

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SMT. JUSTICE T. RAJANI

I.T.T.A.No.582 of 2017

JUDGMENT: (*Per VRS,J*)

The Revenue has come up with the above appeal under Section 260A of the Income Tax Act, 1961, challenging an order of the Income Tax Appellate Tribunal deleting the penalty levied under Section 271 (1) (c) of the Act.

2. Heard Mr. K. Raji Reddy, learned senior standing counsel for the Income Tax Department, appearing for the appellant.

3. The respondent/assessee was engaged in the business of setting up an integrated textile park in the Special Economic Zone at Visakhapatnam. They filed a return of income for the assessment year 2011-2011, declaring the total loss of Rs.43,52,78,405/-.

4. The case was converted into scrutiny and the Assessing Officer made an addition of Rs.5,21,31,306/-. This resulted in the total loss returned by the assessee getting reduced to Rs.38,31,47,099/-. In other words, even after the addition, the assessee did not gain any profit.

5. The addition was made by the Assessing Officer, on the ground that the assessee wrongfully claimed depreciation at the rate of 100% on certain assets, in terms of the provisions of Section 80IA (4) (i) of

the Act. The Assessing Officer restricted depreciation to 15%, on the ground that the assessee was not entitled to claim depreciation under Section 80IA (4) (i).

6. Thereafter, penalty proceedings were initiated under Section 271 (1) (c). The Assessing Officer levied penalty to the tune of Rs.1,73,16,700/-, obviously calculating penalty on the depreciation wrongfully claimed. The assessee took a defense that the mistake was *bona fide*. However, the Assessing Officer over-ruled the objections and levied penalty.

7. The appeal filed by the assessee was allowed by the CIT (Appeals), by an order, dated 30.10.2014. The same was confirmed by the Income Tax Appellate Tribunal. As against the concurrent orders of both the authorities, namely, the CIT (Appeals) and the Tribunal, ordering the deletion of penalty, the Revenue is before us.

8. Substantial questions of law raised by the Revenue in this appeal are as follows:

“1. Whether on the facts and in the circumstances of the case and in law, the Appellate Tribunal was justified in deleting the penalty levied under Section 271 (1) (c) of the Act holding that the excess depreciation claim made by the assessee is a bonafide claim without any fraudulent intention to evade tax which does not tantamount to furnishing inaccurate particulars of income warranting levy of penalty without the appreciating the fact that the mens rea is not essential as decided by the Hon’ble Supreme Court in the case of UOI Vs. Dharmendhra Textile Processors and others - (2008) 306 ITR 277?

2. Whether on the facts and in the circumstances of the case and in law, the Appellate Tribunal was justified in deleting

the penalty holding that the explanation of the assessee for the excess claim of depreciation was bonafide that too when it is assisted by the qualified professionals (Chartered accountants) without appreciating the legislative intent as observed by the Hon'ble High Court of Delhi in the case of Zoom Communication (P) Ltd. (40 DTR 249 (2010)) that if we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bonafide while making a claim of this nature, that would give a license to unscrupulous assesses to make wholly untenable and unsustainable claims without being any basis for making them? and

3. Whether on the facts and in the circumstances of the case and in law, the Appellate Tribunal was justified in distinguishing the case of UOI Vs. Dharmendhra Textile Processors and others ((2008) 306 ITR 277) with that Rajasthan Spinning and Weaving Mills ((2009) 224 CTR 1 (SC)) without appreciating the fact that the explanation 4 (a) to section 271 (1) (c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure as decided by the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Gold Coin Health Food Pvt. Ltd. And that too when the conditions prescribed in the Statute are satisfied (Rajasthan Spinning and Weaving Mills ((2009) 224 CTR 1 (SC)))?"

9. We have carefully considered the material papers and heard the submissions of the learned senior standing counsel for the Department.

10. At the outset, it should be pointed out that the two authorities, namely, the CIT (Appeals) and the Tribunal have held that the mistake committed by the assessee was a *bona fide* mistake. On this finding of fact, no specific question of law would arise for our consideration.

11. However, it is contended by Mr. K. Raji Reddy, learned senior standing counsel for the Department, on the basis of the decision of the Hon'ble Supreme Court in ***Commissioner of Income Tax Vs. Gold Coin Health Food Pvt. Ltd.***¹, that a Company, which is engaged the service of qualified professionals, cannot commit a mistake of this nature *bona fide*, and that for the levy of penalty, *mens rea* was not necessary.

12. But unfortunately, one important aspect lost sight of by the Assessing Officer as well as the Revenue is that even after the addition by the Assessing Officer, the Company was seen to have incurred only a net loss. As we have pointed out earlier, the loss declared by the assessee after claiming depreciation at 100% was Rs.43,52,17,405/-. But, after the Assessing Officer corrected the error and made an addition to the tune of Rs.5,21,31,306/-, the net loss got reduced to Rs.38,31,47,099/-. In other words, there was no profit.

13. Keeping the above factual details in mind, if we have a look at the provisions of Section 271 (1) (c), it could be seen that no penalty could have actually resulted from the addition, especially in the facts and circumstances of the case. The relevant part of Section 271 (1) (c) reads as follows:

“(1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner of Commissioner in the course of any proceedings under this Act, is satisfied that any person –

¹ 304 ITR 308

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

he may direct that such person shall pay by way of penalty,-

(iii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.”

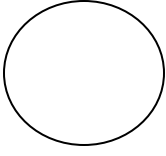
14. It could be seen from the provisions extracted above that the penalty is to be calculated on the amount of tax sought to be evaded by reason of concealment of particulars of income. No amount of tax resulted from the addition at least for the current assessment year. Perhaps, if the losses are allowed to be carried forward to future years, the tax implication may arise in future. But, the amount of liability that will result from such addition in future is indeterminable at least as on date. Therefore, the deletion of penalty by two authorities, do not give rise to any question of law. Hence, the appeal is dismissed.

Consequently, miscellaneous petitions if any pending in the appeal shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

T. RAJANI, J.

18th September, 2017
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THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN ✓
AND
THE HON'BLE SMT. JUSTICE T. RAJANI



ITTA No.582 of 2017
(dismissed)

18th September, 2017

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