IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

TAX APPEAL NO. 28 OF 2007

The Commissioner of Income Tax
Aaykar Bhavan, Near Holy Cross
School, Cantonment, Aurangabad. .. Appellant

Versus

M/S Sidson Chemicals Pvt. Ltd.,
Plot No. H-29, M.I.D.C. Area,
Waluj, Aurangabad. .. Respondent

Shri Alok Sharma, Advocate for the Appellant.
The Respondent sole served - absent.

CORAM : S. V. GANGAPURWALA AND
A. I. S. CHEEMA, JJ.
DATE : 26TH MARCH, 2015.

ORAL JUDGMENT (***Per S. V. Gangapurwala, J.***) **:-**

. This Court while admitting the matter had framed following substantial questions of law :

(i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in upholding the order of the CIT(A) in cancelling the penalty imposed by the Assessing Officer under section 271(1)(c) of the I. T. Act 1961 on the ground that the assessed income was a negative figure at Rs. 6,25,301/- and no tax was found payable by the assessee?

(ii) Whether on the facts and in the circumstances of the case and in law, the Appellate Tribunal was justified in holding that the judgment of Hon'ble Supreme Court in the case of Prithpal Singh and Company is applicable to the present case, whereas the Assessing Officer categorically had distinguished the case from the decision of the Hon'ble Supreme Court referring the insertion of Explanation-4 to section 271(1)(c) of the I. T. Act, 1961 w.e.f. 01/04/1976?

(iii) Whether on the facts and int he circumstances of the present case, the action of Assessing Officer in imposing penalty u/s 271(1)(c) of the Act was right, keeping in view the ratio of decision of the Hon'ble High Court of Delhi dated 2/07/2005 in the case of Commissioner of Income Tax vs. Aditya Chemicals Ltd. and others [(2005) 197 CTR 9Delh.) 241], wherein it is observed that decision of the Hon'ble Supreme Court in the case of Prithpal Singh and Company (supra) will have no bearing in those cases which have arisen between the period of said 1976 and 2003 amendment to sec. 271(1)(c) of the I. T. Act, 1961?

2. The respondent though as per the endorsement of office is served, is absent.

3. Mr. Sharma, the learned counsel for the appellant submits that, the Commissioner allowed the appeal filed by the respondent/assessee against the order of the Assessing Officer levying penalty U/Sec. 271(1)(c) of the Income Tax Act, 1961 (for the sake of brevity hereinafter called as "I. T. Act") on the ground

that the assessed income was a negative figure, no tax was found payable by the assessee, as such provisions of Sec. 271(1)(c) of the I. T. Act would not have been invoked.

4. The learned counsel submits that, the same is not a correct preposition of law. The learned counsel submits that, the issue whether the penalty U/Sec. 271(1)(c) of the I. T. Act, can be levied, if the returned income was a negative figure was referred to the Larger Bench of the Apex Court in a case of ***CIT Vs. Gold Coin Health Food (P) Ltd*** reported in **(2008) 304 ITR 308 (SC)** and the Apex Court has held that, the judgment delivered by the Apex Court earlier in a case of ***Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax*** reported in **2007 (289) ITR 83 (SC)** is not a good law. The learned counsel submits that, the judgments delivered by the Commissioner and the Tribunal as such deserve to be set aside.

5. We have considered the judgments delivered by the Assessing Officer, Commissioner and the Tribunal. So also the judgments of the Apex Court referred by the learned counsel for the appellant. Earlier the Apex Court in a case of ***Virtual Soft Systems Ltd. Vs. Commissioner of Income Tax*** referred supra had held that, if the returned income is loss, then penalty U/Sec. 271(1)(c) of the I. T. Act cannot be levied. The said issue was referred to the Larger Bench by another Division Bench of the

Apex Court in a case of ***CIT Vs. Gold Coin Health Food (P) Ltd*** referred supra. Para 2 of the said order reads as under :-

> "2. Expressing doubt about the correctness of the judgment rendered by a Division Bench of this Court in Virtual Soft Systems Ltd. V. Commissioner of Income Tax, Delhi (2007 (9) SCC 665), a reference has been made by another Division Bench by order dated 7.4.2008 to a larger Bench. The question which was decided in Virtual's case (supra) was as to whether the penalty under Section 271(1)(c) of the Income Tax Act, 1961 (in short the 'Act') can be levied if the returned income is a loss. This question has to be considered in the background of the amendment made by Finance Act, 2002 (in short 'Finance Act') w.e.f. 1.4.2003 in Explanation 4 to Section 271(1)(c) (iii) of the Act. In Virtual's case (supra) the department placed reliance on Notes on Clauses relating to the aforesaid amendment to submit that the amendment was clarificatory in nature and consequentially it was applicable retrospectively. This argument was rejected by this Court in para 52 of the judgment. The Division Bench while making reference was of the view that the true effect of the amendment was not considered, as it was prima facie of the view that merely because the amendment was stated to take effect from 1.4.2003 that cannot be a ground to hold that the same did have the retrospective effect."

6. After considering relevant law, the Larger Bench of the Apex Court concluded as under :-

> "17. Above being the position, the inevitable conclusion is that Explanation 4 to Section 271(1)(c)

> is clarificatory and not substantive. The view expressed to the contrary in Virtual's case (supra) is not correct."

7. In the light of the above, the impugned judgment and order passed by the Commissioner appeals and the Tribunal is quashed and set aside. Appeal accordingly allowed. No costs.

Sd/-
[A. I. S. CHEEMA, J.]

Sd/-
[S. V. GANGAPURWALA, J.]

bsb/March 15