IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri B. Ramakotaiah, Accountant Member
and Shri Amit Shukla, Judicial Member

ITA No.2045/Mum/2010
(Assessment year: 2006-07)

Skil Infrastructure Ltd, 533/534 Vyapar Bhavan, 49 P D Mello Road, Carnac Bunder, Mumbai 400009 PAN: AABCS 7689 F	Vs.	ACIT, Central Circle-25, Aayakar Bhavan, M.K. Road, Mumbai 400 020
(Appellant)		**(Respondent)**

ITA No.2038/Mum/2010
(Assessment year: 2006-07)

ACIT, Central Circle-25, Aayakar Bhavan, M.K. Road, Mumbai 400 020	Vs.	Skil Infrastructure Ltd, 533/534 Vyapar Bhavan, 49 P D Mello Road, Carnac Bunder, Mumbai 400009 PAN: AABCS 7689 F

Assessee by: Shri Arvind Sonde &
Shri S.K. Mutsaddi, Assessee
Department by: Shri Satbir Singh, CIT(DR)

Date of Hearing: 19/07/2012
Date of Pronouncement: 31/08/2012

O R D E R

Per B. Ramakotaiah, A.M.

These are the cross appeals by assessee and Revenue against the order of the CIT (A)-39 Mumbai, dated 30/12/2009. The issue in this appeal is with reference to levy of penalty under section 271(1)(c).

2. The facts relating to the issue in the appeals are that the assessee company is engaged in promoting different types of infrastructure projects. Assessee filed its return of income for assessment year 2006-07 on 30.11.2006 declaring its business

income at Nil after setting of carried forward loss. The return was processed under section 143(1) of the I.T. Act on 30.11.2006. A revised return of income was filed on 24/03/2008 declaring income at Nil, but with minor changes in the computation of income due to change in carry forward losses. In the course of the assessment proceedings AO inquired about the reduction in 'stock in trade' as seen from Schedule-7 of the Act. After issuing a questionnaire dated 6.10.2008, assessee vide letter dated 10.10.2008 offered a net income of ₹.2,98,97,272/- comprising long term capital gain arising on sale of shares of Mumbai SEZ (MISEZ), long term capital gain chargeable under section 45(2) arising in the conversion of shares of Pipava Shipyard Ltd (PSL) which was sold during the year and against this capital gain, claimed loss of equal amount arising on sale of 'stock in trade' of PSL as business loss and further business loss of ₹.34,75,32,880/- which arose out of the expenditure incurred on LNG project abandoned during the year. These amounts were taken to Capital Reserves in books of account. AO examined assessee's contentions and the capital gain working as admitted by assessee was brought to tax. The working is as under:

Particulars	**Long Term Capital Gain Amount (₹.)**	**Short Term Capital Gain amount (₹.)**	**Total Amount (₹.)**
MISEZ shares	39,40,54,501	Nil	39,40,54,501
PSL shares	68,94,15,179	14,62,49,910	83,56,65,089
Total	**103,34,69,680**	**14,62,49,910**	**122,97,19,590**

As against the capital gains arrived at, the following business loss was also accepted:

S.No	**Particulars**	**Amount (₹.)**
1	Income from STT based Trading in shares and future & options	5,49,96,744
2	Loss on Non-STT based trading in shares of PSL	(86,51,35,470)
3	Loss arising out of abandoned LNG Project	(34,75,32,880)

AO also made certain disallowances such as depreciation, expenditure and also amount under section 14A and accordingly assessee's total income was determined at ₹.4,43,15,513/- as against ₹.2,98,97,272/- admitted by assessee vide letter dated 10-10-2008. AO initiated penalty proceedings under section 271(1)(c) in respect of a capital gain arising on sale of MISEZ shares and PSL shares. Vide the order dated 29.6.2009, AO considered the issue of various capital gains brought to tax and taking the amount of concealed income at ₹.122,97,19,590/- (both LTCG and STCG brought to tax) levied penalty of ₹.29,23,58,316/-.

3. Before the CIT (A) assessee contended that there is neither concealment nor furnishing of inaccurate particulars and relied on various facts as arising from the assessment order and submissions made before AO and also the notes made in the annual accounts and further on various case law with reference to levy of penalty under section 271(1)(c). The CIT (A) after considering the submissions, which were discussed elaborately in the order, confirmed the penalty to the extent of income finally brought to tax at ₹.4,43,14,513/- by stating as under:

> "*14. 1 have considered the facts and submissions. In this case the appellant company had filed its return of income on 30-11-06 admitting Rs.36,168/- as total income. Subsequently the appellant filed a revised return on 24-3-08 and the total income admitted is Rs. Nil. In the original return of income, the appellant has treated the income from other sources of Rs.36, 168/- separately whereas in the revised return Rs.36, 168/- was treated as part of income from business. In the original return of income, income from business or profession was worked out to Rs.1,28,09,962/- and it was set off with brought forward business loss and finally the income from business was shown as Nil. In the revised return of income, the income from business was worked out at Rs. 1,28,46,130/- and it was set off with brought forward business and finally the income from business was shown as Nil. The revised return is filed in time and as a result total income admitted finally is NIL.*

14.1 During the assessment proceedings the A.O. noticed that the appellant company has not offered the following income:

Particulars	***Long Term Capital Amount (₹.)***	***Short Term Capital Gain Amount ((₹.)***	***Total Amount (₹.)***
MISEZ shares	*39,40,54,501*	*Nil*	*39,40,54,501*
PSL Shares	*68,94,15,179*	*14,62,49,910*	*83,56,65,089*
Total	***103,34,69,680***	***14,62,49,910***	***1,22,97,19,590***

14.2 The A.O. initiated penalty proceedings u/s.271(1)(c) and in the penalty proceedings, the A.O. has held that the appellant has concealed the particulars of income and furnished inaccurate particulars of income and levied penalty u/s.271(1)(c) of the I.T. Act. The penalty was quantified by the A.O. on the basis of the above mentioned incomes which were not offered by the appellant in the return of income.

14.3 The appellant vehemently contends that it has not concealed any particulars of income nor it had furnished any inaccurate particulars of income.

As far as the capital gains arising from the sale of MISEZ shares, the appellant company contends that it made an application to the CBDT for approval u/s. 10(23G) and the application was pending on the date of filing the return of income and hence the above said income was not offered to taxation in the return of income.

14.4 As far as the capital gains arising from the sale of PSL shares, the appellant contends that the fact of converting the PSL shares into stock in trade was available in the records for asst. year 2005-06 and there is huge business loss arising from the abandoning from the LNG project and it will offset the capital gains from the sale of shares of PSL shares and there will be a net loss and hence the same were not offered to tax in the return of income.

The appellant also relied on the fact that the appellant company filed a letter dated 10-10-2008 and offered the same as income during the assessment proceedings. The appellant contends that the company itself furnished the full details to the A.O. before the detection of the same.

In view of the above stated facts and contentions, the appellant contends that there is no concealment of particulars of income nor furnishing of inaccurate particulars of income and penalty cannot be levied.

14.5 I could not agree with the appellant for the following reasons:

> *1. In the return of income filed the appellant has nowhere disclosed the particulars of the above mentioned income. If the appellant is of the view that the income from the same of MISEZ shares is exempt u/s.1O(23G), the appellant should have mentioned that fact in Schedule 3(e) of the return of income. The appellant failed to do so.*
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> *2. As far as the capital gains from the sale of PSL shares are concerned, the appellant has no explanation to offer. Just because the appellant has indicated the conversion of capital asset into trading asset in the earlier assessment year will not give the conclusion that the appellant has furnished the particulars of capital gain earned during this assessment year. Fact of conversion of shares (which were considered as investment earlier) into stock in trade is different from the fact of sale of shares which gives rise to income from capital gains. The appellant failed to furnish the particulars about the income from sale of shares of PSL. Further, the appellant's contentions that the capital gains income arising from the sale of these shares are adjustable with the business loss and hence it was not shown in the return of income is also not acceptable because the facts related to capital gains should have been furnished in Schedule 2, whereas the business loss should have been considered in Schedule 1 and the appellant failed to do so both.*
> *3. The appellant's contention that it furnished the details of the above mentioned incomes on its own before the detection of the A.O. also could not be accepted. It is seen that the return is filed on 30.11.06 and notice u/s.143(2) was issued on 22-10-07. The appellant company could have disclosed these facts immediately after receipt of this notice taking guidance from the CBDT Circular No.9 dated 10-10-06. The appellant failed to do so.*

The A.O. again issued a notice u/s.142(1) dated 6-10-2008 along with a questionnaire. Question No.7 of the questionnaire read as follows:

"7. As per Schedule 7 of the Accounts it is seen that stock in trade as on 31-3-2005 is Rs.425,43,92,500/- while as on 31-3-2006 it is Rs.281,25,00,00, 150/- (share of P4ava Shipyard Ltd.]. Please explain how the stock in trade deficit of Rs. 144.19 crores relating to the share of Pipava Shipyard Ltd. has been accounted for. Please give a detail explanation along with necessary and relevant documents for the deficit, failing which the same will be brought to tax as per law."

After receipt of this Question No.7, the appellant has filed the letter dated 10-10-2008.

In view of the above stated facts, I am quite convinced that the disclosure made in the letter dated 10-10-2008 is after the detection of the facts by the A.O.

The A.O. has very elaborately discussed this issue in page nos. 12 to 15 of the penalty order. I am in full agreement with the A. 0.'s views.

In view of the above stated facts, I am fully convinced that the appellant has concealed the particulars of income and I hold that the penalty is leviable under section 271(1)(c) of the I.T. Act.

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Now the next question to be decided is what will be the quantum of penalty leviable. The A.O. has taken a view that the explanation 4(a) of section 271(1)(c) is applicable. The appellant contends that it's case is covered by explanation 4(c) of Section 271 (1)(c).

Section 271(1)(iii) reads as follows:

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

Explanation 4 to section 271 reads as follows:

"Explanation 4.-For the purposes 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 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 Explanation 3 applies, means the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148;
(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."

From the above extracts, it is very clear that penalty u/s.271(1)(c) is based on "the amount of tax sought to be evaded" and explanation 4 defines the "amount of tax sought to be evaded".

In this case, it is seen that there is no reduction in the loss declared in the return or converting the loss into income. It is also seen that there is no reduction in the carried forward of loss declared in the return. In view of this, I hold that Explanation 4(a) is not applicable.

Obviously explanation 4(b) is not applicable in this case. So certainly Explanation 4(c) is only applicable in this case.

In this case, total income assessed is Long Term Capital gains of Rs.4,43,14,513/-. If the Long Term Capital gains for which particulars have been concealed is Rs. 108,34,69,680/- and if this is reduced, there will be no

positive income. In view of these facts, the tax on the total income of Rs.4,43,14,513/- will be the amount of tax sought to be evaded as per explanation 4(c) to section 27 1(1) of the I.T. Act.

The A.O. has charged 100% of tax sought to be evaded. I direct the A.O. to take tax on Long Term Capital gain of Rs.4,43, 14,513/- as tax sought to be evaded and levy 100% of that amount as penalty under section 271(1)(c). The grounds raised by the appellant are accordingly disposed".

4. Since the CIT (A) reduced the quantum of penalty on the income determined as concealed, both assessee and the Revenue are aggrieved. All the grounds raised in both the appeals are with reference to the levy of penalty under section 271(1)(c).

5. The learned Counsel referring to the facts in the order submitted that assessee at the time of filing electronic return did not state the capital gains arising out of various transactions, even though in assessment year 2005-06 the fact of converting shares of PSL as stock in trade was intimated. He then referred to the circumstances in which these amounts were undisclosed in the return, item-wise.

6. With reference to the sale of shares in MISEZ, it was submitted that assessee during the year under assessment diversed its investment in MISEZ. MISEZ sought exemption under section 10(23G) from the CBDT vide their letter dated 04/08/2005 and placed a reminder to the CCIT dated 17/01/2006. During the year the appellant sold its investment in MISEZ at a face value of ₹.10/- with the strategic investor (Reliance) at ₹.13.90 per share. The total number of shares sold was 13.50 crores resulting in sale proceeds of ₹.187.65 crores. The book value of the share was ₹.13.5 crores. The long term capital gain after indexation of cost of acquisition was at ₹.39,40,54,501/-. It was the submission of assessee that on the date of filing the returns on 30.11.2006 as well as revised return on 24.03.2008, the application under section 10(23G) was pending

with the CBDT and as no decision has come, they did not offer the capital gain thinking that the amount would be exempt.

7. With reference to shares of PSL, these shares at the face value of ₹.10/- which was held as investment was converted to stock in trade at ₹.25/- per share in assessment year 2005-06. The notional gain of ₹.15/-per share could be offered to tax only in the year of sale of shares. During the year assessee sold 5,76,75,694/- shares to IL & FS at ₹.10/- per share resulting in gross sale proceeds of ₹.57.68 crores. Since the share was already converted as stock in trade, there arose both the capital gain and capital loss. The aggregate capital gain was computed at ₹.83,56,65,089/- and at the same time the business loss worked out to ₹.86,51,35,470/-.

8. With reference to the loss on LNG project it was submitted that assessee is in the project development has decided to abandon the LNG project due to un-viability and the entire amount was written off into the books of account.

9. Referring to the balance sheet of the assessee company, it was submitted that assessee has taken these transactions to capital reserve. The note No.4 to the schedule forming part of the balance sheet as on 31/03/2006 is as under:

> *"**4. Notes on Capital Reserve:** During the year, the company has sold part of investment in Mumbai Integrated Special Economic Zone Projects. The project being infrastructure compliant, the net resultant gains arising on account of this is directly transferred to Capital Reserve. The company also, during the year sold part of its holding in Pipavav Shipyard Ltd, held as stock in trade and the difference between the conversion price and sale price has been adjusted in Capital Reserve. Further, the net loss on account of Pipavav LNG transaction is also adjusted in Capital Reserve Account".*

10. It was submitted further that as far as capital gain on MISEZ is concerned, assessee was under the bonafide impression that the capital gain was exempt from taxation as they sought permission

under section 10(23G). With reference to the capital gain/ loss on sale of PSL shares, it was submitted that there was no effect on the tax computation as the gain was equal to loss, as the shares were sold at face value of ₹.10/- only, the valuation of which was accepted by AO. With reference to the LNG project assessee having incurred heavy expenditure wrote off to capital reserve and did not claim it as revenue expenditure. It was further submitted that consequent to the details called for by AO why there was reduction in stock in trade, assessee sought legal advise and since the permission from CBDT was pending, pending as of now even, assessee chose to offer the capital gain on MISEZ and also claimed the loss on LNG project. It was the submission of assessee that the net amount of ₹.2,98,97,272/- ultimately assessed for capital gain was out of the long term capital gain from sale of MISEZ shares which was not offered for a bonafide reason as the application made to CBDT was pending.

11. The learned Counsel also referred to the reconciliation statement filed with reference to assessee's assessed income to the income offered and submitted that the CIT (A) erred in confirming the penalty on the assessed income which include routine disallowances like depreciation and expenditure. With reference to section 14A also, it was his submission that this amount disallowed consequent to the invoking of section 14A cannot be considered as concealed income or furnishing of inaccurate particulars. With reference to the contention that assessee admitted the income only after inquiry by AO, it was submitted that assessee's balance sheet itself indicated in the notes and since assessee filed electronic return, there was no scope for attaching any computation statement/ notes to the computation and only after receipt of notice for scrutiny, assessee was asked to file manual copy of the return before AO. It was further submitted that assessee could not file any revised return as it was already filed revised return consequent to

adjustment in carry forward losses, even though resulted in Nil income. It was further submitted that AO did not unearth any concealment, made a routine query on seeing the balance sheet figures. Assessee voluntarily offered the income so as to settle the issue as the approval from the Board was still pending by the time this inquiry was started. He also referred to various detailed statements made before the CIT (A) including the case law to submit that assessee was for bonafide reasons could not offer the income when the returns were filed. Subsequently it voluntarily offered the income and therefore, penalty under section 271(1)(c) cannot be levied on the ultimate assessed income as was done by the CIT (A) as the ultimate determined income also had certain adhoc disallowances.

12. The learned DR however, relied on the orders of AO to submit that assessee had enough opportunity to file revised return and referred to the show cause notice issued on 6.10.2008 asking for details of reduction in stock in trade, then only assessee has offered the income which ultimately was brought to tax. It was further submitted that the Revenue is also in appeal in excluding the amount of capital gain brought to tax. He relied on the order of AO and requested for restoration of penalty originally levied by AO. It was his submission that assessee has not filed any voluntary return and explanation that assessee made application under section 10(23) cannot be accepted as the provisions were withdrawn after 1/04/2007. Even though it was submitted that note on capital reserve was given in the balance sheet, there were no details of any of working of gains/losses and further when assessee converted the shares of PSL from investment to stock in trade in assessment year 2005-06, it is aware that assessee has to offer capital gain when it sold the shares. In view of this, he pleaded for confirming the penalty on the entire capital gain not offered to tax.

13. We have considered the issue and examined the facts. Assessee has filed electronic return offering Nil income under the head business and capital gain (nil) but offered small amount of ₹.36,168/- (other sources) as total income. It filed a revised return admitting nil income claiming set off of losses. However, in the course of inquiry from AO, assessee did file a letter dated 10.10.2008 offering amount of ₹.2,98,97,272/- both comprising of capital gain at ₹.122,97,19,590/- and loss on non-STT basis sale of PSL shares and loss arising out of the abandoned project. As can be seen from the assessment order, AO accepted the computation as made by assessee without any change. Even though these amounts were not offered in the original income and long term capital gain of ₹.103,34,69,680/- on both MISEZ and PSL shares along with the short term capital gain of ₹.14,62,49,910/- on PSL shares were accepted as such. As against this capital gain, AO allowed the trading loss arising out of sale of shares of PSL which was held as stock in trade at ₹.25/- face value. This loss was quantified at ₹.86,51,35,470/- which was ultimately more than the capital gains on sale of PSL shares. AO also accepted the claim of loss arising out of the abandoned LNG project at ₹.34,75,32,880/- which was written off to the capital reserve account but claimed as revenue expenditure vide the letter dated 10/10/2008. The ultimate result of both the gains and losses is that assessee has offered income at ₹.2,98,97,272/- as capital gain mostly arising out of sale of shares of MISEZ. There is no dispute with reference to the amounts brought to tax and the amounts allowed as loss. The total income determined by AO not only include the above amounts but also disallowances in the shape of depreciation at ₹.11,78,495/-, expenses at ₹.30.00 lakhs and under section 14A ₹.99,43,676/-. Thus the total income was determined at ₹.4,43,14,513/-. Assessee also filed revised Profit & Loss A/c reworking the Profit & Loss A/c to substantiate its claim. Therefore, even though proceedings under

section 271(1)(c) were initiated and levied on the gross amount by AO, we agree with the reasoning of the CIT (A) that if at all a penalty is to be levied under section 271(1)(c) r.w. Explanation-4, the amount for consideration can only be ₹.4,43,14,513/- on which he confirmed the penalty.

14. The A.O. has taken a view that the explanation 4(a) of section 271(1)(c) is applicable and considered the entire capital gain offered, before setting of losses as concealed income. The CIT(A) held that it is a case covered by explanation 4(c) of Section 271 (1)(c). Section 271(1)(iii) reads as follows:

> "(iii) *in the cases referred to in clause (c) or clause (d), in addition to tax, f any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits."*
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> Explanation 4 to section 271 reads as follows:
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> "Explanation 4.-*For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded',*
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> 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;*
> b. *in any case to which Explanation 3 applies, means the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148;*
> 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."

15. From the above, it is very clear that penalty under section 271(1)(c) is based on "the amount of tax sought to be evaded" and explanation 4 defines the "amount of tax sought to be evaded". In this case, it is seen that there is no reduction in the loss declared in the return or converting the loss into income. It is also seen that there is no reduction in the carried forward of loss declared in the return. In view of this, we uphold the CIT(A) order that Explanation 4(a) is not applicable. Obviously, explanation 4(b) is not applicable in this case. So certainly Explanation 4(c) is only applicable provision in this case.

16. It was the Revenue contention that the amount of income concealed was entirely capital gain which was not offered to tax. This contention of AO cannot be accepted for the simple reason that as far as the gain and loss of sale of PSL shares are concerned, there are more or less cancel each other. As far as the loss of LNG project is concerned, AO himself accepted the claim even though assessee has not originally claimed but, offered along with the capital gain on MISEZ shares. Therefore the net amount, if at all anything can be considered as concealment can only be the amount offered by assessee (₹2,98,97,370/-). The other amounts which are disallowances in the computation of income cannot be considered for levy of penalty under section 271(1)(c) even though returned income and the assessed income are different. Out of two major amounts of disallowance, one was expenses of ₹30/- lakhs disallowed on adhoc basis. This amount cannot be a basis for levy of penalty as it was adhoc disallowance. Therefore, penalty levied on this amount cannot be sustained. The other amount is disallowance under section 14A to the extent of ₹97,43,676/-. This is also computed on the basis of the provisions of section 14A, even though assessee contended that no such disallowance was

warranted. Be that as it may, the disallowances under section 14A was considered by the Hon'ble Supreme Court in the case of CIT vs. Reliance Petro Products Ltd, 322 ITR 158, wherein furnishing of 'inaccurate particulars' was examined and cancellation of penalty was upheld. Therefore, disallowance under section 14A also does not call for penalty keeping the principles laid down by the above judgment of the Hon'ble Supreme Court. The other one is disallowance of depreciation which also does not call for levy of penalty.

17. That leaves us with the net amount offered as capital gain on the sale of MISEZ shares. As explained by assessee, the income could not be offered as assessee sought approval under section 10(23G) as early as of 24.08.2005 which was followed with reminder letter (copy of which is placed at page No.208 of the paper book) addressed to the CCIT on 17.01.2006. Since the application was made in form No.56E, it is natural that the Board will either accept or reject the application in a reasonable period of time. As on 1st Nov.2006 assessee has not been communicated by the result of the application, even though it was following it up. Therefore, there is a bonafide plea that the capital gain arising out of the transactions could not be subjected to tax and accordingly assessee has taken the amount under capital reserve and did not offer in the computation of income. Since the return was filed electronically, there is also no scope for giving any note in this regard. In the first available opportunity when AO made inquiry, assessee offered amounts voluntarily. Without going into the issue whether this is voluntary or not, we are of the opinion that there is a bonafide belief on the part of assessee that the capital gains arising on sale of MISEZ shares are exempt from taxation as the application under section 10(23G) was pending with CBDT. The argument of the learned DR that the provision itself was withdrawn from 1/4/2007 cannot be accepted as relevant provisions was applicable for the

year under consideration and assessee did make an application in time which was pending by the time the return was filed. In fact the application is still pending as no decision has been taken as yet by CBDT.

18. Similar issue was considered by the Coordinate Bench of the ITAT Delhi 'H' Bench in the case of Mewar Industries Ltd vs. Income Tax Officer, 119 TTJ (Del) 712 wherein the Hon'ble ITAT considered that the claim of assessee for exemption under section 10(23G) in anticipation of approval under section 10(23G) did not attract penalty under section 271(1)(c) Explanation-1 thereto. It was held *"While filing return of income the assessee claimed exemption under s. 10 (23G). The assessee was in possession of various letters and correspondence between ATS and Central Government as well as other correspondence to prove that there is all possibility that ATS will be granted registration as infrastructure company which in turn make the assessee eligible for claiming exemption under s. 10(23G). From the numerous correspondences in possession of assessee, assessee can be said to be under the bonafide belief that approval will be granted by the Central Govt. It is a different fact that till date the approval has not been rejected also. ATS was pursuing the matter vigorously for which all the queries raised by the Central Govt. were sought to e complied with from time to time. Thus even the claim of ATS was not a bogus or unwarranted claim. In such a situation if assessee believed the word of ATS and claimed exemption under section 10(23G), no malafide can be ascribed to assessee. It is settled law that merely because additions are made, penalty is not automatic. Since the claim of assessee was bonafide, it is not either a case of concealment of particulars of income or furnishing of inaccurate particulars of income. Assessee has been able to substantiate as to on what basis it was claiming exemption under section 10(23G). This explanation furnished is not found to be false. Therefore, Expln.1 to section 271(1)(c) is also not attracted. In such a*

situation penalty is not leviable. T-Ashok Pai vs. CIT (2007) 210 CTR (SC) 259, K.C. Builders & Anr. Vs. Asstt. CIT (2004) 186 CTR (SC)721; (2004) 265 ITR 562 (SC) and CIT vs. International Audio Visual (2007) 208 CTR (Del) 328: (2007) 288 ITR 570 (Del.) relied on".

19. Since the entire amount of capital gain ultimately brought to tax was arising out of sale of shares in MISEZ alone, we are of the opinion that there is a bonafide belief on the part of assessee in not offering capital gains. Therefore, in our opinion section 271(1)(c) cannot be attracted and accordingly allowing the grounds of assessee, we modify the order of the CIT (A) and delete the penalty so confirmed by the CIT (A).

20. As discussed above in the course of the order, the Revenue contention that only capital gain amount can be considered for penalty can not be accepted as assessee has offered both capital gain and loss arising from the same transaction in the case of PSL shares and the loss which was adjusted in the capital reserve account was allowed by AO as revenue loss. Therefore, the net amount of income brought to tax was only ₹.2,98,97,272/- comprising of long term capital gain arising on sale of shares of Mumbai Integrated Special Economic Zone along with the disallowances made thereon. There is no merit in the Revenue contentions. As seen from the returns originally filed placed on record, assessee had claimed set off of brought forward losses to an extent of ₹.1,28,46,130/- to the extent of profit available under the head business. The order of AO does not indicate whether this loss was set off in earlier years or still available for set off. There is no mention about the carry forward losses. However, after setting off to the capital gain, as net computation under the head business was a loss, the total income determined at ₹.4,43,14,513/- was only arising out of the long term capital gain, out of which if the amounts of disallowances were excluded the net amount of

₹.2,98,97,272/- comprises only of long term capital gains. Accordingly the Revenue grounds are dismissed.

21. In the result appeal filed by assessee is allowed and the Revenue appeal is dismissed.

Order pronounced in the open court on 31st August, 2012.

Sd/-	Sd/-
(Amit Shukla)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, dated 31st August, 2012.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "E " Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI