

No concealment penalty on failure of assessee to prove shareholders' capacity to invest

Summary – The Allahabad High Court in a recent case of Awadh Fertilisers (P.) Ltd., (the Assessee) held that mere failure in proving capacity of shareholders to invest in share capital of the assessee could not be a ground for imposing penalty on the assessee company.

Facts

- During the course of assessment proceeding, the Assessing Officer noticed that the equity share capital of the assessee-company had been increased by an amount of Rs. 9,40,500 and thereby also new unsecured loans.
- When asked to prove the genuineness of these transactions, the assessee submitted confirmatory letters, except in the case of two persons. A number of defects regarding the new loans and shareholders were found in those letters. As assessment was getting barred by limitation and assessee was unable to produce necessary documentary evidence *vis-à-vis* capacity of shareholders and depositors to full extent within a short span of time, in order to buy peace and to avoid litigation, assessee filed a revised return and surrendered share capital and unsecured loans to certain extent.
- Penalty proceedings under section 271(1)(c) was initiated and he imposed penalty of Rs. 4,25,000 on the ground that the assessee had concealed its income to the extent of the share capital and unsecured loans which were surrendered in the revised return.
- The appeal preferred by the assessee before the Commissioner (Appeals) was dismissed.
- On second appeal, the Tribunal allowed the appeal.
- On appeal to the HC, the revenue submitted that the revised return filed by the assessee was no return in the eyes of law. During the course of the assessment proceedings the assessing officer had made inquiries and found the confirmatory letters of shareholders and creditors defective on certain points. Therefore, the assessee surrendered the said amount. The assessee thereafter filed a revised return and could not be absolved from paying the penalty.

Held

- The HC held that the submission for the revenue authorities is wholly misconceived. The revised return had been acted upon by the assessing authority and in fact, the loss of Rs. 13,87,540 declared by the assessee in the revised return filed, had been accepted *in toto*. The *bona fide* of the assessee is, therefore, established because it was not able to produce the necessary documentary evidence for proving the capacity of the shareholders and depositors to the full extent within a short span of

time as the assessment was getting barred by limitation. Even the depreciation of Rs. 24,62,390 claimed in the revised return had been accepted by the Assessing Officer. The share capital and the unsecured loans amounting to Rs. 12,23,100 declared by the assessee in the revised return has also been accepted.

- In HC relied on the decisions of the Supreme Court in the cases of *CIT v. Stellar Investment Ltd.* [[2001](#)] 251 ITR 263/115 Taxman 99 and *CIT v. Lovely Exports (P.) Ltd.* [[2008](#)] 216 CTR 195 (SC), wherein it had been held that the subscription made by the various shareholders in the share capital of a company cannot be taxed at the hand of the company and can only be taxed at the hands of the shareholder under Section 69.
- That being the position, factually, failure of the assessee in proving the capacity of various shareholders to invest in the share capital, could not have been a ground for initiating penalty proceedings. This fact also establishes the *bona fide* of the assessee.
- In view of the aforesaid, the HC upheld the action taken by the Tribunal of rightly deleting the penalty.