

\$~20

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

+ **ITA 612/2016**

PR.COMMISSIONER OF INCOME TAX Appellant
Through : Sh. Rahul Chaudhary, Sr. Standing
Counsel, Sh. Raghvendra Singh, Jr. Standing
Counsel with Sh. Anup Kumar Kesari, Advocates.

versus

MULTIPLEX CAPITAL LTD. Respondent
Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% **19.08.2016**

1. The revenue is aggrieved by the decision of the Income Tax Appellate Tribunal (ITAT) dated 02.03.2016 whereby the deletion of penalty amounts assessed in this case was challenged.

2. The brief facts necessary are that the assessee had filed its returns under Section 115JB of the Income Tax Act, 1961 [hereafter "the 1961 Act"] in the normal computation. It had claimed certain deductions, especially under Section 88E of the 1961 Act. The Assessing Officer (AO), in the original assessment proceedings was of the opinion that the deductions claimed were inadmissible. However, the AO accepted the assessment on the basis of Section 115JB returns. This led to the deposit of higher tax by the assessee in terms of Section 115JB(1). Apparently, in the course of further proceedings, both the CIT(A) and the ITAT added back further amounts to the normal income which led to higher tax liability on the

part of the assessee. In the meanwhile, the AO had initiated penalty proceedings by issuing Show Cause Notice (SCN) under Section 271(1)(c) of the 1961 Act to which the assessee had replied. The ITAT's adverse orders on the assessment/quantum proceedings were taken note of in the penalty proceedings. The AO thereafter issued SCN on the basis of an earlier satisfaction opinion recorded by him with respect to concealment of income. This led to penalty order. The CIT(A) deleted the penalty order; the revenue claimed to be aggrieved and preferred an appeal to the ITAT, which by the impugned order affirmed the CIT(A)'s order.

3. Learned counsel for the revenue had urged that the ITAT in this case correctly concluded that the question of concealment had been finally determined in the quantum proceedings and furthermore the SCN was not time-barred. Yet, it proceeded to affirm the CIT(A)'s directions to delete the penalty order. Learned counsel sought to distinguish the judgment in *CIT v. Nalwa Sons Investments Ltd.* 2010 (327) ITR 543 (Del). In that case, this Court, taking note of Explanation 4 to Section 271 had clarified that if at the stage of assessment in respect of the higher computation – upon which tax is payable, no concealment is alleged or found, the initiation of penalty proceedings would not be warranted and would be impermissible. It is contended that in the present case, the satisfaction had been arrived at but no proceedings were initiated – a significant factual departure from *Nalwa (supra)*, which warrants a different approach.

4. This Court has considered the submissions. The issue in *Nalwa (supra)* was as to the precise meaning of “concealment” under Section

271(1)(c) in the context of Explanation 4. The revenue had relied upon a decision of the Supreme Court in *CIT v. Gold Coin Health Food (P) Ltd.* 2008 (304) ITR 308 (SC) which had interpreted the fourth Explanation after taking note of a departmental circular. The Court had then ruled that income has to be read to include losses in the context of its previous decision and that even when on account of concealed income, the returned loss is reduced, penalty would nevertheless be leviable. After considering these decisions, this Court in *Nalwa (supra)* observed as follows:

“22. 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 115 JB 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 Section 115 JB of the Act resulted in calculation of profits at Rs. 4,01,63,180. 23.

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

“Assessed at Rs. 4,01,63,180 u/s 115 JB, being higher of two. Interest u/s 234B and 234C has been charged as per the provisions of Income Tax Act, 1961. Penalty proceedings u/s 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 115 JB and not under the normal provisions. It is in this context that we have to see and examine the application of Explanation 4.

The judgment in the case of Gold Coins 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 115 JB 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 115 JB of the Act. Hence, when the computation was made under Section 115 JB 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.”

5. Learned counsel for the revenue had sought to distinguish *Nalwa (supra)* by stating that the ITAT itself had in the present case decided that the SCN could not be said to have been time-barred. This Court is of the opinion that the distinction sought to be made between the reasoning in *Nalwa (supra)* and the present case is not germane. What is of importance is that at the time when jurisdiction is assumed by the AO – i.e. upon completion of proceedings or within the time stipulated by forming an opinion that there is no concealment of income, there should be objective material to reach the conclusion

that such concealment is material having regard to the nature and circumstances of the case, especially where two computations are involved. At the stage when the AO sought to assume jurisdiction and form an opinion, the assessment was completed under Section 115JB. Concededly, there was no concealment of any material particulars in respect of that part of the return. The concealment found was in respect of normal computation. That the normal computation involved certain disallowances at later and higher stages of the proceedings at the first appellate and the ITAT's proceedings reflect the unfortunate circumstances of the litigating parties. That would not in any manner deviate from the fact as to whether the AO could have assumed, on the basis of the opinion that there was concealment of income which led to revenue loss. If the revenue evasion were to be accepted, a satisfaction which was otherwise warranted at the time when it was recorded because of operation of Section 115JB(1) or other such like provision would remain pending for about 15 years and the revenue can hopefully urge at later stage that an opinion formed which was not valid at the time it was made, can be revived after a period of hibernation to revisit the assessee. Such circumstances can hardly be called satisfactory or lead to any certainty; it will anyway lead to no certainty in law at all; we are satisfied that no question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

AUGUST 19, 2016/ajk