Court No. - 10

Case :- INCOME TAX APPEAL No. - 65 of 2015

(ASSESSMENT YEAR 2006-07)

Appellant :- Rave Entertainment Pvt. Ltd.
Respondent :- Commissioner Of Inocme Tax Kanpur
Counsel for Appellant :- S.K. Garg,Ashish Bansal
Counsel for Respondent :- C.S.C. It

Hon'ble Arun Tandon,J.
Hon'ble Dr. Satish Chandra,J.

The present appeal is filed by the assessee against the impugned order dated 28th November 2014 passed by the Income Tax Appellate Tribunal, Lucknow in ITA No. 125/LKW/2012 for the assessment year 2006-07.

On 25.03.2015 the appeal was admitted by this Court on the following substantial question of law :

> *"Whether in the facts and circumstances of the case, levy of penalty under Section 271(1)(c) is justified or not?"*

The brief facts of the case are that the appellant-assessee is a Private Limited Company. During the assessment year 2002-03, the assessee was engaged in the construction of Multiplex Theater, but the same could not become commercially operational and functional even after the "trial runs". So on 07.11.2002, the assessee has filed the return showing "nil" income where no depreciation was claimed on capital expenditure. But the A.O. *suo moto* has allowed the depreciation by taking view that the "trial runs" having been carried out by the assessee, so the project is complete.

For assessment year 2003-04 onwards, the assessee has claimed deduction under Section 80-IB(7A)of the Income Tax Act though, there was no positive income. Similarly, in the assessment year 2004-05, the assessee has claimed the

deduction under Section 80-IB (7A) of the Act, but the same was denied by the A.O.

For the assessment year under consideration (2006-07), the appellant was advised to claim the deduction under Section 80-IB(7A) of the Act, for the reason that the A.O. in the assessment year 2002-03, has considered the completion of project. For the purpose, the assessee has submitted audit report in the prescribed form 10CCBA of the Income Tax Rules, 1962. However, the claim was rejected by the A.O. vide order dated 26.12.2008.

At the sametime, the A.O. has opined that the assessee has wrongly made the above claim which amounts the concealment of income, so he levied the penalty under Section 271(1)(c). But, the C.I.T.(A) has cancelled the levy of the penalty by observing that the assessee made a wrong but legal claim, so there was no concealment. However, the Tribunal vide its impugned order has restored the order of the A.O. by setting aside the order of the first appellate authority. Being, aggrieved the assessee has filed the present appeal.

With this background, Shri S.K. Garg assisted by Shri Ashish Bansal, the learned counsel for the assessee relied on the order of the first appellate authority. The learned counsel for the assessee submits that initial mistake was of the A.O., who has allowed the depreciation *suo moto* for the assessment year 2002-03. The A.O. wrongly treated the "trial runs" as a "business runs", which was not so. Legally, the assessee was entitled to claim the deduction under Section 80-IB(7A) for the assessment year 2003-04 and onwards. For the year under consideration (2006-07), the assessee was advised by the Chartered Accountant to make a legal claim for the deduction. For the purpose, necessary form was also submitted alongwith the return. However, the A.O. rejected the same and the assessee has accepted it as no further appeal was filed. In these circumstances, the assessee has made the claim as per legal

advice and there was no malafide intention to conceal any income. The claim of the deduction does not amount the concealment of income. Moreover, no satisfaction was recorded by the A.O. before initiating penalty proceedings. The requirement to record the satisfaction is absolute even after the amendments made in the law relating to the levy of penalty under section 271(1)(c).

It is also a submission of the learned counsel for the assessee that the same claim was made by the appellant in the assessment year 2004-05, which was disallowed and penalty proceedings were also started in the said assessment year, but later, it was dropped vide order dated 31.3.2010. He read out the section 80-IB(7A), which on reproduction reads as under :

"(7A) The amount of deduction in the case of any multiplex theatre shall be-

(a) fifty per cent of the profits and gains derived, from the business of building, owning and operating a multiplex theatre, for a period of five consecutive years beginning from the initial assessment year in any place :

Provided that nothing contained in this clause shall apply to a multiplex theatre located at a place within the municipal jurisdiction (whether known as a municipality, municipal corporation, notified area committee or a cantonment board or by any other name) of Chennai, Delhi, Mumbai or Kolkata;

(b) the deduction under clause (a) shall be allowable only if-

(i) such multiplex theatre is constructed at any time during the period beginning on the 1st day of April, 2002 and ending on the 31st day of March, 2005;

(ii) the business of the multiplex theatre is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of any building or of any machinery or of plant previously used for any purpose;

(iii) the assessee furnishes alongwith the return of income, the report of an audit in such form and containing such particulars as may be prescribed and duly signed and verified by an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed."

After reading the provision, he submits that the assessee had never furnished inaccurate particulars of income as appears from the assessment order.

According to the learned counsel, in the case of penalty, proceedings under Section 271(1)(c) are separate and distinct from the assessment proceedings. This aspect will have to be taken into consideration. The assessee has claimed the deduction on legal advice rendered by the professionally qualified persons, thus, the claim made in the return was pressed not only on the factual matrix of the case, but also on the legal advice. There was no occasion or even necessity for the assessee to revise its return for the assessment year 2006-07. For the purpose, he relied on the ration laid down in the following cases :

(a) Price Waterhouse Coopers Pvt. Ltd vs. CIT [2012] 348 ITR 306 (SC);

(b) CIT vs. Ram Commercial Enterprises Ltd. (2001) 167 CTR (Del) 32: (2000)246 ITR 568(Del);

(c) Diwan Enterprises vs. CIT (2001) 167 CTR (Del) 324: (2000)246 ITR 571(Del);

(d) Shri Bhagwat Finance Co. Ltd vs. CIT (2005) 196 CTR (Del) 462: (2006)280 ITR 412 (Del);

(c) V.V. Projects and Investments P. Ltd. vs. Dy. CIT (2008) 216 CTR (AP) 196: (2008) 6 DTR (AP) 265 : (2008) 300 ITR 40 (AP);

(d) Hindustan Steel Ltd. vs. State of Orissa (1972) 83 ITR 26(SC);

(e) Burmah-Sheel Oil Storage and Distributing Co. of India vs. ITO reported in (1978) 112 ITR 592;

(f) Cement Marketing Co. of India Ltd. vs. ASCT (1980) 124 ITR 15 (SC);

(g) CIT vs. Harshvardhan Chemicals and Mineral Ltd. (2003) 259 ITR 212 (Rajasthan-Jaipur bench);

(h) CIT vs. International Audio Visual Co. (2007) 288 ITR 570 (Del.);

**(i) CIT vs. Nath Bros. Exim International Ltd.
(2007) 288 ITR 670 (Del.);**

**(j) CIT vs. Shahabad Coop. Sugar Mills
(2010) 322 ITR 73 (P&H);**

**(k) CIT vs. Sidhartha Enterprises
(2010) 322 ITR 80 (P & H);**

**(l) CIT vs. Reliance Petroproducts Pvt. Ltd.
(2010) 322 ITR 158 (SC);**

**(m) CIT vs. Hindustan Hydraulics
(2014) 369 ITR 255 (P& H); and**

**(n) CIT vs. Sewak Ice and Cold Storage P.Ltd.
(2014) 369 ITR 316 (All).**

On the other hand, Shri Dhanjay Awasthi, the learned counsel for the Department has justified the impugned order. He submits that that assessee has wrongly made the claim for deduction. The assessee has not revised the return to drop the claim specially when in the earlier years, the claim for deduction under Section 80-IB(7A) was already rejected by the A.O. But repeatedly, the assessee is making the said claim. It is also a submission of the learned counsel for the Department that the failure of the assessee to file the revise return is without any bona-fide reason, hence, the penalty is justified. Since, no defects have been shown by the assessee in the return filed, therefore, the case laws cited by the assessee are not applicable in the instant case. To support his argument, he relied on the ratio laid down in the following cases :

**(a) Ashish Kumar vs. CIT
[2014] 43 Taxmann 92 (P&H);**

**(b) CIT vs. HCIL Kalindee Arsspl
(2013) 37 Taxmann 347(Del); and**

**(c) Standard Hind Co. vs. CIT
(2012) 22 Taxmann 62 (Alld).**

We heard both the parties at length and gone through the materials available on record. From the record, it appears that penalty was levied by the A.O. by observing that the assessee had made a wrong claim under Section 80-IB(7A). The Tribunal

has confirmed the said penalty by observing that the assessee has not revised its return, so the penalty is justified. But fact remains that the assessment proceedings and penalty proceedings are quite different. The findings are not binding on each other as per ratio laid down in the case of ***Durga Kamal Rice Mill vs. CIT 265 ITR 25 (Calcutta)***. While discussing the explanation 1 of Section 271(1)(c), the Hon'ble Rajasthan High Court opined that in the debatable claims, no penalty can be levied **(*CIT vs. Harshvardhan Chemicals 259 ITR 212 (Raj)***. In the case of penalty, lenient view will have to be taken as per C.B.D.T. circular 451 dated 17.2.1986. Similar views were taken by the Madhya Pradesh High Court in the case of ***Shyam Koyal vs. CIT 286 ITR 251 (MP)***.

In the instant case, the assessee has made the claim for deduction under Section 80-IB(7A), which was rejected by the A.O. The claim of the assessee is the legal claim. Nothing was concealed by the assessee. Entire material was available before the A.O. For the legal advise rendered by the Chartered Accountant under bona-fide belief, no penalty is leviable as per the ratio laid down in the case of ***CIT vs. S. Dhanabal, 309 ITR 268 (Del)*** where it was observed that .

> *"The claim of the assessee had been duly certified by the chartered accountant and, therefore, the plea of the assessee that the claim was made under a bona fide mistake deserved to be accepted. Importantly, the Tribunal also noted that "all primary facts wee before the Assessing Officer" and that the deduction was to be allowed on the percentage applicable under section 80HHE. The Tribunal returned a specific finding that the assessee cannot e said to have furnished inaccurate particulars and concluded that the Commissioner of Income-tax (Appeals) had rightly cancelled the penalty. The Revenue's appeal was consequently dismissed."*

Further the record, it appears that construction of the Multiplex had not been completed by 31.3.2002, although a part of it had been completed and the part so completed had started yielding income also. Section 80-IB(7A) specifically talks about construction and not commencing of business. The CIT(A) while deciding the issue of leviability of penalty under Section 271(1)

(c) in favour of the assessee has specifically noted that in the financial year 2002-03, there was an investment in the project, relevant portion is reproduced hereunder :

> *"6.4.4 After going through the case records & submission made, I am of the considered view :-*
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> *(i) that the issue decided by the A.O. and confirmed by the Ld. CIT(A) in the A.Y. 2002-03 revolved around "date of commencement of business". This finding cold not ipso-facto be taken by the A.O. in A.Y. 2004-05 as a conclusive finding with regard to the "period of construction" of the multiplex theatre as envisaged under section 80IB(7). It was incumbent upon the A.O. to give specific findings in this regard especially when the appellant had submitted that there was construction of value exceeding Rs. 4.12 crore in subsequent years (including F.Y. 2002-03). In this view of the matter, it cannot be said that the impugned claimed made by the assessee was a bogus claim or a claim that was wholly untenable."*

It may be mentioned that the penalty can be imposed only when there was some element of deliberate default and not a mere mistake. The finding had been recorded on the facts that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax.

It is pertinent to mention that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in concious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so.

In the audit report in Form 10CCBA relevant to the assessment year 2006-07 (year under appeal here) also the date of completion of construction has been mentioned as 1.5.2002 falling in the assessment year 2003-04. On the basis of these facts there was a strong justification for the assessee to claim exemption under section 80IB(7A) in the assessment year 2006-07 as it was the fourth year and benefit is available for five consecutive years beginning from the initial assessment year.

The fact about completion of construction as noted by the CIT(A), supported by the audit report, remained undisputed at the stage of the Tribunal. Therefore, the assessee cannot be visited with the charge of filing inaccurate particulars, on the basis of which penalty under section 271(1)(c) has been levied by the Assessing Officer.

It is also relevant to mention that penalty has been levied for furnishing inaccurate particulars, whereas the Tribunal in para 8 of its order which reads as under :-

> *"8. We have considered the rival submissions. We find that the admittedly the return of income for the present year was filed by the assesse on 30/11/2006 i.e. before the order of CIT(A) in assessment year 2002-03 as per which he rejected the claim of the assessee regarding its eligibility for deduction u/s 80IB and the same has become final because no appeal was filed by the assessee before the Tribunal against this order of CIT(A) but it is also true that the assessee could have revised the return of income for the present year till 31/03/2008 and in that situation, there could not have been any occasion to levy any penalty but the assessee has chosen not to do so and hence, we find force in the contention of learned D.R. of the Revenue and also in the stand taken by the Assessing Officer that the assessee has concealed its income and therefore, penalty is justified under these facts."*

In view of the above, we are of the view that by making legal claim for deduction under Section 80-IB(7A) assessee is not guilty to concealment of income. In the earlier years, the A.O. himself has cancel the levy of the penalty for the similar reasons. When it is so, then the principal of consistency will have to be followed as per ratio laid down in the case of ***Radhasoami Satsang, 193 ITR 321 (SC)***.

From the record, it also appears that the A.O. has not given any finding that the claim of the deduction was bogus. The A.O. has only stated that such claim was not leviable as the conditions envisaged under Section 80-IB(7A) were not fulfilled. Thus, the claim was found to be legally unacceptable, but it does not amount to furnish the inaccurate particulars/concealment of the income. It is a simple case of non-allowance of the legal claim for which the penalty is not desireable. Hence, we set

aside the impugned order of the Tribunal and restore the order passed by the first appellate authority, who has rightly cancelled the levy of the penalty.

The answer to the substantial question of law is in favour of the assessee and against the Department.

In the result the appeal filed by the assessee is ***allowed***.

(Dr. Satish Chandra, J.) (Arun Tandon, J.)

Order Date :- 16.04.2015.

Anurag/-