

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.02.2013

Coram :

THE HONOURABLE MRS.JUSTICE R.BANUMATHI

and

THE HONOURABLE

MR.JUSTICE

K.RAVICHANDRABAABU

Tax Case (Appeal) No. 341 of 2010

The Commissioner of Income Tax,
Ward IV (1), Chennai.

... Appellant

vs.

P. Rojes,
No.11, Station Road,
West Mambalam, Chennai.

... Respondent

Appeal is filed under section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, 'B' Bench, Chennai dated 05.10.2009 made in ITA No. 531/Mds/2009.

For Appellant: Mr.M.Swaminathan
Standing Counsel for Income Tax

For Respondent: Mr.J.Balachander

JUDGMENT

K. Ravichandrabaabu, J.

The Revenue is on appeal against the order passed by the Tribunal in ITA.No. 531/Mds/2009 dated

05.10.2009, for the relevant assessment year 2005-2006 by raising the following substantial question of law:-

"Whether on the facts and circumstances of the case, the Tribunal was right in cancelling the penalty contrary to the law laid down in 306 ITR 277 by the Apex Court?"

2. The assessee, is an individual. He originally admitted the income of Rs. 1,99,440/- under Section 44 AF of Income Tax Act. The said assessment was selected for scrutiny under 'CASS' based on AIR information, that the assessee had deposited cash of Rs. 47,36,000/- on 31.03.2005. On notice, the assessee filed a letter on 30.11.2007 along with the revised Profit and Loss Account statement with copy of the bank statement and stated that he had not deposited cash of Rs. 47,36,000/- on a single day and that the cash deposit was spread over for the period of twelve months and the deposit was made out of sales and also recovery from the sundry debtors. As such the assessee had admitted the net profit of Rs. 3,92,649/- being 5% of the total gross income of Rs. 78,52,980/-. Further, the assessee agreed for addition of 3% being the profit which works out to Rs. 2,35,589/-. Thus the Income Tax Officer assessed the income as Rs. 6,58,240/-. Consequently, the Assessing Officer imposed penalty of Rs. 4,28,706/- being 300% by invoking his power under Section 271(1)(c) of the said Act.

3. Aggrieved against the said imposition of penalty, assessee filed appeal before the Commissioner of Income Tax (Appeals) in ITA. No. 20/08-09. The Appellate Authority confirmed the order of penalty by holding that the assessee had not shown the deposits

and he had not given any explanation, except saying that books of accounts were not maintained. The Appellate Authority further observed that the reasons for increase the profit percentage from 5% to 8% was not clear. Consequently, the appeal filed by the assessee was dismissed.

4. The further appeal preferred before the Tribunal by the assessee in I.T.A. No. 531/Mds/2009 was allowed by holding that though the Assessing Officer initially proceeded on the basis of information that the assessee deposited cash of Rs. 47,36,000/- a single day, however, he subsequently found that there was no deposit on a single day. It was also found by the Tribunal that the assessee agreed for estimation of income at Rs. 3,92,649/- which was enhanced by the Assessing Officer to Rs. 6,28,240/-. The Tribunal further pointed out that it is not clear as to whether it is a case of suppression of turnover or of the estimation of income at a lower rate. Therefore, considering all these facts and circumstances, Tribunal after being satisfied that it is not a fit case for levy of penalty under Section 271 (1) (c) of the Act, allowed the appeal preferred by the assessee. The Revenue challenged the said order of the Tribunal in this appeal by raising the above said substantial question of law as stated supra.

5. First of all, in order to invoke penalty proceedings under Section 271 (1) (c) of the Act, there must be concealment of particulars of income or furnishing of inaccurate particulars of his income by the assessee. Section 271 (1) (c) of the Act reads as follows:-

"271. Failure to furnish returns, comply with notices, concealment of income, etc.- (1) If the Assessing Officer or the Commissioner (Appeals) in the course of

any proceedings under this Act, is satisfied that any person -

(a)

(b)

(c) has concealed the particulars of his income or furnished inaccurate particulars of income"

From the facts placed before this Court, it could be seen that the Assessing Officer was originally of the impression that a sum of Rs. 47,36,000/- was deposited by the assessee on a single day. However, the Assessing Officer later found that such deposit was not made on a single day and it was made for a period commencing from 01.04.2004 to 29.03.2005.

6. Though the Assessing Officer invoked penalty under Section 27(1)(c) of the Act and stated that the assessee failed to furnish complete details from bank statement, on going through the materials placed before this Court, it is seen that the Assessing Officer has subsequently found that the said deposit was made for the period commencing from 01.04.2004 to 29.03.2005. Therefore, when the Assessing Officer himself has found that the said deposit was not made on a single day, in our considered view, it cannot be said that the assessee had failed to furnish complete particulars. The Tribunal has categorically found that in the return, the assessee had shown the income on estimate basis at Rs. 1,99,440/- and such estimation of income was enhanced by the Assessing Officer and consequently, imposed penalty. Therefore, from the above facts it is clear that levy of penalty was based on the estimation of income. In our considered view,

there cannot be any imposition of penalty based on estimation of income.

7. The Tribunal has rightly found that the present case is not a fit case for levy of penalty under Section 27(1)(c) of the Act by finding that the initial impression of the Assessing Officer was incorrect with regard to the deposit of a sum of Rs. 47,36,000/-. The Tribunal has also pointed out that it was not clear as to whether, according to Assessing Officer, it was a case of suppression of turn over or of estimation of income at a lower rate. When the Revenue itself has not come out with clear case of suppression of turn over and where there was no specific finding with regard to such factual aspect, we find that imposition of penalty under Section 27(1)(c) of the said Act is not warranted. In this connection, it is relevant to quote the decision of the Hon'ble Supreme Court reported in *CIT v. Reliance Petroproducts (P) Ltd.* [2010] 322 ITR 158 in which it is observed that in order to bring the case under Section 27(1)(c) of the Act, there has to be concealment of particulars of the income of the assessee and the assessee must have furnished inaccurate particulars of his income. It was further pointed out by the Hon'ble Supreme Court that in order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. It is further pointed out that making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. The relevant portion of the decision reads as follows:-

"7. As against this, the learned counsel appearing on behalf of the respondent pointed out that the language of Section 27(1)(c) had to be strictly construed, this being a taxing statute and more particularly the one providing for penalty. It was

pointed out that unless the wording directly covered the assessee and the fact situation herein, there could not be any penalty under the Act. It was pointed out that there was no concealment or any inaccurate particulars regarding the income were submitted in the return. Section 271(1)(c) is as under:

27(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.

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly, the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the learned counsel for the Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word 'particular' is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word 'particulars' used in Section 271(1)(c) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars. The learned counsel argued that 'submitting an incorrect claim in law for the

expenditure on interest would amount to giving inaccurate particulars of such income'. We do not think that such can be the interpretation of the words concerned. The words are plain and simple. In order to expose the assessee to the penalty unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By any stretch of imagination, making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In *CIT v. Atul Mohan Bindal* [2009] 183 Taxman 444 (SC) where this Court was considering the same provision, the Court observed that the AO has to be satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income. This Court referred to another decision of this Court in *UOI v. Dharamendra Textile Processors* [2008] 166 Taxman 65 (SC), as also, the decision in *UOI v. Rajasthan Spinning & Weaving Mills* [2009] 180 Taxman 609 (SC) and reiterated in para 13 that:

"13. It goes without saying that for applicability of S.271(1)(c), conditions stated therein must exist."

8. Therefore, it is obvious that it must be shown that the conditions under Section 271(1)(c) must exist before the penalty is imposed. There can be no dispute that everything would depend upon the return filed because that is the only document, where the assessee can furnish the particulars of his income. When such particulars are found to be inaccurate, the liability would arise. In *Dilip N. Shroff v. CIT* [2007] 161 Taxman 218 (SC), this Court explained the terms 'concealment of income' and 'furnishing inaccurate particulars'. The Court went on to hold therein that in order to attract the penalty under Section 271(1)(c), mens rea was necessary, as according to the Court, the word inaccurate signified a deliberate act or

omission on behalf of the assessee. It went on to hold that clause (iii) of Section 271(1) provided for a discretionary jurisdiction upon the assessing authority, inasmuch as the amount of penalty could not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of income, but it may not exceed three times thereof. It was pointed out that the term 'inaccurate particulars' was not defined anywhere in the Act and, therefore, it was held that furnishing of an assessment of the value of the property may not by itself be furnishing inaccurate particulars. It was further held that the assessee must be found to have failed to prove that his explanation is not only not bona fide but all the facts relating to the same and material to the computation of his income were not disclosed by him. It was then held that the explanation must be preceded by a finding as to how and in what manner, the assessee had furnished the particulars of his income. The Court ultimately went on to hold that the element of mens rea was essential. It was only on the point of mens rea that the judgment in *Dilip N. Shroff* (supra) was upset. In *Dharamendra Textile Processors* (supra) after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with the Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under

Section 276-C of the Act. The basic reason why the decision in *Dilip N. Shroff* (supra) was overruled by this Court in *Dharmendra Textile Processors* (supra) was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in *Dilip N. Shroff* (supra). However, it must be pointed out that in *Dharamendra Textile Processors* (supra), no fault was found with the reasoning in the decision in *Dilip N. Shroff* (supra), where the Court explained the meaning of the terms 'conceal' and 'inaccurate'. It was only the ultimate inference in *Dilip N. Shroff* (supra) to the effect that mens rea was an essential ingredient for the penalty under Section 271(1)(c) that the decision in *Dilip N. Shroff* (supra) was overruled."

8. The very same issue was considered by the Division Bench of this Court in Tax Case (Appeal) No. 273 of 2012 dated 12.09.2012 (*CIT v. Shriram Properties & Constructions Ltd.*,) wherein one of us was a member (Justice K. Ravichandrababu, J). In that case, the Assessing Officer initiated penalty proceedings under Section 271(1) (c) of the Act holding that the assessee had not filed the revised return of income to offer the amount as income for the purpose of assessment. Even in that case such levy of penalty was rejected by this Court by holding that when the Tribunal had come to a factual finding that there was no lacking in bona fide in the claim of the assessee originally made, no ground to accept the plea of the Revenue to admit the said Tax Case (Appeal). Here, it is the admitted case that the assessee filed revised profit and loss account statement showing the net profit of Rs. 3,92,649/- being 5% on Rs. 78,52,980/- and the same having been done before the assessment was completed, we fail to understand as to how the Revenue is justified in imposing penalty under

Section 271 (1) (c) of the Act. Therefore by applying the decision of the Hon'ble Supreme Court in *Reliance Petro Products (P.) Ltd. (supra)* as well as the decision of the Division Bench of this Court in Tax Case (Appeal) No. 273 of 2012 dated 12.09.20012, we reject the appeal filed by the Revenue by answering the substantial question of law against the Revenue.

9. Accordingly, the Tax Case (Appeal) is dismissed. No costs.

[R.B.I.,J.]

[K.R.C.B,J.]

05.02.2013

Index : Yes/No

Internet : Yes/No

bbr

To

1. The Income Tax Officer,
Business Ward IV (1), Chennai.

2. The Commissioner of Income Tax,
(Appeals)-VIII, Chennai-34.

3. The Income Tax Appellate Tribunal,
Chennai Bench 'B', Chennai.

R.BANUMATHI,J.

and

K.RAVICHANDRABAABU, J.

bbr

T C (A) No. 341 of 2010

05.02.2013