SUPREME COURT OF INDIA

Messrs Virtual Soft Systems Limited

Vs

Commissioner of Income Tax, Delhi-I

(Ashok Bhan and Dalveer Bhandari,JJ.,)

06.02.2007

JUDGMENT

Ashok Bhan, J.

1. 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.

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

3. 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..... 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 vs. Prithipal Singh & Co., Â 1988 Indlaw PNH 42, which was affirmed by this Court in CIT vs. Prithipal Singh & Co., Civil Appeal No. 1961 of 1996 dated 27.07.2000, reported in Â (SC).

4. 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 (Â 1988 Indlaw PNH 42 and Â) 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)"

5. 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"

6. 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"

7. 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 are 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 - 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 - 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)
- Rs. 80, 18,012.00 = - Rs. 11, 02,255.00)"

8. 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.

9. 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*[1],. 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.

10. 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.

11. 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.

12. 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.

13. 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*[2], *CIT v. N. Krishnan*[3], Reference was made to CIT v. S.V. Angidi Chettiar, Â (SC) which referred to the expression "income tax" this judgment being under Section 28(1)(c) of the Indian Income Tax Act, 1922, Dooars Tea Co. Ltd. v. Commissioner of Agricultural Income-tax, West-Bengal, Â (SC) referring to the expression "total income", CIT (Central) Delhi v. Harparshad & Co. P. Ltd., Â (SC), again referring to the expression word "total income". Reference is also made to CIT v. J.H. Gotla, Â (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., Â (SC).

14. 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.

15. 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, 1975with 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 Â 1999 Indlaw KAR 139, P.R. Bassappa's case (supra) and also by the Bombay High Court in CIT v. Chemiequip Ltd., Â 2003 Indlaw MUM 132 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., Â 4 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.

16. 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 asseessee invited our attention to the decisions of various High Courts *in Modi Cement Ltd. v. Union of India & Ors*[4]*., Indo-Gulf Fertilizers and Chemicals Corporation Ltd. v. Union of India & Anr*[5]*., and CIT v. Zam Zam Tanners*[6]*,*

17. 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.

18. 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.

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

20. We have heard the counsels for the parties at length.

21. 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]
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> 22. 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]

23. 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 laws 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]

24. 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.

25. 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, Â , 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, Â 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., Â , which approved an earlier expression of the rule by us in Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, Â 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 statue 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, Â 1978 CrLJ 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."

26. To the similar effect, is the view taken by this Court and the various *High Courts in CIT v. Vegetable Products Limited Â , 195 (SC)], CWT v. Ram Narain Agrawal*[7] *Tolaram Relumal v. State of Bombay [Â , at page 498], TMT Thangalakshmi v. ITO*[8] *CIT v. A.K. Das*[9] *CIT v. T.V. Sundaram Iyengar & Sons (P) Ltd. Â , at page 773 (SC)], Engineers Impex Pvt. Ltd. & Others v. D.D. Sharma*[10]

27. 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."

28. 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.

29. Contention of the appellant is supported by the decisions of various High Courts reported in Prithipal's case (supra), Â 1988 Indlaw PNH 42 (P&H High Court, CIT v. Prithipal Singh & Co.) affirmed by this Court in Â (SC), *CIT v. Prithipal Singh & Co.*[11], (P&*H High Court, CIT v. Virendra & Co.*[12]*),* (*Kerala High Court, CIT v. N. Krishnan*[13]*), (Madras High Court, Ramnath Goenka v. CIT*[14]*), (M.P. High Court, CIT v. Jabalpur Co-operative Milk Producers Union Ltd*[15]*.),* (Allahabad High Court, CIT v. Zam Zam Tanners), Â 2005 Indlaw CAL 21 (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.

30. 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*[16], - 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.*[17], - 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."

31. It has been laid down in CIT v. Podar Cement (supra) , CIT v. P.J. Chemicals, Â 5 (SC) and again in CIT v. Kerala State Industrial Development Corporation Ltd., Â 6 (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.

32. The contention advanced by the Ld. Counsel appearing for assesses 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 effective 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.

33. 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, Â 1991 Indlaw DEL 110 (Del.), it was held as under: -

> "..... 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]

34. In Indo-Gulf Fertilizers and Chemicals Corporation Ltd. v. Union of India, Â 1992 Indlaw ALL 123 (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 is 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, Â 1991 Indlaw DEL 110 (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]

35. In *J.K. Synthetics Ltd. v. ACIT*[18], 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]

36. 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.

37. 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, 1993with 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.

38. 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)?"

39. Both these questions are fully answered by this Court in *Commissioner of Income Tax, Bombay City v. Elphinstone Spinning and Weaving Mills Co. Ltd*[19]*.,*
(SC).

40. 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

Judgment Referred.

[1]*(1999) Indlaw KAR 0139 (Kar)*
[2]*(1990) Indlaw MAD 0217 (Mad)*
[3]*(1998) Indlaw KER 0223 (Ker)*
[4]*(1991) Indlaw DEL 0110 (Del.)*
[5]*(1992) Indlaw ALL 0123 (All.)*
[6]*(2005) (279) ITR 0197 (All)*
[7]*(1976) Indlaw ALL 0498 (All.)*
8(1993) Indlaw MAD 0185 (Mad.)
[9]*(1969) Indlaw CAL 0059*
[10]*(1999) Indlaw DEL 0304 (Del.)*
[11]*(2001) Indlaw PNH 0177*
[12]*(1998) Indlaw KER 0223*
[13]*(2002) Indlaw MAD 0442*
[14] *(2004 Indlaw MP 0167*
[15]*(2005) (279) ITR 0197*
[16]*(1999) Indlaw KAR 0139 (Kar.)*
[17]*(2003) Indlaw MUM 0132 (Bomb.)*
[18]*(1992) Indlaw DEL 0135 (Del.)*