

Assistant Commissioner of Income Vs. Apsara Processors (P) Ltd.

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Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Dec-27-2004

Reported in : (2005)92TTJ(Ahd.)645

Judge : R Garg, Vice, G Agarwal, R Tolani

Appellant : Assistant Commissioner of Income

Respondent : Apsara Processors (P) Ltd.

Judgement :

1. In the above mentioned cases, the Hon'ble President of Tribunal has referred the following question for the consideration of Special Bench : "Whether penalty can be levied Under Section 271(1)(c) in cases where the assessed income is loss having regard to the amendment made by the Taxation Laws (Amendment) Act, 1975, and by the Finance Act, 2002 ?" 2. The facts which are common in all the cases are that all the assessees have furnished the return disclosing "loss" and what was finally assessed was also "loss" and the assessment years pertaining were after the amendment by Taxation Laws (Amendment) Act, 1975, and before the amendment made by Finance Act, 2002. Several counsels appeared on behalf of the assessees.

3. Shri K.H. Kaji, senior advocate appeared in the case of Apsara Processors vide ITA No. 284/Ahd/2004 and Khedkar Brothers Trading Co.

(P) Ltd. vide ITA No. 251/Ahd/2002. He argued at length. His arguments can be summarised as under : That Section 271(1)(c) provides for levy of penalty for concealment of particulars of income or for furnishing inaccurate particulars of such income. Now, Sub-clause (iii) provides for levy of penalty in addition to any tax payable by the assessee.

Thus, penalty Under Section 271(1)(c) is leviable only when some tax is payable by the assessee because levy of penalty is in addition to the tax payable by the assessee. Sub-clause (iii) of Section 271(1)(c) has been amended by Finance Act, 2002 w.e.f. 1st April, 2003, and by the amendment the words "in addition to tax payable" have been replaced by the words "in addition to tax, if any, payable by the assessee". Thus, before the amendment, the penalty could have been levied only if some tax was payable. Once the penalty is leviable then the computation provision comes into play and for computing the penalty, Explan. 4 can be resorted to. However, if no tax is payable, then penalty provision is inapplicable and the question of invoking Explan. 4 does not arise.

In other words, the Explan. 4 had no meaning and was ineffective till Sub-clause (iii) is amended by the Finance Act, 2002. The learned counsel further submitted that the amendment made by Finance Act, 2002, is w.e.f. 1st April, 2003, and it cannot be considered for the purpose of the appeal under consideration before the Special Bench because in all the appeals, the assessment years are prior to asst. yr. 2003-04.

The learned counsel further submitted that the issue under consideration is covered in favour of the assessee by the decision of Punjab & Haryana High Court in the case of CTT v. Prithipal Singh (1990) 183 ITR 69 (P&H) which is affirmed by the Hon'ble apex Court in CIT v. Prithipal Singh & Co. (2001) 249 ITR 670 (SC). The decision of the Punjab & Haryana High Court has merged with the decision of Hon'ble apex Court and now the matter stands concluded by the above decision of the apex Court.

3.1 That the decision of the Hon'ble Bombay High Court in the case of CIT v. Chemiequip Ltd., (2004) 265 ITR 265 (Bom) is per incurium because it has not considered the decision of the apex Court in the case of CIT v. Prithipal Singh &

Co. (supra). The learned counsel has also relied upon the following decisions in support of his contention : (v) Indo Gulf Fertilisers & Chem. Corporation v. Union of India (1992) 195 ITR 485 (All) Dy. CIT v. Galaxy Dyeing & Printing Mills (P) Ltd. (ITA No. 3331/Mum/1997, dt. 9th March, 2004).

(ii) Subhash Gupta v. Dy. CIT (2003) 78 TTJ (ITAT) 692 : (2003) 85 ITD 167 (Jp)(TM) (iii) Shivram Art Processors v. Asstt. CIT (2001) 115 Taxman 320 (Ahd)(Mag) (v) Shri Khedut Sahakari Khand Udyog Mandli v. ITO, (1990) 36 TTJ (Ahd) 81 H.T. Power Structures Ltd., v. Asstt. CIT, (1993) 47 TTJ (Ahd) 146 3.2 The learned counsel further submitted that the amendment by Finance Act, 2002, w.e.f. 1st April, 2003, in Sub-clause (iii) and Expln. 4 of Section 271(1)(c) cannot be given retrospective effect because for levy of penalty for concealment of income the material date is the date of filing of the return and the law applicable on the date when the return is filed is to be applied.- Therefore, any amendment subsequent to the date of filing of the return cannot be considered for concealment, if any, occurred on the filing of the return. He has also relied upon the following decisions to support his contention that the amendment by Finance Act, 2002, cannot be given retrospective effect : (iii) CIT v. S.R. Patton (1992) 193 ITR 49 (Ker) affirmed by Supreme Court in CIT v. S.R. Patton (1998) 233 ITR 166 (SC) With regard to his contention that for levy of penalty Under Section 271(1)(c) the law applicable is the law on the date on which the return is filed, he relied upon the following decisions : Brij Mohan v. CIT The learned counsel further submitted that even if it is held that two views are possible with regard to levy of penalty where the assessed income is loss, the view in favour of the assessee is to be taken. In support of this contention, he relied upon the decision of Hon'ble apex Court in the case of CIT v. Vegetable Products (1973) 88 ITR 192 (SC).

3.3 At the end, the learned counsel reiterated that the decision of Hon'ble apex Court in the case of Prithipal Singh & Co. (supra) is the law of the land and binding upon the lower authorities under Art. 141 of the Constitution of India. He submitted that when an appeal is dismissed by the Supreme Court on merits, the High Court order merges with the order of the Supreme Court and it becomes the law of the land.

In support of this contention, he relied upon the decision of Hon'ble apex Court in the case of Kunhayammed v. State of Kerala (2000) 245 ITR 360 (SC).

4. Shri S.N. Divatia, advocate, who appeared for and on behalf of Akshai Pump & Engg. (P) Ltd., Ahmedabad, adopted the arguments of Shri Kaji in general. He further submitted that the Tribunal, Ahmedabad Bench, has considered the identical issue in the case of Clarasis Organics Ltd. v. Dy. CIT vide ITA No. 795/Ahd/2000, dt. 3rd April, 2001, for asst. yr. 1995-96. The Tribunal came to the conclusion that the decision of Hon'ble apex Court in the case of Prithipal Singh & Co.

(supra) would be applicable even for asst. yr. 1995-96. That the above decision of the Tribunal has been approved by the jurisdictional High Court and the appeal of the Revenue is dismissed by their Lordships vide Tax Appeal No. 358 of 2001, order dt. 28th Dec, 2001. That the Supreme Court dismissed the SLP by the Revenue against the above decision of the jurisdictional High Court by order dt. 16th Aug., 2002, reported in (2002) 257 ITR (St) 35. He also stated that the issue under consideration is also covered by the decisions cited by Shri Kaji.

4.1 Elaborating the issue of retrospectivity, the learned counsel submitted that there is a normal presumption that the fiscal legislation imposing penalty are generally prospective by the reason of restrictions imposed by Art. 20 of the Constitution. He further stated that the quantum of the penalty is determined with reference to law prevailing on the day when the act of concealment was committed, i.e., on the date when the return was filed. Therefore, once having filed such return, the subsequent amendment to the law relating to the penalty for concealment cannot affect the position as prevailing on the date of filing of the return. He further contended that whenever the legislature intended to give retrospective effect to any Explanation, it expressly so stated while inserting the Explanation. In support of the above argument, he has relied upon the following decisions :Brij Mohan v. CIT 5. Shri Tushar Hemani, advocate, who appeared for M/s Apsara Processors, has adopted the arguments advanced by Shri K.H. Kaji, senior advocate. In addition, he also stated that the Hon'ble Supreme Court has dismissed the appeal filed by the Revenue in the case of Prithipal Singh & Co.

(supra). That the fact of dismissal of appeal is different than the rejection of SLP by the Supreme Court as explained by the Hon'ble Supreme Court in the case of Kunhayammed v. State of Kerala V.M. Salgaonkar & Bros. (P) Ltd. v.CIT 6. Shri Manish J. Shah, advocate, and Shri K.P. Shah, chartered accountant, appeared in the case of Alchemic (P) Ltd. They have adopted the arguments advanced by the other counsel in this respect. Shri K.P.Shah stated that whenever the legislature intended to cover the loss, the word "loss" has been appropriately incorporated in relevant section. In support of his argument, he has referred to the following provisions wherein the legislature has specifically referred to "loss" : (vi) Section 139(1) for return of income having taxable income and Section 139(3) for loss return.

He, therefore, submitted that since in Section 271(1)(c), before the amendment vide Finance Act, 2002, the word "loss" was not included it has to be presumed that the penalty was only for concealment of income and not for concealment of loss. Shri Manish Shah relied upon the decision of Tribunal, Ahmedabad Bench, 'SMC in the case of ITO v.Gausia Enterprises vide ITA No. 867/Ahd/2002, order dt. 5th April, 2004. He has also, relied upon the. decision of Hon'ble apex Court in the case of K.C. Builders and Anr. v. Asstt. CIT (2004) 265 ITR 562 (SC) and contended that before levying the penalty for concealment, the Revenue has to prove mens rea.

7. Shri Milin Mehta, chartered accountant, appeared for Prayas Woollens (P) Ltd. He stated that wherever the legislature intended to give the retrospective effect to any amendment they specifically provided for the same. He pointed out that for levy of additional tax Under Section 143(1A) the law was retrospectively amended so as to cover the cases where loss is reduced by prima facie adjustment. However, with regard to the levy of penalty for concealment, the law was not amended retrospectively and, therefore, the amendment made by Finance Act, 2002, would be applicable prospectively and not retrospectively. He also relied upon the following decisions to support his contention that penalty for concealment is not leviable where loss is reduced.Modi Cement Ltd. v. Union of India (ii) Indo Gulf Fertilisers & Chemicals Corporation v. Union of India and Anr. (supra).

8. Shri S.S. Phadkar, advocate, appeared for and on behalf of M/s Ketan Mehta Films (P) Ltd. who is intervener in these appeals. Shri Phadkar reiterated the arguments as already advanced by the other counsel. He relied upon the decision in the case of CIT v. Onkar Saran & Sons (supra) to support his contention that in respect of penalty for concealment of income, the law applicable is the law prevailing on the date of filing of the return. He also relied upon the decision of apex Court (sic-Delhi High Court) in the case of Chairman, CBDT and Ors. v.V.S. Malhotra (1981) 128 ITR 543 (Del), wherein it has been held that the presumption is that all laws operate prospectively only and only when the legislature has clearly indicated its intention that the law operates retrospectively, then only Courts will give retrospective effect.

9. Shri M.K. Patel, advocate, appeared for the intervener. He submitted that the amendment by Finance Act, 2002, is prospective and not retrospective. In support of this contention, he relied upon one more of such decisions in the case of Kaimabetta Estate (P) Ltd. and Anr. v.Asstt. Commr. of Agrl. FT (2003) 264 ITR 285 (Kar). He also submitted that in Explanation to Section 147, the legislature has specifically provided for reopening of assessment where excessive loss has been computed. If the legislature intended to levy the penalty where the assessee has disclosed excessive loss, it would have been specifically provided in Section 271(1)(c) as it has provided in Explan. 2(c)(iv) to Section 147. He, therefore, contended that the penalty for concealment was not intended for reduction in loss prior to amendment by Finance Act, 2002.

10. The learned Departmental Representative, on the other hand, contended that the avowed purpose of the penal provisions in tax statutes and especially penalty Under Section 271(l)(c) has two limbs; (a) deterrence and (b) equity. Both these concepts are satisfied only when penalty Under Section 271(t)(c) is leviable both in the "loss" cases and in the "income" cases. Non-levy of penalty in "loss" cases leads to anomaly and absurdity which was explained with the help of following example :

Position A	Position B	Difference
R. Income (-) 10,00,000	R.1. (-) 9,99,900	Only of Rs. 200
Concealed 10,00,000	No difference	particulars 10,00,000
Result	Penalty Under Section 271(1)(c)	No penalty Under Section 271(1)(c)

on tax of Rs. 10,00,000 11. It was contended that only a change of Rs.

100 in the loss in one case, the penalty imposable stands at Rs. 10 lakhs and in other cases there is no penalty under the same law. The interpretation advanced by the assessee leads to manifest absurdity and discrimination which cannot be intended by the legislature. This penalty was leviable in "loss" cases even before 1975 Amendment especially after 1st April, 1968 when base of penalty was relatable to quantum of income concealed.

This indicates the intention of the legislature to include the "loss" cases in the ambit of penalty even earlier to 1975 Amendment. The learned Departmental Representative made a point that from the charging provisions of the Act, it can be seen that the words "income" or "profits and gains" should be understood as including loss also so that 'profits and gains' represents (+) income, whereas 'loss' represents (-) income. Reliance was placed on *Atul Kumar Deovrat & Co. v. CIT* (1987) 168 ITR 286 (Cal). On this proposition, it was contended that in *P.R. Basavappa & Sons v. CIT*; (2000) 243 ITR 776 (Kar), the High Court pointed out that there is no inconsistency in the Explanation, since it has always been understood that income includes loss, as for example in *CIT v. Harprasad & Co. (P) Ltd.* (1975) 99 ITR 118 (SC), so that reduction in loss could well be the base for penalty. After all, the loss determined may well have the effect of reduced income in a later year, when it is set off. In this backdrop, it was contended that the word "income" necessarily includes loss which is nothing but negative income. Arguments were made at length in this regard.

12.1 The learned Departmental Representative stated that the case of *Prithipal Singh & Co.* (supra) affirmed by the Supreme Court in (2001) 249 ITR 670 (SC) (supra) was applicable to provision which existed before 1975 Amendment Act. Thus, the same is not applicable to the period after 1st April, 1976. Further, there has been no opinion by the apex Court on the legal issue involved therein. Furthermore, this decision of Punjab & Haryana High Court has been effectively negated in many other decisions of High Courts and Tribunals.

12.2 With respect to the period after. 1st April, 1976, various judgments of Courts and Tribunals support the case of Revenue, although divergence in judicial opinion cannot be denied. The Revenue contends that the correct judicial interpretation is

that after 1975 Amendment, penalty Under Section 271(1)(c) is leviable in the "loss" cases, even without taking the support of the amendment brought by the Finance Act, 2002.

13. Regarding applicability of Prithipal Singh & Co. (supra), it was contended that the Hon'ble High Court held that evasion of tax is sine qua non for imposition of penalty. As there was no positive income, so the motive to avoid tax was missing. May be, it gives benefit in coming years as the loss would be carried forward but, by no stretch of imagination, it can be said the concealment has occurred. Reference to Explns. 3 and 4.-A person need not file a return of income below taxable limit, however he is to file a loss return in view of Section 139(3), if loss is to be carried forward. Word, "income" occurring in Clause (c) and (iii) of Section 271(1) refers to positive income only.

Concealment of income to avoid tax would arise only in the case of positive income and not in the case of loss. In this behalf it was pointed out that the main basis of deletion of penalty Under Section 271(1)(c) in this case is that for penalty positive tax was necessary, which was possible only in case of positive income.

13.1 The learned Departmental Representative contended that this High Court judgment was affirmed by the Hon'ble Supreme Court while disposing of SLP against the above judgment with one line decision "on the facts of the case, no interference is called for". The learned Departmental Representative emphasised that mere rejection of SLP with one line order does not lay down law of the land. For this purpose, following contentions were advanced : (i) As SLP was rejected by saying "on the facts of the case....", it implies that the decision of the apex Court is restricted to the facts of this case only.

(ii) There has been no legal discussion or any judicial interpretation by the apex Court regarding the legal issues raised by the High Court. For example, whether income includes loss, whether motive to avoid tax is missing in any "loss" case or whether benefit of claiming extra or undue loss would not amount to tax benefit in coming year, etc. Therefore, no substantive legal interpretation can be said to emerge from this sentence of the apex Court. The Supreme Court said in the case of S. Shanmugavel Nadar v. State of Tamil Nadu and Ors. (2003) 263 ITR 658

(SC) affirming its earlier stand in the case of Supreme Court Employees' Welfare Association AIR 1990 SC 334, that a summary dismissal without laying down any law, is not a declaration of law.

(iii) As SLP was dismissed, this means that no effective appeal lay with the apex Court on this case and hence, it remained effectively a judgment of the High Court.

(iv) In any case, even if this decision is interpreted as a legal affirmation of the view, the penalty Under Section 271(1)(c) does not exist in "loss" cases : the facts remain that this decision would be applicable to asst. yr. 1974-75 and earlier years because the relevant assessment year in this case was asst. yr. 1970-71, that is to say a period before 1st April, 1976, with effect from which Taxation Laws (Amendment) Act, 1975, became operative.

13.2 The learned Departmental Representative then contended that there is a strong divergence of legal opinion inasmuch as various High Courts have considered the case of Prithipal Singh & Co. (supra) and then held that the penalty Under Section 271(1)(c) was leviable in "loss" cases. Asstt. CIT v. Sharma Cold Storage & Ice Factory (P) Ltd. (1998) 60 TTJ (Pat)(TM) 684 : (1998) 64 ITD 129 (Pat)(TM).

(e) Omrao Ind. Corpn. (P) Ltd. v. ITO (1991) 35 ITD 42 (All) wherein it has also been mentioned as to how the Punjab & Haryana High Court arrived at such a conclusion on the basis of wrong annexures submitted for perusal.

13.3 The Hon'ble Punjab & Haryana High Court itself has not followed the decision in the case of Prithipal Singh & Co. (supra), in the case of CIT v. Sharma & Bros. Poly Fabrics (P) Ltd., wherein reference was granted to Department.

13.4 The amendment made by the Finance Act, 2002, to Explan. 4 of Section 271(1)(c) is clarificatory in nature. The same reads as under: "(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been

concealed or inaccurate particulars have been furnished had such income been the total income." 13.5 The learned Departmental Representative contended that the clarificatory nature of this amendment was clearly discernible from various case laws. Reference was made to notes on clauses appended to Finance Act, 2002 [(2002) 254 ITR (St) 175]. The clarificatory nature has been confirmed by the Hon'ble Bombay High Court in the case of Chemi. Equip Ltd. (supra), the Hon'ble Court has held as under : "The expression "the amount of tax sought to be evaded" has been defined in the newly introduced Expln. 4 to Section 271(1) for the purposes of Section 271(1)(iii) which was introduced w.e.f. 1st April, 1976 by the Taxation Laws (Amendment) Act, 1975. The said expression contemplates that where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income, the base for quantum would be the tax that would have been chargeable on the income concealed, had such income been the total income. Therefore, after 1st April, 1976, the quantum of penalty is linked with the amount of tax sought to be evaded. Therefore, Expln. 4 applies to cases where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished, has the effect of reducing the loss declared in the return or it has the effect of converting that loss into income. Therefore, the Tribunal erred in coming to the conclusion that Section 271(1)(c) was not applicable as the finally assessed income was a reduced loss.

Explanation 4 was not in existence during the asst. yr. 1970-71. The judgment of the Punjab and Haryana High Court in CIT v. Prithipal Singh (1990) 183 ITR 69 (P&H) was applicable to the asst. yr.

1970-71, whereas we are concerned with the asst. yr. 1988-89 when Expln. 4 was in the statute. One more aspect needs to be mentioned.

By the Finance Bill, 2002, Section 271 of the IT Act has been amended vide Clause 97. By Clause 97(f) of the Finance Bill, 2002, it is clarified that in cases where the amount of income in respect of which particulars have been concealed, has the effect of reducing the loss declared in the return, then the amount of tax sought to be evaded shall be the tax that would have been chargeable on the

amount of such income as if such income was the total income. This amendment is clarificatory in nature. It is so stated in the Finance Bill, 2002 : Notes on clauses. Therefore, the view which we have taken is also supported by subsequent amendment. In the circumstances, the Tribunal erred in holding that Section 271(1)(c) was not applicable as the final assessed income was a reduced loss.

The Tribunal has failed to take into account Clause (a) of Expln. 4 as it stood at the relevant time. Question No. 1 is, therefore, answered in the negative, i.e., in favour of the Department and against the assessee." 13.6 The learned Departmental Representative argued the matter at length, sought to distinguish the cases cited by the assessee's counsel. In fine, it was argued that the penalty Under Section 271(1)(c) was leviable in "loss" cases.

14. We have heard both the parties and perused the material placed before us. That the provisions of Section 271(1)(c) immediately prior to amendment by Taxation Laws (Amendment) Act, 1975 which was w.e.f.

1st April, 1976, reads as under : "(1) If the ITO or the AAC in the course of any proceedings under this Act, is satisfied that any person- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, (iii) in the cases referred to in Clause (c), in addition to any tax payable by him, a sum which shall not exceed twice the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

Explanation : Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed Under Section 143 or Section 144 or Section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this subsection." That the issue whether penalty Under Section 271(1)(c) can be levied in a case where the assessed income is loss came up before the Hon'ble Punjab &

Haryana High Court in the case of CIT v. Prithipal Singh & Co.

(supra) for asst. yr. 1970-71. In that case, the assessee has filed the return declaring loss of Rs. 3,35,830. The loss finally determined was Rs. 34,154. The IAC imposed penalty of Rs. 3,50,000 for concealment of income Under Section 271(1)(c). The penalty was cancelled by the Tribunal. At the instance of Revenue, the following question was referred to the Hon'ble Punjab & Haryana High Court : "(1) Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding: (a) that the provisions of the Explanation to Section 271(1)(c) will not be attracted to the present case? (b) that the word 'income' occurring in Clause (c) and (iii) of Section 271(1)(c) refers to a positive income only and not to a loss?" Their Lordships answered the question in the affirmative with the following observation at p. 71 of 183 ITR : "Income" has been defined in Section 2(24) of the Act which clearly includes profits, gains, dividends or other benefits derived only.

Loss cannot possibly be termed as income. Under Section 139(1) of the Act, a person is required to furnish a return only if his total income during the previous year exceeded the maximum amount which is not chargeable to income-tax. If the same falls short of the maximum amount which is not chargeable, which has been the case here as per final assessment, he need not file a return. A person who sustains a loss, however, may file a return in view of Sub-section (3) of Section 139 of the Act. If he wants to claim that the loss or any part thereof should be carried forward. The penal provisions of Section 271(1)(c), therefore, are attracted only in the case of an assessee having positive income and not loss, as the question of concealment of income to avoid payment of tax would arise only in the former case. Penalty is a deterrent measure to prevent evasion of tax and when there was no tax payable, there could not be any such evasion so as to provide scope for levying any penalty. In the present case, only the loss has been reduced and it cannot be said that the assessee had suppressed any income which would have attracted liability to tax. The question of imposition of penalty, therefore, did not arise. Thus, on the facts and in the circumstances of the case, the Tribunal has acted rightly in law in holding that the provisions of the Explanation to Section 271(1)(c) will not be attracted to the present case. The word "income" occurring in

Clause (c) and (iii) of Section 271(1) of the Act refers to positive income only and that no penalty could be levied against the assessee." The Revenue carried the matter before the Hon'ble apex Court. The Hon'ble apex Court in CIT v. Prithipal Singh & Co. (supra) dismissed the Revenue's appeal by the following order; "We have heard learned counsel and find that, on the facts of this case, no interference is called for." 15. On behalf of the assessee, it has been vehemently contended that now the issue is set at rest by the above decision of Hon'ble apex Court that the penalty Under Section 271(1)(c) cannot be levied where the assessed income is loss prior to amendment by Finance Act, 2002.

However, it was contended on behalf of the Revenue that the above decision in the case of Prithipal Singh was with regard to law applicable in asst. yr. 1970-71 and would not be applicable after the amendment by the Taxation Laws (Amendment) Act, 1975 which modified the Explanation w.e.f. 1st April, 1976.

16. We find that the Taxation Laws (Amendment) Act, 1975 w.e.f. 1st April, 1976, has substituted the Explanation to Section 271(1)(c) with four Explanations. The Expln. 4 which is relevant in this regard and which is heavily relied upon by the learned Departmental Representative, reads as under : "Explanation 4 : For the purpose of Clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded: (a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income assessed, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income; (b) in any case to which Expln. 3 applies, means the tax on the total income assessed; (c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished." 17. The above contention of the Revenue has been dealt with at length by the Tribunal, Ahmedabad Bench, in the case of Clarasis Organics Ltd. Baroda v. Dy. CIT vide (supra). In that case, the Tribunal rejected the Revenue's contention and held as under: ".....The distinction sought to be drawn by the learned Departmental

Representative on the premises that Prithipal Singh's case relates to asst. yr. 1970-71 i.e. prior to introduction of Expln. 4, is in our opinion entirely misconceived. The Hon'ble Supreme Court has endorsed the view of the Hon'ble Punjab & Haryana High Court in Prithipal Singh & Co. (P) Ltd.'s case wherein it has been held that: (i) the word "income" in Clauses (c) and (iii) of Section 271(1)(c) of the IT Act, 1961 refers to the positive income only.

(ii) Evasion of tax is the sine qua non for imposition of penalty for concealment Under Section 271(1)(c).

(iii) Explanation 4 annexed to Section 271(1)(c), presupposes taxable income with regard to the assessment year in question. If there is no payment during a particular year, the question of evasion and consequently penalty does not arise.

The aforesaid proposition by the Hon'ble Punjab & Haryana High Court in Prithipal Singh & Co.'s case (supra) constitutes the ratio decidendi of the judgment which has been endorsed and approved by the Hon'ble Supreme Court. We are unable to appreciate the attempt made by the Revenue to distinguish Prithipal Singh & Co.'s case on the ground that it relates to asst. yr. 1970-71, i.e., prior to insertion of Expln. 4, since Expln. 4 has been specifically considered and discussed by the Hon'ble Punjab and Haryana High Court while laying down the propositions extracted hereinbefore by us and the decision has been approved and endorsed by the Hon'ble Supreme Court. It goes without saying that by virtue of the constitutional mandate enshrined in Art. 141 of the constitution, the law declared by the Supreme Court is binding on all Courts and Tribunals within the territorial jurisdiction....." 18. The Revenue has challenged the above decision of the Tribunal, Ahmedabad Bench, before the jurisdictional High Court. The High Court dismissed the Revenue's appeal vide order dt. 28th Dec, 2001 in Tax Appeal No. 358 of 2001. Their Lordships held as under: "We have heard Mr. B.B. Nayak, learned standing counsel appearing for the appellant-Revenue. The Tribunal has applied the law laid down by the apex Court in the case of CIT v. Prithipal Singh & Co.

(2001) 249 ITR 670 (SC). Hence, no substantial question of law arises in the present appeal. Hence, this appeal is dismissed." 19. It was contended by the

learned Departmental Representative that the Hon'ble jurisdictional High Court has dismissed the Revenue's appeal holding that no substantial question of law arises. Thus, the Hon'ble jurisdictional High Court has not laid down any law which is binding upon the lower authorities. We may, however, refer to the subsequent view taken by the Punjab & Haryana High Court in the case of CIT v. Varindra & Co. (supra) wherein the High Court has held the decision of apex Court in Prithipal Singh & Co. (supra) to be applicable to asst. yr. 1990-91. Similarly, the Kerala High Court in the case of N. Krishnan (supra) has taken the view that for asst. yr.

1978-79, penalty Under Section 271(1)(c) cannot be levied where the assessed income is loss.

20. The Revenue has relied upon the contrary decision by the Karnataka High Court in the case of CIT v. P.R. Basavappa & Sons v. CIT (supra) and the Bombay High Court in the case of CIT v. Chemiequip Ltd. (supra). In the case of P.R. Basavappa & Sons (supra), the Karnataka High Court has held that, "the word 'income' includes loss also and since loss declared had been reduced, penalty Under Section 271(1)(c) was imposable." Similarly, in the case of Chemiequip Ltd. (supra), the Bombay High Court reversed the decision of the Tribunal and held that the penalty Under Section 271(1)(c) is imposable where the assessed income is loss after the introduction of Explan. 4 to Section 271(1)(c) w.e.f. 1st April, 1976 by the Taxation Laws (Amendment) Act, 1975.

21. Be that as it may, there are two views on this issue. At one hand, the Karnataka High Court in the case of P.R. Basavappa & Sons (supra) and the Bombay High Court in the case of Chemiequip Ltd. (supra) have held that (penalty) Under Section 271(1)(c) is leviable where the assessed income is loss while contrary view is taken by Punjab & Haryana High Court, in the case of Vazindra & Co. (supra) and the Kerala High Court in the case of N. Krishnan (supra).

22. In the case of CIT v. Vegetable Products Ltd. (supra), the apex Court held at p. 195 of the report as under: ".....On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this

Court in several of its decisions.

Hence, all that we have to see is, what is the true effect of the language employed in Section 271(1)(a)(i). If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so, because the provision relates to imposition of penalty." 23. The above observation of the apex Court would be squarely applicable to the case under consideration before us because we are interpreting the provision for levy of penalty Under Section 271(1)(c).

There are diagonally contrary views of the High Courts and, therefore, it is evident that two reasonable constructions of the provisions of Section 271(1)(c) as it stood after the amendment by Taxation Laws (Amendment) Act, 1975 and before the amendment by Finance Act, 2002, are possible. Therefore, we respectfully following the decision of apex Court in the case of Vegetable Products Ltd. (supra), adopt the interpretation which favours the assessee.

24. We may also state here that the view favourable to assessee is also discernible by looking to other provisions which are *pari materia* to levy of concealment penalty. Section 143(1A), before amendment by Finance Act, 1993 reads as under: "143(1A)(a) Where, in the case of any person, the total income, as a result of the adjustments made under the first proviso to Clause (a) of Sub-section (1), exceeds the total income declared in the return by any amount, the AO shall,- (i) further increase the amount of tax payable under Sub-section (1) by an additional income-tax calculated at the rate of twenty per cent of the tax payable on such excess amount and specify the additional income-tax in the intimation to be sent under Sub-clause (i) of Clause (a) of Sub-section (1); 25. The issue whether the additional tax can be levied where the assessed income is loss as per the above provision of Section 143(1A), came up for consideration before the Allahabad High Court in the case of Indo Gulf Fertilisers & Chemicals Corporation Ltd. v. Union of India & Anr. (supra). Their Lordships relied upon the decision of Punjab & Haryana High Court in the case of Prithipal Singh & Co. (supra) and held that the same principle would apply in the case of an order imposing additional income-tax. The relevant observation of Their Lordships at p. 493 of the reports

reads as under : "..... We feel that the same principle would apply in the case of an order imposing additional income-tax by way of penalty. According to Circular No. 549, referred to above, Clause (i) of the Explanation to Section 143(1A) of the Act, is on the same lines for the purpose of imposition of penalty as that of Section 271(1)(c) of the Act, for concealment of income in case of loss returns as contained in Clause (a) of Expln. 4 to Section 271(1). The circular, we find, does not contain correct directions, nor the directions issued by the Board for imposition of additional tax in case of reduced losses. For imposition of additional tax or penalty for concealment of income or for furnishing inaccurate returns to evade income-tax, there should be some concealment of positive income. We may clarify here that we are only considering the question of imposition of additional tax Under Section 143(1A) of the Act. It does not cover cases of imposition of penalty or additional tax under any provision for any other act, omission or commission on the part of the assessee." *Modi Cements Ltd. v. Union of India* (supra) and *J.K. Synthetics Ltd. v. Asstt. CIT* (1993) 200 ITR 584 (Del). After the above decisions, the legislature by Finance Act, 1993 amended Section 143(1A) with retrospective effect from 1st April, 1989 and specifically provided for levy of additional tax where the loss declared by such persons in the return of income is reduced or is converted into income. In fact, in the memorandum explaining the provision in Finance Bill, 1993, the reason for amending the provision is given as under which is reported in (1993) 200 ITR (St) 140 at p. 161 : "In two recent judicial pronouncements, it has been held that the provisions of Section 143(1A) of the IT Act, as these are worded, are not applicable in loss cases.

The Bill, therefore, seeks to amend Section 143(1A) of the IT Act to provide that where as a result of the adjustments made under the first proviso to Section 143(1A), the income declared by any person in the return is increased, the AO shall charge additional income-tax at the rate of twenty per cent on the difference between the tax on the increased total income and the tax that would have been chargeable had such total income been reduced by the amount of adjustments. In cases where the loss declared in the return has been reduced as a result of the aforesaid adjustments or the aforesaid adjustments have the effect of converting that loss into income, the bill seeks to provide that the AO shall calculate a sum (referred to as additional income-tax) equal to twenty per cent of the tax that would

have been chargeable on the amount of the adjustments as if it had been the total income of such person." 27. Thus, the legislature vide Finance Act, 1993, has amended Section 143(1A) with retrospective effect from 1st April, 1989 for providing the levy of additional tax where the loss is reduced. However, no such amendment was made in Section 271(1)(c) at that time, The Allahabad High Court in the case of Indo Gulf Fertilisers & Chemical Corporation Ltd. (supra), held that the principle for levy of penalty for concealment of income Under Section 271(1)(c) and the levy of additional tax Under Section 143(1A), would be the same where the assessed income is loss. After the above decision, the legislature amended Section 143(1A) with retrospective effect while no such modification was made in Section 271(1)(c) till the Finance Act, 2002.

The legislature vide Finance Act, 2002 amended Section 271(1)(c) w.e.f.

1st April, 2003 and modified Clause (iii) after Section 271(1)(c) as under : "(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 the furnishing of inaccurate particulars of such income : " 28. Thus, after the sentence "in addition to tax", the words "if any" are inserted. Similarly, the Expln. 4 is modified and new Expln. 4 reads as under: "Explanation 4 : For the purpose of Clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded"- (a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been concealed or inaccurate particulars have been furnished had such income been the total income; (b) in any case to which Expln. 3 applies, means the tax on the total income assessed.

(c) In any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable, had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished." 29. From the above

Expln. 4(a), it is clear that now the legislature clearly provides for the levy of penalty where the loss declared in the return of income is reduced or converted into income. Therefore, in our opinion, before the amendment by Finance Act, 2002, it cannot be held that the penalty Under Section 271(1)(c) can be levied where the assessed income is loss.

30. It was, however, contended by the learned Departmental Representative that the amendment made by the Finance Act, 2002 in Section 271(1)(c) is clarificatory and, therefore, retrospective in operation. In support of this contention, reliance has been placed upon the decision of the Bombay High Court in the case of Chemiequip Ltd. (supra). On the other hand, on behalf of the assessee, it has been contended that the amendment in the penal provisions cannot be retrospective unless it has been specifically provided to be retrospective. On behalf of the assessee, reliance has been placed upon several decisions of Hon'ble apex Court and the High Courts which have been mentioned while discussing the arguments of the assessee's counsel.

31. We have carefully considered the rival contentions in this regard.

We find that the Hon'ble apex Court in the case of K.M. Sharma v. ITO (supra) held at p. 779 as under: "... The taxing provision imposing a liability is governed by the normal presumption that it is not retrospective and the settled principle of law is that the law to be applied is that which is in force in the assessment year unless otherwise provided expressly or by necessary implication. Even a procedural provision cannot in the absence of clear contrary intendment expressed therein, be given greater retrospectivity than is expressly mentioned or to open up liabilities, which have become barred by lapse of time.." 32. The above observation will be applicable with all force to the amendment in Section 271(1)(c) by the Finance Act, 2002 because as per Finance Act, 2002, the above amendment is effective from 1st April, 2003 and Section 271(1)(c) is a provision for imposing penalty and, therefore, in view of the above decision of the Hon'ble apex Court, the normal presumption is that the amendment is not retrospective unless provided otherwise expressly or by necessary implication. We also find that the Hon'ble apex Court in the case of Pyare Lal Sharma v. Managing Director,

Jammu & Kashmir Industries Ltd. (supra), held, "it is basic principle of natural justice that no one can be penalised on the ground of a conduct which was not penal on the day it was committed." 33. In the case of CIT v. Omkar Sharan & Sons (supra), the Hon'ble apex Court has held that the penalty for concealment would be governed by the law as it stood at the time when the original return was filed.

Similar view was expressed by Their Lordships of Hon'ble apex Court in the case of Brij Mohan v. CIT (supra). It is undisputed that the return in the case of all the assessee's before us were filed much prior to the amendment by the Finance Act, 2002. As per the law prevailing at that time, penalty Under Section 271(1)(c) was not to be levied if the assessed income is loss. Therefore, the subsequent amendment cannot fasten the liability of penalty upon the assessees unless the legislature expressly provided for the same. As the Finance Act, 2002 made the amendment in Section 271(1)(c) w.e.f. 1st April, 2003, it cannot be said that the amendment was clarificatory and, therefore, retrospective in operation. We have already noticed that Under Section 143(1A), as it stood prior to the amendment by Finance Act, 1993, there was provision for levy of additional tax for any variation in the returned income. Courts have held that additional tax cannot be levied when the assessed income is loss. For taking such view, the Hon'ble Allahabad High Court in the case of Indo Gulf Fertiliser and Chemical Corporation Ltd. (supra) has noticed the provision of Section 271(1)(c) and has stated that the provisions of Section 143(1A) are similar to Section 271(1)(c) and thereafter came to the conclusion that levy of additional tax was not permissible where the assessed income is loss.

The legislature has amended Section 143(1 A) by Finance Act, 1993, with retrospective effect from 1st April, 1989. However, when Section 271(1)(c) is amended by Finance Act, 2002, it has been made effective from 1st April, 2003, and not retrospectively. Therefore, the only inference can be drawn that the legislature did not intent to effect the amendment in Section 271(1)(c) retrospectively.

34. In view of above, having regard to the amendment made by Taxation Laws (Amendment) Act, 1975 and by Finance Act, 2002, we hold that for the assessment years under appeal before us, penalty cannot be levied Under Section 271(1)(c) in the cases where the assessed income is loss.

In all the cases under appeal before us, the assessed income is loss and, therefore, the levy of penalty Under Section 271(1)(c) is not justified and the same is cancelled.

35. Accordingly, the Revenue's appeals in the case of Apsara Processors (P) Ltd., Ahmedabad, Akshai Pump & Engg. (P) Ltd., Ahmedabad, Alchemic (P) Ltd., Ahmedabad and Kushal Electronics (P) Ltd., Vadodara are dismissed while the assessee's appeals in the case of Khedkar Brothers Trading Co. (P) Ltd., Anand, Prayas Woollens (P) Ltd., Vadodara, Nature Care (P) Ltd., Ahmedabad and Ravi Pharmaceuticals (P) Ltd., Baroda are allowed.

36. The appeals of the intervenes namely M/s Ketan Mehta Films (P) Ltd., Mumbai and Gujarat Extrusion (P) Ltd., Ahmedabad, will be heard and adjudicated upon by the respective Division Bench in accordance with law.

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