ORDER SHEET

IN THE HIGH COURT AT CALCUTTA

Special Jurisdiction
[Income Tax]

ORIGINAL SIDE

ITA 42 of 2006

PAHARPUR COOLING TOWERS LTD.

VERSUS

COMMISSIONER OF INCOME TAX, KOLKATA-IV

BEFORE:

The Hon'ble JUSTICE SOUMITRA PAL

The Hon'ble JUSTICE MIR DARA SHEKO

Date : 19th November, 2015.

Mr. J. P. Khaitan, Senior Advocate.
Agnibesh Sengupta, Advocate.

Mr. P. K. Bhowmick, Advocate.

Soumitra Pal, J:-

This Income Tax Appeal, pertaining to assessment year 1993-94, was admitted on the following substantial question of law:

> " *Whether on a true and proper interpretation of section 271(1)(c) of the Income Tax Act, 1961 and, in particular, Explanation – 1 thereto, any penalty can be imposed upon the appellant for making a claim that exchange gain made upon cancellation of a forward contract made in connection with acquisition of plant and machinery being imported for setting up a new factory was a capital receipt and purported findings of the Tribunal upholding the imposition of penalty and reversing the order of the Commissioner of Income Tax (Appeals) are arbitrary, unreasonable perverse?"*

The fact of the case is that the assessee filed its return showing total income of Rs.9,81,75,426/-. The case was assessed under Section 143(3) on a total income of Rs.11,32,19,669/-. In the assessment order, an addition of Rs.52,90,499/- was made by treating profits on cancellation of forward foreign exchange contract as trading receipt instead of capital receipt. The Assessing Officer issued direction to initiate proceedings under Section 271(1)(c). It appears that the assessee in its profit and loss account had shown the said receipt as a revenue receipt.

Aggrieved, the assessee preferred appeal before the CIT(A) which was dismissed. Still aggrieved, the assessee preferred appeal before the Income Tax Appellate Tribunal, which according to Mr. J. P. Khaitan, learned senior advocate for the appellant, went unattended so far as the assessee is concerned and there was no decision on merits.

Incidentally in the meantime, the Assessing Officer had passed an order under Section 271(1)(c) imposing a penalty of Rs.30,43,036 by holding as under:

> "*The words inaccurate particulars would cover both falsity in final figure as also constituent element, which are inaccurate in some specific or definite respect, whether in constituent or subordinate items of income or end result.*
>
> *Therefore, any concealment or inaccuracy in particulars of income in return occurring at any stage upto and inclusive of ultimate stage of working out of total income, would attract penalty provisions of Sec.271(1)(c).*
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> *A.M.Shah & Co. –Vs- C.I.T. [1999] 238 ITR 415 (Guj)*
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> *In this case the assessee claimed deduction of the amount from its taxable income in the computation though treating the same as revenue receipt in P & L A/c. There is no doubt that the assessee was having any doubt regarding nature of this receipt as revenue receipt. This is proved by intention of the assessee to adjust the income with revenue expenses and to debit net revenue expenses. Had it been the case of capital receipt in the mind of assessee, it could have not been adjusted with revenue item. Had this case not been scrutinized u/s. 143(3), the assessee could have taken the benefit and such deduction could have been allowed.*
>
> *This to conclude, the assessee furnished inaccurate particulars and concealed the particulars of its income by claiming wrong and false deduction in computation knowing very well that the amount earned by it was revenue receipt*."

Aggrieved by the order of penalty, the assessee preferred an appeal which was allowed by the CIT(A) by holding as under:

> "*Perusal of the appellant's computation of income clearly indicates that the receipt of Rs.52,90,499/- had been claimed as a deductible item. The AO has also mentioned very clearly in his assessment order the claim of the appellant that the said receipt was a capital receipt and not a revenue income. These facts indicate that the receipt of Rs.52,90,499/- had not been hidden from the Department. It is therefore cannot be said that such amount was concealed or hidden from the Department. The claim made by the appellant that such receipt is a capital receipt and not a revenue receipt is always a claim and such claim may be correct or incorrect. To conclude that having made a claim, such claim is concealment or a submission of inaccurate particulars of income would be a wrong conclusion. Accordingly, after carefully considering the facts and circumstances of the case, I am of the opinion that a claim cannot be defined or interpreted as concealment or filing inaccurate particulars of income. In this view of the matter, the penalty levied by the AO stands cancelled.*"

The Department, being aggrieved by the said deletion of the order of penalty, preferred an appeal before the Tribunal. The Tribunal while allowing the said appeal held as under:

> " *We have examined the rival submissions. We find that the facts stated by the A.O. in his penalty order are correct. The assessee has shown the aforesaid receipts as revenue receipts and adjusted this amount with bank charges, and only net bank charges had been debited. The quantum appeal has been decided against the assessee. We are of the view that after the insertion of Explanation I to Section 271 (1)(c), the requirement that the department should establish that there has been a conscious concealment of particulars of income or a deliberate failure to furnish accurate particulars, is no longer necessary. In case the Additions are made and the explanation submitted by the assessee is not satisfactory, the income should be treated as deemed concealment.*
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> *According to us the words "inaccurate particulars" would cover both falsity in the final figure as also in the constitution adamants which are inaccurate in some specific or definite respect. In this case the assessee claimed Deduction of the amount from its taxable income in the computation by treating the same as a revenue receipt. This is proved by the intention of the assessee to adjust the income with revenue expenses and to debit net revenue expenses. Had it been the case of capital receipt in the mind of the assessee it should not have been adjusted with the revenue item. Had this case not been scrutinized u/s*

> *143(3) the assessee could have taken the benefit and such deduction would have been allowed.*
>
> *We, therefore, conclude that the assessee furnished inaccurate particulars and concealed the particulars of its income by claiming a wrong and false deduction in the computation knowing that the amount earned by it was a revenue receipt. We, therefore, set aside the order of the CIT(A) and restore the order of the A.O*."

The order passed by the Tribunal is the subject matter of this instant appeal.

Mr. Khaitan, relying on the computation of income, annexed to the paper book, submits that the amount of Rs.52,90,499/- is a part of the claim. There was no falsity in the figures mentioned. Referring to Section 271(1)(c) of the Act, it has been submitted that since there was no concealment of particulars of income and when materials to the computation of income were disclosed, the Tribunal erred in setting aside the order passed by the CIT(A). Submission is, had there been a failure to explain the facts, Section 271(1)(c) could have been attracted which is not the case in hand. Mr. Khaitan has relied on the judgement of the Supreme Court in *C.I.T. vs. Reliance Petroproducts Pvt. Ltd. : 322 ITR 158(SC)* and on an unreported judgment of this Court passed on 9th April, 2015 in *ITA 820 of 2008 [C.I.T., Central-II, Kol. Vs. M/s. M.K. Shah Exports Ltd.*] wherein the judgement in *CIT vs. Reliance Petroproducts Pvt. Ltd.[supra*] has been relied on.

Mr. Bhowmick, learned advocate appearing for the respondent, relying on the judgment in CIT vs. Bijay Iron Stores : 252 ITR 408 [Cal.] submits that as the assessee had shown the receipts attributable as revenue receipt and as there was no proper explanation, the Tribunal was justified in passing the order under challenge.

It is evident that in the computation of income a sum of Rs.52,90,499/- has been shown as a deduction being "*Receipts attributable to foreign exchange fluctuation in forward contract in respect of foreign currency loan liability against capital equipment – excluded being in nature*." As noted, the assessee had mentioned the figure, claimed as deduction, with the said explanation. Since the figure is undisputed, it was upto the income tax authorities to accept or not to accept explanation. The Tribunal did not accept the explanation in support of the claim. The question is whether non-acceptance of a claim can be said to be a concealment. In a case where claim is made it is for the authorities to decide. It may or may not accept the claim. In the instant case, as the sum claimed as deduction is undisputed, it cannot be said that the assessee had furnished inaccurate particulars of income. Since there is no finding that the factual details furnished by the assessee in its return were inaccurate or erroneous or false and as the assessee had claimed the deduction of an expenditure treating it be capital in nature, it is appropriate to refer to the law laid down by the Supreme Court in CIT vs. Reliance Petroproducts [supra], wherein it has been held as under:

"…………………...Such not being the case, there would be no question of inviting the penalty under section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to the inaccurate particulars.

……………………We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty under section 271(1)(c). That is clearly not the intendment of the Legislature."

Since the respondent does not dispute the figure furnished by the assessee in its return, in view of the law laid down by the Supreme Court in *CIT vs. Reliance Petroproducts [supra],* followed by the High Court in *CIT Central II, Kolkata v. M/s. M.K. Shah Exports Ltd.,* the contention of the respondent cannot be accepted. So far as the judgment relied on by the respondent is concerned, in our view, it is not applicable to the case in hand as therein the son, being one of the partners, had admitted that he had authored some of the papers which were found at the time of search.

Therefore, for the reasons aforesaid, the order of the Tribunal cannot be sustained and is thus set aside and quashed. Accordingly, we hold that the income tax authorities erred in imposing the penalty and the Tribunal was not justified in upholding the imposition of penalty.

The appeal is allowed. No order as to costs.

(SOUMITRA PAL, J.)

I agree.

(MIR DARA SHEKO, J.)

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