

CASE NO.:
Appeal (civil) 7115 of 2005

PETITIONER:
M/s Virtual Soft Systems Ltd

RESPONDENT:
Commissioner of Income Tax, Delhi-I

DATE OF JUDGMENT: 06/02/2007

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T

With
C.A. No. 345 of 2006, C.A. No. 1340 of 2006, C.A. No. 3390 of 2006, C.A. No. 5219 of 2006 (@ SLP No. 13579 of 2006), C.A. No. 5221 of 2006 (@ SLP No. 14629 of 2006] C.A. No. 5220 of 2006 (@ SLP No. 14720 of 2006] C.A. No. 5218 of 2006 (@ SLP No. 14726 of 2006) and C.A. No. 4367 of 2006

BHAN, J.

We propose to dispose of these appeals as has been done by the High Court, by a common order, as the point involved in all these appeals is the same.

Facts are taken from Civil Appeal No. 7115 of 2005.

Commissioner of Income Tax, Delhi-I, the respondent herein, filed ITA No. 340 of 2004 in the High Court of Delhi against the order passed by the Income Tax Appellate Tribunal (for short "the Tribunal") under Section 260A of the Income Tax Act. Assessee also filed ITA No\005. of 2004 being aggrieved against a part of the order of the Tribunal. High Court allowed the ITA No. 340 of 2004 filed by the Revenue and held that the Tribunal was not right in deleting the penalty imposed under Section 271(1)(c) of the Income Tax Act, 1961 (for short "the Act") merely on the ground that the total income of the assessee was assessed at a minus figure/loss. Tribunal had allowed the assessee's appeal remitting the penalty imposed by the assessing officer under Section 271(1)(c) relating to the assessment year 1996-97, relying upon the decision of the Punjab High Court in CIT v. Prithipal Singh & Co., 183 ITR 69, which was affirmed by this Court in CIT v. Prithipal Singh & Co., Civil Appeal No. 1961 of 1996 dated 27.07.2000, reported in 249 ITR 670 (SC). In the appeal filed by the Revenue in the High Court of Delhi, the following two questions of law were framed:

" 1. Whether the ITAT was right in deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 on the ground that the total income of the assessee has been assessed at a minus figure/loss?

2. Whether the ITAT was justified in holding that the judgments in Prithipal Singh's case (183 ITR 69 and 249 ITR 670) will apply even after insertion of Explanation 4 to Section 271(1)(c) of the Income Tax Act, 1961 with effect from 1.4.1976?

FACTS (C.A. NO. 7115 OF 2005)

For the assessment year 1996-97, the assessee-appellant returned an income of Rs. 1,32,44,507.29 subject to depreciation. The depreciation claimed for the year was Rs.1,47,97,995.01 computed as under:-

Depreciation for Assessment year
1996-97

Rs. 1,32,44,507.29

Unabsorbed depreciation for
Assessment Year 1995-96

Rs. 15,53,487.72

Total =

Rs. 1,47,97,995.01

Accordingly, the appellant filed a "nil" return and carried forward the unabsorbed depreciation of Rs. 15,53,487.72 (Rs. 1,47,97,995.01 - Rs. 1,32,44,507.29 = Rs. 15,53,487.72) to the following year. By the assessment order dated 30.03.1999, the Deputy Commissioner of Income-Tax assessed the appellant's income at a figure of Rs. 47,03,120.00. This was because:

(i)

Disallowance of claim of depreciation of purchase and lease of cinematographic films held to be bogus

Rs. 57,51,520.00

(ii)

Reduction of claim of depreciation in respect of leasing vehicles from 40% to 20%.

Rs. 10,28,462.00

(iii)

Unexplained share application money added back as unexplained cash credits under Section 68

Rs. 19,16,000.00

(iv)

Lease rentals of cinematographic films held to be bogus and assessed as income from other sources

Rs. 63,43,750.00

The Commissioner of Income Tax set aside the order of assessment and directed the Assessing Officer to frame a fresh assessment and fresh proceedings concluded with an order of assessment dated 19.03.2002 in which it was found that the appellant had a loss of Rs. 11,02,255.00. It was because:

(i)

Since the leasing transactions in respect of cinematograph films were found to be bogus and the depreciation of Rs. 57,51,520.00 was not allowed, nor could the lease rental of Rs. 63,43,750.00 be added as income.

(ii)

Therefore, the Appellant's income was reduced to Rs. 68,00,757.00 (returned income, Rs. 1,32,44,507.00 $\ominus$ Rs. 63,43,750.00 = Rs. 68,00,757.00)

(iii)

The appellant was able to prove some sources of the share application money and the amount of Rs. 19,16,000.00 added back was reduced to Rs. 1,15,000.00

(iv)

Adding the above amount, the Appellant's income became Rs. 69,15,757.00 (Rs. 68,00,757.00 + Rs. 1,15,000.00 = Rs. 69,15,757.00)

(v)

Depreciation on leased vehicles claimed at 40% was reduced to 20% (as in the original assessment) and an amount of Rs. 10,28,462.00 was disallowed.

(vi)

Accordingly, against the total amount of depreciation claimed at Rs. 1,47,97,994.00, an amount of Rs. 67,79,982.00 (Rs. 57,51,520.00 + Rs. 10,28,462.00 = Rs. 67,79,982.00) was disallowed.

(vii)

Therefore, the depreciation allowable was Rs. 80,18,011.00 (Rs. 1,47,97,995.00 $\ominus$ Rs. 67,79,982.00 = Rs. 80,18,011.00)

(viii)

Making a deduction on account of depreciation as in sub-Paragraph (vii) above, the Appellant was assessed at a loss of Rs. 11,02,255.00 (Rs. 69,15,757.00 $\ominus$ Rs. 80,18,012.00 = - Rs. 11,02,255.00)

In this manner, the carry-forward loss of Rs. 15,53,487.72 originally claimed by the appellant was reduced to Rs. 11,02,225.00.

By order dated nil September, 2002, the Deputy Commissioner of Income Tax levied a penalty of Rs. 31,71,692.00. He distinguished the decision of the Punjab

and Haryana High Court in Prithipal Singh's case (supra), which was affirmed by this Court on the ground that it related to the assessment year 1971-72 when Explanation 4 to Section 271(1)(c) had not been introduced. He concluded the issue against the appellant on the basis of the decision of the Karnataka High Court in P.R. Basavappa & Sons v. CIT, 243 ITR 776 (Karnataka). He added the amounts disallowed i.e. Rs. 10,28,462.00, Rs. 57,51,520.00 and Rs. 1,15,000.00. He concluded that by adding these figures the total amount of Rs. 68,94,982.00 was the income in respect of which inaccurate particulars had been furnished. The tax was computed at Rs. 31,71,692.00. It was held that the tax sought to be evaded was Rs. 31,71,692.00 and imposed penalty of Rs. 31,71,692.00 (100% of the tax). The Commissioner of Income Tax confirmed the order of the assessing officer on 24.12.2002. The Tribunal by its order dated 11.05.2004 reversed the order of the Commissioner of Income Tax by applying Prithipal Singh's case (supra). Revenue filed an appeal under Section 260A of the Act which was allowed by the High Court by the impugned order.

The point involved before the High Court was, as to whether penalty was leviable under Section 271 (1)(c)(iii) read with Explanation 4 thereto which came on the statute book w.e.f. 01.04.1976, in a case where the return filed was one of loss and the assessment made by the assessing officer was at a reduced amount of loss.

Revenue's case before the High Court was that after 1.4.1976 Explanation 4 had made a material change and even though no tax was payable, as a result of the assessment framed at a loss, it will still fall under Section 271(1)(c)(iii) attracting levy of penalty in so far as the effect of reduction of loss from the returned loss, had resulted in concealment of income, the assessee having filed inaccurate particulars of its income in filing the loss return. In support of this proposition, the Revenue placed reliance on the interpretation of Explanation 4 which added the words "tax sought to be evaded". Revenue's contention was that Prithipal Singh's case (supra) decided by the Punjab and Haryana High Court pertaining to the assessment year 1970-71 was prior to the amendment of Finance Act, 1975 and therefore, was not applicable. For the same reason, the decision of this Court in affirming the decision of the Punjab and Haryana High Court in Prithipal Singh's case (supra) was also not applicable. Revenue had also placed reliance on the decision of the Karnataka High Court in P.R. Basavappa's case (supra). In this case Karnataka High Court distinguished the view taken in Prithipal Singh's case (supra) on facts stating that the said decision related to the period prior to 1.4.1976 and therefore, has no application as Explanation 4 inserted w.e.f. 1.4.1976 in the statute book was not considered by the Punjab and Haryana High Court.

The High Court answering the second question first, concurred with the view taken by the Karnataka High Court and dissented from the view taken by the Punjab and Haryana High Court in Prithipal Singh's case (supra), distinguishing the same on facts stating that the said decision related to the period prior to 1.4.1976 and therefore, had no application because Explanation 4 inserted in Section 271 (1)(c) with effect from 1.4.1976 in the statute was not considered by the Punjab and Haryana High Court and for similar reason held that the decision of this Court upholding the decision of the Punjab and Haryana High Court in Prithipal Singh's case (supra) was

also not helpful to the assessee in such a case.

Answering the first question also against the assessee and in favour of the Revenue, the High Court referred to some illustrations in the impugned order and concluded that the Tribunal was not right in deleting the penalty imposed under Section 271(1)(c) of the Act, merely on the ground that the total income of the assessee was assessed at a minus figure/loss. In arriving at this decision on question no.1, the Delhi High Court in the impugned order dissented from the view taken by Madras High Court, reported as CIT v. C.R. Niranjan, 187 ITR 280 (Madras), CIT v. N. Krishnan, 240 ITR 47 (Ker.). Reference was made to CIT v. S.V. Angidi Chettiar, 44 ITR 739 (SC) which referred to the expression "income tax" this judgment being under Section 28(1)(c) of the Income Tax Act, 1922, Dooars Tea Co. Ltd. v. Commissioner of Agricultural Income-tax, West-Bengal, 44 ITR 6 (SC) referring to the expression "total income", CIT (Central) Delhi v. Harparshad & Co. P. Ltd., 99 ITR 118 (SC), again referring to the expression word "total income". Reference is also made to CIT v. J.H. Gotla, 156 ITR 323 (SC) for the proposition as to whether word income would include loss. In this connection, the High Court also referred to CIT, Bombay v. Elphinstone Spinning & Weaving Mills Company Ltd., 40 ITR 142 (SC).

Section 271(1)(c) was again amended by the Finance Act, 2002. Subsequent amendment was brought to the notice of the Bench hearing the Appeal. In the impugned order, the High Court did not express any opinion and observed inter alia that while the Revenue stated that the amendment brought about by the Finance Act, 2002, w.e.f. 1.4.2003, was declaratory in nature, therefore, retrospective in operation and the submission on behalf of the assessee was that the same being substantive in nature and being an amendment to the statute could not be said to be operative retrospectively. The High Court as stated above, did not express any opinion on this aspect of the matter and held that for imposition of penalty after 1.4.1976 it was not necessary that there must be a positive income and the levy of tax, for the penalty to be imposed under Section 271(1)(c) of the Act.

Learned counsels appearing in different appeals filed by the assessee assailed the impugned judgment by contending that provisions of Section 271 (1)(c)(iii) prior to 1.4.1976 and after its amendment by the Finance Act, 1975 with effect from 1.4.1976, later provisions being applicable to the assessment year in question, being substantially the same, the High Court in the impugned order erred in distinguishing Prithipal Singh's case (supra), and taking a view contrary to the view taken in the said case. They referred to a number of judgments of various High Courts in support of their contention. According to them even after 1.4.1976, if there is no positive income, no taxes was leviable, and therefore penalty cannot be levied for concealment of income. The view that with the insertion of Explanation 4 w.e.f. 1.4.1976, penalty is leviable even in cases where the return filed is of loss and assessment framed is also of loss, as expressed by the Karnataka High Court in 243 ITR page 776, P.R. Bassappa's case (supra) and also by the Bombay High Court in CIT v. Chemiequip Ltd., 265 ITR page 265 do not lay down the correct law as these decisions run contrary to the law laid down by this Court in CIT v. Prithipal Singh & Co. (Supra). It is contended that the contrary view in any case, is of no assistance to the Revenue as against large number of other decisions of different High Courts. It was contended that it has been laid down

by this Court in CIT v. Podar Cement Pvt. Ltd. & Ors., 226 ITR 625 at 648 that where various High Courts have taken different views on a particular point, then that view which is in favour of the assessee should be adopted.

It was contended that income will not include loss as income means positive income on which tax is leviable which would not include loss income as no tax would be payable on a loss income. In the context of provisions of Section 271(1)(c), as it existed prior to 2002 amendment, in the absence of no tax, no penalty could be levied. This submission is based with reference to the provisions contained in Section 143 (1A) of the Act before its amendment which came on the Statute in 1993 with retrospective effect from 1.4.1989. In support of this contention, the assessee invited our attention to the decisions of various High Courts in Modi Cement Ltd. v. Union of India & Ors., [193 ITR 91 (Del.)], Indo-Gulf Fertilizers and Chemicals Corporation Ltd. v. Union of India & Anr., [195 ITR 485 (All.)] and CIT v. Zam Zam Tanners, [279 ITR page 197 (All)].

Referring to the amendment carried in Section 271(1)(c)(iii) and Explanation 4 by the Finance Act, 2002 where the expression used in Explanation 4 "the amount of tax sought to be evaded" has been amended providing specifically that where the filing of return and the assessment had the effect of reducing the loss would entail the penalty. It is contended that the Legislature has now deliberately enacted such provision to fill in the lacuna in law and also to put an end to the controversy which existed between the High Courts in interpreting the laws after 1.4.1976.

It was also contended that the view taken by the Bombay High Court in CIT v. Chemiequpi Ltd. (supra) that the amendment in Finance Act, 2002 is retrospective according to them is bad in law. That the amendment is not clarificatory in nature. That the penalty being penal, provisions could not be brought on the statute book with retrospective effect.

As against this, the Counsel for the Revenue supported the judgment for the reasons recorded in the impugned order.

We have heard the counsels for the parties at length.

Section 271 (1)(c) and the subsequent amendments carried out in the said section with effect from 1.4.1976 (as amended by the Taxation Laws (Amendment) Act, 1975) and the amendment by Finance Act, 2002 (with effect from 1.4.2003) on the interpretation of which the entire controversy in the present appeal rests are:-

"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the income tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person--

- (a) xxxxx; or
- (b) xxxxx; or
- (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty,--
 - (i) xxxxx
 - (ii) xxxxx
 - (iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum

which shall not be less than, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished."

[Emphasis supplied]

Sub-clause (iii) of sub-section (1)(c) of Section 271 after its amendment with effect from 1.4.1976 and the Explanation 4 added thereto read as under:-

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

[Emphasis supplied]

"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 exceeds the total income assessed, 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 Expln. 3 applies, means the tax on the total income assessed;

(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."

[Emphasis supplied]

Sub-clause (iii) of Section 271(1)(c) after its amendment by Finance Act, 2002 with effect from 1.4.2003 and the amendment to clause (a) of Explanation 4 are reproduced below:-

"(iii) in the cases referred to in clause (c), in addition to tax, if 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 the furnishing of inaccurate particulars of such income."

"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 tax 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;

[Emphasis supplied]

Section 271 of the Act is a penal provision and there are well established principles for the interpretation of such a penal provision. Such a provision has to be construed strictly and narrowly and not widely or with the object of advancing the object and intention of the legislature.

This Court as well as the various High Courts of the country have consistently held that the statute creating the penalty is the first and the last consideration and must be construed within the term and language of the particular statute. In *Bijaya Kumar Agarwala v. State of Orissa*, 1996 (5) SCC 1, it has been held by this Court in para 17 and 18 as under:-

"17. Strict construction is the general rule of penal statutes. Justice Mahajan in *Tolaram Relumal v. State of Bombay*, AIR 1954 SC 496 at pages 498-499, stated the rule in the following words:

"(I)f two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature."

18. The same principle was echoed in the Judgment of the five Judge Bench in the case of *Sanjay Dutt v. State through C.B.I.*, 1994 (5) SCC 402, which approved an earlier expression of the rule by us in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya*, 1990 (4) SCC 76, at page 86 para 8.

"Therefore, when a law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law."

Keeping in view the rules of interpretation of criminal statute and the language and intent of the Order and the Act, we find ourselves in agreement with the view expressed by Ranganath Misra, J. as he then was, in *Prem Bahadur v. State of Orissa*, 1978 Cri. LJ 683, at page 685, para 4 :

"The Orissa Order does not make possession without a licence an offence. Storage, however, has been made an offence. Between "possession" and "storage" some elements may be common and, therefore, it would be appropriate to say that in all instances of storage there would be possession. Yet, all possession may not amount to storage. "Storage" in the common parlance meaning connotes the concept of continued possession. There is an element of continuity of

possession spread over some time and the concept is connected with the idea of a regular place of storage. Transshipment in a moving vehicle would not amount to storage within the meaning of the Orissa Order."

To the similar effect, is the view taken by this Court and the various High Courts in CIT v. Vegetable Products Limited [88 ITR 192, 195 (SC)], CWT v. Ram Narain Agrawal [106 ITR 965-968 (All.)], Tolaram Relumal v. State of Bombay [AIR 1954 SC 496, at page 498], TMT Thangalakshmi v. ITO [205 ITR 176 (Mad.)], CIT v. A.K. Das [77 ITR 31, at page 52 (Cal.)], CIT v. T.V. Sundaram Iyengar & Sons (P) Ltd. [101 ITR 764, at page 773 (SC)], Engineers Impex Pvt. Ltd. & Others v. D.D. Sharma [244 ITR 247 (Del.)].

Every statutory provision for imposition of penalty has two distinct components: -

- (i) That which lays down the conditions for imposition of penalty.
- (ii) That which provides for computation of the quantum of penalty.

Section 271(1)(c) and clause (iiii) relate to the conditions for imposition of penalty, whereas, on the other hand, Explanation 4 to Section 271(1)(c) relates to the computation of the quantum of penalty.

The provisions of Section 271(1)(c)(iii) prior to 1.4.1976, and after its amendment by the Finance Act, 1975 with effect from 1.4.1976, later provisions being applicable to the assessment year in question, being substantially the same except that in place of the word 'income' in sub clause (iii) to sub clause (c) of Section 271 prior to its amendment by Finance Act, 1975, the expression "amount of tax sought to be evaded" have been substituted. Explanation 4 inserted for the purpose of clause (iii) where the expression "the amount of tax sought to be evaded", was inserted had in fact made no difference in so far as the main criteria, namely, absence of tax continued to exist, prior to or after 1.4.1976, changing only the measure or the scale as to the working of the penalty which earlier was with reference to the 'income' and after the amendment related to the 'tax sought to be evaded'. The sine qua non which was there prior or after the amendment on 1.4.1976 to the fact that there must be a positive income resulting in tax before any penalty could be levied continued to exist. The penalty imposed was in 'addition to any tax'. If there was no tax, no penalty could be levied. The return filed declaring loss and assessment made at a reduced loss did not warrant any levy of penalty within the meaning of Section 271 (1)(c)(iii) with or without Explanation 4.

Contention of the appellant is supported by the decisions of various High Courts reported in Prithipal's case (supra), 183 ITR page 69 (P&H High Court, CIT v. Prithipal Singh & Co.) affirmed by this Court in 249 ITR page 670 (SC), CIT v. Prithipal Singh & Co., 171 CTR page 51 (P&H High Court, CIT v. Virendra & Co.), 240 ITR page 47 (Kerala High Court, CIT v. N. Krishnan), 259 ITR page 229 (Madras High Court, Ramnath Goenka v. CIT), 276 ITR page 649 (M.P. High Court, CIT v. Jabalpur Co-operative Milk Producers Union Ltd.), 279 ITR page 197 (Allahabad High Court, CIT v. Zam Zam Tanners), 278 ITR page 140 (Calcutta High Court, CIT v. R.G. Sales (P) Ltd.), all the aforesaid decisions support the assessee's contention that even after 1.4.1976 if there is no

positive income, no taxes leviable, no penalty can be levied for concealment of income.

Predominant majority of High Courts to which reference has been made in the foregoing paragraph have taken the view that the judgment in the Prithipal Singh's case holds good in respect of Section 271(1)(c) as it stood after the 1976 amendment and prior to its amendment by Finance Act, 2002. Contrary view is expressed in: -

- i. P.R. Basavappa & Sons v. CIT, 243 ITR 776 (Kar.) - Karnataka High Court rejected assessee's reference on the sole ground that Prithipal's case relates to assessment year 1970-71 and prior, therefore, to the 1976 amendment.
- ii. CIT v. Chemiequip Ltd., 265 ITR 265 (Bomb.) \026 Bombay High Court has held that after 1.4.1976, Explanation 4(a) permits the charge on an assessee whose loss has been reduced in assessment proceedings distinguishing Prithipal Singh's case and also refers to the amendment in Section 271(1)(c) by Finance Act, 2002. In this judgment, there is no discussion or reasoning either on the scope of Section 271(1)(c) and Explanation 4(a) or the nature of 1976 or 2002-2003 amendments.

It has been laid down in CIT v. Podar Cement (supra) , CIT v. P.J. Chemicals, 210 ITR 830 (SC) and again in CIT v. Kerala State Industrial Development Corporation Ltd., 233 ITR 197 (SC) that where the predominant majority of the High Courts have taken certain view of the interpretation of a certain provision, the Supreme Court would lean in favour of the predominant view.

The contention advanced by the Ld. Counsel appearing for assessee that when there is no tax, there cannot be any penalty, is made with reference to the provisions contained in Section 143 (1A) of the Act before its amendment which came on the statute in 1993 with retrospective effect from 1.4.1989. The Finance Act, 1993 amended Section 143 (1A) of the Act with retrospective effect from 1.4.1989 to specifically provide for levy of additional tax in a situation where the loss declared by the assessee is reduced or is converted into his income.

Section 143(1A) (before its amendment in 1993) was interpreted by the following 3 decisions which include 2 of the Delhi High Court itself. In Modi Cement Ltd. v. Union of India, 193 ITR 91 (Del.), it was held as under: -

"\005.. What is important is that, as a result of the adjustments carried out under sub-section (1) of section 143, the assessee became liable to pay some tax. Where, as in the present case, after the adjustments under section 143(1A) are carried out, the resultant figure is still at a loss, the question of section 143(1A) applying does not arise. As a result of adjustments carried out, no tax is payable if the resultant figure is a loss and a question of there being any further increase to this does not arise. We are surprised that the Deputy Commissioner having accepted a huge loss of Rs.1,32,97,22,383, still required the assess to pay a sum of Rs.38,60,075. If the interpretation sought to be put by the Department is correct, then there would be a lot of force in the contention of Shri Aggarwal, learned counsel for the petitioner, that such a provision would be clearly arbitrary and may even have to be struck down."

[Emphasis supplied]

In Indo-Gulf Fertilizers and Chemicals Corporation Ltd. v. Union of India, 195 ITR 485 (All.), it was held as under: -

"The language of the provision quoted above itself shows that where "the total income" after making adjustments under clause (a) of sub-section (1) of section 143 of the Act exceeds the total income declared in the return, in that event an order can be passed levying additional income-tax. In a case like the present one, there is no income shown in the return but only losses are indicated. Adjustment resulting in reduction of the amount of losses can, by no stretch of imagination, be said to have increased the "total income" declared in the return. There is no dispute that in the return, only losses are shown even after adjustment and if there is no income, no tax or additional income-tax can be charged. Therefore, it is immaterial that the amount of losses are more or less. To elaborate further, it may be pointed out that if no tax was chargeable on the losses to the tune of rupees sixty-two crores odd, as shown in the return submitted by the petitioner, there would be no question of charging any additional income-tax under section 143 (1A)(a) of the Act, on the amount of reduced losses, i.e., rupees fifty-eight crores odd. To put it plainly, if there is no income, there would be no income-tax of any kind, whether additional or by way of surcharge. Learned counsel for the petitioner has rightly placed reliance upon a case, Modi Cement Ltd. v. Union of India, [1992] 193 ITR 91 (Delhi). In the said case, the order passed under section 143 (1A)(a) of the Act was quashed under similar circumstances where, after adjustment, the assessee was still found to be in losses."

[Emphasis supplied]

In J.K. Synthetics Ltd. v. ACIT, 200 ITR 584 (Del.), it was held as under: -

"The income-tax is payable only on income which in a business venture would imply profit after deducting therefrom deductible expenses and not loss. If after determining the liability of the assessee after the process of adjustment, the net result is still loss, there cannot be any question of any further tax liability accruing and as such, no tax would be payable much less any additional tax on the amount by which the losses stood reduced."

[Emphasis supplied]

It was because of these decisions that section 143(1A) was amended by the Finance Act, 1993 in exactly the same manner as the Finance Act, 2002 amended Section 271(1)(c) and Explanation 4(a). However, this amendment was retrospective with effect from 1.4.1989, not claiming to be declaratory or clarificatory.

Though the Legislature was conscious that the provisions of Section 143 (1A) and 271 (1)(c) are pari materia and were similarly interpreted by different High Courts, while Section 143(1A) was amended by Finance Act, 1993 with retrospective effect from 1.4.1989, the provisions of Section 271(1)(c) have been amended much later by Finance Act, 2002 with prospective effect from 1.4.2003.

The two questions which arise in the present cases are, prior to

the amendments by the Finance Act, 1992 with effect from 1.4.2003 (2003 amendment): -

i. What is meant by the words "in addition to any tax" in the charging Section 271(1)(c)(iii)?

ii. What is meant by the term "total income" in Explanation 4(a)?

Both these questions are fully answered by this Court in Commissioner of Income Tax, Bombay City v. Elphinstone Spinning and Weaving Mills Co. Ltd., 40 ITR 142 (SC).

Under the Finance Act, 1951, a provision was enacted to discourage the declaration of dividend disproportionate to the declared income. It provided that where the "total income" exceeded the dividend by a certain amount, a rebate would be allowed, and where the dividend exceeded the "total income" by such amount, "an additional income tax" would be levied.

The facts of the case were: -

"During the calendar year 1950, the assessee company had made a profit but the depreciation allowance which it was entitled to under the Income-tax Act came to Rs.7,84,063 thus converting the profit into a loss of Rs.2,19,848 for income-tax purposes, and the company was adjudged not to be liable to income-tax for the relevant assessment year 1951-52. The company, however, declared dividends in that year amounting to Rs.3,29,062 and the question was whether this amount was "excess dividend" within the meaning of paragraph B of Part I of the First Schedule to the Finance Act, 1951, and additional income-tax could be levied in respect thereof:"

It was held by this Court that: -

"The word "additional" in the expression "additional income-tax" must refer to a state of affairs in which there has been a tax before."

and that:

"The words "charge on the total income" are not appropriate to describe a case in which there is no income or there is a loss."

These two findings conclude the two issues in paragraph (i) and (ii) above in favour of the assessee's contention in the present batch of cases. It was noted by this Court that there was indeed a lacuna in the statute but that Court could not depart from the rule of literal construction: -

"There is no doubt that if the words of a taxing statute fail, then so must the tax. The courts cannot, except rarely and in clear cases, help the draftsmen by a favourable construction. Here, the difficulty is not one of inaccurate language only. It is really this that a very large number of taxpayers are within the words but some of them are not. Whether the enactment might fail in the former case on some other ground (as has happened in another case decided today) is not a matter we are dealing with at the moment. It is sufficient to say here that the words do not take in the modifications which the learned counsel for the appellant suggests. The word "additional" in the expression "additional

income-tax" must refer to a state of affairs in which there has been a tax before. The words "charge on the total income" are not appropriate to describe a case in which there is no income or there is loss. The same is the case with the expression "profit liable to tax". The last expression "dividends payable out of such profits" can only apply when there are profits and not when there are no profits."

[Emphasis supplied]

This Court noted that the High Court allowed the assessee's reference (reluctantly) but from the plain language of the provision, an assessee sustaining a loss could have no "total income": -

"It is clear that the Legislature had in mind the case of persons paying dividends beyond a reasonable portion of their income. A rebate was intended to be given to those who kept within the limit and an enhanced rate was to be imposed on those who exceeded it. The law was calculated to reach those persons who did the latter even if they resorted to the device of keeping profits back in one year to earn rebate to pay out the same profits in the next. For this purpose, the profits of the earlier years were deemed to be profits of the succeeding years. So far so good. But the Legislature failed to fit in the law in the scheme of the Indian Income-tax Act under which and to effectuate which the Finance Act is passed. The Legislature used language appropriate to income, and applied the rate to the "total income". Obviously, therefore, the law must fail in those cases where there is no total income at all, and the courts cannot be invited to supply the omission by the Legislature.

It is quite possible that the Legislature did not contemplate the imposition of tax in circumstances such as these, and we are not prepared to read the proviso without the words "on the total income" or after modifying this and other expressions. The High Court has given adequate reasons to show that these words are quite inappropriate, where the total income, if it can be described as income at all, is a loss. The imposition of the additional income-tax is conditioned by the existence of income and profits, to the total of which income the rate is made applicable. Unless some other amount, not strictly income, is by law deemed to be income [see, for example, *Mc Gregor & Balfour Ltd. v. Commissioner of Income-tax*, (1959) 36 ITR 65] we cannot improve the existing law by deeming it to be so by our interpretation."

[Emphasis supplied]

The impugned judgment has erred in observing that in *Elphinstone* case (*supra*): -
"The situation is different and the context is different."

The observations by this Court were not made in any special context or in the face of a fiction created by the Finance Act, 1951. On the contrary, the Act set out in the First Schedule as under: -

"For the purposes of this section and of the rates of tax imposed thereby, the expression 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Income Tax Act\005"

In fact, it is the impugned Judgment which has isolated a phrase in Elphinstone case and taken it out of context.

The ratio of Elphinstone case cannot be that a loss can be described as total income. If it were so, this Court could not have dismissed the appeal of the Revenue.

In CIT v. B.C. Srinivasa Setty, (supra), this Court reiterated the principle that the charge and its computation were two parts of an integral whole and concluded therefore, that if the computation could not be done, the charge was not intended to apply. In this case, the Court was concerned with the transfer of goodwill valued at Rs.1,50,000 from a dissolved partnership to a newly constituted one. Despite the fact that this Court found that goodwill was an "asset of the business", it was held that the charge of capital gains could not be levied because under section 48 (ii) required computing the gain by deducting from the full value of the consideration received.

Applying Elphinstone case to the present case, it can be held: -

- a. "Total income" can only connote a positive figure and prior to the 2003 Amendment, Explanation 4(a) to Section 271(1)(c) required the computation to be done with reference to "total income".
- b. The computation in the case of a loss making assessee, as in the present case cannot be made.
- c. The words "in addition to any tax payable" can only be understood as the words "additional income-tax" were in Elphinstone case where this Court held that these words presuppose that tax was otherwise payable.
- d. Conversely, even if the words "in addition to any tax payable" are considered superfluous and must be ignored when considering the case of a loss return, the computation cannot be made because here there is no total income, and because the computation cannot be made, the charge cannot be levied.

The judgment of this Court in Angidi Chettair's case (supra) relied upon by the Delhi High Court in its impugned judgment, has been given in an entirely different statutory context and, therefore, the ratio of that judgment is not at all applicable to the issue arising for consideration in the present case. That judgment dealt with the interpretation of section 28(1)(c) of the Income-tax Act, 1922. The question which arose in that case was whether a penalty could be imposed on a registered firm. The contention of the assessee was that a registered firm was not liable to pay tax itself and that under the statute as it then stood, the tax was payable only by the partners of the registered firm and not by the registered firm itself. The Revenue pointed out that if this contention of the assessee is accepted, then the highly anomalous and totally unacceptable consequence that would follow would be that no penalty could even be imposed on a registered firm, even though this section itself expressly provided that the penalty can be imposed on any 'person' and 'person' unquestionably included a registered firm. It was in this special and extraordinary statutory context that this Court laid down that a

penalty could be imposed on a registered firm even though the firm was not liable to pay tax, or otherwise a portion of section 28 would be rendered completely meaningless and infructuous. Further, in the said case, this Court proceeded specifically on the footing that under section 23(5) of the 1922 Act, a registered firm was liable to pay tax but the tax due from the firm was collected from the partners. This judgment has to be read in the special and extraordinary statutory context of section 28 of the 1922 Act, the wording and phraseology of which is very different from that of section 271 (1)(c)(iii) of the Income-tax Act. The judgment in Angidi Chettiar's case (supra) cannot be relied upon for the purpose of construing section 271 (1)(c)(iii) of the Income-tax Act.

Prior to the amendment made to Section 271 by the Finance Act, 2002, which came into operation on 1.4.2003, no penalty for concealment could be imposed unless some tax was payable by the assessee. In other words, if no tax was payable by the assessee, then the question of imposition of penalty of concealment did not arise at all. That position was changed for the first time only by the amendment made by the Finance Act, 2002 with effect from 1.4.2003. It is only by this amendment that the hitherto inseverable inter-connection between the liability to pay tax and the imposition of penalty was severed for the first time.

It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force with effect from 1.4.2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statute stated that the said amendment would come into effect on 1.4.2003 and therefore, would apply only to future periods and not to any period prior to 1.4.2003 or to any assessment year prior to assessment year 2003-2004. It is the well settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods. In this connection, see the following: -

1. Sakuru v. Tanaji, 1985 (3) SCC 590 at page 593-594.
2. Harding and another v. Commissioner of Stamps for Queensland, 1898 Appeal Cases 769 at 775 to 776.
3. R. Rajagopal Reddy (Dead) by Lrs. and others v. Padmini Chandrasekharan (Dead) by Lrs., 1995 (2) SCC page 630 at 646.
4. CIT v. Patel Brothers & Co. Ltd. & Ors., 215 ITR 165 (SC).
5. Sedco Forex International Drill Inc. & Ors. v. CIT & Anr., 279 ITR 310 page 317.

In the present case, it is only in the Notes on Clauses relating to 2002 amendment that it has been stated that the said amendment is clarificatory. There is no such mention of the said amendment being clarificatory, anywhere in the statute itself. Such a statement in the Notes on Clauses cannot possibly bind the Court when even a statement in the statute itself is not regarded as binding or conclusive. In the present case, the statute expressly states that the amendment would take effect only from 1.4.2003. Consequently, this amendment cannot possibly be applied to or in respect of any period

prior to 1.4.2003.

Otherwise also, it has been consistently held that a provision must be read subject to the rule that in the absence of an express provision or clear implication, the Legislature does not intend to attribute to the amending provision, a greater retrospectivity than is expressly mentioned. It is settled law that a taxing provision imposing liability is governed by the normal presumption that is not retrospective. Reference made to the decisions in: -

- i. S.S. Gadgil, ITO, Bombay v. Lal & Co., 53 ITR 231 (SC),
- ii. K.M. Sharma v. ITO, 254 ITR 772 (SC),
- iii. Gem Granites v. CIT, 271 ITR 322 (SC),
- iv. Sedco Forex International Drill Inc. & Ors. v. CIT, 279 ITR 310 (SC).

There is nothing in the language of Section 271(1)(c) as amended by the Finance Act, 2002 w.e.f. 1.4.2003 to suggest that the amendment is retrospective. The amendment in clause (iii) and simultaneously in Explanation 4(a) carried out enlarges the scope of penalty under Section 271(1)(c) to include even cases where assessment has been completed at loss. The same being in the nature of a substantive amendment would be prospective, in the absence of any indication to the contrary.

Explanation 4 to Section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002, requires to be carefully compared with the said Explanation as amended by the Finance Act, 2002. The comparison of the Explanation as it stood before 2002 and after 2002 by itself shows clearly that it is only after the amendment made by the Finance Act, 2002 that the Explanation dealt with the situation of an assessee having returned a loss and where, even after addition of concealed income by the assessee, the end result was still an assessed loss. This situation was not dealt with at all by the Explanation to Section 271(1)(c) as it stood prior to its amendment by the Finance Act, 2002. Further, the plain reading of clause (a) of Explanation 4 to section 271 as it stood prior to the 2002 amendment, shows that this clause applied to a situation where an assessee has returned a loss which by reason of the addition of the concealed income thereto by the assessing officer, is converted into a positive figure of the assessed income on which the assessee is required to pay tax. In contrast, clause (c) of the said Explanation 4 applies only to a situation where the assessee has returned a positive income, which stands enhanced by reason of the concealed income added thereto by the assessing officer in the assessment order. Consequently, both under clause (a) and clause (c) of the said Explanation 4, the assessee can be penalized only if he has a positive assessed income on which tax is payable. The only difference between clause (a) and clause (c) is that clause (a) applied to an assessee who had filed a loss return, and clause (c) to an assessee who has filed a positive return. However, the end result in both the cases was the same, i.e., a positive assessed income on which the assessee was required to pay tax. It is this basic condition precedent for the imposition of the penalty, i.e., existence of liability to pay tax which existed prior to 2002, which has been done away with for the first time by the Finance Act, 2002.

There is nothing in the language of Section 271(1)(c) as amended by the Finance Act, 2002 w.e.f. 1.4.2003 to suggest that the amendment is retrospective. The amendment in clause (iii) and simultaneously in Explanation 4(a) carried out enlarges the scope of penalty under Section 271(1)(c) to include even cases where assessment has been completed at loss. The same being in the nature of a substantive amendment would be prospective, in the absence of

any indication to the contrary. The Finance Bill/Finance Act, 2002 brought about many amendments in the statute, some of which had retrospective operation. The amendment in Section 271(1)(c) was consciously made applicable w.e.f. 1.4.2003 and not with retrospective date.

Next proposition is with reference to the amended provision of law made by the Finance Act, 2002, where the expression used in Explanation 4 "the amount of tax sought to be evaded" has been deliberately amended providing specifically cases where the filing of return and the assessment had the effect of reducing the loss declared in the return or converting that losses into income. Taking support from this amendment brought about in the statute with effect from 1.4.2003, it is contended that the Legislature has now deliberately enacted such provision to fill in the lacuna in law and also to put an end to the controversy which existed between the High Courts in interpreting the laws after 1.4.1976. The amended provision of law is not available prior to 1.4.2003, as the same is not enacted with retrospective effect. That this amendment is declaratory and applies to all pending cases, as held by the Bombay High Court in CIT v. Chemiequip Ltd (supra), is untenable for the following reasons: -

(a) There is nothing in the statute to suggest to that effect. The interpretation that it is clarificatory as per the notes on clauses do not advance the Revenue's case, because of its specific omission to that effect. It is purely a case of amendment to the statute;

(b) Amendment is not retrospective and there is no assumption as to its retrospectivity. Retrospectivity has to be enacted specifically in the fiscal statute and it is more so in the case of penal provisions, otherwise it would be contradictory or derogatory to Article 20 (1) of the Constitution. This Court has held in Brij Mohan v. C.I.T., New Delhi, 120 ITR page 1, that the law to be applied is the one in force on the first day of accounting period. To this effect are the other decisions of this Court reported as CIT v. Patel Brothers & Co. Ltd. & Ors. , 215 ITR page 165 (SC). Allahabad High Court has also taken same view in Zam Zam Tanners (supra). Notes on clauses on the amendment introduced by the Finance Act, 2002 makes specific mention inter alia of the amendment to be effective from 1.4.2003 of which the Bombay High Court has failed to take notice in its judgment in CIT v. Chemiequip Ltd (supra).

For the reasons stated above, the Appeals are accepted and the impugned judgment is set aside, it is held that prior to its amendment by Finance Act, 2002 in the absence of any positive income and no tax being levied, penalty for concealment of income could not be levied. The view taken by the Karnataka High Court in P.R. Basavapaa & Sons v. CIT (supra) and CIT v. Chemiequip Ltd. (supra), does not lay down the correct law.

The position stands altered after the amendment in law by the amendment of Section 271(1)(c) and Explanation 4(a) by the Finance Act, 2002 w.e.f. 1.4.2003.