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

DECIDED ON: 11.10.2012

\+ **ITA 67/2012**

PRAMOD MITTAL ..... Appellant
Through: Sh. S. Krishnan, Advocate.

versus

CIT ..... Respondent
Through: Ms. Suruchi Aggarwal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

%

1. The following question of law arises for consideration in this appeal by the assessee:

> *"Whether the Tribunal fell into error in upholding the penalty imposed under Section 271(1)(c) by the lower authorities on the ground that it (the assessee) had filed a return containing inaccurate particulars?"*

2. The facts briefly are that the assessee was partner of a firm with his brother. The assessee succeeded to the business by way of family settlement which also dissolved the firm with effect from 18.09.2004. The petitioner, who took over the business, assets, liabilities and affairs of the ongoing

business, filed a return in which he claimed set-off of the losses of the erstwhile firm. These losses were by way of unrecoverable expenses over the income of the erstwhile firm. The Assessing Officer (AO), the CIT (A) and later the Income Tax Appellate Tribunal (ITAT) rejected the claim on the ground that Section 78(2) did not entitle the assessee to it. On appeal, this Court affirmed that view and also held as follows:

> *"5. It will be appropriate to refer to Section 170(1) of the Act, which reads: -*
>
> *"Section 170. Succession to business otherwise than on death.*
>
> *(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession, - (a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;*
>
> *(b) the successor shall be assessed in respect of the income of the previous year after the date of succession."*
>
> *6. Section 170(1) is very lucid and clear. The partnership firm has to be assessed in respect of profit and gains from the business for the period up to 18th September, 2004. After the said date and after the partnership firm was dissolved, the sole proprietor has to be assessed in respect of profits and losses. The income earned by the appellant, as an individual, would include his share of loss as an individual but not the losses suffered by the partnership firm. The losses suffered by the partnership firm cannot be set off from the income of the appellant as an individual, in the absence of any specific*

provision in the Act. The partnership firm and individual are two separate taxable entities or persons under the Act.

7. There is no contradiction between Section 78(2) and Section 170(1). They provide for different situations. Section 170(1) provides for a situation where a person carrying on business or profession is succeeded to by another person, who continues to carry on that business. In such a situation, the sub-section says that predecessor in business shall be assessed in respect of the income of the previous year up to the date of succession and the successor in business shall be assessed in respect of the income after the date of succession. This sub-section only provides as to who will be assessable in respect of the income of the previous year from business, when there is a change in the person carrying on the business by succession. Section 78(2) provides for a different situation. It speaks only of carry forward of the losses of a person who was carrying on a business or profession and who was succeeded to by another person. It makes no provision for the division of the income of the previous year between the predecessor and successor. It says that it is only the person who incurred or suffered the loss who will be entitled to carry forward the same and set it off, and no other person. An exception to this rule is the case of succession by inheritance."

3. In the meanwhile, the income authorities initiated penalty proceedings on the footing that the assessee had made a false claim. This penalty imposed was confirmed by CIT(A) – an order which was upheld by the ITAT.

4. Learned counsel argues that the discussion by the lower authorities would reveal that even according to their understanding this was not a case where Section 170 of the Income Tax Act applied, which was one of the principal reasons which impelled the Court to reject his claim. It was urged that the CIT(A) as indeed the AO seemed to have fallen into error in holding

that the assessee was not a successor whereas in fact he was because he took over the assets, finance, liabilities and other affairs of the erstwhile firm which was in turn an assessee. Learned counsel also argued that the assessee, though a new entity, continued to receive amounts which were payable to the old firm for which even TDS was effected. It was further emphasized that the PAN of the dissolved firm continued and was succeeded to by the assessee. Learned counsel for the Revenue, on the other hand, argued that this was a case where Section 78(2) squarely applied and the position of the law being clear and known to the assessee, it has claimed for setting-off of the losses, which was plainly untenable. Since the assessee consciously made it, the set-off claim was clearly a "bogus" one and fell within the meaning of that expression. Reliance was placed upon the judgment of this Court reported as *CIT v. Harparshad and Company Ltd.* 328 ITR 53.

5. This Court has considered the submissions. The order of the AO and the CIT(A) would reveal that there is no separate discussion apart from the fact that the assessee had made a claim for set-off of all the losses incurred by the erstwhile entity. The assessee is to that extent correct in arguing that both the orders are unreasoned. As far as the Tribunal is concerned, it upheld the liability in the following terms:

> *"27. Now coming to penalty imposed in respect of hire charges of Rs.1,11,500/-, paid to Ms. Neena Chadha, the genuineness of transaction was not proved. Ms. Neena Chadha was an employee of the assessee. The assessee alleged to have made payment on account of hire charges of road roller, but the ownership of the same was not proved by the assessee. It is not a case where the party is not cooperating with the assessee. She is in the employment of the assessee and, therefore, there*

could not have been any difficulty in furnishing the documents relating to the ownership of the road rollers. From these facts, it is evident that the assessee had not proved the genuineness of the transactions. Therefore, assessee had claimed expenditure which was not allowable as deduction. As regards setting off of loss of the firm against the individual income, the provisions of Section 78(2) are clear and unambiguous. The loss incurred by an assessee cannot be set off against the profit earned by another assessee. A firm and an individual are two different assessees. Therefore, the claim made by the assessee setting off of the loss of erstwhile partnership firm against the income of the assessee was not allowable as deduction. We have upheld the disallowance made by the Assessing Officer and upheld by the CIT(A). In view of these facts, it is clear that the assessee had made a false claim which was not allowable as deduction. Explanation (1) to Section 271(1)(c) of the Act provides for two situation under which the additions made will be deemed to represent the income in respect of which particulars have been concealed. Clause (A) of the Explanation91) to Section 271(1)(c) of the Act takes into the ambit the cases, where a person fails to offer an explanation or offers an explanation which is found by the Assessing officer or CIT(A) or Commissioner to be false whereas under Clause (B), a person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and all the material facts relating to the same and material to the computation of his total income have been disclosed by him. In assessee's case, the claim of set off of partnership firms's loss against the individual income is blatantly wrong. It is not a case of bona fide explanation that the assessee had claimed set off of loss under bona fide belief that set off of brought forward loss was allowable. Therefore, the addition made by Assessing Officer will amount to represent the income in respect of which particulars have been concealed.

XXXXXX XXXXXX XXXXXX

29. The decision relied upon by the ld. AR of the assessee in

the case of CIT v. Reliance Petro Products (supra) is not applicable to the facts of the assessee's case as the information given in the return of income has been found to be incorrect. It is not a case merely of making incorrect claim for deduction, but it is a case of bogus claim for set off of loss of firm against income of individual. It is also a case of bogus claim in respect of road roller hire charges. Therefore, the issue is squarely covered by the decision of Hon'ble Delhi High Court in the case of Har Parshad & Co. Ltd. (supra). Respectfully following the decision of Hon'ble Delhi High Court, it is held that penalty under Section 271(1)(c) is leviable in respect of set off of loss of Rs.22,40,193/- and bogus claim for payment of road roller hire charges to Ms. Neena Chadha. We, therefore, uphold the order of the ld. CIT (Appeals)."

6. This Court has heard the counsel for the parties. Learned counsel for the assessee argued that having regard to the facts, the ultimate disallowance was on account of Section 170(1) which was not even reflected in the orders of the lower authorities, nor adverted to by the orders of the lower authorities as well as the Tribunal in either round of litigation, i.e. quantum and penalty. Such being the case, the upholding of the quantum proceedings by the Court could not have been the only basis for the imposing of the penalty. Learned counsel for the Revenue, on the other hand, argued that this Court, in the quantum proceedings had clearly stated that Section 78(2) applied to the facts of the case. In the circumstances, the claim for setting-off was plainly inadmissible despite which the assessee had put it forward which in turn meant that it was bogus claim made deliberately, warranting the penalty.

7. This Court has considered the submissions. The extracts from the orders of the CIT (A) and ITAT referred to above would show that there is

absolutely no discussion of Section 170 of the Act, which in fact is the applicable provision as regards the succession. Moreover, the AO in this case, as also the CIT(A) was under the misapprehension that the assessee was not a successor. This Court has conclusively ruled that the assessee was in fact a successor but not entitled by virtue of Section 170(1) to lay claim to the adjustment of the loss of the erstwhile firm. Such being the case, lack of clarity by the income tax authorities right upto the ITAT itself, in the opinion of the Court, is a justifiable ground for the assessee to say that the point was debatable. This is underscored by the final judgment of the Court reported as *Pramod Mittal v. Commissioner of Income Tax* (2012) 205 Taxman 444 (Delhi) in the assessee's own case. In these circumstances, the imposition of penalty was not warranted. The impugned order requires to be and is set-aside. The question of law is, therefore, answered in favor of the assessee and against the Revenue. The appeal is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

OCTOBER 11, 2012
'ajk'