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

Date of decision: 1st December, 2014

\+ **ITA No. 82/2012**

COMMISSIONER OF INCOME ..... Appellant
Through Mr. Rohit Madan, Sr. Standing Counsel with Mr. Ruchir Bhatia and Mr. Akash Vajpai, Advocates.

versus

NG TECHNOLOGIES LTD. ..... Respondent
Through Mr. Ashish Makhija, Mr. Karamveer Jindal, Advocates for the Official Liquidator.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act', for short) pertains to assessment years 2006-07 and was admitted for hearing vide order dated 7th December, 2012, on the following substantial question of law:-

> *"Whether the ld. ITAT was correct in law in allowing the appeal of the assessee in holding that the assessee had discharged the onus cast upon it under Explanation-I Section 271(1)(c) of the IT Act?"*

We note that the assessee company has gone into liquidation and the Official Liquidator has been appointed. Accordingly, we have

heard the counsel for the Official Liquidator, who has appeared for t assessee.

2. The order impugned passed by the Income Tax Appellate Tribunal (Tribunal, for short) is dated 13th September, 2010 and deletes the penalty imposed under Section 271(1)(c) of the Act.

3. The respondent-assessee had filed e-return for the assessment year in question on 30th November, 2006, declaring loss of Rs.1,89,44,380/-. In the return, under head profit and loss, the assessee had claimed business loss amounting to Rs.2,33,07,349/- on account of sale of fixed assets.

4. During the course of assessment proceedings, details of which we will refer to subsequently, the assessee filed a revised return on 8th March, 2008 declaring total income of Rs.33,62,974/-. In the revised return, the loss of Rs. 2,33,07,349 on account of sale of fixed assets was not treated as "business loss", rather shown as capital loss. The Assessing Officer, vide its assessment was order dated 5th June, 2008, made some additions and assessed the total income of assessee at Rs.40,19,974/- and taxable income at "NIL" after giving benefit of brought forward losses.

5. Pursuant to the satisfaction recorded in the assessment order, penalty proceedings for concealment under Section 271(1)(c) of the Act were initiated and penalty equal to 100% of the tax payable of Rs.

80,66,400/- on the concealed income was imposed.

6. We will be referring to the reasoning given by the Assessing Officer and Commissioner of Income Tax (Appeals), who affirmed the penalty order subsequently.

7. The Tribunal by the impugned order, as recorded above, deleted the penalty recording the following reasons:-

> "6.1 Coming to the issue of the claim of loss on sale of assets, the facts are that the assessee sold machinery and plant in this year due to circumstances beyond its control. Actual loss was incurred in the transaction of sale. This loss was debited to profit and loss account. The schedule of fixed assets showed deduction of the assets on account of sale. According to the existing position of law, this loss could not have been claimed while computing the total income. The correct course of action would have been to reduce the amount of sale proceeds from the written down value of the block of assets relating to machinery and plant. As against the aforesaid, the assessee reduced the WDV of the machinery and plant sold in this year from the block of assets. The chartered accountant, who prepared the audit report and the return of income did not deduct the loss from the profit as per profit & loss account to reflect the correct state of loss in the computation of total income. The assessee has changed the chartered accountant since then, which is an admitted fact as per record.
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> 6.2 x x x x x
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> 6.3 x x x x x
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> 6.4 We have considered the facts of the case and the submissions made before us in respect of this issue also. We have also perused the letters written by the AO to the assessee and replies furnished thereto. We find that the assessee was not asked to furnish the details of loss occurring

on account of sale of assets specifically. The assessee was also not required to explain how the loss is admissible in computing the total income. General questions were asked. The assessee was required to file tax-audit report and depreciation chart. Further, the assessee was required to furnish details of all exemptions and deductions. The assessee was also required to furnish details of addition to fixed assets. No question was asked about deduction from the assets. On the basis of these facts, the case of the Id. counsel is that the revised return was bona-fide. The learned DR has not been able to place on record any communication from the AO to the assessee seeking explanation regarding the claim of loss occurring on account of sale of assets. Therefore, in such circumstances, it has to be held that the revised return was bona-fidely filed u/s 139(5) of the Act.

6.5 Coming to the decision in the case of Reliance Petro Products Pvt. Ltd. (supra), the ratio of the case is that a claim in respect of which all facts have been disclosed will not lead to inference of furnishing inaccurate particulars of income under Explanation-1 of section 271 (I)(c). In this case, the assessee has furnished all facts along with the 'return of income. In particular, the details filed by it include the profit & loss account, statement of income and the schedule of fixed assets. The schedule of fixed assets shows deduction of the assets. It has also been explained that the return was prepared by the then chartered accountant and, thus, the assessee was not properly advised by the chartered accountant. In view thereof, his services were dispensed with and a new-chartered accountant was engaged. We may now examine the explanation of the assessee in the light of the decision in the case of Zoom Communication (P) *Lid.* (supra). In that case, the assessee had not explained the circumstances in which patently wrong claim of deduction was made. It was also not explained as to who had committed the mistake. In this case the person and the circumstances have been specified by the assessee. Further, the Tribunal had not

> recorded a finding on the plea of the bona fides of the explanation tendered by the assessee. This, according to us, is the crux of the matter as the bona-fides of the explanation have to be examined in view of the decision of Hon'ble Supreme Court in the case of Dharmendra Textile Processors (supra). When we look into the bona fides of the explanation, it is seen that the assessee cannot be expected to be well-versed in intricacies of the law. The loss was actually incurred. However, in view of the concept of block of assets, the loss could not have been claimed. Only the sale proceeds could have been deducted from the WDV of the block of assets. Obviously, the claim was patently wrong. But, the circumstances leading to such a wrong claim have been explained. All facts relating to the claim exist on record. No falsity has been found in the accounts in this regard. Therefore, we are of the view that the explanation tendered by the assessee is bona fide notwithstanding the fact that a wrong claim has been made. In such a situation, the claim can be said to be wrong only and not false. The mistake was rectified as soon as it was noticed by the assessee without any specific query from the AO. Thus, we are of the view that the assessee has discharged the onus cast on it under Explanation-1 and, therefore, it is not liable to be penalized u/s 271(1)(c).

8. The Tribunal, after referring to judgment in ***Union of India Vs. Dharmendra Textile Processors*** (2008) 306 ITR 277 (SC), has relied upon decision of the Supreme Court in ***CIT Vs. Reliance Petro Products (P) Ltd.*** (2010) 322 ITR 158 (SC).

9. Section 271(1)(c) and Explanation 1 thereto read as under:-

> **"271.** (1) If the Assessing Officer or the Commissioner (Appeals)] [55][or the *Principal Commissioner or* Commissioner in the course of any proceedings under this Act, is satisfied that any person—
>
> (a) xxxxx

(b) xxxxx

(*c*) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

> "**Explanation 1**- Where in respect of any facts material to the computation of the total income of any person under this Act:-
> (A) Such person falls to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or
> (B)Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bone fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, Then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

10. The word "concealment" would refer to somewhat malicious and mala fide conduct on the part of the assessee. The expression "inaccurate particulars" is copiously wider and broader and would include cases where particulars furnished are not accurate and which results in avoidance or evasion of tax. In Webster's Dictionary, the word "inaccurate" has been defined as:

> "not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

The word 'particular' means detail or details of a claim or separate items of an account. Thus the words "furnished inaccurate particulars" would refer to inaccuracy which would cause under-declaration or escapement of income. It may also refer to particulars which should

have been furnished or were required to be furnished or recorded in t books of accounts etc. [See ***CIT v. Raj Trading Co.*** (1996) 217 ITR 208 (Raj.)] Inaccuracy or wrong furnishing of income would be covered by the said expression

11. *Mens rea* is not a necessary attribute to impose penalty under Section under Section 271(1)(c) of the Act. Penalty under the said section is imposed as a civil liability/obligation. The provision is both remedial and coercive in nature. It is far different and unlike any penalty for a crime or a fine or forfeiture imposed under the criminal and penal laws. Penalty under section 271(1) (c) of the Act refers to blameworthy conduct for contravention of the Act and it equally applies to tax delinquency cases. In ***Dharmendra Textile Processors*** (supra), it was held that the earlier decision of the Supreme Court in ***Dilip N. Shroff Vs. Joint Commissioner of Income Tax, Mumbai and Anr.*** [2007] 8 Scale 304 (SC) (3) was wrongly decided as it did not consider the effect and relevance of Section 271(1) (c) of the Act. The object behind enactment of Section 271(1)(c) along with Explanations was to provide for a remedy for loss of revenue and imposes a civil liability. Willful conduct etc. is not an essential ingredient.

12. However, it is not necessary that penalty should be imposed in all cases where inaccurate particulars have been furnished. This is the

object and purpose behind enacting Explanation 1, which consists two limbs i.e. clause (A) and clause (B). Clause (A) applies when an assessee fails to furnish an explanation or when the explanation offered is found to be false. In such cases, penalty can be imposed. Clause (B) applies to cases wherein explanation is offered, but the assessee has not been able to substantiate the same. The assessee can escape rigors of penalty, provided he satisfies the two conditions, namely, (1) the assessee should demonstrate that his explanation was bona fide; and (2) he had furnished and disclosed facts and material relating to computation of his income. Onus of establishing that the two conditions are satisfied is on the assessee. Both the conditions are cumulative and when the conditions are satisfied, penalty under section 271(1)(c) of the Act should not be imposed.

13. When we refer to the facts of the present case and the return of income originally filed, it is noticeable that the assessee in Schedule-16 "General Expenses" of the profit and loss account had shown a debit of Rs.2,33,07,349/- on account of loss on sale of the fixed assets. Thus, the fact that the assessee had incurred losses was indicated in Schedule-16 of the profit and loss account. To this extent, the facts were stated in the original return. It is plausible for the assessee to urge that material facts were submitted and stated in the original return.

14. The second question, which arises for consideration is whether

the assessee has been able to show that his conduct was bona fide.

15. We have recorded the findings of the Tribunal on the aforesaid aspect in paragraphs quoted from the impugned order. The reasoning of the Tribunal is two-fold. Firstly, the assessee had relied upon the report submitted by the Chartered Accountant and the return of income prepared by the said Chartered Accountant. The mistake or error had occurred due to lack of proper legal advice. Secondly, the error or mistake in claiming capital loss in the profit and loss account was rectified and corrected by filing the revised return, before detection or erratum being discovered.

16. We have examined the aforesaid reasoning, but are unable to accept the said finding. All claims or deductions wrongly made cannot be treated as bona fide and protected by Explanation 1 to section 271(1)(c) of the Act. Whether or not the conduct of the assessee was legitimate or mere legerdemain would depend upon facts of each case, nature and character of the claim, whether the legal provision applicable was capable of two interpretations, whether the claim/exemption was plausible and conceivable etc. In cases where interpretive skills and divergent views are plausible, penalty for concealment should not be imposed. Assessee need not be asked to pay penalty if he has taken a particular legal

stand and preferred an interpretation in his favour. However, at t same time, the interpretation put forward or the claim made should not be banal or a ruse, *per se or ex facie* incorrect or wrong. Platitudinous conduct or claim is not a bonafide conduct.

17. In the facts of the present case, it is noticeable that the assessee had claimed loss on account of sale of plant and machinery i.e. the fixed assets, in the profit and loss account. This should not have been obviously claimed. It was without any debate and discussion a capital loss. The claim cannot be explained and justified by any argument and reasoning. The claim was positively and meaningfully incorrect and contrary to the principles of straight forward and primary accountancy. It is true and correct that an assessee would normally rely upon legal opinion of a Chartered Accountant, who is required to audit accounts of the company and also submit an audit report, but penalty cannot be deleted on guise or pretence of legal opinion as a smokescreen and façade. The claim or the entry in the present case was contrary to elementary and well-known basic principles of accountancy. The present case is not a case of a debatable issue relating to legal or accountancy principle which could have been interpreted differently.

18. It is mandatory and compulsory for a company to get their accounts audited from a Chartered Accountant, who is required to submit an audit report to be filed with the return. We cannot,

therefore, accept the contention of the assessee as universal a comprehensive that all claims howsoever untenable, once certified by a Chartered Accountant or the Directors of the company, cannot be made a subject matter of penalty proceedings. This will be stretching and making the requirement to prove bona fide conduct illusionary and ineffective and would fail to, check and stop fanciful and incredible claims. It is noticeable that most of the income tax returns are accepted without scrutiny or regular assessment and self-compliance of tax provisions is a rule required to be followed. The view, which we have taken, is in consonance with the ratio expounded in ***Reliance Petro Products Pvt. Ltd.*** (supra).

19. The second aspect, which arises for consideration, is whether the revised return was filed voluntarily and before the notice of the inaccurate particulars by the Assessing Officer. Factum of filing a revised return to rectify an earlier mistake is an important and relevant factor to determine whether the conduct of the assessee was bona fide. The Tribunal, in the impugned order has held that the revised return was filed before any specific query was raised by the Assessing Officer. Tribunal at the same time observed that the Assessing Officer had directed the assessee to file tax audit report, depreciation chart, details of all exemptions and deductions as well as

details of addition to fixed assets, but no question had bee raised about deduction in respect of the assets. The aforesaid reasoning by the Tribunal accepts the fact that the assessee had been asked to furnish details of fixed assets and details of all deductions were called. Noticeably, in the assessment order, the Assessing Officer has recorded the following facts:-

(i) The case was taken up for scrutiny assessment by issue of notice under Section 143(2) dated 12th October, 2007, which was duly served on the respondent-assessee within the prescribed statutory time limit.

(ii) the assessee was asked to furnish the following details:-

> "Furnish the details of all exemptions and deductions claimed. Also justify as to why the same should not be accepted by the Department."

The assessment order specifically records that one of the deductions claimed was debit of Rs.2,33,07,349/- recorded in Schedule-16 "General Expenses" of the profit and loss account being loss on account of sale of the fixed assets. Specific reference has been made in the assessment order to this note. Thereafter, the vide notice under Section 142(1) dated 1st February, 2008, the assessee was asked to furnish the aforesaid details.

(iii) On 18th February, 2008, the assessee was asked about the reason

for regular loss. It was submitted by the authorized representative the assessee that there was a massive fire in the factory premises on 11th May, 2003 and thereafter the business had closed down. The assessee was asked to furnish evidence of fire loss and insurance claim received. The case was fixed for reply on 29th February, 2008. The authorized representative was confronted on allowability of loss on sale of plant and machinery and besides other details were sought to justify loss along with supporting evidence.

(iv) Subsequently, a Chartered Accountant appeared and filed reply dated 10th March, 2008 along with supporting evidence on sale of the plant and machinery and its incorporation in the depreciation chart etc. On 10th March, 2008, the authorized representative of the assessee informed that they had filed a revised return on 8th March, 2008 in which they had not claimed loss on sale of fixed asset in the profit and loss account.

(v) On the basis of the revised return, the taxable income was declared at a positive figure of Rs.33,62,974/- as against the loss declared of Rs.1,89,44,380/- in the original return.

20. Therefore, it is clear to us that the assessee had not filed revised return voluntarily, but had filed the revised return after the Assessing Officer confronted the assessee and they were asked to explain how and why loss on account of sale of fixed assets was claimed in the

profit and loss account. The said loss, capital in nature and could n have been claimed in the profit and loss account.

21. In view of the aforesaid discussion, we answer the substantial question of law in favour of the Revenue and against the respondent-assessee. We uphold levy of penalty by the Assessing Officer under Section 271(1)(c) of the Act. The appeal is disposed of. No costs.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

DECEMBER 1, 2014
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