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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `B' NEW DELHI

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

I.T.A.No.1173/Del/2012
Asstt.Year: 2005-06

ACIT,	vs	Consolidated Finvest & Holdings Ltd.
Circle-3(1),		H.No. 11/5B, Basement-01,
New Delhi.		Opp. Telephone Exchange, Pusa Road,
		New Delhi-110055
		(PAN: AAACJ0090N)
(Appellant)		(Respondent)

Appellant by: Shri K.K. Jaiswal, Sr. DR
Respondent by : S/Shri Rupes Jain, Gaurav Jain, Adv.
Date of Hearing: 11.5.2015
Date of pronouncement:19.6.2015

O R D E R

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal by the revenue has been directed against the order of CIT(A)-VI, New Delhi dated 02.12.2011 in Appeal No. 2/10-11 for AY 2005-06 by which penalty order dated 5.3.2010 passed u/s 271(1)(c) of the Income Tax Act, 1961 (for short the Act) has been set aside and the AO was directed to delete the impugned penalty. The sole ground raised by the revenue reads as under:-

> *"1. The ld. CIT(A) has erred on facts and in law in deleting penalty imposed u/s 271(1)(c) of the IT Act in respect*

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of expenditure of Rs.52,30,121/- claimed by the assessee u/s 35D of the Act."

2. Briefly stated the facts giving rise to this appeal are that the assessee is an investment company registered as non-banking financial company (NBFC) with Reserve Bank of India. For the relevant financial year under consideration, return of income was filed showing taxable income of Rs.5,29,14,607/- on 28.10.2005 and the AO completed the assessment u/s 143(3) of the Act at an income of Rs.5,93,93,381/- after making several disallowances including disallowance of Rs.52,30,121/- u/s 35D of the Act.

3. The aggrieved assessee filed an appeal before the CIT(A) wherein the assessee did not press disallowance made by the AO u/s 35D of the Act. Subsequently, the AO issued notice dated 19.2.2010 requiring the assessee to show cause as to why penalty u/s 271(1)(c) of the Act be not imposed with reference to additions sustained on further appeal before the CIT(A) viz. disallowance of Rs.52,30,127 u/s 35D of the Act and disallowance of Rs.97,381 u/s 14A of the Act. After considering detailed reply dated 26.2.2010 of the assessee, the AO did not find himself satisfied with the explanation furnished by the assessee and imposed penalty u/s 271(1)(c) of the Act in respect of aforesaid both disallowances. Being aggrieved by the said penalty order, the assessee preferred an appeal before the CIT(A) which was allowed on both the counts and the CIT(A) directed the AO to delete the penalty. Now, the aggrieved revenue is before this Tribunal with the sole ground as reproduced hereinabove.

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4. We have heard arguments of both the sides and carefully perused the relevant material placed on record. At the very outset, from the operative part of the penalty order dated 5.3.2010, we note that the AO imposed penalty of Rs.19,49,466 on account of both the disallowances which were upheld by the CIT(A) when these grounds were not pressed by the assessee before first appellate authority and the issue attained finality. From the grounds raised by the revenue as reproduced hereinabove, we note that the revenue has only agitated the issue of deletion of penalty in respect of expenditure claimed by the assessee u/s 35D of the Act. In this situation, we presume that the department has not challenged the deletion of penalty in respect of disallowance u/s 14A of the Act.

5. Ld. DR pointed out para 5.2 at page 7 of the impugned order and submitted that in the relevant assessment year, the assessee claimed deduction u/s 35D of the Act in respect of unit at Dadra, UP for a period of 10 years w.e.f. AY 1996-97 in accordance with the provisions of section 35D of the Act. The DR further submitted that the relevant assessment year was the last year for this claim. Ld. DR further submitted that Dadra Unit was demerged under the scheme of demerger w.e.f. 1.4.2004 into transferee company viz. Consolidated Photo Products Ltd. (now known as Jindal Photo Limited). Ld. DR further submitted that the assessee claimed deduction u/s 35D of the Act by furnishing inaccurate particulars of its income, therefore, the AO was justified in imposing

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the penalty. Ld. DR further submitted that the onus was on the assessee to prove that there was no concealment of income and assessee has not furnished inaccurate particulars of its income and the assessee has failed to discharge its onus and the explanation offered by the assessee was not found to be satisfactory and acceptable by the AO, therefore, the penalty was rightly imposed u/s 271(1)(c) of the Act. Ld. DR vehemently pointed out that the CIT(A) deleted the said penalty without any justified reason and basis, therefore, the impugned order may be set aside by restoring that of the AO.

6. Replying to the above, ld. Advocate of the assessee supported the impugned order and submitted that the unamortized amount of public issue expense lying in the books of account was not described with assets of demerged unit at Dadra by the accountants while preparing the scheme of demerger and due to this inadvertent and bona fide mistake, the assessee company claimed deduction u/s 35D of the Act in the return of income for the relevant assessment year. Ld. counsel of the assessee further submitted that even in the case of disallowance in the hands of assessee company, the same amount would be eligible for deduction in accordance with the provisions of sub-section (5A) of section 35D of the Act for the unexpired period in the hands of resulting company i.e. Consolidated Photo Products Ltd. which did not claim any deduction in this regard in the return of income for the year under consideration. Ld. counsel strenuously contended that the assessee company

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was not at any advantageous position to claim deduction u/s 35D of the Act as both the companies i.e. appellant company and the transferee company belong to the same group, therefore, the mistake was bona fide and inadvertent and hence penalty was not leviable.

7. Ld. counsel of the assessee has further drawn our attention towards paper book page no. 106 and 107 and submitted that no deduction for the aforesaid expenditure was claimed in the return of income of Consolidated Photo Products Ltd. for AY 2005-06 which again shows the bona fide of the assessee in this regard.

8. On careful consideration of above submissions from both the sides, from operative part of the impugned order, we note that the CIT(A) granted relief for the assessee with following observations and conclusion:-

> *"5.2 Regarding the issue of disallowance u/s 350 it is seen that the aforesaid deduction was claimed by the appellant company in respect of explanation of a unit at Dadra, UP for a period of 10 years w.e.f. A.Y. 1996-97 in accordance with the provisions of section 350 of the Act. The relevant assessment year was the last year for a claim of deduction in terms of section 35D of the Act. However, this unit at Dadra was demerged under the scheme of demerger w.e.f. 1.4.2004 into transferee company viz. Consolidated Photo Products Ltd. (now known as Jindal Photo Ltd.). The unamortized amount of public issue expense laying in the books of account was not described with assets of demerged unit at Dadra by the accountant while "preparing the scheme of demerger. As per the ld. AR , this mistake was inadvertent and bonafide. As a result thereof the appellant company inadvertently claimed deduction u/s 35D of the Act in the return of income for the relevant assessment year. I find force in the submissions made*

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by the Id. AR. Even in the case of disallowance in the hands of the appellant company, the same amount would be eligible for deduction in accordance with provision of sub-section (5A) of Section 35D of the Act for the unexpired period in the hands of resulting company i.e. Consolidated Photo Products Ltd. It is further seen that no deduction for the aforesaid expenditure was claimed in the return of income of consolidated Photo Products Ltd. Which was otherwise eligible in terms of section 35D(5A) of the Act. The return of income was filed by M/s Consolidated Photo Products Ltd. at total income of Rs. 26,68,67,560/- on which tax was also duly paid by the company. The impugned claim of deduction u/s 350 of the Act in the hands of Consolidated Photo Products Ltd. would have reduced the aforesaid income and consequential payment of taxes. Therefore, in my opinion, the appellant company was not at any advantageous position to claim deduction u/s 35D of the Act, since both the appellant company and the transferee company belongs to the same group. Therefore, in my opinion, the appellant's contention is bonafide and the mistake is inadvertent. Therefore, the AO is directed to delete the impugned penalty imposed u/s 271(1) (c)."

9. In view of above, at the very outset, we note that although the assessee claimed deduction u/s 35D of the Act, the unamortized amount of public issue expense lying in the books of account was disallowed by the AO and addition was made. We further note that this disallowance attained finality when the assessee accepted the conclusion of the AO by not pressing the ground before the CIT(A) pertaining to this issue. However, it is a well-settled proposition that the quantum of penalty proceedings are separate proceedings and penalty cannot be imposed merely on the ground that the assessee did not challenge or agitate the issue before higher forum and accepted the disallowance made by the AO. As per section 271(1)(c) of the Act, penalty is imposable if the AO is satisfied that any person has concealed the particulars of his income or has

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furnished inaccurate particulars of such income. Explanation 1 to section 271(1) (c) of the Act further makes it clear that where in respect of any facts material to the computation of total income of any person under this Act, such person fails to offer an explanation or offers an explanation which is found by the AO to be false or such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed. In the present case, the AO has not disputed that there was an unamortized amount of public issue expenses lying in the books of account of Dadra Unit. The main explanation of the assessee is that due to inadvertent mistake and under bona fide belief, the amount of unamortized public issue expense was claimed as deduction u/s 35D of the Act as the same was not described with assets of demerged unit at Dadra by the accountant of the assessee while preparing the scheme of demerger. The contention of ld. DR is that the Dadra unit was showing loss which was subsequently merged with the assessee and in this situation, the assessee placed claim u/s 35D of the Act with the intention to reduce tax liability of the assessee and therefore, the AO was right in imposing penalty for concealment and furnishing of inaccurate particulars of income of the assessee.

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10. On careful consideration of above submissions of both the sides, we note that in accordance with the provisions of section (5A) of section 35D of the Act, the resulting company was eligible for deduction but no deduction was claimed by the resulting company i.e. Consolidated Photo Products Ltd. as per computation of income for the year under consideration available at pages 106 and 107 of the assessee's paper book. In view of above noted facts, we are inclined to agree with the conclusion of the CIT(A) that the impugned claim of deduction u/s 35D of the Act in the hands of Consolidated Photo Products Ltd. would have reduced the aforesaid income and consequential payment of taxes and hence, the assessee company was not at all in any advantageous position to make a false claim of deduction u/s 35D of the Act as the assessee company and the transferee company belong to the same group of companies. At this juncture, we respectfully take note of decision of Hon'ble Supreme Court in the case of **CIT vs. Reliance Petroproducts 322 ITR 158 (SC)** and **Pricewaterhouse Coopers Pvt. Ltd. vs CIT (2012) 348 ITR 306 (SC)** wherein it was held that penalty is not imposable merely on the ground that the assessee submitted the claim under a bona fide belief and due to inadvertent mistake which was not found to be acceptable or was not accepted by the revenue. Respectfully following the ratio of these judgements of Hon'ble Apex Court, we finally hold that the view taken by the CIT(A) is justified and reasonable and we are unable to see any valid reason to interfere with the same. Accordingly, sole ground of the revenue being devoid of merits is dismissed.

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11. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 19.06.2015.

Sd/-	Sd/-
(N.K. SAINI)	(CHANDRAMOHAN GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

DT. 19th JUNE 2015
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. C.I.T.(A)
4. C.I.T.
5. DR

By Order

Asstt.Registrar