IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1718 OF 2014

Samson Maritime Ltd., .. Appellant.
v/s.
Commissioner of Income Tax, City-7 .. Respondent.

Mr. S. Sriram i/b. Mr. B. V. Jhaveri, for the Appellant.
Mr. N. C. Mohanty, for the Respondent.

CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.
DATE : 9th MARCH, 2017.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 18th June, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 18th June, 2014 is in respect of Assessment Year 2007-08.

2 The Revenue urges the following question of law, for our consideration:

> *" Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in upholding imposition of penalty under Section 271(1)(c) of the Act on a finding that the appellant had concealed its income and/or furnished inaccurate particulars of its income in respect of the apportionment of foreign exchange fluctuation loss between the Tonnage Income and Non-Tonnage Income while filing the return of income for A. Y. 2007-08.?"*

3 The appellant-assessee is engaged in shipping business. The appellant-assessee is assessed to tax under Chapter XII-G of the Act to the extent its income is earned from vessels, satisfying/ qualifying the requirements thereof (tonnage income). So far as the income from other vessels i.e. non-qualifying vessels (non-tonnage income) is concerned, the same is subjected to tax under the head *"Profit & Gain from its Business or Profession"*. Thus, classifying its income as tonnage business and non-tonnage business. During the subject Assessment Year, the appellant-assessee had suffered foreign exchange loss in respect of its tonnage business which is taxable under Chapter XII-G of the Act. However, the above foreign exchange loss of Rs.9.37 lakhs was debited to compute its non-tonnage income while bringing it to tax under Profit & Gain from business or profession.

4 Thereafter, on 14th January, 2009, the Assessing Officer issued a notice under Sections 142(1) & 143(2) of the Act, calling various details/ information as set out in the annexure thereto. This included information regarding details of expenses debited in its Profit & Loss Account and expenses incurred on account of foreign exchange. Thereafter, the appellant-assessee responded to the same and by order dated 24th December, 2009, the Assessing Officer determined the appellant-assessee to an income of Rs.2.58 Crores under Section 143(3) of the Act. This was after adding the foreign exchange loss of Rs.9.37 lakhs which had been incorrectly debited while computing its non-tonnage income. The order of the Assessing Officer records that this was done after it was found on verification that no foreign exchange loss was incurred in respect of non-tonnage income. Besides, initiating penalty proceedings under Section 271(1)(c) of the Act.

5 Thereafter, order dated 30th June, 2010, was passed by the Assessing Officer, imposing a penalty under Section 271(1)(c) of the Act, wherein it specifically records the fact that though there were no transaction in foreign currency resulting in foreign exchange loss, in case of non-tonnage income, yet the appellant-assessee had debited exchange loss to its non-tonnage business only to reduce its non-tonnage income being offered to tax. Therefore, by an order dated 30th June, 2010, the Assessing Officer imposed a penalty of Rs.3.09 lakhs being 100% tax sought to be evaded by debiting foreign exchange loss of Rs.9.37 lakhs to determine its non-tonnage income.

6 Being aggrieved, the appellant-assessee carried the above issue of penalty in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated 15th July, 2012, the CIT(A) dismissed the assessee's appeal. This, by holding that there was a deliberate attempt on the part of the assessee to furnish inaccurate particulars so as to reduce its taxable income. The Explanation of mistake offered for the same by the appellant was not found to be satisfactory even by the CIT(A).

7 Being aggrieved, the appellant-assessee filed a second appeal to the Tribunal against imposition of penalty. By the impugned order dated 18th June, 2014, the Tribunal upheld the imposition of penalty under Section 271(1)(c) of the Act. This by negativing the assessee's contention before it that allocating/ debiting the foreign exchange loss to determine its non-tonnage income, was a mistake and the mistake had been voluntarily disclosed by the appellant during the assessment proceedings. The contention of the appellant was not accepted as the so-called disclosure was made by the appellant only after it received notices

under Section 142(1) & 143(2) of the Act, calling for various details. Moreover, the Explanation offered by the appellant for having debited foreign exchange loss to determine non-tonnage loss, was not found to be satisfactory by the Assessing Officer as well as by the CIT(A). The impugned order of the Tribunal also placed reliance upon the decision of the Apex Court in ***MAK Data P. Ltd., v/s. Commissioner of Income Tax 358 ITR 593***, that voluntary disclosure itself does not release the assessee from penal consequences.

8 The grievance of the appellant-assessee before us is that it had itself brought its mistake of debiting the loss on account of foreign exchange fluctuation to determine its Non-Tonnage income to the notice of the Assessing Officer. This, according to him, is stated in its Affidavit dated 23rd June, 2010 filed during the penalty proceedings before the Assessing Officer. However, the above affidavit as filed by the appellant during penal proceedings, has been ignored by all the authorities including the Tribunal while passing the impugned order. It is submitted that the above fact itself would justify dropping of any penal proceedings against appellant-assessee. It was also submitted before us that debiting of the foreign exchange loss to arrive its non-tonnage income, was a mistake and no penalty be imposed for the mistake committed. Reliance was placed upon the Apex Court's decision in ***Price Waterhouse Coopers (P) Ltd., v/s. CIT 348 ITR 306*** to contend that mistakes made by an assessee cannot be the basis for imposition of penalty. In the above view, it is submitted that the appeal be admitted.

9 From the record it is clear that the notice under Sections 142(1) and 143(2) of the Act were issued to the appellant on 14th

January, 2009. The notice also contains an annexure, seeking details of expenses debited to Profit and Loss Account, along with details of foreign exchange expenses. Even according to the appellant, the alleged mistake on its part was pointed out by a letter dated 23rd September, 2009 during assessment proceedings where it stated that it had committed a mistake in debiting foreign exchange loss to its determine non-tonnage income, when in fact, no foreign exchange loss was involved in respect of its non-tonnage business. Thus, it is clear that so-called mistake as claimed by the appellant-assesssee, was only after notices dated 14th January, 2009 were issued under Sections 142 and 143 of the Act. It was only an attempt to pre-empt the Revenue finding out the the appellant had furnished inaccurate particulars. Therefore, it cannot be said that it was voluntary disclosure. In fact, the Apex Court in MAK Data (P) Ltd., (supra) has observed that *" The Assessing Officer, in our view, shall not be carried away by the plea of the Assessee like "voluntary disclosure", "buy peace", "avoid litigation" "amicable settlement" etc. to explain its conduct."* The Apex Court has also further observed that *" It is trite law that the voluntary disclosure does not release appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty."* In the peculiar fact of the present case, the so-called voluntary disclosure was only after the Assessing Officer initiated proceedings under Section 142 of the Act. Thus, it was not a voluntary disclosure. In fact, the Assessment Order dated 24th December, 2009 under Section 143(3) of the Act also records the fact of verification by the Assessing Officer, leading to a finding that the appellant-assessee had debited foreign exchange loss to arrive its non-tonnage income. This order was accepted and no grievance

in respect of the same being found by the Assessing Officer, was made by the appellant-assessee. It is only in penalty proceedings that this issue is raised for the first time. Further, the appellant-assessee besides stating it is a mistake, has not offered any explanation. Therefore, the explanation under Section 271(1)(c) of the Act was not found to be satisfactory by the authorities under the Act and penalty imposed and sustained.

10 Reliance placed by the appellant-assessee upon the decision of the Apex Court in Price Waterhouse Coopers (P) Ltd., (supra), is inappropriate in the facts of the present case. In the above case, the Apex Court noted the fact that Tribunal had itself come to a finding that there was a silly mistake on the part of the assesssee in not having added the provision for gratuity to its total income even when the documents accompanying the return of income, did show that provision for gratuity is not allowable as deduction under Section 40(7) of the Act. Thus, it was only a computation error in the return of income. In the present facts, none of the authorities including the Tribunal have found the debit of foreign exchange loss to its non-tonnage business was made on account of a mistake. Nor can it be classified as an computation error after complete disclosure. Thus, the aforesaid decision does not assist the appellant-assessee.

11 We note that all the three authorities have come to a finding of fact, adverse to the appellant, that the so-called voluntary disclosure was not voluntary, but made only in response to notices under Sections 142 and 143 of the Act. This finding of fact is not shown to be perverse and/or arbitrary, warranting interference. In view of the above, the question as framed does not give rise to any substantial question of law.

12 Accordingly, **Appeal dismissed.** No order as to costs.

(A.K.MENON,J.) **(M.S.SANKLECHA,J.)**