

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No.1058 of 2009**

% RESERVED ON: MARCH 01, 2011
PRONOUNCED On: APRIL 08, 2011

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Sr.
Advocate with Mr. Deepak
Anand, Jr. Standing
Counsel.

VERSUS

M/S. SAS PHARMACEUTICALS . . . Respondent

through: Mr. Amar Dave with Mr.
Nitin Mishra, Advocates.

CORAM :

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. This appeal arises out of the order of the Income Tax Appellate Tribunal ('the Tribunal' for brevity) vide which it has affirmed the order of the CIT (A) deleting the penalty of ₹32,39,393/- imposed by the Assessing Officer under the provisions of Section 271(1)(c) of the Income Tax Act (hereinafter referred to as 'the Act'). It so happened that a survey was carried out at the business premises and godown of the respondent-assessee on 06.01.2003. In that survey, discrepancies in cash, stock and renovation were found. When the assessee was confronted with the same, it surrendered the amount of ₹88,14,676/- during the survey. Since the survey was conducted on 06.01.2003, i.e., in the Financial Year 2002-03 corresponding to the Assessment Year 2003-04, for that assessment year, the assessee had not filed the income tax return and naturally the occasion to file the income tax return had not matured. When the income tax return was ultimately filed by the assessee on 02.12.2003, the assessee declared its income @ ₹87,71,580/- including the amount surrendered by the assessee itself. The

assessment was framed including the surrendered amount. While passing the assessment order, the AO also decided to initiate penalty proceedings separately on the ground that the assessee had concealed the income. Show cause notice was given to which the assessee submitted the reply stating that the assessee had itself voluntarily surrendered the amount to avoid litigation and to buy peace of mind and had not concealed any income. This explanation was not digested by the AO, who had the view that the surrender was made only when discrepancies were brought to the notice of the assessee, which were found in cash, stock as well as renovation of the premises done by the assessee. He, thus, was of the opinion that had there been no survey, the assessee would have succeeded in concealing the income and evading tax. On this premise, penalty of ₹32,39,393/- was imposed.

2. The CIT (A) deleted the penalty on the ground that there was no concealment of income as in the return filed by the assessee, the said income was duly reflected.

3. The Tribunal has upheld the order of the CIT (A) and dismissed the appeal of the Revenue. It is in this factual context that the instant appeal is preferred by the Revenue, which was admitted on the following substantial questions of law:

“(i) Whether ITAT was correct in law in deleting the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act?

(ii) Whether ITAT was correct in law in holding that no concealment was made by the assessee though the assessee had surrendered the amount of ₹88,14,676/- during survey on account of discrepancies found in cash, stock and difference in renovation?”

4. The facts demonstrated bring forth the position that when the survey was conducted a couple of months before the close of Financial Year, i.e., 06.01.2006, definitely discrepancies were found inasmuch as there was difference in cash, stock as well as renovation expenses are as follows:

“Difference in cash	₹22,80,876
Difference in stock	₹ 5,00,200
Renovation difference	<u>₹60,33,580</u>
	₹88,14,676”

5. The assessee accepted this difference and surrendered the amount. No attempt was made by the assessee even after this surrender to retract therefrom or to explain that there were no such discrepancies. In fact, the position was carried by including this amount even in the income tax return filed by the assessee. Thus, no doubt, the assessee has surrendered certain income during the course of survey and discrepancies noticed by the survey team would suggest that the assessee was not maintaining proper accounts in respect to cash, stock and renovation expenses, etc. Therefore, there could be a possibility that but for this survey, the discrepancies brought to the notice of the assessee and physical verification of the stock and other accounts would have gone unnoticed and the assessee might have suppressed in the income tax return as well. However, fact remains that it has disclosed this in the return filed by it.
6. In this context, the question would be as to whether the assessee can be imposed penalty under Section 271(1)(c) of the Act when the assessee has shown this income in

the income tax return filed by it and contends that it has voluntarily declared the same in the 'regular return filed for the relevant year'.

7. To seek an answer, it would be necessary to look into the language of Section 271(1)(c) of the Act. This provision reads as under:

"271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner 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 such income,"

8. As pointed out above, the contention of the Department is that the intention of the assessee in maintaining false records relating to cash, stock and renovation, etc., was manifest, viz., to conceal the particulars of income and furnished inaccurate particulars of such income. It was contended that but for the said survey in which the

assessee was exposed, he would have filed the income tax return concealing the said income and therefore, provisions of Section 271(1)(c) of the act are clearly attracted.

9. The learned counsel for the assessee, on the other hand, contends that Clause (c) of Section 271(1) of the Act makes it crystal clear that the act of 'concealment' or 'furnishing inaccurate particulars' is relatable only in respect of a return being filed. Therefore, in a case where the stage of filing return itself had not been reached, there is no question of invocation of the penal provision of Section 271 of the Act, as is the position in the present case. In the present case, the return was filed well within the prescribed time, i.e., on 02.12.2003 and in the said return the entire amount had been duly shown as income. Therefore, invoking a penal provision merely on the basis of assumption that the assessee 'would not have included' the said amount while filing his return is completely erroneous and unsustainable. It is a settled position of

law as enunciated in various judicial pronouncements that 'penalty cannot be based on presumptions and surmises'. It was also argued that the legislative intent in connection with Section 271 of the Act is further fortified from the various Explanations provided in the said provision. In this regard, Explanation 4 is relevant wherein it is specifically provided as to what would be included in the expression 'the amount of tax sought to be evaded', which is the basis for imposition of penalty contemplated under Section 271 (1) (c) of the Act. The perusal of the said Explanation also clearly establishes the direct nexus between the concealment/inaccurate particular being furnished with the return filed.

10. To bolster this submission, the learned counsel for the assessee took refuge of Explanation 5 and Explanation 5A of Section 271 of the Act and submitted that these Explanations provide that in cases of search by way of deeming fiction, the liability towards penalty has been prescribed even in cases where the return of income for

such year has not been furnished before the said date of search. Therefore, wherever the legislature intended to impose a penal liability covering a case where return was yet to be filed, a deeming fiction has been consciously provided. In the absence of any such deeming fiction imposing penalty in a case of survey where return is yet to be filed, the penal provision of Section 271 of the Act cannot be invoked as the mandatory ingredients thereof are not met at all.

11. He also sought to draw sustenance from the judgment of Supreme Court in the case of ***Commissioner of Income Tax, Ahmedabad Vs. Reliance Petroproducts Pvt. Ltd. (2010) 3 SCR 510*** wherein *inter alia* it has been held that unless the conditions under Section 271 (1)(c) of the Act exist in a particular case, penalty cannot be imposed and it was further held that 271 of the Act being a penal provision is required to be construed strictly. The following observations made in the said judgment were specifically referred to:

"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."

12. After considering the respective submissions of the learned counsel for the parties, we are of the view that the argument of the learned counsel for the assessee has to prevail as it carried substantial weight. It is to be kept in mind that Section 271(1)(c) of the Act is a penal provision and such a provision has to be strictly construed. Unless the case falls within the four-corners of the said provision, penalty cannot be imposed. Sub-section (1) of Section 271 stipulates certain contingencies on the happening whereof the AO or the Commissioner (Appeals) may direct payment of penalty by the assessee. We are concerned herewith the fundamentality provided in Clause (c) of Section 271 (1) of the Act, which authorizes

imposition of penalty when the AO is satisfied that the assessee has either;

- (a) Concealed the particulars of his income; or
- (b) Furnished inaccurate particulars of such income.

13. It is not the case of furnishing inaccurate particular of income, as in the income tax return, particulars of income have been duly furnished and the surrendered amount of income was duly reflected in the income tax return. The question is whether the particulars of income were concealed by the assessee or not. It would depend upon the issue as to whether this concealment has reference to the income tax return filed by the assessee, viz., whether concealment is to be found in the income tax return.
14. We may, first of all, reject the contention of the learned counsel for the Revenue relying upon the expression 'in the course of any proceedings under this Act' occurring in Sub-section (1) of Section 271 of the Act and contending that even during survey when it was found that the

assessee had concealed the particular of his income, it would amount concealment in the course of 'any proceedings'. The words 'in the course of any proceedings under this Act' are prefaced by the satisfaction of the AO or the Commissioner of Income Tax (Appeals). When the survey is conducted by a survey team, the question of satisfaction of AO or the Commissioner (Appeals) or the Commissioner does not arise. We have to keep in mind that it is the AO who initiated the penalty proceedings and directed the payment of penalty. He had not recorded any satisfaction during the course of survey. Decision to initiate penalty proceedings was taken while making assessment order. It is, thus, obvious that the expression 'in the course of any proceedings under this Act' cannot have the reference to survey proceedings, in this case.

15. It necessarily follows that concealment of particulars of income or furnishing of inaccurate particular of income by the assessee has to be in the income tax return filed by it. There is sufficient indication of this in the judgment of this

Court in the case of ***Commissioner of Income Tax, Delhi-I Vs. Mohan Das Hassa Nand*** 141 ITR 203 and in ***Reliance Petroproducts Pvt. Ltd. (supra)***, the Supreme Court has clinched this aspect, viz., the assessee can furnish the particulars of income in his return and everything would depend upon the income tax return filed by the assessee. This view gets supported by Explanation 4 as well as 5 and 5A of Section 271 of the Act as contended by the learned counsel for the Respondent.

16. No doubt, the discrepancies were found during the survey. This has yielded income from the assessee in the form of amount surrendered by the assessee. Presently, we are not concerned with the assessment of income, but the moot question is to whether this would attract penalty upon the assessee under the provisions of Section 271(1)(c) of the Act. Obviously, no penalty can be imposed unless the conditions stipulated in the said provisions are duly and unambiguously satisfied. Since the assessee was exposed during survey, may be, it would have not

disclosed the income but for the said survey. However, there cannot be any penalty only on surmises, conjectures and possibilities. Section 271 (1) (c) of the Act has to be construed strictly. Unless it is found that there is actually a concealment or non-disclosure of the particulars of income, penalty cannot be imposed. There is no such concealment or non-disclosure as the assessee had made a complete disclosure in the income tax return and offered the surrendered amount for the purposes of tax.

17. We, thus, answer the questions as formulated above, in favour of the assessee and against the Revenue finding no fault with the decisions of the CIT (A) as well as the Tribunal. As a result, this appeal is dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

APRIL 08, 2011
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