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

% Date of Decision : 18th April, 2012.

+ ITA 999/2011
+ ITA 1091/2011

CIT Appellant
Through Mr. Abhishek Maratha, sr. standing
counsel with Ms. Anshul Sharma, Adv.

versus

CENTRAL WAREHOUSING CORPORATION...Respondent
Through Mr. M S Syali, Sr. Adv. with Mr.
Mayank Nagi, Ms. Husnal Syali, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

These two appeals by the Revenue in the case of Central Warehousing Corporation, the respondent-assessee, relate to assessment years 2003-04 and 2004-05. By the common impugned order dated 15.11.2010, Income Tax Appellate Tribunal ('Tribunal', for short) has deleted the penalty under Section 271(1)(c) of the Income Tax Act, 1961 ('Act', for short) after applying and following

the decision of this Court in *CIT Vs. Nalwa Sons Investments Ltd.* (2010) 327 ITR 543 (Delhi).

2. The issue raised is whether the decision in *Nalwa Sons Investments Ltd.* (supra) is applicable to the facts of the present case. The facts for the two assessment years may be noted.

3. The assessment year 2003-04: -

(a) The assessee had returned loss of ₹10.74 crores under the normal tax provisions. The assessee had disclosed book profit of ₹47.62 crores under Section 115JB of the Act.

(b) The Assessing Officer computed the income under the normal provisions at a positive figure of ₹149.90 crores after additions. The book profits under Section 115JB of the Act were also enhanced to ₹97.29 crores.

(c) The assessee preferred appeals and after giving appeal effect, the normal taxable income as per the Act, was finally assessed at a loss of ₹ 15.87 lakhs. The book profits under Section 115JB were assessed at ₹46.56 crores. The book profits were more and therefore, the income of the assessee was assessed under Section 115JB at ₹46.56 crores. This figure is slightly less than the figure of book profits mentioned in the return income of ₹47.62 crores.

4. The assessment year 2004-05: -

(a) The returned income under the normal tax provisions was loss of ₹26.45 crores. The book profits under Section 115JB were declared at a positive figure of ₹62.81 crores.

(b) The Assessing Officer made various additions to the normal income and computed the same at a positive figure of ₹48.56 crores. However, the said figure was less than the book profit of ₹62.81 crores as declared and accordingly, the taxable income was computed under Section 115JB at a figure of ₹62.81 crores. Book profits were not enhanced.

5. The question raised in the present appeals is whether penalty can be imposed on the assessee, where additions are made under the normal provisions of the Act but actually the taxable income of the assessee is assessed not under the normal provisions but under Section 115JB and there is no addition as far as book profits is concerned.

6. The said aspect was examined by this Court in *Nalwa Sons Investments Ltd. (supra)*. In the said case, after referring to Explanation 4(a) to section 271(1)(c), it has been held as under: -

“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 115JB of the Act. On the basis of normal provision, the income was assessed in the negative i.e. at a loss of Rs. 36,95,21,018. On the other hand, assessment under s. 115JB of the Act resulted in calculation of profits at Rs. 4,01,63,180.

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

"Assessed at Rs. 4,01,63,180 under section 115JB, being higher of two. Interest under section 234B and 234C has been charged as per the provisions of IT Act, 1961. Penalty proceedings under section 271(1) (c) of the Income-tax Act, 1961 have been initiated. Issue necessary forms."

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

Judgment in the case of Gold Coin (2008) 304 ITR 308, 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 115JB 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 115JB of the Act. Hence, when the computation was made under section 115JB 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.”

7. The issue being clearly covered by the said decision, we do not think any substantial question of law arises for our consideration. The appeal is dismissed. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

APRIL 18, 2012

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