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

Before Shri G. Manjunatha, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.1197/Mum/2020
(Assessment Year: 2014-15)

M/s Flemingo Travel Retail Limited (formerly known as DFS India Pvt. Ltd.), Chhatrapati Shivaji International Airport, New Terminal 2, CSI Airport, Sahar, Mumbai.	Vs.	DCIT –9(3)(2) Room No. 418, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai 400020

PAN – AACCD7412N

(Appellant) **(Respondent)**

Appellant by: Shri J.P. Bairagra, A.R
Respondent by: Shri Rahul Raman, Sr.D.R

Date of Hearing: 23.06.2020
Date of Pronouncement: 07.08.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-16, Mumbai, dated 27.12.2019 which in turn arises from the order passed by the A.O under Sec.271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 29.06.2017. The assessee has assailed the impugned order on the following ground of appeal before us:

1. The Ld. CIT (A) erred in confirming levy of penalty of Rs.3,26,69,600/- by AO under section 271(1)(c) of the Act.

2. The Ld. CIT (A) further erred in confirming levy of penalty under section 271(1)(c) when the appellant was assessed and had paid tax under MAT as per provisions of section 115JB of the Act and hence no penalty under section 271(1)(c) could be imposed for additions made under normal provisions. The amendment made by substitution of *Explanation 4* to subsection (1) of section 271 is applicable prospectively w.e.f. 01-04-2016.

3. The Ld. CIT (A) further erred in upholding the penalty order passed under section 271(1)(c) which is null and void since the notice u/s 274 r.w.s. 271(1)(c) was issued by learned AO mechanically without specifying for which limb the penalty under section 271(1)(c) is sought to be initiated i.e. for concealment of income or for furnishing inaccurate particulars of income.

4. The Ld. CIT (A) further erred in confirming the finding of the AO that appellant has furnished inaccurate particulars of income and therefore liable for penalty under section 271(1)(c) of the Act when a bonafide and genuine claim of the appellant company for allowing the revenue expense on account of interest paid on compulsory convertible debentures of Rs.23,55,545/- and bid development cost of Rs.6,24,76,800/- was not accepted but the appellant was allowed to capitalize the same to respective asset and depreciation was granted thereon.

5. The Ld. CIT (A) failed to appreciate that the issue whether the payment made for interest cost of Rs.23,55,545/- on Compulsory Convertible Debentures and bid development cost of Rs.6,24,76,800/- is in nature of capital or revenue expense is a disputable issue and no penalty can be levied on account of difference of opinion on legal claim made by appellant.

6. The Ld. CIT (A) further erred in not appreciating the fact that though the claim of the appellant treating payment made for bid development fee of Rs.6,24,76,800/- and interest cost of Rs. 23,55,545/- on Compulsory Convertible Debentures as revenue expense was not accepted by AO but he had accepted alternate plea of the appellant that the interest cost should be capitalized to their respective asset in view of explanation 8 to section 43(1) of the Act and depreciation was granted thereon.

7. The Ld. CIT (A) further erred in confirming the penalty levied by AO on the provision for income tax of Rs.3,12,82,993/- pertaining to AY 2013-14 which was inadvertently claimed as deduction in return filed for AY 2014-15 under section 40(a)(ia) due to clerical error. In doing so the learned Commissioner of Income-tax (Appeals) has not appreciated that since the Appellant has both returned as well as assessed income under section 1 115JB which is higher than the income assessed under normal provisions as there is loss as per normal provisions, penalty is not leviable on the assessee u/s 271(1)(c) of the Act on said addition made under normal provisions.

8. The Ld. CIT (A) while confirming the penalty on the provision for income tax of Rs 3,12,82,993/- erred in relying on the finding of the AO that the assessee had not taken into consideration the said provision while

computing book profit under MAT for AY 2014-15 whereas the provision for tax pertains to AY 2013-14 and disallowed while computing book profit under MAT for AY 2013-14 which was inadvertently claimed in AY 2014- 15 along with other expenses u/s 40(a)(ia) and the same was not forming part of the profit and loss account for AY 2014-15.

9. The Ld. CIT (A) wrongly held in para 4.1.5 of the order that the appellant had agreed during assessment proceedings to the mistake of not capitalizing the interest cost to Work in progress of assets and claimed the same as revenue expense.

10. The Appellant craves leave to add to, alter or amend any ground before or at the time of hearing.

2. Briefly stated, the assessee company which is engaged in the business of operating duty free retail outlets at the Mumbai and Delhi international airports for the sale of various products viz. liquor, tobacco and fashion products etc., had e-filed its return of income for A.Y. 2014-15 on 28.11.2014, declaring its total income at (-) Rs.12,70,50,647/- and book profit under Sec. 115JB of Rs.14,17,57,489/-. Since, the tax payable on the normal income was less than the tax calculated under Sec.115JB of the Act, the tax was calculated on book profit of Rs.14,17,57,489/- as per Sec.115JB of the Act. The return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act.

3. In the course of the assessment proceedings the A.O made certain additions/disallowances viz. (i) disallowance made on account of treating of payment towards bid development fee as capital expenditure amounting to Rs.6,24,76,800/-; (ii) disallowance under Sec.36(1)(iii) amounting to Rs.23,55,545/- on account of capitalisation of interest cost in 'capital work-in-progress' ; and (iii) disallowance under Sec.40(a)(ia) amounting to Rs.3,12,82,993/- on account of provision of taxes claimed. After making the aforesaid

additions/disallowances the A.O assessed the loss of the assessee company under the normal provisions at an amount of Rs (-) 3,09,35,310/-, while for its book profit under Sec. 115JB was worked out at Rs.14,17,57,489/-. The A.O while culminating the assessment also initiated penalty proceedings under Sec. 271(1)(c) of the Act. On a perusal of the records, we find that the assessee had not assailed the normal assessment any further in appeal before the CIT(A), as a result whereof the assessment order attained finality.

4. The A.O after the culmination of the assessment proceedings called upon the assessee to explain as to why the penalty under Sec. 271(1)(c) of the Act may not be imposed upon it. In reply, the assessee tried to impress upon the A.O that in the backdrop of the additions/disallowances made in its hands no penalty under Sec. 271(1)(c) was called for in its hands. However, the A.O not finding favour with the contentions advanced by the assessee levied penalty of Rs.3,26,69,600/- under Sec.271(1)(c) of the Act.

5. Aggrieved, the assessee assailed penalty imposed by the A.O under Sec.271(1)(c) in appeal before the CIT(A). On merits, the CIT(A) did not find any infirmity in the view taken by the A.O that the assessee had furnished inaccurate particulars of its income within the meaning of Sec.271(1)(c) of the Act. Before the CIT(A) it was inter alia submitted by the assessee that in a case where tax payable on income assessed under the normal provisions is less than the tax payable under the deeming provision of Sec. 115JB of the Act, then penalty under Sec. 271(1)(c) should not be imposed for additions made under the normal provisions. In order to buttress its said claim, it was

submitted by the assessee that the aforesaid position of law as was applicable during the year under consideration was substituted only vide the amendment made in 'Explanation 4' to sub-section (1) of Sec. 271 of the Act, vide the Finance Act 2015, w.e.f 01.04.2016. It was the claim of the assessee that as the amended position of law was applicable only w.e.f A.Y. 2016-17, therefore, the same did not have any bearing insofar the order under consideration was concerned i.e A.Y. 2014-15. In order to fortify its aforesaid claim the assessee had relied upon the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Nalwa Sons Investments Ltd. (2010) 327 ITR 543 (Del). Further, it was brought to notice of the appellate authority that the 'Special Leave petition' (SLP) filed by the revenue before Hon'ble Supreme Court was dismissed as CIT Vs. Nalwa Sons Investments Ltd. [SLP (Civil) NO(s). 18564/2011; dated 04.05.2012]. However, the CIT(A) after deliberating on the contentions advanced by the assessee was not inclined to accept the same. Accordingly, finding no merit in the contentions advanced by the assessee on merits, as well as the validity of the penalty imposed under Sec. 271(1)(c) of the Act, the CIT(A) dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the very outset of the hearing of the appeal the ld. Authorized Representative (for short 'A.R') for the assessee took us through the order that was passed by the Tribunal while disposing off the stay application of the assessee, vide its order passed in S.A. No. 105/Mum/2020, dated 28.02.2020. It was submitted by the ld. A.R that as the tax payable on income assessed under the normal provisions in the case of the assessee was

less than the tax payable under the deeming provisions of Sec. 115JB of the Act, therefore, the assessee company had paid the tax under the MAT on its book profit under Sec. 115JB of the Act. It was submitted by the ld. A.R that as per the law as was available on the statute during the year under consideration i.e. A.Y. 2014-15, no penalty under Sec. 271(1)(c) of the Act should be imposed for additions/disallowance made under the normal provisions in a case where the assessee had paid the tax on its book profits under Sec.115JB of the Act. It was vehemently submitted by the ld. A.R that the aforesaid position of law was amended vide the Finance Act, 2015, w.e.f 01.04.2016 and hence was thereafter applicable prospectively from A.Y. 2016-17. In order drive home his aforesaid claim, the ld. A.R relied on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Nalwa Sons Investments Ltd. 327 ITR 543.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As observed by us hereinabove, the assessee had in its return of income for the year under consideration declared a loss of Rs. (-) 12,70,50,647/- under the normal provisions, and 'book profit' u/s 115JB of Rs. 14,17,57,489/-. In the course of the regular assessment the A.O made three additions/disallowances in the hands of the assessee viz. (i). disallowance of the assessee's claim for deduction of the "bid development fees" of Rs. 6,24,76,800/- (USD 10,00,000) that was paid to "Mumbai International Airport Ltd." (for short "MIAL") for leasing of space at Terminal 2 of MIAL for a period of 10 years and 8 months, by recharacterising the same as a capital

expenditure ; (ii). disallowance of interest expenditure u/s 36(1)(iii) of Rs. 23,55,545/- (out of the finance cost of Rs. 15,54,43,000/- debited by the assessee in its profit & loss account) by attributing the same to the capital work-in-progress of the assessee; and (iii). disallowance of "provision for tax" (pertaining to A.Y 2013-14) claimed by the assessee in its 'computation of income' as a deduction u/s 40(a)(ia) of the Act. In the backdrop of the aforesaid additions/disallowances the loss returned by the assessee company under the normal provisions was scaled down to an amount of Rs. (-) 3,09,35,310/-. At this stage, we may herein observe that the 'book profit' reflected by the assessee u/s 115JB at Rs. 14,17,57,489/- remained as such and no addition was made to the same. As observed by us hereinabove, the A.O after culminating the assessment had imposed penalty u/s 271(1)(c) of Rs. 3,26,69,600/- on the assessee for the additions/disallowances that were made in its hands under the normal provisions while framing the assessment.

8. Ld. A.R at the very outset of the hearing of the appeal submitted, that the A.O while imposing penalty u/s 271(1)(c) had traversed beyond the jurisdiction that was vested with him under the said statutory provision during the year under consideration. It was submitted by the ld. A.R that since the tax payable on the normal income was less than the tax calculated u/s 115JB of the Act, therefore, the assessee had in its return of income calculated the tax on its 'book profit' of Rs. 14,17,57,489/- u/s 115JB of the Act. It was further submitted by the ld. A.R that as the assessee company had been assessed to tax at its deemed income returned u/s 115JB of the Act, therefore, no penalty u/s 271(1)(c) could have been imposed for

the additions/disallowances that were made under the normal provisions in the course of its regular assessment for the year under consideration. It was submitted by the ld. A.R that as per 'Explanation 4' of s. 271(1)(c) of the Act, the penalty is levied with respect to the amount of tax sought to be evaded. Accordingly, it was submitted by the ld. A.R that as the amount of tax was paid by the assessee under the deeming provisions of s. 115JB, no penalty could have been levied in respect of the additions/disallowances made by the A.O under the normal provisions of the Act. It was averred by the ld. A.R, that as per 'Explanation. 4' of Sec. 271(1)(c) of the Act, the penalty was to be levied with respect to the amount of tax sought to be evaded. It was submitted by the ld. A.R that since the assessee had paid the tax under the deeming provisions of Sec. 115JB of the Act, no penalty could have been levied in respect of the additions/disallowances made under the general provisions of the Act by the A.O. In order to drive home his aforesaid claim the ld. A.R relied on the judgment of the Hon'ble High Court of Delhi in the case of CIT Vs. Nalwa Sons Investments Ltd. (2010) 327 ITR 543 (Del). Alternatively, the ld. A.R also assailed on merits the validity of the penalty imposed by the A.O u/s 271(1)(c) of the Act. In order to buttress his claim that even otherwise on merits no penalty u/s 271(1)(c) was called for in the hands of the assessee, the ld. A.R took us through the 'written submissions', dated 11.06.2020 that were filed with us. On a perusal of the submissions, we find that it was the claim of the assessee, that now when it had duly disclosed the "bid development fees" paid to MIAL in its return of income, therefore, merely on the basis of disallowance of the same on the ground of its recharacterisation as a

'capital expenditure' by no means would justify imposition of penalty u/s 271(1)(c). As regards disallowance of interest expenditure of Rs. 23,55,545/- u/s 36(1)(iii) by attributing the same to capital work-in-progress, it was submitted by the assessee that as it had duly disclosed the interest expenditure and the capital work-in-progress in its books of accounts, therefore, no penalty u/s 271(1)(c) on such presumptive attribution of interest expenditure towards CWIP could have justifiably been imposed. Apart from that, it was submitted by the assessee that even otherwise as it had with it internal accruals in excess of the value of the CWIP, therefore, the disallowance of interest expenditure in itself was not free from doubts. In support of its contention that a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars of income, the assessee had relied on the judgment of the Hon'ble Apex Court in CIT Vs. Reliance Petroproducts (P) Ltd. 322 ITR 158 (SC). In so far the disallowance of "provision for tax" claimed by the assessee in its 'computation of income' as a deduction u/s 40(a)(ia) of the Act was concerned, it was submitted by the ld. A.R that the same was the 'provision for tax' for the immediately preceding year i.e A.Y 2013-14. Adverting to the facts attending to the said issue, it was submitted by the assessee that it had disallowed certain amounts u/s 40(a)(ia) i.e for non-deduction of tax at source along with disallowance of a 'provision for income-tax' of Rs. 3,12,82,993/- in A.Y 2013-14. As claimed by the assessee, that as it had during the year under consideration deducted tax at source on the amounts which were disallowed in the preceding year u/s 40(a)(ia), and deposited the same in the government treasury, therefore, it had as per the mandate of

law claimed deduction of the said amounts in its computation of income for the year under consideration. But then, due to an inadvertent mistake of its accountant, it is stated by the assessee that deduction of the entire amount of Rs. 31,84,55,511/- (including 'provision for income-tax' of Rs. 3,12,82,993/-) was claimed in the computation of income for the year under consideration. On the basis of the said facts, it was the claim of the assessee that on learning about the said mistake it had suo motto disclosed the said fact in the course of the assessment proceedings. It is the claim of the assessee, that as it was during the year assessed to tax under the deeming provisions of Sec. 115JB of the Act, therefore, the disallowance of the 'provision for tax' for the preceding year i.e A.Y 2013-14 did not result to any loss of revenue. However, as claimed by the assessee in its written submissions, dated 11.06.2020, the A.O in his penalty order u/s 271(1)(c), had misconceived the factual position and loosing sight of the fact that the 'provision for tax' pertained to the preceding year i.e A.Y 2013-14 and not the year under consideration, had wrongly observed that the assessee by not taking the same into consideration had understated its 'book profit' within the meaning of 'Explanation 1' to Sec. 115JB. Apart from that, the assessee in support of its claim that no penalty u/s 271(1)(c) could be imposed for bona fide mistakes, had relied on the judgment of the Hon'ble Apex Court in Price Waterhouse Coopers (P) Ltd. Vs. CIT 348 ITR 306 (SC).

9. Per contra, the ld. Departmental representative had relied before us on the orders of the lower authorities. It was submitted by the ld. D.R, that as the assessee had furnished inaccurate particulars of

income, therefore, the A.O had rightly imposed penalty u/s 271(1)C), which thereafter had been confirmed by the CIT(A).

10. As the assessee has assailed the validity of the penalty imposed by the A.O u/s 271(1)(c), on the ground, that by so doing he had exceeded the scope of the jurisdiction vested with him, therefore, we shall first deal with the said contention of the assessee. It is the claim of the ld. A.R, that 'Explanation 4' to Sec. 271(1) of the Act, as was available on the statute during the year under consideration i.e prior to its amendment vide the Finance Act, 2015, w.e.f 01.04.2016, did not provide for any penalty in a situation where additions/disallowances were made in the hands of the assessee under the normal provisions of the Act, but the assessee is assessed to tax as per the deeming provisions of Sec. 115JB of the Act. For the sake of clarity, we reproduce herein below the "Explanation 4" to Sec. 271(1) as was applicable during the year under consideration i.e A.Y 2014-15 :

> "271. Failure to furnish returns, comply with notices, concealment of income, etc.—
>
> (1) If the AO or the CIT(A) or the CIT in the course of any proceedings under this Act, is satisfied that any person—
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or
>
> he may direct that such person shall pay by way of penalty,—
>
> (iii) in the cases referred to in cl. (c) or cl. (d), 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 fringe benefits or the furnishing of inaccurate particulars of such income or fringe benefits.
>
> Explanation 4—For the purposes of cl. (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 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 Expln. 3 applies, means the tax on the total income assessed as reduced by the amount of advance tax, TDS, tax collected at source and self-assessment tax paid before the issue of notice under s. 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....."

On a perusal of the aforesaid, we find that penalty u/s 271(1)(c) to be imposed for either of the defaults viz. (i). concealment of income; or (ii) furnishing of inaccurate particulars of income, had to be quantified with reference to the amount of tax sought to be evaded. In other words, the tax sought to be evaded would be the difference between the tax due on the income assessed and the tax that would have been chargeable had such total income been reduced by the amount of concealed income. As such, the penalty u/s 271(1)(c) is to be levied on the basis of tax on the difference between the income assessed and the income returned. But then, the issue before us is that where the assessee was assessed as per the deeming provisions of Sec. 115JB, then, could penalty u/s 271(1)(c) as per the pre-amended "Explanation 4"(i.e prior to amendment vide the Finance Act, 2015, w.e.f 01.04.2016) could be imposed in respect of additions/disallowances made under the normal provisions of the Act. We find that the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Nalwa Sons Investments Ltd. (2010) 327 ITR 543 (Del)**, dealing with this issue, had observed, in context of the pre-amended "Explanation 4" to Sec. 271(1)(c), that in a case where the income of

an assessee company was finally assessed at 'book profit' by deeming the same to be the total income of the assessee, then in such a case penalty u/s 271(1)(c) could only be levied in respect of any adjustment /addition /disallowance made while computing such 'book profit' of the assessee company. It was observed by the Hon'ble High Court, as under:

> **"20.** We have considered the rival submissions. Judgment of the Supreme Court in Gold Coin (supra) clarifies that even if there are losses in a particular year, penalty can be imposed as even in that situation there can be a tax evasion. As per s. 271(1)(c), the penalty can be imposed when any person has concealed the particulars of his income or furnished incorrect particulars of the income. Once this condition is satisfied, quantum of penalty is to be levied as per cl. (iii) of s. 271(1)(c) which stipulates that the penalty shall not exceed three times "the amount of tax sought to be evaded". The expression "the amount of tax sought to be evaded" is clarified and explained in Expln. 4 thereto, as per which it has to have the effect of reducing the loss declared in the return or converting that loss into income. It is in this context that in Gold Coin (supra) the Supreme Court explained the legal position as under :
>
> > "Reference to the Department Circular No. 204, dt. 24th July, 1976 reported in 1978 CTR (Jourl) 1 : (1977) 110 ITR 21 (St) has also substantial relevance. Same reads as follows :
> >
> > > 'New Expln. 4 defined 'the amount of tax sought to be evaded'. According to the definition, this expression will ordinarily mean 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. In a case, however, where on setting off the concealed income, against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure, 'the tax sought to be evaded' will mean the tax chargeable on the concealed income as if it were the total income. Another exception to the general definition of the expression 'tax sought to be evaded' given earlier is a case to which Expln. 3 applies. Here, the tax sought to be evaded will be the tax chargeable on the entire total income assessed.'
>
> A combined reading of the Committee's recommendations and the circular makes the position clear that Expln. 4 (a) to s. 271(1)(c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1st April, 1976 to 1st April, 2003

the position was that the penalty was leviable even in a case where addition of concealed income reduces the returned loss.

When the word 'income' is read to include losses as held in Harprasad's case (supra) it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1st April, 1976 to 1st April, 2003. Even in the circular dt. 24th July, 1976, referred to above, the position was clarified by Central Board of Direct Taxes (in short 'CBDT'). It is stated that in a case where on setting off the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case 'the tax sought to be evaded' will be tax chargeable on concealed income as if it is 'total income'."

21. The question, however, in the present case, would be, as to whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded. Under the scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the 'book profits' computed under s. 115JB of the Act. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, 'book profits' are deemed as the total income of the appellant in terms of s. 115JB of the Act.

22. In the present case, the income computed as per the normal procedure was less than the income determined by legal fiction namely 'book profits' under s. 115JB of the Act. On the basis of normal provision, the income was assessed in the negative i.e. at a loss of Rs. 36,95,21,018. On the other hand, assessment under s. 115JB of the Act resulted in calculation of profits at Rs. 4,01,63,180.

23. In view thereof, in conclusion, the assessment order records as follows :

> "Assessed at Rs. 4,01,63,180 under s. 115JB, being higher of two. Interest under ss. 234B and 234C has been charged as per the provisions of IT Act, 1961. Penalty proceedings under s. 271(1)(c) of the IT Act, 1961 have been initiated. Issue necessary forms."

24. The income of the assessee was thus assessed under s. 115JB and not under the normal provisions. It is in this context that we have to see and examine the application of Expln. 4.

25. Judgment in the case of Gold Coin (supra), obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the IT return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The Court was of the opinion that 'the tax sought to be evaded' will mean the tax chargeable not as if it were the total income. Once, we apply this rationale to Expln.

> 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under s. 115JB of the Act which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under s. 115JB of the Act. Hence, when the computation was made under s. 115JB of the Act, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all.
>
> **26.** The upshot of the aforesaid discussion would be to sustain the order of the Tribunal, though on different grounds. Therefore, while we do not agree with the reasoning and approach of the Tribunal, for our reasons disclosed above, we are of the opinion that penalty could not have been imposed even in respect of claim of depreciation made by the assessee. This appeal is accordingly dismissed."

On a perusal of the aforesaid judgment of the High Court, we find that it was observed that an addition/disallowance in the hands of the assessee may result to concealment, but that had its repercussions only when the assessment was done under the normal procedure. It was observed, that as the assessment as per the normal procedure was, however, not acted upon, and it was the deemed income of the assessee that was assessed under s. 115JB of the Act, as it was higher of the two, therefore the concealment based on the additions /disallowances made under the normal provisions of the Act had no role to play and were totally irrelevant. We may herein observe, that the "Special Leave Petition" (SLP) filed by the revenue against the aforesaid judgment of the Hon'ble High Court of Delhi had thereafter been dismissed by the Hon'ble Supreme Court in CIT Vs. Nalwa Sons Investment Ltd. [SLP (Civil) No(s). 18564/2011; dated 04.05.2012].

11. At this stage, we may herein observe, that the legislature in all its wisdom after considering the aforesaid shortcoming in the "Explanation 4" to Sec. 271(1)(c), had therein came forth with an

amendment vide the Finance Act, 2015, w.e.f 01.04.2016, which therein reads as under:

"*Explanation 4.*— For the purposes of clause (iii) of this sub-section,—

(a) the amount of tax sought to be evaded shall be determined in accordance with the following formula—

(A - B) + (C - D)

where,

A = amount of tax on the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);

B = amount of tax that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished;

C = amount of tax on the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = amount of tax that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished:

Provided that where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D:

Provided further that in a case where the provisions contained in section 115JB or section 115JC are not applicable, the item (C - D) in the formula shall be ignored;

(b) where in any case the amount of income in respect of which particulars ave 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, the amount of tax sought to be evaded shall be determined in accordance with the formula specified in clause (a) with the modification that the amount to be determined for item (A - B) in that formula shall be the amount of 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;

(c) where in any case to which *Explanation* 3 applies, the amount of tax sought to be evaded shall be 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."

On the basis of the aforesaid amendment, w.e.f Asst. Year 2016-17, even in a case where there are certain additions/disallowances under the normal provisions of the Act, penalty u/s 271(1)(c) can be imposed, irrespective of the fact that the assessee is assessed as per the deeming provisions of Sec. 115JB or Sec. 115JC of the Act. In fact, a careful perusal of the aforesaid amendment reveals that the machinery proviso for quantification of penalty had now been rendered as workable. On a perusal of the **"Explanatory Notes to the Provisions of the Finance Act, 2015"**, we find that the same reads as under:

> **"55. Amount of tax sought to be evaded for the purposes of penalty for concealment of income under clause (iii) of sub-section (1) of section 271**
>
> 55.1 The provisions contained in clause (c) of sub-section (1) of section 271 of the Act, before amendment by the Act, provided that penalty for concealment of income or furnishing inaccurate particulars of income is to be levied on the "amount of tax sought to be evaded", which has been defined, inter-alia, as the difference between the tax due on the income assessed and the tax which would have been chargeable had such total income been reduced by the amount of concealed income.
>
> 55.2 Problems have arisen in the computation of amount of tax sought to be evaded where the concealment of income or furnishing inaccurate particulars of income occurs in the computation of income under provisions of section 115JB or 115JC of the Income tax Act and also under the provisions other than the provisions of section 115JB or 115JC of the Income-tax Act (hereafter referred as general provisions). Further, courts have held that penalty under clause (c) of sub-section (1) of section 271 of the Income tax Act cannot be levied in cases where the concealment of income occurs with regard to the income computed under general provisions and the tax is paid under the provisions of section 115JB or 115JC of the Income-tax Act.
>
> 55.3 Tax paid under the provisions of section 115JB or 115JC over and above the tax liability arising under general provisions is available as credit for set off against future tax liability. Understatement of income and the tax liability thereon under general provisions results in larger amount of such credit becoming available to the assessee for set off in future years. Therefore, where concealment of income, as computed under the general provisions, has taken place, penalty under clause (c) of sub-section (1) of section 271 should be leviable even if the tax liability of the assessee for the year has been determined under provisions of section 115JB or 115JC of the Income-tax Act.

> 55.4 Accordingly, section 271 of the Income-tax Act has been amended so as to provide that the amount of tax sought to be evaded shall be the summation of tax sought to be evaded under the general provisions and the tax sought to be evaded under the provisions of section 115JB or 115JC of the Income-tax Act. However, if an amount of concealment of income on any issue is considered both under the general provisions and provisions of section 115JB or 115JC then such amount shall not be considered in computing tax sought to be evaded under provisions of section 115JB or 115JC. Further, in a case where the provisions of section 115JB or 115JC are not applicable, the computation of tax sought to be evaded under the provisions of section 115JB or 115JC shall be ignored.
>
> 55.5 Applicability: This amendment will take effect from 1st April, 2016 and will accordingly apply, in relation to the assessment year 2016-17 and subsequent assessment years."

As such, the legislature observed that in a case where tax was paid by an assessee under the deeming provisions of Sec. 115JB or 115JC, the excess of such tax paid over and above its tax liability under the general provisions would thereafter be available as credit for set off against its future tax liability. On the said premises, it was observed that in a case of understatement of income under the general provisions of the Act, would thus, result in larger amount of such credit becoming available to the assessee for set off in future years. Accordingly, it was observed that, where concealment of income as computed under the general provisions has taken place, penalty under clause (c) of sub-section (1) of section 271 should be leviable even if the tax liability of the assessee for the year has been determined under provisions of section 115JB or 115JC of the Income-tax Act. But then, we find that the said amendment to "Explanation 4" to Sec. 271(1)(c) had explicitly been provided to be effective from 1st April, 2016 and thus will accordingly apply, in relation to the assessment year 2016-17 and subsequent assessment years. As the case of the assessee before us is for A.Y 2014-15 therefore, the post-amended

"Explanation 4" to Sec. 271(1)(c) would not be applicable in its case. As the issue involved in the present case is squarely covered by the judgment of the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Nalwa Sons Investments Ltd. (2010) 327 ITR 543 (Del)**, we thus respectfully follow the same. As such, now when the assessee company had been assessed to tax under the deeming provisions of Sec. 115JB of the Act, therefore, on the basis of our aforesaid observations no penalty u/s 271(1)(c) in respect of additions/disallowances made under the normal provisions of the Act could have been imposed upon the assessee. We thus in the backdrop of our aforesaid deliberations quash the penalty imposed by the A.O u/s 271(1)(c) of the Act. The **Ground of appeal No. 2** is allowed in terms of our aforesaid observations.

12. As we have quashed the penalty imposed by the A.O u/s 271(1)(c) of the Act, therefore, we refrain from adverting to and therein adjudicating upon the contentions advanced by the ld. A.R on merits, in his attempt to impress upon us to conclude that no penalty was even otherwise liable to be imposed u/s 271(1)(c) of the Act, which thus are left open.

13. The appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/-	Sd/-
(G. Manjunatha)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 07.08.2020

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**