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

+ ITA 1471/2010

THE COMMISSIONER OF INCOME TAX Appellant
Through: Mr. Sanjeev Sabharwal, Advocate

versus

JUBILANT ENPRO PVT. LTD. Respondent
Through: Mr. Ajay Vohra, Advocate with
Ms. Kavita Jha, Advocate.

% Date of Decision: 28th September, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

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

MANMOHAN, J

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act") challenging the order dated 09th October, 2009 passed by the Income Tax Appellate Tribunal (in short "Tribunal") in ITA No. 2658/Del/2008, for the Assessment Year 1999-2000.

2. Mr. Sanjeev Sabharwal, learned counsel for the revenue submitted that the Tribunal had erred in law in dismissing the revenue's appeal whereby the penalty under Section 271(1)(c) of the Act amounting to ₹ 6,25,000/- imposed by the Assessing Officer (in short,



“AO”) had been deleted.

3. In the present case, we find that the Tribunal has given cogent reasons for setting aside the penalty levied under Section 271(1)(c) of the Act. The relevant portion of the impugned order of the Tribunal is reproduced hereinbelow:-

“7. Now, coming to the first item, regarding imposition of penalty under Section 271(1)(c) of the Income Tax Act, 1961 for disallowance of expenses amounting to Rs.1,03,684/-under the production sharing the contract, we find that it remained undisputed that the expenditure on this count during the assessment year 1998-99 was based on unaudited statement of account received from PSC. The Assessing Officer disallowed an amount which was an excess expenditure claimed by the assessee on account of difference between unaudited and audited figures received from PSC. The assessee has adjusted this difference which occurred in assessment year 1998-99 in the revised return of the current assessment year 1999-2000. This fact has also been accepted by the Assessing Officer in para 6 of the assessment order for assessment year 1998-99. In our opinion, as the assessee has shown the difference between the provisional and audited figures of the expenses pertaining to relevant previous year, i.e. 1998-99 in the books of account of financial year 1999-2000 by crediting the same against expenses incurred for that year there was no deliberate attempt on the part of the assessee to either conceal particulars of income or furnish inaccurate particulars thereof, while claiming the expenses of Rs.1,03,684/- on the basis of unaudited statement of accounts provided by the operator of PSC. Hence, in the facts and circumstances, no penalty under Section 271(1)(c) of the Act is eligible on this term. Consequently, the orders of tax authorities below on this count are set aside and the Assessing Officer is directed to delete the impugned penalty amount on this item.

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9. According to learned AR of the assessee, the impugned amount of Rs.16,398/- disallowable under section 43B of the Act was not added back in the return of income for the relevant previous year as the tax audit report pertaining to the accounts of consortium was not available with the assessee before the



date of filing of the return income by the assessee. This fact remained uncontroverted before us. Further, according to learned AR, the assessee was, therefore, unaware of the disallowance, if any, under Section 43B of the Act. Hence, in our opinion in the facts and circumstances, there was no deliberate attempt on the part of the assessee to either conceal the particulars of income or furnish inaccurate particulars thereof and the penalty on this item was no leviable. Consequently, the orders of tax authorities below in this regard are set aside and the Assessing Officer is directed to delete the penalty imposed under Section 271(1)(c) of the Income Tax Act, 1961 on this count.”

10. Now, we shall consider the third item of penalty under Section 271(1)(c) of the Income Tax Act, 1961 relating to payment of interest on late deposit of service tax amounting to Rs.832/-. The assessee claimed that this disallowance was not penal in nature but was compensatory in nature. In support of the contention, the learned AR submitted that due to smallness of tax effect, he did not press this item before the Tribunal, otherwise, as per the decision of Apex Court in the case of Lachman Dass Mathura Dass Vs. CIT, 254 ITR 799, wherein their Lordships had held that interest on arrears of sales tax or on the outstanding balance of sales tax is compensatory and not penal in nature and its accordingly, an allowable deduction against profit of the business. In this view of the matter, we are of the opinion that the interest payable for late deposit of service tax, being an admissible deduction, the disallowance made by the Assessing Officer, even if not challenged by the assessee, does not call for imposition of penalty under Section 271(1)(c) of the Income Tax Act, 1961. Accordingly, the orders of tax authorities below in the regard are set aside and the Assessing Officer is directed to delete the impugned penalty amount imposed under Section 271(1)(c) of the Income Tax Act, 1961 on this count.

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12. The issue whether such disallowable item of interest under section 10A of the Income Tax Act, 1961 calls for penalty under section 271(1)(c) of the income Tax Act, 1961 came up for consideration before the Tribunal in the case of ACIT Vs. M/s. HCL Technologies etc. and ITAT, 'C' Bench, Delhi vide a consolidated order dated 31st March, 2009 passed in ITA No.1445/Del/2008 assessment year 1998-99, ITA No.1320/Del/2008 assessment year 2003-04 and ITA No.1446/Del/2008 assessment year 2003-04 while considering



a number of disallowable item under section 10A for imposition of penalty under section 271(1)(c) of the Income Tax Act, 1961, in which one of the temps also was disallowance of interest received on FDRs under section 10A, held that penalty under section 271(1)(c) of the Income Tax Act, 1961 was not leviable, while observing as under:-

“3.The case of the assessee before us and before the Ld. CIT(A) was that the claim for deduction under section 10A on the aforesaid items was made bonafidely, as there were differing decisions of the Tribunal in the matter. Therefore, if subsequent decision of the Hon’ble High Court or the Hon’ble Supreme Court reverses the finding of the Tribunal, then a claim made in consonance with the order of the Tribunal does not lead to an inference of concealment of income. We find that the learned DR was not able to rebut this argument. We also find that the learned CIT(A) has specifically held that all the facts relating to computation of income had been disclosed and, thereafter specific claims for deduction were made. In such circumstances, we are of the view that decision in the case of Dharmendra Textile Processors & Others (supra) does not support the case of the revenue as the decision is that the matter has to be decided in the light of statutory language contained in section 271(1)(c) and Explanation offered by the assessee could not be said to be mala fide. Therefore, we are of the view that the learned CIT(A) was right in deleting the penalty.”

13.Hence, following the decision (supra), it is held that the tax authorities below erred in imposing/sustaining the impugned penalty amount levied on the disallowable interest amounting to Rs.1,67,822/- under section 10A of the Income Tax Act, 1961.....

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15. The issue whether disallowance made by the Assessing Officer under Explanation 73 of the Act towards fall in value of shares held in stock in trade calls for penalty under section 271(1)(c) of the Income Tax Act, 1961 came up for consideration before ITAT, Delhi ‘H’ Bench, in DCIT Vs. Artic Investment (P) Ltd. and Tribunal vide order dated 11th April, 2008 passed in ITA No.194/Del/2007 decided the issue in favour of the assessee and cancelled the impugned penalty imposed by the Assessing Officer while observing in para 7 & 8 of the order as under:-

“7. We have considered the rival submission and also perused the relevant material on record. It is



observed that the assessee in the present case is an investment company which is engaged in the inter alia in the business of dealing in shares and securities. During the year under consideration, a loss was suffered by it in the said activity of purchase and sale of shares and having regard to the nature of said transactions as well as the nature of its own business, the assessee company was under a belief that the said transactions were forming part of its business and the loss suffered in the said transactions was its business loss. Although the said treatment given by the assessee company to the loss as its business loss was not accepted by the AO keeping in view the deeming fiction created in the provisions of Explanation to Section 73 and this position was accepted even by the assessee, we are of the view that it cannot be said that the claim of the assessee for such business loss was not based on a bona fide belief entertained by it having regard to the nature of the relevant transactions as well as the said change in the head of income by the AO from “business loss” to “speculative loss” had made the assessee disentitled to thereby resulted in addition to the total income of the assessee, the question needs to be considered here is whether such a mere change in the head of the income would amount to concealment by the assessee as envisaged in section 271(1)(c) of the Income Tax Act, 1961. It is observed that this question has been answered by the Hon’ble Delhi High Court in favour of the assessee in its judgment in the case of Auric Investments & Securities Ltd. (supra) cited by the learned counsel for the assessee wherein it was held that mere treatment of the business loss as speculation loss by the AO does not automatically justify inference of concealment of the income justifying imposition of penalty under section 271(1)(c) of the Income Tax Act, 1961.....”

16. In this view of the matter and respectfully following the decision (supra) of the Bench, it is held that the penalty under section 271(1)(c) of the Income Tax Act, 1961 on this count on a sum of Rs.16,77,065/- was not leviable and, therefore, the order of tax authorities below in this regard are set aside and the Assessing Officer is directed to delete the impugned penalty amount levied on this item.”



4. From the aforesaid, it is apparent that the respondent-assessee had made full disclosure and there was neither any concealment of income nor furnishing of inaccurate particulars. In fact, the Tribunal has found that the justification furnished by the respondent-assessee was bonafide. Consequently, keeping in view the conclusion of facts arrived at by the Tribunal, the explanation offered by the respondent-assessee is bona fide and the respondent-assessee's case would fall within the ambit of Explanation 1 to Section 271 of Act.

5. Accordingly, the respondent-assessee is not liable to pay penalty under Section 271(1)(c) of Act and thus the present appeal being devoid of merits is dismissed *in limine* but with no order as to costs.

MANMOHAN, J

CHIEF JUSTICE

SEPTEMBER 28, 2010

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