Reportable

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

\+ **ITA No. 1420/2009**

Judgment reserved on: August 3, 2010.
Judgment delivered on: August 26, 2010

Commissioner of Income Tax ..... **Appellant**
Through: Ms. Prem Lata Bansal, Advocate.

Versus

M/s. Nalwa Sons Investments Ltd. ..... **Respondent**
Through: Mr. Ajay Vohra and Ms. Kavita Jha, Advocates.

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

A.K. SIKRI, J.

1. In this appeal, we are concerned with the penalty proceedings initiated by the Assessing Officer in respect of the assessment year 2001-02. For the said assessment year the respondent-assessee had filed return declaring loss at Rs.43.47 crores. Thereafter, the revised return exhibiting the income at Rs.3,86,82,128/- was filed under the provisions of Section 115JB of the Income Tax Act, 1961 (for short 'the Act'). The assessment order was framed by the Assessing Officer

under Section 143(3) at a loss of Rs.36.95 crores as per normal provisions and at book profits at Rs.4,01,63,180/- under Section 115 JB of the Act. While doing so, various additions were made by the Assessing Officer including the following: -

a. In so far the claim of depreciation is concerned, the Assessing Officer disallowed the depreciation to the extent of Rs.32,51,906/-.

b. The addition towards the provident fund of Rs.3,030/- treating the same as income, was also made on the ground that this contribution was made belatedly by the assessee.

c. The Assessing Officer also disallowed deduction under Section 80HHC of the Act on the ground that the assessee had not adjusted the loss incurred on manufactured and traded goods exported out of India against incentives and had claimed deduction under Section 80HHC of the Act on 90% of the incentives.

2. These additions were upheld by the CIT (A) as well.

3. While drawing the assessment order, the Assessing Officer also directed that the penalty proceedings be initiated against the assessee by issuing a show cause notice under Section 271 (1) (c) of the Act. The show cause notice was thus given to the respondent-assessee, who submitted its reply thereto. However, the Assessing Officer was not convinced with the reply and thus, passed the order dated 28th September, 2007 imposing a penalty of Rs. 90,97,415/- in respect of the aforesaid three additions holding that the assessee had furnished

inaccurate particulars of the income which fell within the purview of the Section 271 (1) (c) of the Act and Explanation 1 thereto.

4. The assessee preferred an appeal there against, which was allowed by the CIT (A), who set aside the penalty order. The Income Tax Appellate Tribunal has affirmed the order of the CIT (A) maintaining that no penalty could have been imposed upon the assessee under the given circumstances. It is in this backdrop that the present appeal is preferred under Section 260A of the Act.

5. In so far as the addition of Rs.3,030/- towards the provident fund account is concerned, the CIT (A) as well as the ITAT held that the claim for deduction on this account was debatable. It was not disputed that all the payments were made. They were made beyond the due date. Actually, the learned counsel for the Revenue states that this amount was not paid at all. It is not necessary to go into this controversy having regard to the meager amount involved, and therefore, it is not necessary to interfere with the order of the Tribunal in so far as the setting aside of the penalty on this account is concerned.

6. As far as the claim of the assessee under Section 80HHC of the Act is concerned, the explanation of the assessee was that after taking into account the loss in trading goods and loss in manufacturing goods there was a negative figure and, accordingly, relying on the judgment of the Bombay High Court in the case of ***IPCA Laboratories vs. DCIT***

251 ITR 451, the Assessing Officer held that it was not entitled to any deduction under Section 80HHC. Whether the deduction under Section 80HHC of the Act can be allowed or not was a debatable issue as there were judgments of other High Courts as per which under these circumstances, deductions under Section 80 HHC of the Act were permissible. In these circumstances, when the law on this issue had not been authoritatively determined and crystallized and two opinions prevailed at that time, penalty under Section 271 (1) (c) could not be imposed. The Tribunal, in support of this proposition has relied upon the judgment in ***CIT vs. International Audio Visual Company 288 ITR 570***. Therefore, we do not find any error in the orders of the CIT (A) as well as the ITAT deleting the penalty on that score.

7. Coming to the imposition of the penalty on disallowance of depreciation, the assessee had claimed depreciation on certain plants and machinery in respect of which book entry was made on 31st March, 2001. When the Assessing Officer took note of the aforesaid fact, he put a specific query to the assessee to explain as whether these machineries were put to use for business purposes during the year under consideration, and a show cause notice was also issued as to why the claim of depreciation on the said plant and machinery be not rejected as these assets were not put to use for business purpose during the year under consideration. The assessee had replied that all the assets were put to use and hence the depreciation on all these assets be allowed in full. The assessment order further reveals that

during the course of hearing the assessee was specifically asked to produce the supporting evidence including records etc. to prove their claim. However, the assessee could not produce any evidence. From this, the Assessing Officer concluded that the machineries, which were shown to have been brought on record on 31st March, 1997 only, had not put to use at all during the relevant assessment year. For this reason, the claim of depreciation on this machinery was not allowable. It was under these circumstances, the Assessing Officer had disallowed the depreciation to the extent of Rs.32,51,906/-. On this premise, the Assessing Officer, in the penalty proceedings, took the view that the assessee had furnished inaccurate particulars, and had tried to claim the depreciation by misleading the authorities even when such a claim was not permissible in law. Thus, he imposed the penalty on this account.

8. The order of the CIT (A) would demonstrate that the penalty on this account is also set aside by relying upon its earlier order dated 15th May, 2007 in respect of the assessment year 1999-2000. The portion of that order dated 15th May, 2007 is extracted by the CIT (A) and it reads as under: -

> "Without prejudice to this, even on the merit the books of accounts of the appellant company and stores consumption record suggest clearly that the building and plant & machinery under consideration was not put to use only on 19.3.1998 but it was a continuous process. Certain claim if made regarding any expenditure/allowance in the bona fide manner, which is disallowed by the A.O., does not prove itself that it was a clear case of furnishing of the

> inaccurate particulars of income. Confirming the disallowance of any claim like depreciation by the appellate authority and confirming addition u/s 43B in itself does not prove that it was a proved case of furnishing of the inaccurate particular of income. Fact remains that in the penalty proceedings, the A.O. has not independently established that the appellant company has furnished inaccurate particulars of income. With this discussion, a penalty levied by the A.O. of Rs.26,68,625/- is hereby cancelled."

9. The CIT (A) was, therefore, of the opinion that as the facts in this year were also the same, there was no reason to differ with the finding as recorded in the earlier order and deleted the penalty. The CIT (A) also observed that even on merits, such a penalty was not leviable and rather there was no need of adjudication because the same disallowance had not been considered while computing the income of the assessee under Section 115JB Of the Act.

10. It is pointed out by Ms. Bansal, the learned counsel for the appellant-Revenue that the reliance placed on the order dated 15th May, 2007 in respect of the assessment year 1999-00 was totally misconceived. She read out the aforesaid extracted portion of that order and drew our attention to the fact that in that order, the CIT (A) was concerned with the stores consumption. However, in this year no such record was produced. On the contrary, submitted the learned counsel, in so far as this assessment year is concerned, the order of the Assessing Officer would clearly reveal that it was a case of plant and machinery which was, as per books of accounts, bought on 31st March, 2001 and there could not have been any question of using the

said machinery in that year. She further argued that the depreciation was disallowed on the specific ground that the assessee could not produce any evidence of its user during the year. She argued that this aspect has not been dealt with by the CIT (A) at all in the impugned order. Likewise, Ms. Bansal pointed out that the Income Tax Appellate Tribunal has also totally ignored the aforesaid aspect. The ITAT has simply noted the contention of the assessee that the machinery was not purchased on the last date but it was issued from the stores and was accounted for on the last date of the financial year, and that there was no dispute about the purchase of the machinery, and on that basis the ITAT observed that it was not the case of the Revenue that bogus claim of depreciation was made by the assessee.

11. We find that the submission of Ms. Bansal to this extent appears to be correct. The reason which prompted the Assessing Officer to take steps to impose penalty against the assessee was that though the assessee had bought the concerned machinery only on the last day of the year in respect of which book entry was made on 31st March, 2001, it still claimed the depreciation which could be claimed only if the machinery was put to use for the purpose of business during the year under consideration. Even when the assessee was specifically asked to produce the supporting evidence including records to prove that it had used the machinery in the relevant year, the assessee could not give any evidence. Claim for depreciation qua that machinery was rejected on this ground. It thus becomes clear that the assessee had

claimed the depreciation on the said machinery projecting that it had used the machinery which, turned out to be false. Neither the CIT (A) nor ITAT looked into the matter from the proper perspective and rather scuttled the real issue by deleting the penalty.

12. Mr. Vohra, the learned counsel appearing for the assessee, however, gave a totally a different twist to the matter by predicating his submission on Section 115JB of the Act. His contention was that as per Explanation 4 of Section 271 (1) (c) of the Act, the penalty is levied with respect to the amount of tax sought to be evaded. According to him since the amount of tax had been paid by the assessee under Section 115JB of the Act, no penalty could be levied in respect of the additions/disallowances made by the A.O.

13. Before we proceed to take note of further argument on this point, we reproduce the relevant provision of Section 271 (1) (c) of the Act:-

> **"271. Failure to furnish returns, comply with notices, concealment of income, etc.**
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> (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-
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> xxx xxx xxx
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> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
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> xxx xxx xxx
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> He may direct that such person shall pay by way of penalty,-
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> xxx xxx xxx

(iii) in the cases referred to in clause (c) or clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.

xxx xxx xxx

Explanation4- For the purposes of clause (iii) of this sub-section , the expression "the amount of tax sought to be evaded"-

(a) In any case where the amount of income in respect of particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) In any case to which Explanation 3 applies, means the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under Section 148;

(c) In any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished

xxx xxx xxx"

14. Mr. Vohra argued that even if the penalty was to be imposed on the alleged concealment of income by the assessee or in respect of income in which inaccurate particulars have been furnished, the quantum of penalty is

quantified with reference to the amount of tax sought to be evaded. His explanation was that the tax sought to be evaded would be the difference between the tax due on the income assessed and the tax that would have been chargeable had such total income been reduced by the amount of concealed income. Thus, the penalty is levied on the basis of tax on the difference between the income assessed and the income returned.

15. On this principle, the penalty could not be imposed in the present case as the assessee had paid the tax at deemed income under Section 115 JB of the Act, which income was more than the income assessed as per normal procedure. The Scheme of the Act is that if the tax payable under normal procedure is higher, such amount is taxable income of the appellant; otherwise book profits are deemed as the total income of the assessee in terms of Section 115 JB of the Act. He thus submitted that once 'book profits' are, by a legal fiction, deemed to be total income of the assessee, such deeming fiction must be taken to its logical conclusion. As a necessary corollary, in such a case where income of an assessee company is finally assessed at 'book profits' by deeming the same to be total income of the assessee, penalty imposable under Section 271(1) (c) of the Act could only be levied in respect of any adjustment/addition/disallowance made while computing such 'book profits'. In such a situation, the

revenue cannot be allowed to impose penalty with reference to the additions/ disallowances made while computing normal income since such income pales into insignificance, both for the purpose of imposition of tax and all logical consequences following thereon.

16. In nut shell, his submission was that when the tax was imposed and calculated under the Act on the deemed income under Section 115JB of the Act, for the purposes of the imposition of penalty the department could not revert back to the normal income as it would lead to an absurd situation of two different incomes of the same person for the same assessment year. Further more, when the income tax is paid on the 'book profits' by a legal fiction, such legal fiction has to be taken to its logical conclusion. He referred to the following decisions in support of his submissions:-

(i) A.S. Glittre Vs. CIT, 225 ITR 739 @ 744

(ii) M. Venugoal Vs. Divisional Manager, LIC of India, AIR 1994 SC 1343, 1347-48

(iii) UOI Vs. Jalyan Udyog, AIR 1994 SC 88, 96-97

(iv) Builders Association of India Vs. UOI, 73 STC 370 at 400 (SC)

17. Ms. Bansal countered the aforesaid arguments of Mr. Vohra by submitting that the Supreme Court had now made it clear in ***CIT Vs. Gold Coin Health Care Limited*** that even where the assessed income and returned income both are at loss, penalty can be levied

under Section 271 (1) (c) of the Act. Her submission was that no restricted meaning can be given to the term “amount of tax sought to be evaded”. Where the loss has been determined by the AO at a figure less than the returned income then it would amount to concealment of income and the tax on the said amount would be treated as the amount of tax sought to be evaded.

18. Ms. Bansal justified the penalty by arguing that as per the provisions of Section 115 JB of the Act where the book profit is determined at a figure higher than the returned figure, then the penalty could be levied, because as per the provisions of Section 115 JB (5) save as otherwise provided in this Section, all other provisions of the Act shall apply to the assessee and therefore, penalty is leviable with respect to book profits. CIT (A) has observed in para 2.6 of his order that as regards disallowance of depreciation of Rs. 32,51,906/- and disallowance of Rs. 3,030/- under Section 2 (24) (x), there is no need of adjudication because the same have not been considered while computing the income u/s 115 JB of the Act, it had been considered while computing loss under regular provisions of the Act and thereafter, (CIT (A) had considered merits of the case. Thus CIT (A) has not given any finding as to whether penalty could be levied on the income/loss as per the normal provisions of the Act when positive book profit is determined u/s 115JB of the Act.

19. However, it is to be stated that as per the scheme under Section 115JB, AO could not have made addition with respect to depreciation and disallowance under Section 2 (24) (x) because as per the judgment of Supreme Court I the case of **Apollo Tyres Limited(255 ITR 273)** Balance Sheet prepared by the assessee as per Schedule VI of the Companies Act is sacrosanct, and the AO cannot tamper with the net profit declared in such Profit & Loss A/c. Therefore, AO could not have tampered with the figure of depreciation as claimed by the assessee as per the Companies Act, may be WDV method or straight line method or any other method.

20. We have considered the rival submissions. Judgment of the Supreme Court in ***Gold Coin*'s** (supra) clarifies that even if there are losses in a particular year, penalty can be imposed as even in that situation there can be a tax evasion. As per Section 271 (1) (c), the penalty can be imposed when any person has concealed the particulars of his income or furnished incorrect particulars of the income. Once this condition is satisfied, quantum of penalty is to be levied as per clause (3) of Section 271 (1) (c) which stipulates that the penalty shall not exceed three times " the amount of tax sought to be evaded". The expression "the amount of tax sought to be evaded" is clarified and explained in Explanation 4 thereto, as per which it has to have the effect of reducing the loss declared in the return or converting that loss into income. It is in this context that in ***Gold***

Coins (supra) the Supreme Court explained the legal position as under:-

> "Reference to the Department Circular No. 204 dated 24.7.1976 reported in 1977 (110) ITR 21 (St.) has also substantial relevance. Same reads as follows:-
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> New Explanation 4 defined 'the amount of tax sought to be evaded'. According to the definition, this expression will ordinarily mean the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed. In a case, however, where on setting off the concealed income, against any loss incurred by the assessee under other head of income or brought forward from earlier years, the' total income is reduced to a figure lower than the concealed income or even to a minus figure, 'the tax sought to be evaded' will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression 'tax sought to be evaded' given earlier is a case to which Explanation 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed.
>
> A combined reading of the Committee's recommendations and the Circular makes the position clear that Explanation 4 (a) to Section 271 (1) (c) intended to levy the penalty not only in a case where after addition of concealed income, a

loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1.4.1976 to 1.4.2003 the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

When the word "income" is read to include losses as held in Harprasad's case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1.4.1976 to 1.4.2003. Even in the Circular dated 24.7.1976, referred to above, the position was clarified by Central Bureau of Direct Taxes (in short 'CBDT'). It is stated that in a case where on setting off the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case "the tax sought to be evaded' will be tax chargeable on concealed income as if it is "total income".

21. The question, however, in the present case, would be, as to whether furnishing of such wrong particulars had any the effect on the

amount of tax sought to be evaded. Under the scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the 'book profits' computed under section 115JB of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, 'book profits' are deemed as the total income of the appellant in terms of Section 115JB of the Act.

22. In the present case, the income computed as per the normal procedure was less than the income determined by legal fiction *namely* 'book profits' under Section 115 JB of the Act. On the basis of normal provision, the income was assessed in the negative i.e. at a loss of Rs. 369521018. On the other hand, assessment under Section 115 JB of the Act resulted in calculation of profits at Rs. 40163180.

23. In view thereof, in conclusion, the assessment order records as follows:-

> "Assessed at Rs. 40163180 u/s 115 JB, being higher of two. Interest u/s 234B and 234C has been charged as per the provisions of Income Tax Act, 1961. Penalty proceedings u/s 271 (1) © of the Income Tax Act, 1961 have been initiated. Issue necessary forms."

24. The income of the assessee was thus assessed under Section 115 JB and not under the normal provisions. It is in this context that we have to see and examine the application of Explanation 4.

25. Judgment in the case of ***Gold Coins*** *(supra), obviously,* does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the income tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The court was of the opinion that 'the tax sought to be evaded' will mean the tax chargeable not as if it were the total income. Once, we apply this rationale to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under Section 115 JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under Section 115 JB of the Act. Hence, when the computation was made under Section 115 JB of the Act, the aforesaid concealment had no role to play and was totally

irrelevant. Therefore, the concealment did not lead to tax evasion at all.

26. The upshot of the aforesaid discussion would be to sustain the order of the Tribunal, though on different grounds. Therefore, while we do not agree with the reasoning and approach of the Tribunal, for our reasons disclosed above, we are of the opinion that penalty could not have been imposed even in respect of claim of depreciation made by the assessee. This appeal is accordingly dismissed.

A.K. SIKRI
(JUDGE)

REVA KHETRAPAL
(JUDGE)

August 26, 2010
sk/skb