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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B', NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.1510/Del/2016
Assessment Year: 2005-06

M/s. Nortel Networks India Pvt. Ltd., C-227, Ground Floor, Near Garden of Five Senses, Westend Marg, Paryavaran Complex, New Delhi	**Vs.**	DCIT, Circle-18(2), New Delhi
PAN :AABCN1428B		
(Appellant)		**(Respondent)**

Appellant by	Ms. Ananya Kapoor, Adv.
Respondent by	Shri G. Johnson, Sr.DR

Date of hearing	31.07.2019
Date of pronouncement	07.08.2019

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 31/12/2015 passed by the Ld. Commissioner of Income-tax (Appeals)-6, Delhi [in short 'the Ld. CIT(A)'] for assessment year 2005-06 in relation to penalty under section 271(1)(c) of Income-tax Act, 1961 (in short 'the Act'). The grounds of appeal raised by the assessee are reproduced as under:

Ground 1: Levy of penalty under section 271(1)(c)
1. On facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) -6, New Delhi [learned 'CIT(A)'] has erred in upholding the action of the learned Deputy Commissioner of Income Tax, Circle 13(1), New Delhi (learned AO') in levying penalty of

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INR 905,664 under section 271 (1)(c) of the Income Tax Act, 1961 ('Act') on the addition made by the learned AO on account of write off of security deposit forfeited.

1.1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in alleging that the issue of deduction of write off of security deposit forfeited is not a debatable issue without fully appreciating the judicial precedents relied upon by the Appellant, and has accordingly erred in not holding that penalty u/s 271(1)(c) cannot be levied in the instant case where more than one legal view is possible.

1.2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in placing reliance on the decisions in case of Robert Addie & Sons' Colleries v. C1T [1924] 8 Tax Cas. 671 and Bharat Collieries Ltd. Vs. C1T (32 1TR 547).

1.3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred, in alleging that the claim of the Appellant with respect to the aforesaid write off was made under the hope that the return of income for the subject AY will not be picked up for scrutiny, and, in holding that penalty provisions do not require culpable mens rea.

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case.

2. Before us, the assessee also filed additional ground of appeal challenging the validity of notice issued for initiation of penalty as under:

> *1.4: "That the notice issued under section 271(1) (c)/ 274 of the Act, and the order passed under section 271(l)(c) of the Act are illegal, bad in law and without jurisdiction*
>
> *1.5: "That the penalty has been initiated vide notice under section 271(1)(c) /274 of the Act without any specific charge, hence, the said notice and the order passed under section 271(l)(c) of the Act are illegal, bad in law and without jurisdiction. "*
>
> *1.6: "That satisfaction recorded/charge levied while completing the assessment and while levying the penalty are different and hence the notice issued under section 274 of the Act, and the order passed under section 271(l)(c) of the Act are illegal bad in law and without jurisdiction. "*
>
> *Ground 1.7: "That the levy of penalty is illegal, unjust and not in accordance „*

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the mandatory requirements of Section 271(l)(c) have not been met in the instant case.

The relevant facts are already on record and no new fact is required to be investigated. The above noted grounds go to the root of the matter. It is therefore humbly requested that the same may kindly be admitted and adjudicated. Reliance is place on the decision of Hon'ble Supreme court in the case of NTPC 229 ITR 383 (SC)

3. Briefly stated facts of the case are that as against the return of income declared of Rs.33,34,44,830/-, the total income of the assessee for the year under consideration was assessed under section 143(3) of the Act at Rs.74,27,57,980/-and penalty proceedings were initiated under section 271(1)(c) of the Act. On further appeal, the disallowance in respect of loss of security deposit was sustained by the Ld. CIT(A). In view of the disallowance sustained, the Ld. Assessing Officer issued show cause for levy of penalty and after considering the submission of the assessee, he held the assessee liable for penalty and levied penalty of Rs.9,28,125/- equivalent to hundred percentile of the tax sought to be evaded by the assessee in respect of the addition of Rs.24,75,000/-. On further appeal, the Ld. CIT(A) upheld the penalty. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

4. In the additional ground raised, the assessee has challenged the notice issued for initiation of the penalty. According to the assessee, the charges for initiation of penalty, whether for concealment of particulars of income or furnishing inaccurate particulars of income, was not striked down in the notice dated 29/12/2008 issued under section 274 read with section 271 of the Act.

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4.1 The Ld. counsel of the assessee submitted that this ground being only legal in nature and does not require investigation of the fresh facts and thus may be admitted at any stage of appellate proceedings, in view of the decision of the Hon'ble Supreme Court in the case of NTPC Vs. CIT, 229 ITR 383.

4.2 The learned DR, on the other hand, opposed admission of the additional ground.

4.3 We have heard the parties on the issue of admission of the additional ground. This being a legal ground and all facts in respect of the issue are available on record, the additional ground was admitted in view of the settled principle laid by the Hon'ble Supreme Court in the case of NTPC (supra).

5. The learned counsel arguing the additional ground filed a paper-book containing pages 1 to 206 and submitted that notice dated 29/12/2008 for initiation of the penalty under section 274 read with section 271 of the Act is vague as far as charges for which penalty is initiated. She submitted that it is not clear in the notice whether the penalty has been initiated for concealment of the particulars of the income or for furnishing inaccurate particulars of income. According to her, in view of charges for initiation of the penalty not specified in the notice, the penalty levied on the assessee need to be set-aside in view of the decision of the Hon'ble Karnataka High Court in the case of Manjunath Cotton & Ginning Factory, 359 ITR 565 (Kar.)

6. On the other hand, the learned DR submitted that charges on which penalty was initiated are clearly mentioned in the assessment order and, therefore, assessee was aware about the charges, for penalty was initiated.

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7. We have heard the rival submission on the issue in dispute. The learned counsel of the assessee agreed with the facts that the charges on which penalty was initiated were clearly mentioned in the assessment order. In view of the clarity of the charges at the stage of the assessment order, she did not press the additional ground and proceeded to argue the penalty on merit. Accordingly the additional ground of the appeal is dismissed.

7.1 While arguing the ground of the appeal, the Ld. counsel of the assessee submitted that all facts in respect of the issue in dispute on which addition made by the Assessing Officer, were duly disclosed by the assessee in the return of income as well as in the assessment proceedings. According to her, the addition has been made merely on the difference of opinion, whether the loss of security deposit in respect of the asset which was taken on lease, would amount to revenue expenditure or capital expenditure. She referred to page 6 of the assessment order wherein addition on this issue of Rs.24,75,000/- has been made by the Assessing Officer. She further referred to the penalty order under section 271(1)(c) of the Act and submitted that the Assessing Officer has levied penalty on the ground of non-furnishing of explanation as to the default in declaring the income as provided under Explanation 1 of section 271(1)(c) of the Act. According to her the assessee has offered the explanation for claiming the expenses as revenue expenditure and such explanation is *bonafide* and all the facts in relation to same and material to the computation of the total income have been disclosed by the assessee and therefore, lower authorities were not justified in sustaining the penalty levied under section 271(1)(c) of the Act. In support of her contention that there are

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two opinion available on whether the expenditure in question could be considered as revenue expenditure or capital expenditure, she relied on the following decisions:

1. *Mysore Sugar Company Ltd. (SC), 46 ITR 649*
2. *IBM World Trade Corporation Vs. CIT (Bom. HC), 186 ITR 412*
3. *Inden Biselers (Mad. HC), 181 ITR 69*
4. *Narandas Mathuradas & Co. Vs. CIT (Bom. HC), 35 ITR 460*
5. *Jhalani and Company Vs. CIT (Del. ITAT), 77 ITD 44*

7.2 Further, in support of her claim that, no penalty could be levied where assessee discloses all the transactions, she relied on following decisions;

1. *Commissioner of Income-tax Vs. Amtek Auto Ltd. (P&H) 36 taxmann.com 342;*

2. *Commissioner of Income Tax Vs. Electrolux Kelvenatro Ltd. (Del. HC) 44 taxmann.com 369*

7.3 On the contrary, the learned DR relied on the order of the Ld. CIT(A) and submitted that assessee deliberately not disclosed the facts in the return of income filed. He referred to para 5.13 of Ld. CIT(A) to support the contention that complete facts regarding the issue of addition were not available on the return of income and document enclosed.

7.3 We have heard the rival submission of the parties on the issue in dispute. The facts in respect of the issue in dispute are that the Assessing Officer observed payment of Rs.24,94,181/- as advances written off under the head administrative and other expenses in the profit and loss account. On being asked, the assessee vide letter dated 28/07/2008 explained that amount of Rs.24,75,000/- was on account of forfeiture of security deposit in

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relation to certain equipment taken on lease from M/s Toshiwal Enterprises Controls Private Limited (vendor). It was submitted that said equipment was lost by the assessee and thus security deposit was forfeited by the vendor. According to the assessee, since the forfeiture of the security was in relation to lease of the equipment, the loss of security deposit was a revenue expenditure. The assessee relied on following judgments for its claim as business loss:

1. *IBM World Trade Corporation Vs. CIT (186 ITR 42)*
2. *CIT Vs. Mysore Sugar Company Ltd. (46 ITR 649)*
3. *CIT Vs. India Biselores (181 ITR 69)*

7.4 Whereas, according to the Assessing Officer, security amount was paid for acquisition of the capital asset and therefore, loss was in the nature of the capital loss only. The Ld. CIT(A) held that the security deposit was for purpose of acquiring the asset on lease. According to him, an asset taken on lease are lost, this does not change the character of the security deposit which remained on capital account and therefore, security deposit forfeited represented capital loss and hence, not allowable as deduction.

7.5 During penalty proceedings before the Assessing Officer, the assessee submitted that it provided all the requisite information and document in response to the queries raised by the Assessing Officer so as to enable him complete understanding of the facts related to the case. According to the assessee, it fulfilled the conditions for not levy of the penalty invoking Explanation-1 of section 271(1) of the Act. The contentions of the assessee were not accepted by the Assessing Officer. The Ld. CIT(A) also upheld the penalty mainly on the ground that the assessee has not made

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full disclosure of the transaction either in the tax audit report or in the financial statements of the assessee or in the computation of income. The relevant finding of the Ld. CIT(A) in para 5.11 to para 5.13 is reproduced as under:

> *"5.11 Further, a perusal of the Form No. 3CD (which is a part of tax audit report) dated 27.03.2006 issued by the appellant's tax auditor contains a remark regarding claim of 100% depreciation on certain assets as against the item no. 17(a)-— "Amount debited to the profit and loss account being expenditure of capital nature". However, no such remark/mention was made in respect of claim of forfeiture of security deposit amounting to Rs. 24,75,001 /- as revenue expenditure.*
>
> *5.12 The appellant claimed that it has not disallowed forfeiture of security deposit Rs.24,75,000/- while computing taxable income and claimed the same as revenue expenditure based on certain judgments. Therefore, two opinions are possible and penalty for concealment cannot be levied if there are debatable views. Most of the judgments relied upon by the assessee relates to writing off of advances and does not relate to the compensation paid for loss of leased asset. The appellant's claim relates to compensation paid for a leased asset which has been permanently destroyed/ lost. The law relating to allowability of compensation paid for permanent damage to the leased asset has long been settled in the case of Robert Addie & Sons Collieries v. CIR [1924] 8 Tax Cas. 671 wherein it has been held that the compensation paid for a permanent damage to the leased asset is in the nature of capital expenditure. The ratio of this case was followed in the case of Bharat Collieries Ltd. vs. CIT (32 ITR 547). Therefore, the submission of the appellant that the issue of allowability of forfeiture of security deposit for the loss of leased asset is a debatable issue is not correct. Moreover, the appellant could not furnish relevant documents/evidence to substantiate its claim.*
>
> *5.13 As discussed above, the facts regarding claim of forfeiture of security deposit amounting to Rs. 24,75,000/- as revenue expenditure was not apparent from the From the Schedule N "Administrative & Other Expenses" of the AFS for the FY 2004-05 without making further inquiries/obtaining further details of the amount of Rs. 24,94,181/- . Similarly, the said claim was not disclosed by the tax auditor in tax audit report even though there is specific requirement to disclose amount in the nature of capital expenditure. Moreover, the appellant appended a note regarding claim made by the appellant in respect of provision for warranty based on in the judicial pronouncements. However, no such note was appended for the claim of forfeiture of security deposit. The appellant's submission that as the claim was supported by the*

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various judicial pronouncements, hence it was not required to disclose the same is self contradictory. As apparent from the note of the provision for the warranty the claim made by the appellant was also based on the judicial decisions. The appellant submitted that it had treated the claim of the forfeiture of security deposit as revenue expenditure based on certain judicial pronouncements. Therefore, from the appellant's point of view, the position of claim of provision for warranty and claim for forfeiture of security was similar and therefore the appellant has failed to furnish any valid reason for non-furnishing of note in respect of claim for forfeiture of security by the appellant."

7.6 In view of the above finding of the lower authorities, it is relevant for us to reproduce the Explanation 1 of section 271(1)(c), relying on which penalty is levied, as under:

"Failure to furnish returns, comply with notices, concealment of income, etc.

271. *(1)..*

Explanation 1.—Where in respect of any facts material to the computation of the total income of any person under this Act,—

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner to be false, or

(B) 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."

7.7 It is evident from the above that assessee is deemed to represent the income in respect of which particulars have been concealed if in respect of any fact material to the computation of income,

- the assessee failed to offer an explanation or explanation is found to be false

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- or
- explanation is not substantiated and the assessee fails to prove that such explanation is bonafide and all facts material to the computation of the income have been disclosed.

7.8 In the instant case, the assessee has offered Explanation as why the transaction of loss of security was claimed as business loss. This Explanation has not found to be false by the Assessing Officer. Further, the assessee substantiated the Explanation by way of filing relevant documents in relation to the transaction. In our opinion, the assessee has disclosed all the facts material to the computation of the income in the assessment proceedings. It is not the requirement of the law that all the facts material to the computation of income have to be disclosed in the return of income only as there are no relevant columns in the return of income form for disclosing all the facts of the case. During the assessment proceedings, the Assessing Officer asked queries in respect of the claim of loss of security deposit claim and the assessee submitted all the detailed information in respect of the transaction and no facts have been found to be wrong by the Assessing Officer. The issue involved is only of the interpretation of the transaction of loss of security. According to the assessee, it was in the nature of revenue expenditure whereas according to the Assessing Officer, it is capital loss, not allowable against the business profit. The Ld. counsel has before us referred the decision where similar advances forfeited have been held to be revenue expenditure. In the case of Mysore Sugar Company Limited (supra) the Hon'ble Supreme Court held as under:

> *"These cases illustrate the distinction between an expenditure by way of investment and an expenditure in the course of business,*

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> *which we have described as current expenditure. The first may truly be regarded as on the capital side but not the second. Applying this test to this simple case, it is quite obvious which it is. The amount was an advance against price of one crop. The Oppigedars were to get the assistance not as an investment by the assessee company in its agriculture, but only as an advance payment of price. The amount, so far as the assessee company was concerned, represented the current expenditure towards the purchase of sugarcane, and it makes no difference that the sugarcane thus purchased was grown by the Oppigedars with the seedlings, fertiliser and money taken on account from the assessee company. In so far as the assessee company was concerned, it was doing no more than making a forward arrangement for the next year's crop and paying an amount in advance out of the price, so that the growing of the crop may not suffer due to want of funds in the hands of the growers. There was hardly any element of investment which contemplates more than payment of advance price. The resulting loss to the assessee company was just as much a loss on the revenue side as would have been, if it had paid for the ready crop which was not delivered.*
>
> *In our judgment, the decision of the High Court is right. The appeal fails and is dismissed with costs."*

7.9 In view of the above decision, there is no doubt that there were two opinions, whether the advances written off could be considered as revenue expenditure or capital expenditure.

7.10 Further, we find that Hon'ble High Court of Punjab and Haryana in the case of **Commissioner of Income Tax versus Amtek Auto Limited (supra)** has held that *"merely because assessee claimed expenditure as revenue, which was held as capital by the Assessing Officer, penalty for concealment could not be imposed where assessee discloses nature of transaction"*.

7.11 In the case of Commissioner of Income Tax Vs. Electrolux Kelvantro Ltd. (supra), Hon'ble Delhi High Court held that where the issue involved is debatable and not free from doubt, no penalty can be levied. The relevant finding of the Hon'ble High Court is reproduced as under:

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> *"5. In the present case, the Tribunal has upheld the order of the Commissioner of Income-tax (Appeals) deleting penalty imposed by the Assessing Officer under section 271(1)(c) of the Income-tax Act, 1961 (for short, "the Act"). The assessee had made payment of non-compete fee amounting to Rs. 36,66,663 and claimed it as a revenue expense. Payment was monthly. The Assessing Officer observed and held that it was a capital expense. The issue was clearly debatable and not free from doubt. It is not the case of the Revenue that there was an affirmative decision of the High Court or the Supreme Court on the subject matter, when the return of income was filed or an affirmative opinion of the Tribunal or the High Court in the case of the assessee."*

7.12 In view of the foregoing discussion and respectfully following the decisions of the Hon'ble High Court, we are of the view that Explanation 1 of 271(1) is not attracted in the case of the assessee for levy of penalty under section 271(1)(c) of the Act. Accordingly, the findings of the Ld. CIT(A) on the issue in dispute are set aside and the penalty levied by the Assessing Officer is cancelled. The grounds of the appeal of the assessee accordingly allowed.

8. In the result, the appeal filed by the assessee is allowed.

Order is pronounced in the open court on 7th August, 2019.

Sd/-	Sd/-
[SUDHANSHU SRIVASTAVA]	**[O.P. KANT]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 7th August, 2019.
RK/-[d.t.d.s]
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi