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

\+ **INCOME TAX APPEAL NO. 71/2013**

Date of decision: 12th September, 2013.

COMMISSIONER OF INCOME TAX-III

..... Appellant

Through Mr. Sanjeev Rajpal, Sr. Standing Counsel.

versus

ARCOTECH LTD (FORMERLY SKS LTD.)

..... Respondent

Through Mr. Gaurav Mitra, Mr. Saurabh Seth & Ms. Kanchan Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

In this appeal, which pertains to Assessment Year 2003-04 and arises out of order of the Income Tax Appellate Tribunal (tribunal, for short) dated 29th June, 2012, on the last date of hearing the following substantial question of law was framed:-

> "Whether the tribunal was justified in deleting penalty on additions made on account of loss of sale of investment and vehicles, which was wrongly claimed as business loss and expenditure disallowed under Section 43B of the Income Tax Act, 1961?"

As is apparent from the question, tribunal has allowed the appeal of t respondent assessee and deleted penalty under Section 271(1)(c) of the Income Tax Act, 1961 (Act, for short)

2. The respondent-assessee had filed its return of income declaring loss of Rs.13,65,54,483/- duly supported by audited accounts and this return was processed under Section 143(1) of the Act. Subsequently, re-assessment notice was issued after noticing that the assessee had claimed depreciation on plant and machinery though no manufacturing activity was conducted during the year under consideration and had wrongly claimed capital loss on sale of investments amounting to Rs.59,15,000/- as business loss.

3. In response to the notice under Section 148 of the Act, the respondent-assessee filed a letter dated 9th August, 2007 stating that their earlier return filed under Section 139 dated 31st October, 2002 should be treated as a return filed in response to the said notice. The assessee on receipt of reasons for reopening, filed objections to the initiation of the re-assessment proceedings and contested the notice under Section 148 of the Act. The said objections of the assessee were rejected vide order sheet entry dated 24th December, 2007.

4. During the course of assessment proceedings, the assessee filed a revised computation in which they accepted that Rs.59,15,000/- was wrongly claimed as a revenue loss and was in fact capital loss. The

assessee also accepted that unpaid interest charges of Rs.4,46,13,87 should have been disallowed under Section 43B cannot be accounted for in the profit and loss account. Similarly, the respondent had erroneously accounted Rs.12,610/- and Rs.4,715/-, due and payable on account of provident fund and ESI in the profit and loss account, although this was not permissible and was contrary to Section 43B of the Act. The Assessing Officer disallowed depreciation claim of Rs.89,95,173/- and claim on account of loss on sale of vehicles, which was treated by the respondent as revenue loss of Rs.1,27,930/-. This loss it was observed was a capital loss. On account of the aforesaid additions, total income of the assessee was assessed at loss of Rs.7,66,79,891/-. Proceedings under Section 271(1)(c) of the Act were initiated.

5. The Assessing Officer imposed penalty of Rs.2,13,75,229/- on account of concealment and/or furnishing of inaccurate particulars. He rejected the contention of the respondent that the claims/entries were bona fide and lapse had occurred because the respondent was without competent professional staff due to closure of running operations and that the return was filed by a junior accountant, who was not well versed with the tax laws.

6. Commissioner of Income Tax (Appeals) upheld the order imposing penalty.

7. Tribunal by the impugned order has deleted penalty, inter alia, recording that all details with regard to the loss suffered were filed along with the return of income and the change of head of income cannot be considered as concealment or furnishing inaccurate particulars of income. The legal claim made by the respondent-assessee was not found to be allowable under the head "business loss" but the same was allowed as a "capital loss". In order to appreciate the contention of the Revenue, we would like to reproduce the exact words and reasoning given by the tribunal to delete the penalty:-

> "5. We have heard rival contentions and gone through the relevant material available on record. Apropos the issue of claim of depreciation, penalty imposed under similar facts and circumstances has been deleted by the ITAT in preceding year, as reproduced above. Respectfully following the same, the penalty qua the claim of depreciation is deleted.
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> 5.1. Apropos long term capital gain on sale of investments and sale of vehicles, the fact that the assessee was allowed the claim of loss is not disputed. The only difference between assessee's claim and the assessed loss is the head of allowability of loss i.e. capital loss as against assessee's claim of business loss. In our view all the relevant details were filed by the assessee along with the return of income and a change in claim of head of income cannot be considered as concealment of particulars of income or furnishing inaccurate particulars of such income. The assessee made a legal claim which was not found to be allowable by the Assessing Officer under the head business loss but the same was allowed as long term capital

loss. In these facts and circumstances we are not inclined to hold that the assessee concealed any particulars or furnished inaccurate particulars in this behalf.

5.2. In respect of PF and ESI also the assessee had disclosed in its Chartered Accountant's report that these amounts were not deposited, therefore, assessee itself claimed them to be exfacie not allowable. The only mistake committed by the assessee is in not giving proper effect to P&L A/c. With these disclosure on record, the mistake can be held to be of technical or venial in nature and cannot be termed as amounting to concealing particulars of income or furnishing inaccurate particulars of such income.

5.3. Apropos 43B disallowance, assessee has given satisfactory explanation that revised return was prepared which was not filed by the Chartered Accountant due to dispute on payment of professional fees with the C.A are the same is indicated by the record. In our considered view the details having been furnished along with the return of income, the assessee's case is not liable to be visited with penalty u/s 271(1)(c).

5.4. Apropos ld. DR's reliance of ITAT order in the case of M/s Anand & Anand (supra), the facts and circumstances in that case are peculiarly different inasmuch as in this case assessee had earlier paid advance tax on a particular item of income and later on, in the guise of legal opinion, the same was claimed to be a capital receipt, it had no earlier history and was a profit making organization. In the present case, the facts are peculiarly different and it is a case of continuous loss making concern since past many years. Therefore, facts being distinguishable the decision in the case of M/s

Anand & Anand cannot be applied to the facts of the present case.

5.5. In case of reduction of assessed loss, though technically penalty u/s 271(1)(c) is leviable, but one cannot be oblivious of the explanation and justification given by the assessee. In our view, assessee's explanation demonstrates justification for the stand taken in the return of income and reassessment proceedings. The explanation cannot be called to be false or bogus, therefore, we delete the penalty, keeping in view the judgment of Hon'ble Supreme Court in the case of Reliance Petroproducts (supra) and in the case of Hindustan Steels 83 ITR 26(SC)."

(emphasis supplied)

8. Before we examine the aforesaid observations and the contentions of the parties, for the sake of clarity, we would like to mention that during the re-assessment proceedings the respondent's loss was reduced by Rs.5,98,74,592/- on account of the following additions/disallowances:-

1.	Depreciation on plant & machinery	Rs.89,95,173/-
2.	Loss on sale of investments	Rs.59,15,000/-
3.	Loss on sale of vehicles	Rs.1,27,900/-
4.	Disallowance u/s 43B	Rs.17,325/-
5.	Disallowance u/s 43B	Rs.4,48,19,194/-

9. We are in agreement with the learned counsel for the respondent

that as far as claim for depreciation of plant and machinery concerned. Claim of depreciation was a debatable issue. Passive use entitles an assessee to claim depreciation (see ***CIT versus Geo Tech Construction Corporation***, [2000] 244 ITR 452 (Ker.) and ***Commissioner of Income Tax versus Refrigeration and Allied Industries Limited***, [2001] 247 ITR 12). No manufacturing activities were conducted during the assessment year in question but the assessee had approached Board of Financial Reconstruction for rehabilitation of the company under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. We also notice that penalty imposed in the last year for same reason was deleted by the tribunal. The real contest is with regard to loss on sale of investments and sale of vehicles of Rs.59,15,000/- and Rs.1,27,930/- respectively and disallowance under Section 43B of Rs.4,48,19,194/- and Rs.17,325/- on account of finance charges and PF/ESI dues respectively.

10. In paragraph 5.1 of the impugned order, the tribunal has referred and stated that details were furnished by the respondent along with the return of income and observed change of head of income cannot be considered as concealment of particulars or furnishing inaccurate particulars of income. The said statement as a ratio is broad and wide to be treated as universally true. It depends upon facts of a particular case and whether the question was debatable or capable of only a

singular view. We, therefore, cannot agree with the view expressed by the tribunal that change of head under which income is to be assessed per se would justify cancellation of penalty for concealment for the reason that it is not a case of furnishing of inaccurate particulars. Furnishing of inaccurate particulars of income can have different connotations and may arise when income is enhanced, deduction denied or when head of income, is changed resulting in a higher rate of tax or increase in income. The real question is application of Explanation 1. Paragraphs 5.2 and 5.3 refer to the disallowance under Section 43B and observe that ESI and PF deductions as claimed were a mistake and a case of not giving proper effect to profit and loss account. However, this cannot be read in isolation as the assessee had not made disallowance under Section 43B even in respect of interest payable but not paid, to the financial institutions.

11. Paragraphs 5.4 and 5.5 record that the respondent was continuously loss making concern for last many years and, therefore, decision in another case was distinguishable. Whether or not the assessee makes loss is not the relevant criteria or factor to determine whether penalty should be imposed under Section 271(1)(c) or not. Of course, lack of or inability to engage a good professional tax consultant is a different matter but there should be proof and basis to hold that the losses incurred prevented an assessee from getting proper tax advice

and the issue in question was complicated or required professior advice of a highly expert nature. Further, this is not the correct way of applying Explanation 1. In paragraph 5.5 it is recorded that one cannot be oblivious to the explanation and justification given by the assesse. Indeed one has to take into consideration the explanation and the justification given by the assessee but it cannot be accepted as bona fide and true on mere asking. Onus under Explanation 1 is on the assessee to prove the reason as to why a particular claim or deduction was made. The justification and cause shown should be bona fide and acceptable. Penalty cannot be deleted by merely recording the explanation, though not proved and established. It is not for the Revenue to show that the explanation offered is not false or bogus.

12. Learned counsel for the respondent referred to paragraph 5.3 of the impugned order and has stated that the revised return was prepared by the Chartered Accountant but due to dispute with regard to payment of professional fee with them, the same was not furnished. This explanation given by the assessee has been accepted by the tribunal but is on the face of it contrary. In fact, the tribunal has not discussed the facts or basis for the said conclusion. The assessee had filed original return of income, as noticed above, on 31st October, 2002. Return was supported by duly audited accounts. Copy of the said audited accounts, auditor's report etc. have been filed on record before us by the

respondent-assessee. The accounts were audited by a Charter Accountant and the audit was dated 30th August, 2002. Subsequently, after re-assessment notice under Section 148 dated 7th July, 2008 was issued, the respondent-assessee filed a letter dated 9th August, 2007, nearly four years after the date of filing of the original return, that the earlier return dated 31st October, 2002 should be treated as the return filed pursuant to the reassessment notice. This was a chance given to the respondent to file a rectified return in case of error or mistake made. After the return of income was filed, the assessee was furnished with copy of the reasons to believe, which as already noticed above, recorded two reasons; (i) wrong claim of depreciation in spite of the fact that no manufacturing activity was conducted during the year under consideration and (ii) claim of loss on sale of investments was wrongly claimed as business loss as it was a capital loss. The respondent-assessee filed written objections dated 14th December, 2007 to the reopening and contested. The respondent-assessee tried to justify the claims made and treatment given in the accounts. The assessment order records that on 20th December, 2007, the assessee had tried to justify the claim of loss of Rs.59,15,000/- as business loss stating as under:-

> "The investment was made out of surplus funds available with the company. This was with a view to earn profits from business. Business

> activity or transaction necessarily implies the activity with an object to earn profit. Uncertainty about the return to be received from the investment and also the facing of many imponderables and even the risk of losing the amount invested are inherent in activity called business. Risk, uncertainty foresignhedness(sic) to visualise the imponderables and capacity to over come the unforeseen hurdles are the essential for business activity."

The objections were considered and rejected on 24th December, 2007.

13. For the sake of clarity, we record that the aforesaid loss was loss suffered on sale of shares held as investment or as a capital asset. The assessee was not a trader in shares and the shares were not held as stock-in-trade. They were not part of the closing stock. It is only subsequently that the respondent-assessee filed a revised computation and accepted that the said loss was capital loss and not revenue loss. Revised computation was filed after contest and on being confronted by the Assessing Officer. The aforesaid reasoning will equally apply to the loss suffered on sale of vehicles.

14. Section 271(1)(c) of the Act as applicable has been considered and interpreted in several judgments of the Supreme Court and the Delhi High Court. The said Section is invoked when an assessee furnishes inaccurate particulars or conceals his income. Explanation 1

can come to the rescue of the assessee in case he had offered explanation but was unable to substantiate it, provided he is able to establish that the explanation offered was bona fide and the facts relating to furnishing of inaccurate particulars and material for computation of total income were duly disclosed by him. In the present case, the assessee had furnished inaccurate particulars of income and this is established beyond doubt. Assessment order passed under Section 143(3)/147 of the Act dated 28th December, 2007 was accepted by the respondent-assessee in which the aforesaid disallowance/additions were made. In fact, submission of the assessee before us is that the aforesaid errors pointed out in the assessment order were conceded to and accepted by the respondent-assessee during the course of the assessment proceedings by filing a revised computation. In these circumstances, the contradictory contention of the respondent-assessee that they had not furnished inaccurate particulars of their income is not acceptable. The moot question and issue is whether the assessee has discharged the burden under Explanation 1 to Section 271(1)(c) of the Act or rather more precisely whether the tribunal has correctly applied the said Explanation as mandated and required by the statute.

15. *Mens rea* is not required and necessary to impose penalty for concealment. In ***Union of India vs. Dharmendra Textile Processors***

[2008]306 ITR 277, the Supreme Court examined Section 271(1)(c) the Act and other provisions for imposition of penalty in different statutory enactments. It was held that penalty in such cases imposed for tax delinquency is a civil obligation, remedial and coercive in nature and is far different from penalty for crime or a fine or forfeiture as stipulated in criminal or penal laws. It refers to blameworthy conduct for contravention of the Act and it equally applies to tax delinquency cases. Mens rea or willful failure or conduct is not required to be proved and established. Mens rea is essential or sine-qua-non for criminal offences but is not an essential element for imposing penalty for breach of civil obligations or liabilities. It was accordingly observed as under:

> "The Explanations appended to Section 272(1)(c) of the Income Tax Act entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The judgment in Dilip N. Shroff's case [2007] 8 Scale 304 (SC) (3) has not considered the effect and relevance of Section 276C of the Income Tax Act. The object behind the enactment of Section 271(1)(c) read with the Explanations indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the Income Tax Act."

16. Thus, penalty under Section 271(1)(c) is imposed when an assessee conceals his income or furnishes incorrect particulars. In

terms of explanation I, we have to examine whether the case question falls within the two limbs viz. clause (A) and (B) i.e. which of the two limbs and effect thereof. Clause (A) applies when an assessee fails to furnish explanation or when an explanation is found to be false. Clause (B) applies to cases where explanation is offered but the assessee is not able to substantiate the explanation. In such cases, we have to examine two conditions: (1) Whether the assessee has been able to show that his explanation was bonafide; (2) whether the assessee had furnished and disclosed facts and material relating to computation of his income. Onus of establishing that the assessee satisfies the two conditions is on the assessee. Both the conditions have to be satisfied. In case the assessee satisfies the twin condition, penalty should not be imposed.

17. On the second aspect, which relates to addition on account of disallowance under Section 43B of the Act, position remains the same. In the audited accounts, there is no mention or reference to the said Section or that in the profit and loss account expenditure which has to be disallowed under Section 43B has been debited and claimed. The fact that interest due and payable to the financial institution has not been paid but was treated as expenditure in the profit and loss account was not stated or adverted to. Thus, full facts relating to the assessment of income were not stated.

18. In the present case, additions or disallowance has been made on account of wrong claim of revenue loss, which was in fact capital loss and disallowance under Section 43B. From the reasoning given by the tribunal, it is not possible to decipher and hold that the explanation given by the assessee shows as to why his claims were bona fide and justified. The onus of establishing the reasons for the claim made is on the assessee. Reference has been made to the judgment of the Supreme Court in ***Hindustan Steel Limited versus State of Orissa***, (1972) 83 ITR 26 (SC), which pertains to the earlier provision relating to penalty, which was worded differently. Decision in the case of ***CIT versus Reliance Petroproducts Private Limited***, (2010) 11 SCC 762 is relevant but would indicate that in the said case the assessee had given an explanation in respect of disallowance of expenditure under Section 14A. Full details of expenditure had been given in the return but the claim of the assessee was not accepted in view of the legal interpretation given to the statutory provision. Thus, merely making a claim, which was not sustainable in law should not result in penalization under Section 271(1)(c). Penalty should not be imposed provided the assessee has furnished full details with the return itself and the claim made was debatable or reasonably plausible or may have well been accepted. It is, in this context, that Delhi High Court deleted penalty in ***Shervani Hospitalities Limited versus Commissioner of***

Income Tax, (2011) 329 ITR 572 Delhi, ***Karan Raghav Expo versus CIT***, (2012) 349 ITR 112 (Delhi), ***CIT versus Zoom Communication Private Limited***, (2010) 327 ITR 510(Delhi). One cannot be oblivious to divergent views on legal interpretation of tax provisions and that uniformity and consistency of opinion on aspects of law may not be possible. Therefore, penalty cannot be imposed because an assessee has taken a particular legal stand. However, this does not mean that the assessees can claim wrong deductions or claim without any basis or foundation to justify the claim. False, spurious and mendacious claims do not fall in this class.

19. In the present case, the assessee is a company and the accounts were audited by Chartered Accountant. Difference between "capital loss" or "revenue loss" in some cases may be marginal and debatable, but in the present case, the assessee a manufacturing company had sold shares held by them as investment or as a capital asset. There was and could not have been any debate or plausible claim that the loss was a capital loss. Anyone remotely conversant with the provisions of the Act or accounts would know that loss on the sale of the investments cannot be booked and treated as a business loss, yet the respondent-assessee had booked the said loss as a business loss instead of a capital loss. This was contrary to elementary principles of accountancy and something which is very basic. Learned counsel for the respondent has

emphasized that the figures, i.e., loss of Rs.59,15,000/- has not be disputed. Therefore, full facts were on record. This is partly correct but would not satisfy the requirements of Explanation 1. Explanation 1 has two stipulations; firstly, the assessee should have furnished facts and material relating to computation of his income and secondly, establish that the explanation furnished by him was bona fide. Furnishing of figures or non-interference with the figures would show only furnishing of facts and material but would not satisfy the second requirement. Similarly, with regard to the disallowance made under Section 43B, the law on the point and the provision in question is well known and not capable of two interpretations. The assessee had not paid interest amounting to Rs.4,48,19,194/- and had defaulted and not paid PF/ESI instalment of Rs.17,325/-, but had claimed them as an expenditure, contrary to the mandate of Section 43B. The audit report was silent and this fact was not disclosed. Material and facts were not stated.

20. Learned counsel for the assessee has submitted that the respondent company became sick and, therefore, did not have funds to engage a proper accountant or tax consultant when the original return was filed. The return was filed by a junior accountant. Firstly, we find that this aspect has not been accepted by the tribunal. Secondly, the two set of additions in question were clearly contrary to law. As

already noted above and are elementary and well-known, in the gui of wrong or improper legal opinion, an assessee should not be permitted and allowed to escape penalty when the accounts are audited by a Chartered Accountant, when the provision and position in law is well-known and well-understood. It is not a case of a debatable issue or a legal provision which could have escaped or missed notice or consideration of the Chartered Accountant or the accountant or the directors of the company. We cannot stretch the plea that the issue was debatable or there was wrong advice beyond the point to believe or accept contentions when the claim itself is impossible to accept and is contrary to fundamentals of tax or accountancy. Income tax returns are mostly accepted without scrutiny or regular assessment. Self and due compliance of tax provisions is required. In the present case, the original return filed by the respondent was accepted under Section 143(1) of the Act. Subsequently, noting discrepancies, notice under Section 148 of the Act was issued. Even at that time, the respondent-assessee did not accept the fault and in their letter dated 9th August, 2007 stated that the original return may be treated as filed in response to the reassessment notice. Objections to re-opening were raised and the stand and stance of the respondent-assessee changed when they were repeatedly confronted. It is not a case where the assessee suo motu on his own or on immediately noticing the wrong claim rectified

or corrected the purported errors and understatements. It is only wh the assessee was cornered and confronted by the Assessing Officer that the revised computation was filed. The revised computation was filed after the objections to the re-opening were dismissed by the Assessing Officer.

21. At this stage, we would like to notice and refer to the judgments relied by the counsel for the respondents in ***Commissioner of Income Tax, Lucknow versus Hari Om Ashok Kumar Sugar Works***, (2007) 295 ITR 507 (Allahabad), ***Commissioner of Income Tax versus Sidhartha Enterprises***, (2010) 322 ITR 80 (P&H), ***Commissioner of Income Tax versus Somany Evergree Knits Limited***, (2013) 352 ITR 592 (Bombay) and ***Commissioner of Income Tax versus Sania Mirza***, (2013) 259 CTR (AP) 386 and ***Price Waterhouse Coopers Private Limited versus Commissioner of Income Tax,*** (2012) 11 SCC 316 .

22. At the very outset, we observe that whether an assessee had offered an explanation and whether the explanation was bona fide when discussed and examined as stipulated in Explanation 1, is a question of fact and depends upon several factors, including whether the assessee is an individual or corporate assessee, literate or illiterate, the nature, character and quantum of the deduction, his past conduct relating to the same claim/deduction, the provision or section applicable etc. (Failure to apply Explanation 1, as per law would make

it, mixed question of law and fact) It is not one fact but several facts which have to be taken into consideration to determine whether or not the claim or explanation of an assessee is bona fide. For example, in the case of ***Hari Om Ashok Kumar Sugar Works*** (supra) income taxable under Section 41(2) of the Act was made subject matter of penalty. In the said case, tribunal also accepted the contention that the assessee was under the belief that profit on sale of machinery etc. being capital goods was not taxable. He was ignorant about provisions of law. In the case of ***Sania Mirza*** (supra), awards received from the Government or other institutions were not included in her income and were disclosed in the return as a capital receipt. The amount received, on re-opening was voluntarily surrendered. In ***Somany Evergree Knits Limited*** (supra) the factual finding recorded was that the assessee had committed a mistake and they withdrew the claim of loss shown as revenue expenditure in the profit and loss account in the second/revised return of income. It was a case of bona fide mistake. In the case of ***Price Waterhouse Coopers Private Limited*** (supra), there was variation between the tax audit report and the income tax return. In the computation sheet with the income tax return disallowance under Section 40(a)(7) was not reflected. The Supreme Court observed that this was a clear case of error made by the assessee, who by mistake had overlooked the contents of the tax audit report. It

was held that the inadvertent error was a bona fide mistake. In t present case, we do not think any of the aforesaid decisions are applicable rather it is one wherein the assessee had wrongly shown loss on sale of shares held as investments as business loss and had wrongly not excluded from expenditure/profit and loss account, interest which had not been to the financial institutions or PF/ESI amounts not paid contrary to Section 43B of the Act. The quantum of amount involved was Rs.4,48,19,194/-

23. In view of the aforesaid discussion, we answer the question of law in favour of the Revenue and against the respondent-assessee and uphold levy of penalty u/s 271(1)(c) of the Act in respect of loss on account of investments, vehicle and disallowance under Section 43B. The claims were *ex facie* wrong being contrary to fundamental/basic principles of accounts and Act, would not have escaped notice or missed. However, we do not think penalty was justified and proper on the wrong claim for depreciation of plant and machinery as the legal position on the said claim was debatable.

The appeal is disposed of. There will be no order as to costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

SEPTEMBER 12, 2013
VKR