

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH `G': NEW DELHI**

**BEFORE SHRI C.L.SETHI, JM & SHRI SHAMIM YAHYA, AM**

**I.T. A. No.12/Del of 2010  
Assessment Year: 2004-05**

**M/s Survidhi Financial Services Ltd.,      Asstt. Commr. of Income-tax,  
W5/16, Western Avenue,                      vs Circle 9(1), New Delhi.  
Sainik Farms, New Delhi.**

**Appellant**

**Respondent**

Appellant by: Shri Rajesh Mahna  
Respondent by: Smt. Pratima Kaushik

**ORDER**

**PER C.L. SETHI, JM:**

The assessee is in appeal against the order dated 25.9.2009 passed by the learned CIT(A) confirming the penalty amounting to Rs.10,820/- levied u/s 271(1)(c) of the Income-tax Act, 1961 (the Act) pertaining to Asstt. Year 2004-05.

2. The main grievance of the assessee is that the CIT(A) has erred, on law and on facts, in not deleting the penalty imposed u/s 271(1)(c) by the AO in respect of the addition of Rs.30,159/- made in the assessment by way of disallowance of loss of Rs.30,159/- arising to the assessee on account of purchase and sale of units covered by Section 94(7) of the Act.

3. Facts giving rise to the issue in hand are summarized as under:
4. The assessee company is a non-banking financial company and has been granted registration by the Reserve bank of India. The principal business of the assessee company was to deal in securities. The assessee company filed its return of income on 27.10.04 declaring total income at Rs.12,44,787/-. The return was initially processed u/s 143(1) of the Act. Later, the case was selected for scrutiny, and notice u/s 143(2) of the Act was duly issued within stipulated time, and was also served upon the assessee. The questionnaire along with notice u/s 142(1) of the Act dated 19.9.2005 was also issued by the AO, which was served upon the assessee. In response to the notices issued u/s 142(1) and 143(2) from time to time by the AO, the assessee's Authorized Representative appeared before the AO and filed the various details and evidences as required. Assessee also submitted written submissions before the AO. The matter was then examined and discussed by the AO, and framed the assessment u/s 143(3) on 28.12.2006. In the assessment, the AO has stated that during the course of assessment proceedings, it was noticed by the AO that the assessee had booked the income from dealing in securities under the head "Capital Gains". After discussing the matter thoroughly with the assessee, the AO noted the following facts:-

- (i) The purchase and sale of securities was allied to his usual trade of business.
- (ii) The scale of activity viewed from the overall perspective of scale of operations was substantial.
- (iii) The transactions were entered into continuously and regularly during the assessment year.
- (iv) The main object of the assessee company carried out during the year was dealing in securities.
- (v) All the transactions in securities during the year were in listed securities.

After analyzing the facts and circumstances of the case, AO came to a view that the gain of Rs.38,44,159/- shown by the assessee is to be treated as business profit of the assessee, and accordingly, no set off of this profit was allowed against the brought forward long term capital loss. The AO also noted one more fact that the loss of Rs.30,159/- incurred on sale of units has been adjusted by the assessee against the gain arising from sale of securities though the same was required to be adjusted against the dividend income received on same units in view of the provisions contained in Section 94(7) of the Act. As no reply was filed by the assessee in this regard, the AO after making a reference to Section 94(7) of the Act had taken a view that loss of Rs.17,386/- on Birla MIP Plan A Monthly Dividend and a loss of Rs.12,773/- on Franklin Templeton MIP Plan B was not allowable. The AO, therefore, disallowed the loss of Rs.30,159/- for the purpose of set off of the same against other profit of the year. The AO also initiated penalty

proceedings u/s 271(1)(c ) of the Act by observing that the assessee has furnished inaccurate particulars by making a claim of set off of loss of Rs.30,159/- incurred on sale of units against the profit on sale of securities, and thereby concealed the particulars of its income, rendering itself liable for penalty leviable u/s 271(1)(c) of the Act.

5. Being aggrieved against the aforesaid assessment order of AO in disallowing assessee's claim of loss of Rs.30,159/-, the assessee preferred an appeal before the learned CIT(A). The CIT(A) upheld the disallowance made by the AO. Thereafter, the assessee preferred an appeal before the Tribunal by taking a ground that the CIT(A) has erred in upholding the disallowance of Rs.30,159/- u/s 97(4) of the Act, without satisfying the pre-requisite conditions for the same. However, before the Tribunal, as no argument was advanced by learned AR of the assessee in respect of this ground, the Tribunal had taken a view that the cross objection filed by the assessee on this issue is to be dismissed as not pressed for.

6. Having found that the disallowance made by the AO was confirmed by the CIT(A), the AO provided opportunity of being heard to the assessee before levying any penalty u/s 271(1)( c) of the Act. The AO then considered the facts as discussed in the assessment order and also the material available on record, and found that the fact with regard to the loss

disallowable u/s 94(7) of the Act was not disclosed by the assessee in the audit report and by not doing so; the assessee has concealed the particulars of its income. The AO then vide his order dated 23.3.2009 levied penalty amounting to Rs.10,820/-, being 100% of the tax sought to be evaded on the amount of Rs.30,159/- disallowed by the AO u/s 94(7) of the Act.

7. Being aggrieved with the AO's penalty order, assessee preferred an appeal before the learned CIT(A).

8. Before the learned CIT(A), the assessee has taken a ground that the assessee has duly deposited the amount of tax on the income of Rs.30,159/- along with applicable surcharge and interest thereon, even prior to issuance of notice for levy of penalty u/s 271(1)(c) of the Act. It was also submitted before the CIT(A) that the assessee had duly disclosed the said income in the return filed by the assessee as the said income was disclosed by way of dividend income and profit earned on sale of securities. It was further submitted that no opportunity of being heard was given by the AO before levying the penalty.

9. After considering the assessee's submissions and the facts of the case, the learned CIT(A) confirmed the penalty order by observing that the addition of Rs.30,159/- made by the AO has been sustained in appeal, and further the assessee failed to disclose the particulars about the applicability

of Section 94(7) of the Act, which amounted to concealment of the particular of its income or furnishing inaccurate particulars of its income by the assessee.

10. Still aggrieved, the assessee is in appeal before us.

11. The learned counsel for the assessee has submitted that there is no requirement to disclose in the audit report the matter with regard to disallowance of loss within the meaning of Section 94(7), and as such mere because the fact of disallowance of loss to be made u/s 94(7) was not mentioned in the audit report, it could not be said that the assessee has concealed the particulars of his income or furnished inaccurate particulars of his income. The assessee further submitted that it has duly disclosed the particulars of income in the return of income. He further submitted that the claim in the return was a bonafide claim, and mere because the assessee could not appear in response to the show cause notice, the penalty could not be levied in respect of bonafide claim made in the return. In this respect, the assessee has relied upon certain decisions, which are as under;

- (a) CIT vs. International Audio Visual Co., 288 ITR 570 (Del);
- (b) CIT vs PHI Seeds India, 301 ITR 13 (Del);
- (c) Shri Krishna Electrical vs State of Tamil Nadu, 23 VST 249 (SC)

12. The learned DR, on the other hand, submitted that all the basic particulars about the purchase and sale of units, in respect of which dividend

income has been claimed exempted by the assessee were never disclosed by the assessee in the return of income. He further submitted that the assessee, on the one hand, claimed the dividend income earned on units as exempted, and, at the same time, the assessee adjusted the loss arising from sale and purchase of same units against other profit on sale of securities without adjusting the dividend income earned on units against the loss arising from sale of same units sold within specified time, which is totally contrary to the specific provisions contained in Section 94(7) of the Act. He, therefore, submitted that the assessee's claim cannot be treated to be a bonafide one, but assessee has deliberately made a false claim totally in disregard of the specific provisions contained in Section 94(7) of the Act without disclosing the basic and primary facts relating to purchase and sale of units made within specified period of record date as contemplated u/s 94(7) of the Act. He, therefore, contended that the AO was very much justified in levying the penalty, which has been rightly confirmed by the learned CIT(A).

13. We have considered the rival contentions of both the parties and have carefully gone through the orders of the authorities below. We have also deliberated upon the decisions cited by both the parties.

14. The assessee company is a non-banking financial company approved by the Reserve Bank of India. The assessee company is engaged in the

business of dealing in securities. The equity shares of the company are listed on the Calcutta Stock Exchange and the Gauhati Stock Exchange Ltd. at the relevant point of time. In the Profit & Loss Account, the assessee has shown interest and other income of Rs.61,58,144/- consisting of the following items:

(i) Miscellaneous income	Rs,3,897/-
(ii) Dividend on mutual fund	Rs.2,89,538/-
(iii) Interest on loan	Rs.19,97,199/-
(iv) Profit On sale of assessee's/ mutual fund units	Rs.38,67,509/-

During the year, the assessee purchased and then sold units of Birla MIP Plan A and Franklin Templeton Plan B, in respect of which the assessee had incurred a loss of Rs.17,386/- and Rs.12,773/- aggregating to Rs.30,159/-. The dividend received on these units after the units were purchased and before the same were sold, were claimed exempted in the return of income filed by the assessee. While claiming the dividend income as exempted, the assessee has not adjusted the loss arising to the assessee on sale of said units in respect of which dividend was earned. At this stage, we have to refer to the provisions contained in Section 94(7) of the Act, which reads as under (as it stood at the relevant point of time):

“Section 94(7): Where –



- (a) any person buys or acquires any securities or unit within a period of three months prior to the record date;
- (b) Such person sells or transfers such securities or unit within a period of three months after such date;

Then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purposes of computing his income chargeable to tax.”

Under Explanation to Section 94(7), the “record date” is defined to mean as under:

“ ‘record date’ means such date as may be fixed by –

- (i) a company for the purposes of entitlement of the holder of the securities to receive dividend; or
- (ii) a Mutual Fund or the Administrator of the specified undertaking or the specified company as referred to in the Explanation to clause (35) of section 10, for the purposes of entitlement of the holder of the units to receive income, or additional unit without any consideration, as the case may be.”

15. The sub-section (7) in Section 94 was inserted effective from Assessment Year 2002-03 as a measure to curb creation of short-term losses by certain transactions in securities and units. The then existing provisions of the Act before the insertion of sub-section (7) in Section 94 of the Act did

not cover a case where a person buys securities (including units of a mutual fund) shortly before the record date fixed for declaration of dividends, and sells the same shortly after the record date. Since the cum-dividend price at which the securities are purchased would normally be higher than ex-dividend price of which they are sold, such transactions would result in a loss which could be set off against other income of the year. At the same time, the dividends received would be exempt from tax u/s 10(33). The net result would be the creation of a tax loss without any actually outgoings. With a view to curb the creation of such short-term losses, the Act has inserted a new sub-section (7) in the Section 94 to provide that where any person buys or acquires securities or units within a period of three months prior to the record date fixed for declaration of dividend or distribution of income in respect of the securities or units, and sells or transfers the same within a period of three months after such record date, and the dividend or income received or receivable is exempt, then, the loss, if any, arising from such purchase or sale shall be ignored to the extent such loss does not exceed the amount of such dividend or interest, in the computation of the income chargeable to tax of such person. Definitions of the terms “record date” and “unit” have also been provided in the Explanation after sub-section (7) of Section 94. This amendment was made effective from 1<sup>st</sup>

April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years.

16. In order to apply the aforesaid provisions of sub section (7) of Section 94 of the Act to any given case, the following primary and basic facts need to be brought on record:-

- (i) Whether any person buys or acquires any securities or unit within a period of 3 months prior to the record date fixed for distribution of dividend.
- (ii) Whether such person sells or transfers such securities or unit within a period of 3 months after such record date.
- (iii) Whether the dividend or income on such securities or units received or receivable by such person is claimed exempted.
- (iv) Whether any loss arising to such person on sale of such securities or units has been adjusted against the dividend or income received or receivable on such securities or units to the extent of the amount of such dividend or income received or receivable, while computing his income chargeable to tax.

17. In the present case, the assessee filed its return of income declaring income of Rs.12,44,787/-. The return was accompanied by the audited

statement of accounts. In the return, the assessee claimed the income by way of dividend received on units, namely, unit of Birla MIP Plan A monthly dividend or Franklin Templeton MIP Plan B as exempted and did not include it in the income chargeable to tax. It is not in dispute that the assessee has also incurred loss on sale of the aforesaid units, and the aggregate loss of Rs.30,159/- was not adjusted against the dividend income but was adjusted against the other taxable income of the assessee. We, therefore, have to determine whether the act of the assessee in making claim of loss incurred on sale of units by way of adjusting the same against taxable income of the assessee instead of adjusting the same against dividend income contrary to the provisions of Section 94(7) of the Act is bonafide and whether the assessee has disclosed all relevant facts material to the computation of assessee's total income under the Act.

18. The basic and primary facts that these units were purchased by the assessee within a period of 3 months prior to the date fixed for the purpose of entitlement of the holder of the unit to receive dividend, and were subsequently sold within a period of three months after such record date, has not been disclosed by the assessee in the statement of account or any another note annexed to the return of income. The further fact that the dividend received by the assessee, which has been claimed as exempted, was in

respect of the same units, which were purchased within a period of three months prior to the record date of distribution of dividend, and then sold within a period of three months after such record date, and in respect of which the assessee has incurred loss on sale of such unit, has never been disclosed by the assessee in the return of income. What has been disclosed by the assessee in the return of income is only the amount of loss adjusted against the other taxable income of the assessee, and amount of dividend claimed exempt without disclosing any other particulars whatsoever relating to the purchase and sale of units. The assessee's contention advanced before the Id. CIT(A) was only that the assessee had incorporated the amount in its books of accounts, but the assessee has failed to show and establish that the primary and basic facts about the date on which the units were purchased, record date of distribution of dividend and the date on which the units were sold, were also disclosed. Mere stating the amount of income or loss in the statement of accounts without disclosing the particulars and details of the item, in respect of which the loss was incurred or the income was earned, cannot be considered to be a true and full disclosure of the particulars relating to that income or loss. Unless and until particulars of the item in respect of which income was earned or loss was incurred is disclosed, it is beyond imagination of any person to decide as to whether provisions of

Section 94(7) are applicable or not in so far as that loss or income is concerned. The relevant particulars and basic facts necessary for applying the provisions of Section 94(7) must be brought on record before any assessee makes a claim that particulars of income or loss on securities or units were fully disclosed in the return of income. In the present case, the basic or primary facts to apply the provisions of Section 94(7) were discovered by the AO during the course of assessment proceedings. In the course of assessment proceedings, when the assessee was asked to explain as to why the loss incurred on units should not be adjusted against the dividend income received on such units, the assessee gave no reply. Therefore, it is a case where the assessee has failed to furnish any explanation and material particulars relating to the income and loss arising to the assessee on purchase and sale of the units in question as to why the loss incurred on sale of units were not adjusted or set off against the dividend income. In the course of first appellate proceedings against the penalty order, the assessee submitted its explanation saying that the assessee had incorporated the entry of claim in the books of accounts and the claim was bonafide, but the assessee has failed to show and establish as to how and in what manner the assessee had disclosed all relevant particulars necessary for deciding the question as to whether provisions of Section 94(7) were applicable to the dividend income

earned by the assessee vis-à-vis loss incurred by the assessee on sale of same units and has failed to give any plausible explanation as to why the loss incurred on sale of units was adjusted against other taxable income of the assessee instead of adjusting the same against exempted dividend income. As already stated above, mere disclosing amount of any income or loss without disclosing the particulars of income or loss cannot be said to be a full and true disclosure of facts for the purpose of determining total income under the Act. In the present case, unless the assessee discloses the date of purchase of units, details of record date for distribution of dividend and the date of sale of units in respect of which the assessee had incurred loss, it cannot be said that the assessee has disclosed particulars of loss incurred on units claimed in the return filed by it. It is thus not a case where merely assessee's claim by itself has been disallowed on the facts disclosed by the assessee in the return of income, but it is a case where all the basic and primary facts relating to the loss claimed by the assessee were not disclosed. The assessee has even failed to disclose that there were direct link and nexus between the dividend income earned on units, and the loss incurred on sale of same units. The AO as well as CIT(A) has categorically stated in their respective orders that assessee has failed to disclose all the facts in the audit report filed along with the return of income, that would mean that the

assessee never disclosed the primary and basic facts as to the applicability of provisions of Section 94(7) of the Act in the audited statement of account filed along with the return of income. Mere because the basic and primary facts necessary for the purpose of Section 94(7) are not required to be disclosed in the Audit Report obtained under Company's Act, that by itself cannot be a reason for the assessee for not disclosing the same in the return of income filed by the assessee particularly in the light of the fact that the assessee, on one hand, has claimed the dividend income exempted, and, at the same time, it has set off the loss incurred on sale of such units against the other taxable income of the assessee. Thus, in our considered view, mere because the assessee is not required to disclose the particulars of sale and purchase of units in the audit report obtained under the Company's Act, it cannot be a bonafide reason or an excuse for not disclosing the same in the statement of accounts or any annexure filed along with the return of income for the purpose of determining the total income under the Income-tax Act. Whatever has been stated by the AO and by the learned CIT(A) about the non disclosure of relevant facts by the assessee is to be looked into from the point of view of determining assessee's total income under the Income-tax Act and not from the point of view of preparing profit and loss account for the purpose of Company's Act. The assessee has failed to give any



explanation as to why the loss incurred on sale of units sold within the specified period of record date was not adjusted against the dividend received on such units. In this view of the matter, the contention of the learned counsel for the assessee that the assessee cannot be founded fault with because for the reason that no such disclosure was necessary to be made in the audit report obtained under the Company's Act, is misconceived and is, thus, rejected.

19. The present case is not a case of small investor making investment in shares and units. The assessee company is a Non-Banking Financial company and its one of main business is to deal and invest in shares, mutual funds and other securities. The focus of the assessee company is on investment in shares and other securities and mutual fund etc. The assessee has been deriving profit on sale of shares and mutual funds, interest income and dividend income. The assessee company's shares are listed in Stock Exchange. This makes it amply clear without any doubt that the assessee company is supposed to be fully aware about the various situations in which the price of shares or units are fluctuated. How the prices of shares or units cum dividend or ex-dividend are fluctuated in the market, is common phenomenon known to such a NBFC dealing in shares or units. The fact that the units were purchased cum dividend and were sold ex-dividend after

receiving dividend within the period specified u/s 94(7) of the Act was well within the knowledge of the assessee. It is not the case of the assessee made out at any stage of proceedings that the relevant facts to invoke Section 94(7) of the Act to the loss on units were not within the knowledge of the assessee. Therefore, mere a wild and bold statement that the claim of loss was made bonafide without explaining as to how and why the claim made by the assessee is to be considered to have been made bonafide, is not acceptable. It is well settled that all and every fanciful and fantastic explanation offered by any person cannot in itself be construed to be a bonafide one.

20. In the light of the scheme of Section 271(1)(c ), it is by now well settled that each and every addition or disallowance made in the assessment would not by itself automatically attract penalty leviable under Section 271(1)(c ) of the Act if the assessee gives an explanation that his claim was bonafide and all material facts relating to the computation of income has been fully and truly disclosed. However, in the present case, the assessee has not been able to point out any fact or circumstances indicating that the claim of loss incurred on sale of units without adjusting the same against dividend income as required u/s 94(7) of the Act was made bonafide or all basic and the primary facts relating to the said loss have been fully and truly

disclosed. In other words, the burden that lay upon the assessee vide Explanation 1 to Section 271(1)(c) has not been discharged even to a smaller extent. It is not the case where all facts relating to claim were disclosed by the assessee but claim of the assessee by itself has been merely disallowed by taking a different view by the AO. In this view of the matter, we hold that the penalty is leviable.

21. We further observe that before the Id. CIT(A) the assessee has also contended that in the quantum appeal, the Tribunal has cancelled the assessment on account of legality of the notice taken up in appeal, and, therefore, on this ground alone, the penalty cannot be imposed. After carefully going through the Tribunal's order passed in the quantum appeal, we find that this sort of contention advanced by the learned counsel for the assessee before the CIT(A) was totally misconceived, and without understanding the meaning and the effect of the order of the Tribunal. In respect of quantum appeal filed by the revenue, the assessee filed cross objection. Departmental appeal and the Cross Objection filed by the assessee were taken up together. In the departmental appeal, the issue was whether gain on sale of securities is to be treated and assessed as 'long-term capital gain' or as 'business income'. In the Cross Objection filed by the assessee, the assessee has taken four grounds of appeal, which have been reproduced

by the Tribunal in Para 9 at pages 4,5 and 6 of the order. In Para 9, all the four grounds of appeal have been reproduced where the assessee has contended that the assessment order is illegal inasmuch as ITO had no jurisdiction over the case of the assessee and notice issued u/s 143(2) and/or 142(1) of the Act were not addressed to the Principal officer, being in violation of provisions of Section 282(2) of the Act, and, therefore, the assessment deserves to be annulled/cancelled. The Cross Objection filed by the assessee were disposed of by the Tribunal by discussing the matter in Para 10 of the order as under:

“No argument was advanced by Id. AR of the assessee regarding any grounds of this Cross objection and hence we infer that the cross objection of the assessee is not pressed and hence, we dismiss the same as not pressed. Otherwise also, the cross objection of the assessee has become redundant because we have dismissed the appeal of the revenue.”

From the aforesaid decision, it is clear that the Cross Objection was dismissed as not pressed for inasmuch as no argument was advanced by the learned AR of the assessee regarding any grounds of the Cross Objection. Therefore, it is wrong and incorrect on the part of the assessee to say that the Tribunal has cancelled the assessment in terms of Para 9 at page 6 of the order on account of legality of the notice taken up in appeal within the meaning of Section 282(2) of the Act. Whatever stated in para 9 at page 6 of

the order is reproduction of the grounds taken by the assessee in the cross-objection and not that it was a decision given by the Tribunal. Thus, this contention advanced by the learned counsel for the assessee before the learned CIT(A) as well as before us is found to be misconceived, and is rejected.

22. Coming to the various decisions cited by the learned counsel for the assessee in support of the contention that no penalty u/s 271(1)(c) is leviable in the present case, we find, after going through all those decisions, that any advantage can hardly be derived by the assessee from these decisions. In the case of CIT vs International Audio Visual Co. (supra), there was a clear finding of fact that there was no concealment of primary facts and since there was no concealment of primary facts, it cannot be said that the assessee was liable to suffer a penalty under the provisions of Section 271(1)(c) of the Act. But, in the present case before us, as already discussed and detailed above, the primary facts as to the date of the purchase of the units, detail of record date and date on which the units were sold and that the dividend income earned by the assessee and the loss incurred by the assessee on same units were covered by Section 94(7) of the Act, have never been disclosed by the assessee in the return of income filed by it, but rather the assessee has set off the loss incurred on the units against other taxable income of the

assessee instead of adjusting the same against the dividend income. It is, thus, clear that assessee derived double benefit once by claiming dividend income as exempted, and secondly, by adjusting the loss incurred on same units against the other taxable income of the assessee. On the facts of the case, therefore, the decision in the case of CIT vs International Audio Visual Co. (supra) is of no help to the assessee's case.

23. In the case of CIT vs PHI Seeds India (supra), the Hon'ble Delhi High Court has given the following reasoning:

“If a return of income is found to be incorrect and the assessment that is eventually framed by the AO is for a larger income, penalty proceedings are not an inexorable or inevitable consequence. It is axiomatic that Section 271(1)(c) is attracted only in those instances where the assessee has concealed the particulars of his income, or has furnished inaccurate particulars of such income with a intent to mislead the Revenue into accepting its return for an income offered for taxing, which is lesser than the income actually exigible to tax. Since all the transactions had been mentioned by the assessee in its return, concealment is obviously not made out.”

From the said reasoning given by the Hon'ble High Court, it is clear that when all the transactions are mentioned by the assessee in its return, and the assessee has not concealed the particulars of his income or has not furnished inaccurate particulars of such income, merely because return of income is found to be incorrect and the assessment that is eventually framed by the AO

was for a larger income, penalty proceedings u/s 271(1)(c) are not an inexorable or inevitable consequence. The Hon'ble High Court further observed that it is axiomatic that Section 271(1)(c) is attracted only in those cases where the assessee has concealed the particulars of his income, or has furnished inaccurate particulars of such income with a intent to mislead the Revenue into accepting its return for an income offered for taxing, which is lesser than the income actually exigible to tax. However, this decision would also be no help to the assessee on facts inasmuch as in the present case, the assessee has concealed the particulars or furnished inaccurate particulars of units, in respect of which the dividend income was claimed as exempted, and, at the same time, loss incurred on sale thereof within specified time has been set off against the other taxable income of the assessee, though, under the law, the dividend income and loss on said units were required to be set off against each other in the light of the specific provisions contained in Section 94(7) of the Act. The present case is a case where assessee has failed to furnish full particulars of dividend income and loss incurred on units, and has offered the lesser income than the income actually exigible to tax. Thus, the principle enunciated in this decision supports the revenue's case rather than of any help to the assessee.

24. In the case of Shree Krishana Electricals vs State of Tamil Nadu and another (supra), under the Tamil Nadu General Sales-Tax Act, the facts were quite different inasmuch as the item of income involved in that case was incorporated in the assessee's account books though assessee had not included them in its turnover. But in the present case, the assessee never disclosed the fact that the assessee had purchased the units three months before the record date, and then sold the same after three months from the record date and has earned dividend and incurred loss on some units but, on the one hand, the assessee has claimed double benefit, one by claiming the dividend income as exempted and the other by setting off of loss incurred on sale of such units against the other taxable income of the assessee. The present case is a case where bogus claim is made. Therefore, the present case is not a case where we can say that the assessee's conduct was bonafide and has disclosed all primary and basic facts relating to the loss on units.

25. In the light of the discussions made above, we are of the considered view that the aforesaid three decisions relied by the assessee do not advance the case of the assessee rather they support the case of the revenue on facts of the present case.

26. The assessee has also furnished before us a copy of the decision of Hon'ble High Court of Delhi in the case of CIT vs. Usha Marketing P. Ltd.,



which decision, in our considered view, is also not of any help to the assessee's case but rather it supports the case of revenue. In this case, parameters of explanation to Section 271(1)(c) has been applied, and then it was held that no penalty would be leviable u/s 271(1)(c) of the Act. Under Explanation to Section 271(1)(c), the assessee can be exonerated from levy of penalty provided it is established that all the facts relating to the claim have been disclosed by the assessee and assessee offers an explanation, which is not found to be false but is bonafide. Applying the parameters of Explanation 1 to Section 271(1)(c) to the present case, we find that the assessee has not discharged the necessary criteria laid down in that Explanation inasmuch as assessee has failed to disclose all relevant, and material particulars relating to the loss claimed by the assessee by way of set off of the loss against the taxable income of the assessee instead of setting it off against the dividend income earned on same units, and further, the assessee failed to offer any explanation before the AO, and whatever explanation has been offered by the assessee before the learned CIT(A) cannot be held to be bonafide as no reasonable man would claim such loss on sale of units to be set off against the other taxable income of the assessee when such loss was squarely covered by the provisions of Section 94(7) of the Act.

27. After the hearing was concluded, the learned counsel for the assessee forwarded a copy of Hon'ble Supreme Court judgment in the case of CIT vs Reliance Petroproducts Ltd., (2010) 322 ITR 158 (SC) to contend that in the light of this decision, the penalty u/s 271(1)(c) is not leviable upon the assessee. We have carefully gone through the aforesaid decision of Hon'ble Supreme Court in the case of Reliance Petroproducts Ltd. and find that the Hon'ble Supreme Court noted in this order that in that case there was no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false, and in that situation, a mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. In the light of the facts of the present case before us, we are afraid that this decision would also be of no help to the assessee inasmuch as, in the present case, the details supplied by the assessee in the return of income were not full, complete and correct rather the assessee misled the department by claiming double benefit i.e. once by claiming exemption of dividend income, and at the same time claiming the loss incurred on sale of units in respect of which dividend was also earned, to be set off against other taxable income of the assessee rather than to be set off against the dividend income. Therefore, the present case is not a case where all the facts relating to claim were

disclosed by the assessee and by itself has been merely disallowed, but it is the case where a claim of loss on units has been made by the assessee without disclosing or furnishing full and true particulars relating to the claim where no such claim did exist at all under the law.

28. At this stage, a reference is made to a decision of Hon'ble jurisdictional high Court of Delhi in the case of CIT vs Escorts Finance Ltd. dated 24<sup>th</sup> August, 24, 2009 passed in ITA No.1005/2008 reported on 2009-TIOL-483-HC-DEL-IT where penalty levied u/s 271(1)(c ) in respect of the disallowance of assessee's claim made u/s 35D for expenses incurred for public issue of shares was held to be justified. In that case, it was found that the deduction u/s 35D was clearly available only to other investment company or industrial undertaking for expansion of business and there could not be two opinions that the assessee was not eligible for such benefits, and against such clarity in law, how can the assessee claimed that such a deduction was made under bonafide belief based on the opinion of a Chartered Accountant. In that case, it was held that it is not a case of bonafide error but the assessee made bogus claim and the same would attract penal provisions. In that case, it was further observed that even if there is no concealment of income or furnishing of inaccurate particulars, but on the basis thereof the claim which is made is ex-facie bogus, it may still attract

penal provision. Similarly, in the present case, the provisions of Section 94(7) effective from Asstt. Year 1992-93 are clear and unambiguous, and in the light of those provision, it is very difficult to believe that the assessee could claim double benefit, one by claiming the dividend income being exempted, and at the same time, claiming the loss incurred on sale of units in respect of which dividend was also received, to be set off against taxable income, when the purchase and sale of units were made within the specified period of record date as laid down in Section 94(7) of the Act. It is not the case of the assessee that there were two views possible about the meaning and scope of Section 94(7) of the Act. The assessee has merely made a wild statement that it was a bonafide claim, but it has failed to show how and in what manner the assessee's claim can be said to be bonafide, particularly, in view of the fact that all the particulars about the purchase and sale of units made within the specified period of record date were not disclosed by the assessee in the return of income when assessee made the double claim as aforesaid. Therefore, this decision is squarely applicable to the present case, and in this view of the matter, we are constrained to uphold the order of CIT(A) in confirming the penalty levied by the AO u/s 271(1)(c) of the Act.

29. For the reasons given above, we, therefore, uphold the order of CIT(A) in confirming the penalty levied u/s 271(1)(c) of the Act by the AO, and reject this ground raised by the assessee by holding that the claim of the assessee to adjust the loss incurred on sale of units sold within specified period of record date as contemplated u/s 94(7) of the Act, against the taxable profit of the assessee instead of adjusting the same against exempted dividend income and thereby derived double benefit, is totally in disregard to the clear and unambiguous provisions contained in Section 94(7) of the Act and is not bonafide, and further, the assessee has failed to disclose fully and truly all materials relating to that claim in the return of income.

30. In the result, the appeal filed by the assessee stands dismissed.

31. This decision was pronounced in the Open Court on.....May, 2010.

(SHAMIM YAHYA)  
ACCOUNTANT MEMBER

(C.L. SETHI)  
JUDICIAL MEMBER

Dated: May , 2010  
Vijay

Copy to:

1. Appellant.
2. Respondent.
3. CIT
4. CIT(A)-XII, New Delhi
5. DR

Assistant Registrar