: Mr. Abhishek Maratha, Sr. Standing Counsel.

versus

TANEJA DEVELOPERS AND INFRASTRUCTUERE LTD.
.....Respondent

Through: Mr. Salil Aggarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

RAJIV SHAKDHER, J. (ORAL):

1. This appeal is directed against the order dated 25.06.2018, concerning the assessment year 2007-2008, passed by the Income Tax Appellate Tribunal (in short 'Tribunal').

2. To adjudicate upon this appeal, the following facts are required to be noticed.

2.1 The assessee had filed its original return on 15.11.2007 whereby taxable income amounting to Rs.93,72,590/- was declared. This return was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act').

2.2 The record shows that the assessee's case was picked up for scrutiny

and a notice under Section 143(2) of the Act was issued.

2.3 On 05.01.2009, search and seizure operations under Section 132 of the Act were carried out *qua* the Taneja Puri Group.

2.4 This led to proceedings under Sections 132 and 153A of the Act against the assessee. Consequently, the assessee filed a fresh return in which a cumulative expenditure amounting to Rs.13,42,70,655/- comprising interest paid on borrowings, brokerage and other expenses [hereafter referred to as the "expenses"] was claimed, albeit, on an accrual basis.

2.5 It appears while processing the return; the assessing officer noticed that the said expenses had not been claimed in the original return filed by the assessee under Section 139 of the Act. The assessing officer, thus, while framing the return under Section 153A/143(3) of the Act disallowed the expenses claimed by the assessee.

2.6. Being aggrieved, the assessee preferred an appeal with the Commissioner of Income Tax (Appeals) [in short 'CIT (A)']. The CIT (A) *vide* order dated 17.02.2012 sustained the addition made by the assessing officer.

2.7. It is because the CIT (A) had sustained the aforementioned disallowances, the assessing officer, initiated penalty proceedings and went on to levy penalty amounting to Rs.4,43,47,750/- under Section 271(1)(c) of the Act.

2.8. In the meanwhile, the assessee had carried the quantum appeal to the Tribunal. Before the Tribunal, the assessee gave up its challenge to the disallowance of its claimed expenses by the assessing officer. Accordingly, the net result was that the disallowance of the expenses ordered by the assessing officer and sustained by the CIT(A), stayed put.

2.9 Insofar as the penalty order dated 28.03.2013 passed by the assessing officer was concerned, the assessee preferred an appeal. The CIT (A), *vide* order dated 21.10.2013, set aside the order passed by the assessing officer.

3. This time, the revenue was aggrieved and, hence, carried the matter in appeal to the Tribunal. The Tribunal did not oblige and rejected the appeal via the impugned order. In paragraph 40 of the impugned order, the Tribunal made the following pertinent observations:

> "We have carefully considered the rival contentions and the orders of the lower authority of assessment as well as of penalty. **The[sic: In the] present case the assessee has made a fresh claim under section 153A of the income tax act of the proportionate expenditure, which was originally claimed, partly in the original return and the balance was claimed in the return under Section 153A of the Income Tax Act.** Admittedly, the balance expenditure which is claimed by the assessee in return filed under Section 153A of the Income Tax Act was already shown in the project expenditure for that year at the close of the year which carried forward in the next year as opening project work in progress. Therefore, in the subsequent year the same are also claimed as expenditure. We do not find any infirmity in the order of the Ld. assessing officer to this finding. However, with respect to the penalty the claim of the assessee was rejected at the threshold itself based on the decision of the Hon'ble Supreme Court in case of Sun engineering works private limited (supra). The claim of the assessee was also examined on merits of the case by the assessing officer as well as by the 1st appellate authority. **The Ld. CIT(A) held that the claim of assessee was based on accounting principles changing method of accounting. It was not acceptable to the Ld. assessing officer and therefore it was rejected. Mere rejection of the claim, which is found untenable, does not lead to penalty for furnishing of inaccurate particulars. Even otherwise the complete details of the expenditure, the accounting policy followed by the assessee, the claim of the assessee in the original assessment proceedings under section**

> **143 (3) of the act were already before the Ld. assessing officer**. **It was merely a claim that whether the expenditure should be carried on in the project work in progress or allowable as expenditure in the year in which it is incurred in case of the developer. The Ld. departmental representative could not controvert finding of the Ld. CIT – A that the claim of the assessee is legal and based on the method of accounting. On reading the various paragraphs of the order of the Ld. CIT – A wherein he has given reasons for deletion of the penalty, we do not find any infirmity in his order in deleting the penalty.** In view of this the order of the ld. CIT – A is confirmed and appeal of the revenue is dismissed."
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> [Emphasis is ours]

4. We have heard learned counsel for the parties and perused the record. What is evident to us [and there are findings of fact returned, in that behalf, by the authorities below], is as follows:

(i) The assessee brought about a change in the accounting policy vis-a-vis the aforementioned expenses to align it with Accounting Standard-7 (in short 'AS-7').

(ii) Before the Tribunal, in the quantum appeal, the assessee gave up its claim qua the expenses which was made on an accrual basis as the assessment *qua* the assessment year 2007-2008 (the assessment year-in-issue) had been completed and the fresh return filed by the assessee, pursuant to proceedings taken out under Section 132 read with Section 153A of the Act, did not give the assessee, the leeway to sustain the said claim, since no incriminating material was found during the search.

(ii)(a) It is not in dispute that assessment *qua* the assessment year 2007-2008 stood completed before the search, which, as indicated above, was carried out on 05.01.2009.

5. Given the foregoing, the issue which the Tribunal was required to consider, was: whether penalty could be imposed on the assessee only because it had made a new claim [in line with the change in its accounting policy] in its fresh return? Admittedly, [and there is no dispute about it] AS-7 permitted the assessee to make the new claim qua the aforementioned expenses, on an accrual basis, in the relevant assessment year 2007-2008. However, the assessee had, in its original return, filed for the said assessment year, i.e., 2007-2008, claimed deduction of a portion of the said expenses based on an accounting policy [i.e., a percentage of completion method] which was in vogue at that point in time.

6. There is also no dispute that these facts were in the knowledge of the revenue and the aforementioned expenses which were sought to be claimed, albeit on an accrual basis, constituted a fresh claim which was embedded in the fresh return filed pursuant to the proceedings carried out under Section 153A of the Act.

7. Therefore, to our minds, since this was not a case where the assessee had either concealed particulars of its income and/or furnished inaccurate particulars of its income which are the prerequisite for imposition of penalty, the conclusion reached by the Tribunal that the penalty imposed by the assessing officer was correctly cancelled, by the CIT (A), cannot be found fault with. Where basic facts are disclosed[1] or where a new claim is made because of a change in accounting policy, albeit in a fresh return, and given up because the law, as declared, did not permit such a claim, in such circumstances, initiation of penalty proceedings against the assessee, in our view, is not mandated in law. [See: ***Commissioner of Income-tax,***

Ahmedabad vs. Reliance Petroproducts (P.) Ltd., 322 ITR 158 (SC)[2]; ***Commissioner of Income-tax vs. Thakur Prasad Sao & Sons (P.) Ltd.***, 386 ITR 448, and ***Commissioner of Income-tax vs. Bhoj Raj & Co.***, 247 ITR 696].

8. We may indicate that Mr. Abhishek Maratha, who appears for the revenue, had relied upon the affidavit dated 27.01.2020 filed by Mr. Adarsh Kumar Modi, Principal Commissioner of Income Tax, pursuant to a direction issued by this Court, *vide* order dated 11.01.2019, to demonstrate that the assessee had made a "dual claim" qua the aforementioned expenses while its return filed under Section 153A of Act.

8.1 In this behalf, Mr. Maratha drew our attention to the three tabular charts outlined in the said affidavit. These tabular charts pertain to the expenditure incurred on account of brokerage and commission, interest and other expenditure.

8.2 We have perused the figures given in the chart concerning the assessment year in the issue, i.e., the assessment year 2007-2008. We find that, contrary to the revenue's assertion, it does not appear that the assessee had claimed the said expenses twice over in the assessment year in issue.

8.3 Besides this, Mr. Maratha also sought to place reliance upon the

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[1] See: ***Chandra Pal Bagga vs. Income-tax Appellate Tribunal***, [2003] 128 Taxman 632.

[2] "**9.** ... A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the Return cannot amount to the inaccurate particulars.

10. ... 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 Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(*c*). That is clearly not the intendment of the Legislature."

judgment of a Division Bench of this Court in ***CIT vs. Zoom Communication Pvt. Ltd. (2010) 233 CTR (Delhi) 465***.

8.4 We have perused the said judgement. In our view, the facts obtaining, in that case, are distinguishable from those existing in the instant case. That was a case where the assessee, i.e., Zoom Communication Pvt. Ltd. [Zoom] had filed a return wherein it had, inter alia, debited its profit and loss account to extent of Rs.1,00,000/- qua income tax paid by it. This figure was shown in the schedule appended to the profit and loss account under the heading "Administration and other Expenses". The explanation given by Zoom was that, due to oversight, the said amount was not added, as it ought to have while computing its taxable income.

8.5 It is in this backdrop that the Court reversed the view of the Tribunal whereby penalty had been deleted and answered the question of law framed in favour of the revenue given the fact it was a completely unsustainable claim.

9. In the facts of the instant case, as noticed above, the assessee attempted a change in the method of accounting, concerning the aforementioned expenses. The method of accounting, as noticed by us, was in line with the AS-7. The only reason that the assessee in the quantum appeal preferred before the Tribunal gave up its claim was on account of the fact that it was a new claim which was sought to be incorporated in the fresh return filed by it in pursuant to the proceedings carried out under Section 153A of the Act - which, as per the advice received, could not have passed muster given the state of law, unless incriminating material had been found *qua* the assessee in the course of the search. Therefore, we are unable to agree with Mr. Maratha that the judgment rendered in ***Zoom***

Communication Pvt. Ltd. applies to the facts obtaining in the present case.

10. Thus, for the foregoing reasons, we are of the view that the appeal does not raise any substantial question of law and is, accordingly, dismissed.

RAJIV SHAKDHER, J

TALWANT SINGH, J

MARCH 24, 2021/tr

Click here to check corrigendum, if any