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

+ ITA 926/2010

COMMISSIONER OF
INCOME TAX

Through: Appellant
Ms. Suruchii Aggarwal,
Advocate

versus

M/S. SHIVANI TEXTILES LTD. Respondent
Through: None

% Date of Decision: 19th July, 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? Yes
3. Whether the judgment should be reported in the Digest? Yes

MANMOHAN, J (ORAL)

1. The present appeal has been filed under Section 260A of Income Tax Act, 1961 (for brevity "Act, 1961") challenging the order dated 30th November, 2009 passed by the Income Tax Appellate Tribunal (in short "ITAT") in ITA No. 3573/Del/2009, for the assessment year 2001-2002.

2. Ms. Suruchii Aggarwal, learned counsel for Revenue submitted that the ITAT had erred in law in dismissing the Revenue's appeal



whereby penalty under Section 271(1)(c) of Act, 1961 amounting to 11,85,500/- levied by the assessing officer had been deleted. She contended that the assessee's claim with regard to bad debts relating to investment in shares, not being the business of assessee, cannot be held to be bona fide. She relied upon a judgment of Supreme Court in ***Union of India Vs. Dharamendra Textiles Processors, (2008) 13, SCC 369.***

3. In our opinion, ITAT in its impugned order has given cogent reasons for not interfering with the order of the Commissioner of Income Tax (Appeal) (in short "Commissioner"). The relevant portion of the impugned order is reproduced hereinbelow :-

"7. It is not in dispute that the penalty u/s. 271(1)(c) is a civil liability and the department need not to prove any mensrea on the part of the assessee in making a claim of deduction of bad debts or as business loss in the return of income. However, at the same time, it is also well settled that mere because the claim of the assessee has been disallowed, it must not mean that penalty should automatically be levied in respect of the addition made by the AO by way of disallowance of assessee's claim. The Explanation 1 to section 271(1)(c) raises a rebuttable presumption and shifts onus on the assessee to establish bonafide of its claim. We, therefore, have to see as to whether the assessee has been able to discharge its burden that lay upon it under Explanation 1 to section 271(1)(c) of the Act, in the light of the facts and circumstances of the present case.

8. In this case, it is not in dispute that the sum of Rs. 40,00,000/- had given by the assessee to Shri Gautam Nemani, share broker, for purchase of shares in the month of July, 1997. It is also not in dispute that no shares were ever purchased out of the aforesaid amount. Mr. Gautam Nemani had not given the money back to the assessee company till February 2001, when only the sum of Rs. 10,00,000/- was given to the assessee leaving balance of Rs. 30,00,000/- receivable by the assessee from Mr. Guatam Nemani. The AO in his assessment order has mentioned that on March 09, 2001, the Board of Directors of the Company had taken a resolution that in view of the very poor financial conditions of



Mr. Gautam Nemani, the balance amount of Rs. 30,00,000/- due from him may be treated as bad debts and be written off in that year. It is thus clear that writing off of the amount of Rs. 30,00,000/- to the profit loss account is pursuant to the resolution taken by the Board of Directors on March 09, 2001. It is not the case that the amount has been written off at the end of the year after finalization of accounts of the assessee so as to presume that assessee intended to reduce its taxable income to evade payment of taxes. There is no material available on record to entertain any doubt or suspicion about the veracity of the resolution taken on March 09, 2001 in the Board meeting. At the one stage, the AO in the assessment order has taken a view to the effect that this bad debt is not a business loss but is investment loss of the assessee, which makes it clear that the AO was also of the view that there was an investment loss to the assessee. Though, in the same assessment order, the AO has also made an observation that when Mr. Gautam Nemani had paid Rs. 10,00,000/- in the month of February 2001, how he had become a defaulter in the month of March, 2001, but this observation of the AO is not sufficient to hold that the financial condition of Mr. Gautam Nemani was not very poor when the resolution was taken on March 09, 2001 by the Board of Directors of the company stating that in the very poor financial condition of Mr. Gautam Nemani, the balance amount of Rs. 30,00,000/- due from him be written off in that year. It is important to note that in the quantum appeal before the Tribunal, the Tribunal has accepted the assessee's contention that Board resolution dated 04.12.1987 permitted the assessee to pursue the object incidental to the main object of the company viz., the business of investment in shares and, a copy of which duly filed by the assessee before the AO. Thus, the observation of the CIT(A) in the quantum appeal to the contrary was held to be not correct by the Tribunal i.e. whether the assessee did file the copy of Board resolution dated 04.12.1987 before the AO. In the light of the Board resolution dated 04.12.1987, the Tribunal, therefore, held that the assessee had the authority to pursue the business of investment in shares. However, after examining and verifying subsequent conduct of the assessee, the Tribunal has taken a view that there was no other circumstances brought on record to show that the assessee's intention would he advanced money to Mr. Gautam Nemani was to purchase share to be held as stock in trade of business of dealing in shares. Therefore, the Tribunal held that the loans in question cannot be considered as one which occurred in the course of any business which the assessee carried on or intended to carry on. However, in the light of the Board's resolution dated 04.12.1987, there could be a bonafide reason for the assessee to treat the advances given to Mr. Gautam Nemani as an amount paid in the course of carrying on business of



investment in shares which was intended to be carried on by the assessee company by the Board resolution dated 04.12.1987. The assessee's decision taken in Board's meeting on March 2001, but write off the balance amount of Rs. 30,00,000/- due from Mr. Gautam Nemani as bad debts in the books of accounts cannot be said to non-bona fide."

4. From the aforesaid, it is apparent that in the quantum appeal, ITAT had accepted assessee's contention that by virtue of the Board resolution dated 4th December, 1987, the assessee was entitled to pursue the object incidental to main object of the company, that is, investment in shares. It is also apparent that the assessee Board had on 1st March, 2009 taken a decision, in view of the poor financial condition of the share broker, Mr. Gautam Nemani to write off the balance amount of Rs. 30,00,000/- due from him.

5. In our opinion, the decision in *Dharamendra Textile Processors* (supra) must be understood to mean that applicability of Section 271(1)(c) would depend upon the existence or otherwise on the conditions expressly stated in the said Section but once the said Section was applicable, the authority concerned would have no discretion in quantifying the penalty. Consequently, if the assessee is able to bring his case within Explanation 1 to Section 271, then no penalty can be levied on him.

6. In the present case, keeping in view the conclusion on facts arrived at by the Commissioner as well as by the ITAT, the explanation offered by the assessee is bona fide and the assessee's case would fall within the ambit of Explanation 1 to Section 271 of Act, 1961.



7. Consequently, the assessee is not liable to pay penalty under Section 271(1)(c) of Act, 1961. Accordingly, present appeal being devoid of merits is dismissed but with no order as to costs.

MANMOHAN, J

CHIEF JUSTICE

JULY 19, 2010

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