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

% ***Date of decision:22.03.2023***

\+ **ITA 962/2018**

THE PR. COMMISSIONER OF INCOME TAX -6..... Appellant
Through: Mr Ruchir Bhatia, Sr. Standing Counsel.

versus

NATIONAL TEXTILES CORPORATION LTD. ..... Respondent
Through: Mr Ved Jain with Mr Nischay Kantoor, Advocates.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MS JUSTICE TARA VITASTA GANJU
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

Background

1. This appeal is directed against order dated 22.02.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] concerning Assessment Year (AY) 2009-2010.

2. The appellant/revenue is aggrieved by the fact that the Tribunal has sustained the view taken by the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"], whereby the CIT(A) has deleted the penalty amounting to Rs. 4,40,47,933/- imposed by the Assessing Officer (AO) under Section 271(1)(C) of the Income Tax Act, 1961 [in short, "the Act"].

Prefatory Facts

3. To carry out an adjudication in the instant case, broadly, the following facts are required to be noticed:

4. The respondent/assessee, which is a public sector company, had filed its return of income on 28.07.2009, declaring its income as Rs. 1,16,540/-.

4.1 Thereafter, a revised return was filed by the respondent/assessee on 31.03.2010, when respondent/assessee chose to declare its income as "nil".

5. The return filed by the respondent/assessee was subjected to scrutiny. In the course of scrutiny, the AO, *inter alia*, disallowed Rs.14,25,49,948/- on account of foreign exchange fluctuation losses. The assessment order in that behalf, under Section 143(3) of the Act, was passed by the AO on 23.12.2011.

6. The record shows that prior to the aforementioned assessment order being passed, during scrutiny, an issue arose, *inter alia*, with regard to the claim made by the respondent/assessee on account of foreign currency fluctuation losses. This aspect arose in and about 28.11.2011.

6.1 The record shows that before the assessment order was passed, the respondent/assessee on 15.12.2011, submitted a letter to the AO, whereby it claimed depreciation to the extent of Rs. 3,45,93,316/-, on account of the increase in the cost of machinery due to foreign currency fluctuation losses. In other words, the respondent/assessee accepted the position that the foreign currency fluctuation losses had to be capitalized, and therefore, logically, depreciation *qua* the same had to be allowed.

7. The AO while passing the assessment order added, as indicated above, Rs. 14,25,49,948/- to the income of the respondent/assessee, without giving the benefit of depreciation.

8. The respondent/assessee, being aggrieved, carried the matter in appeal to the CIT(A). The CIT(A) *via* order dated 31.01.2013, insofar as this issue was concerned, accepted the stance of the respondent/assessee.

Accordingly, the CIT(A), while sustaining the view of the AO that addition with regard to foreign currency losses was viable, overruled the AO to the extent that he had not granted depreciation to the respondent/assessee, on account of increase in the cost of plant and machinery.

8.1 This aspect of the matter is evident upon perusal of paragraph 6.3 of the order dated 31.01.2013 passed by the CIT(A). We may note that a hard copy of the said order has been placed before us. For the sake of convenience, paragraph 6.3 is extracted hereafter:

> *"I have carefully considered the finding of the A.O as well as all the submissions of the appellant. The assessee had claimed 'Foreign Exchange Fluctuation Loss' of Rs. 14,25,49,948/- under the head 'Finance Charges' of the Profit and Loss Account. The assessee has admitted that the foreign exchange fluctuation loss pertains to the rate difference arising on account of purchase of plant and machinery. Therefore, A.O. held that under the provision of u/s 43A the foreign exchange fluctuation loss is to be allowed on payment basis and is to be reduced / increased from the corresponding cost of the relevant plant and machinery. Accordingly foreign cxchange fluctuation loss of Rs. 14,25,49,948/- was being disallowed and added back to the income of the assessee by the A.O. The assessee has admitted that due to bonafide error it wrongly claimed Foreign Exchange Rate Difference of Rs. 124,25,49,948.21 as an expense which was disallowed by the A.O. & accepted by assessee. However, the A.O. has erred is not allowing depreciation on account of increase in cost of plant & machinery by the amount of foreign exchange fluctuation of Rs. 14,25,49,948/- as per the provision of sec 43A read with sec 32(1)(ii) & (iia) of the I.T. Act. In view of the above, depreciation @15% and additional depreciation @20% has to be allowed as per the provisions of sec 32(1)(ii) and (iia) of the I.T. Act. The A.O. is, therefore, directed to allow the depreciation of Rs. 3,45,93,316/- as above. The appeal is allowed on the ground."*

9. It is also pertinent to note that while passing the assessment order, the AO had also initiated penalty proceedings against the respondent/assessee under Section 271(1)(C) of the Act. In doing so, the AO had triggered both limbs of the said provision, i.e., that not only had the respondent/assessee

furnished inaccurate particulars of its income, but had also concealed its income. This penalty order was passed on 31.03.2014.

9.1 Consequently, penalty amounting to 100% of the tax sought to be evaded was imposed on the respondent/assessee. As indicated above, the penalty imposed upon the respondent/assessee was pegged at Rs.4,40,47,933/-.

10. We may note that there is no dispute that prior to imposition of penalty, a show cause notice was served on the respondent/assessee under Section 274 of the Act. This show cause notice was dated 07.01.2014.

11. Being aggrieved, the respondent/assessee preferred an appeal with the CIT(A). As indicated above, the CIT(A) deleted the penalty. While doing so, the CIT(A) noted certain submissions which, in our view, contextualized the impugned action of the respondent/assessee. For the sake of convenience, paragraph 3 of the order dated 17.07.2015 of the CIT(A) is set forth hereafter:

> *"3. In the written submissions, the A/R of appellant company submitted:-*
> *LD DCIT imposed penalty u/s 271(1)(C) on the sustained additions of Rs 14,25,49,948/- pertaining to Foreign Exchange Fluctuation Loss by concluding that explanation given by NTC is false & liable by penalty. The order of LD DCIT is bad in law & on the facts of the case as follows:-*
> *1. The LD DCIT committed the factual mistake by not following the order of LD CIT(A). Please note that Ld CIT (A) directed the LD DCIT to allow depreciation of Rs 3,45,93,316/- (Ref CIT (A) order page 14) against the above addition, but with the thirst of revenue he ignored it & imposed penalty on Rs 14,25,49,948/- instead of on Rs 10,79,56,632/- resulting in excessive penalty by Rs 1,06,89,225/-.*
> *2. NTC never offered false explanation as explained below to be imposed with rigorous of penalty as explained below:-*
> *2.1. NTC is having unabsorbed losses of Rs.12,218.52 Crores alongwith BIFR order for nonpayment of taxes. It means NTC isn't going to gain any thing by not disallowing meager sum of Rs 10.79 Crores, the fundamental basis of Penalty.*

2.2.1t is also a covered matter as in earlier years penalty u/s 271 1 (C) has been deleted based on above reasoning by CIT(A)-XVI- & ITAT for the A.Y. 2003-04 (Ref Paper Book Page no 116-123).

2.3. NTC is a public sector undertaking owned by President of India. The payment of taxes if any shall mean payment from one pocket to another pocket only. In other words no malafide intention of NTC can ever be thought of as alleged by LD DCIT.

2.4. Please note that NTC by bonafide ·error didn't added back Foreign Exchange Fluctuation Loss on Fixed Assets purchase under the bonafide belief that it is an allowable expense being incurred during the normal course of business. NTC although declared the amount in Profit & Loss a/c but omitted to add back as per sec 43 A read with sec 43(1). Please note that there was no malafide intention but simple omission to apply intricate I-Tax provisions. The mistake apparently occurred due to non availability of technical staff and hard pressing of time due to late receiving of reports etc from auditors of sub offices\Mills, whose figures are clubbed together. In fact Tax audit Report was signed as on 25th Sept 2009 and received as on 26th Sept 2009 for filling of ROI as on 27th Sept 2009. In fact on discovery of mistake by NTC during assessment proceedings, NTC voluntarily surrendered the amount as per documents placed on record and even not disputed it in the regular appeal also being bonafide error.

2.5. NTC was formed solely to fulfill its social objects by taking over SICK CLOTH MILLS to safe guard the interest of WORKERS and later on also become sick and referred to B1FR for restructuring and President of India is the 98.67% shareholders of the NTC and all the Directors including CMD is appointed by GOI. In other words by no stretch of imagination it can be presumed that NTC or its employee were ever having malafide intention to show increased losses with the intention of getting it's benefit in the coming years. At the most it is a venial & technical mistake committed in preparation of Computation of Income, for which your Goodself are humbly requested to quash the Penalty proceedings as a matter of fairness & justice.

2.6. The Foreign Exchange Fluctuation Loss was duly shown in the Profit & Loss a/c. In other words there was true & fair disclosure of expenses. The assessee has neither suppressed any income nor claimed any bogus or false expenditure. The disallowances have been made on technical & legal ground, which does not tantamount to concealment. It has been held by the various higher authorities that no penalty can be imposed simply because the assessee has made a wrong claim or incorrect computation in the statement of income. There may be a mistake or incorrect computation on the part of the assessee or his representative while filing return, but such mistake cannot be ground of attracting penal provision ti/s. 271[sic:u/s](1)(C)(101 Taxman 269). In this case the assessee has not

> *claimed any bogus expenses, therefore, the legal presumption is that the assessee has not stated anything false. No penalty can be imposed for an accidental or intentional omission. Mere addition or disallowance does not automatically lead to penalty especially where disallowance has been made. on technical ground."*

12. Thereafter, the CIT(A), upon considering various judicial decisions, reached the following conclusion to delete the penalty, based on the rationale captured in his order:

> *"So, to apply this judgment AO has to prove that*
> *1. The claim of assessee is wrong but also that*
> *2. It was made with mala fide intension*
> *The facts in the present case, show that*
> *-assessee is a public sector undertaking owned by govt, of India*
> ***-assessee is incurring heavy losses***
> *- no personal benefit accrues to anybody because of wrong claim of deduction*
> ***-assessee has also not concealed any income or furnished any inaccurate particulars***
> ***-it is only an issue of Wrong claim of deduction***
>
> ***Hence as AO failed to prove that the claim was made with mala fide intension [sic: intention], the above cited judgment won't apply.***
> ***Based on the above facts and circumstances, the penalty u/s 27 (I)(c) levied for AY 2009-10 is hereby cancelled..."***
>
> [Emphasis is ours]

13. Aggrieved by the decision of the CIT(A), the appellant/revenue carried the matter in appeal to the Tribunal. The Tribunal, *via* the impugned order dated 22.02.2018, sustained the decision of the CIT(A) dated 17.07.2015.

Submissions of Counsels

14. Mr Ruchir Bhatia, who appears on behalf of the appellant/revenue, submits that the view taken by the Tribunal and the CIT(A) cannot be sustained. It is Mr Bhatia's contention that course correction was made by the respondent/assessee only after the issue regarding the claim made by it,

was pointed out by the AO.

15. On the other hand, Mr Ved Jain, who appears on behalf of the respondent/assessee, submits that it was a bona fide error and the course correction was made at the earliest, even before the assessment order was passed.

16. We may note that initially, Mr Jain had also raised the point that the AO had committed an error in not indicating, clearly, as to which limb of Section 271(1)(c) of the Act was applicable, in the facts and circumstances of the case. However, Mr Jain did not, ultimately, press this submission.

Analysis and Reasoning

17. We have heard the counsel for the parties and perused the record. Clearly, the record shows that the respondent/assessee could not have claimed the loss on account of foreign currency as deductable expenditure, in view of the provisions of Section 43A of the Act.

17.1 This provision, broadly, mandates adjustment in the cost of an asset, depending on whether there was an increase or a reduction in the liability of the assessee at the time of making payment, on account of changes in the rate of exchange.

17.2 It appears that this aspect emerged during scrutiny.

18. The respondent/assessee, as rightly pointed out by Mr Jain, accepted this position, without demur, even before the assessment order was passed, and accordingly, claimed depreciation on the increased cost of plant and machinery ,*qua* which foreign currency fluctuation loss had been incurred.

19. The record shows that the respondent/assessee had preferred the appeal with CIT(A) only *vis-a-vis* that aspect of the assessment order whereby depreciation had not been granted by the AO.

20. Furthermore, as noted by the CIT(A) while dealing with the penalty order passed by the Deputy Commissioner of Income Tax [in short, "DCIT"], there was in fact no advantage accruing to the respondent/assessee in claiming foreign currency fluctuation loss as deductable expenditure, given the fact that it had unobserved losses amounting to Rs.12,218.52 crores.

21. Clearly, the respondent/assessee, as noted even by the CIT(A), could not have gained anything by claiming foreign currency fluctuation loss as deductable expenditure, as it would have only added to the existing burgeoning losses.

22. At worst, in the instant case, the petitioner's action could be construed as one where it sought to make a claim which was unsustainable in law. That by itself, in the given circumstance, would not call for imposition of penalty, as once the error was pointed out by the AO, the respondent/assessee made a course correction before the assessment order was passed.

23. The law on the issue of penalty is a well traversed course, both by this court as well as by the Supreme Court. (See ***Commissioner of Income Tax, Ahmedabad v. Reliance Petroproducts Pvt. Ltd.*** [2011] 3 SCR 951; and judgment of this court in ITA 11/2019, titled ***Pr. Commissioner of Income Tax-Central 3 v. Taneja Developers and Infrastructure Ltd***.*)*. It is only the application of law which has occurred in the facts and circumstances of the case.

Conclusion

24. Therefore, according to us, no substantial question of law arises for consideration which would merit interference with the order of the Tribunal.

25. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

MARCH 22, 2023 / SA