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**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'A' BENCH, KOLKATA**

**Before Shri Pramod Kumar (Accountant Member)
- As A Third Member**

I.T.A. No.: 695/ Kol/ 2010
Assessment year: 2003-04

Darwabshaw B Cursetjee Sons Ltd ***……………….Appellant***

Vs.

Income Tax Officer
Ward 6(1), Kolkata ***……………Respondent***

Appearances by:

D S Damle, alongwith **Akkal Dudhwewala**, *for the appellant*
R N Saha, *for the respondent*

Date of hearing : 16th March, 2012
Date of order : 31st May , 2012

ORDER

1. On a difference of opinion between the Members constituting the Division Bench when this appeal originally came up for hearing, following point of difference has been referred to me by Hon'ble President under section 255(4) of the Income-tax Act, 1961:

> **Whether, in the given facts and circumstances of the case, the CIT(A) is justified in upholding the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 or not ?**

2. The material facts giving rise to this dispute before me are as follows. The assessee is engaged in the stevedoring business. The assessee had filed the original return of income on 25.11.2003 disclosing

income of Rs 26,950, and this return was processed under section 143(1) of the Act. In the assessment so finalized, the assessee has claimed a deduction of Rs 23,25,000 in respect of expenses incurred on voluntary retirement scheme. The Assessing Officer was of the view that this claim was erroneous inasmuch as the assessee was entitled to the deduction, under section 35DDA of the Act, of only one fifth of the expenses incurred on voluntary retirement scheme. The Assessing Officer further noted that in the immediately preceding year, the assessee had claimed only one fifth of the expenses on voluntary retirement scheme, and, it could not, therefore, be said that the assessee was unaware of the provisions of Section 35DDA of the Act. It was in this backdrop that the Assessing Officer reopened the assessment by issuance of notice under section 148. In the return filed by the assessee, in response to the reassessment notice, the assessee disallowed the VRS payment of Rs 23,25,000, and, thereafter, allowed Rs 4,65,000, being one fifth of Rs 23,25,000, ending up, vis-à-vis the original return, with a disallowance of Rs 18,60,000. The matter did not rest there. The Assessing Officer also imposed the penalty under section 271(1)(c) for concealment of income to the extent of Rs 18,60,000 i.e. the expenditure, on voluntary retirement scheme, which was claimed as deduction in the original income tax return even though the same was not admissible as deduction in the relevant assessment year. The line of reasoning adopted by the Assessing Officer was as follows:

> **On receipt of return of income u/s 148, the then AO passed order u/s 147/143(3) and penalty proceedings under section 271(1)(c) had been initiated for furnishing inaccurate particulars of income or suppression of income in the original return filed u/s 139(1). It is a fact that the assessee had not come up voluntarily with the increased income. It is the department which detected the escaped income and proceedings u/s 147 were initiated. Had the department not detected the escapement, the entire amount of Rs 18,60,000 would never have been assessed to tax. Therefore, it is a clear case of concealment or submission of inaccurate particulars of income. Accordingly, it is a fit case for imposition of penalty u/s 271(1)(c), and, therefore, minimum penalty, @100% of tax**

sought to be evaded, amounting to Rs 6,51,000 is imposed upon the assessee.

3. Aggrieved by the stand so taken by the Assessing Officer, assessee carried the matter in appeal before the CIT(A). The assessee's plea was that in view of the provisions of Explanation 3 to Section 271(1)(c), even an income declared in income tax return in response to notice under section 148 can only be subjected to penalty under section 271(1)(c) when the assessee had not filed the return under section 139(1) and when the return has been filed for the first time in response to notice under section 148. Learned CIT(A) rejected this plea as "contrary to the legal meaning intended by the legislature". The next plea was that the assessee was informed that, vide circular dated 23rd January 2001, the CBDT had taken a stand that the VRS payments are in the nature of capital expenditure, and the assessee sought legal advice on the same from Vakharia & Associates, a firm of chartered accountants handling the assessee's accounting and taxation matters. This CA firm, according to the assessee, advised the assessee, vide their letter dated 11th July 2003, that in view of Hon'ble Bombay High Court's judgment in the case of CIT Vs Bhor Industries Limited (264 ITR 180), the VRS expenditure was allowable in entirety and in the year in which the said expenditure was incurred. It was for this reason, according to the assessee, that the assessee claimed deduction of the entire VRS expenditure. However, upon receipt of the reassessment notice, the assessee consulted Shri Damle, a senior chartered accountant and was told that the legal position explained to the assessee held good only till the assessment year 2001-02 i.e. till Section 35DDA was brought to the statute. The assessee then immediately rectified the error and filed the correct return. The stand of the assessee, in claiming deduction of entire VRS expenditure, was thus bonafide – even if incorrect. The CIT(A) rejected this plea as well, particularly as, in the immediately preceding assessment year, the assessee himself has applied Section 35 DDA to the VRS payments and

claimed deduction in respect of only one fifth of such expenditure. The CIT(A) rejected the assessee's claim of bonafide conduct as well. In addition to the above, learned CIT(A) discussed the factual matrix of the case in detail, referred to certain judicial precedents in support of the proposition that even making a false claim will also amount to concealment of income, and concluded that the penalty deserves to be confirmed. Aggrieved also by the stand taken by the learned CIT(A), assessee carried the matter in appeal before this Tribunal, but this appeal resulted in a split verdict.

4. Learned Judicial Member, in his lead order and after discussing the facts of the case as also the applicable legal position in great detail, concluded that "the assessee, under mistaken belief, claimed deduction of VRS expenditure in entirety in AY 2003-04 from a specialist advice from a CA firm and the decision of Hon'ble Bombay High Court in the case of Bhor Industries Ltd *(supra)".* Learned Judicial Member further observed that " the assessee, in the P&L account filed with the original return of income, disclosed the fact that it had incurred VRS expenditure amounting to Rs 23.25 lakhs and claimed deduction during the relevant AY in entirety" and that in his view "the information filed in the return of income was correct and voluntarily furnished but the claim was in excess of amount permissible under section 35DDA of the Act" and that, accordingly, "the assessee cannot be held guilty to be concealing or furnishing inaccurate particulars of income because it has voluntarily furnished information with regard to VRS in the original return and further filed the return in response to notice u/s 148 after obtaining opinion of another expert and claimed deduction in conformity with the provisions of Section 35DDA of the Act". Learned Judicial Member was of the view that the assessee had acted in a bonafide manner and on the first available opportunity rectified the error committed in the original return. He then referred to Hon'ble Chattisgarh High Court's judgment in the case of CIT Vs Vijay Kumar Jain (325 ITR 378) and analysed the same to

support the stand so taken. He also observed that the assessee has filed full particulars, that the assessee has relied upon the expert advice, that the expenses incurred are genuine, the explanation of the assessee has not been found false, and that the explanation of the assessee is bonafide. The impugned penalty was thus ordered to be deleted. Learned Accountant Member, however, did not share the approach so adopted by the learned Judicial Member. Learned Accountant Member was of the view that the mandate of Section 35DDA was clear and unambiguous. Referring to the expert opinion relied upon by the assessee, learned Accountant Member was of the view that once the specific provisions of Section 35 DDA were enacted and the assessee himself had followed the same, the need of obtaining a legal advice was far from justified. It was also pointed out that the so called expert advice did not even refer to the provisions of Section 35 DDA. Learned Accountant Member also expressed the view that the assessee has obtained the expert advice only to support the assessee's stand. Learned Accountant Member also observed that the law laid down in the case of Bhor Industries Limited *(supra)* was with respect to the provisions of the statute in the assessment year 1996-97 and it had no application in the present assessment year. As regards the references to Hon'ble Supreme Court's judgment in the case of CIT vs Reliance Petroproducts Ltd (322 ITR 158) and of Hon'ble Chattisgarh High Court in the case of CIT Vs Vijay Kumar Jain (235 ITR 378), learned Accountant Member was of the view that these judicial precedents are not applicable on the facts of this case. To sum up, learned Accountant Member was of the view that there was no need for interference in the matter and that the CIT(A) was justified in upholding the impugned penalty. As a result of this split verdict by the Division Bench, the matter is now before me for expressing my view as a Third Member.

5. I have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

6. I consider it appropriate to reproduce Explanation 1 to Section 271(1)(c), which deals with penalty for concealment of income and for furnishing of inaccurate particulars, as follows

> **Where in respect of any facts material to the computation of the total income of any person under this Act,—**
>
> **(*A*) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or**
>
> **(*B*) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,**
>
> **then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (*c*) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.**

7. It is thus clear that the onus is on the assessee to prove*, inter alia*, that such explanation is given by the assessee is *bonafide*. In the present case, the assessee's explanation for that making this claim for deduction, in respect of entire amount paid to the employees for voluntary retirement scheme, is that this admittedly erroneous claim was made because of the expert advice received from their tax consultant, and as such it was a *bonafide* mistake on the part of the assessee to have claimed the deduction.

8. In the case of CIT v. Nathulal Agarwala & Sons (145 ITR 292), Full Bench of Hon'ble Patna High Court has observed as follows:

> "**As to the nature of explanation offered by the assessee, it seems plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed on him will be discharged and presumption rebutted. It is not the law, and perhaps hardly can be, that any and every explanation of**

the assessee must be accepted. In my view, the explanation of the assessee for avoidance of penalty must be an acceptable explanation. He may not prove what he asserts to the hilt positively, but at least material brought on record must show that what he says is reasonably valid."

9. The above views were approved by the Hon'ble Supreme Court in the case of CIT v. Mussadilal Ram Bharose (165 ITR 14). Referring the judgment of Hon'ble Patna High Court, Their Lordships have observed as follows :

"The Patna High Court emphasized that as to the nature of explanation to be rendered by the assessee, it was plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed on him will be discharged and presumption rebutted. We agree. We further agree that it is not the law that each and every explanation by the assessee must be accepted. It must be acceptable explanation, acceptable to a fact finding body."

10. Viewed in this perspective, just because assessee has an explanation- whatever be its worth and credibility, it does not cease to be a case in which concealment penalty can be levied. The explanation of the assessee has to be considered on merits and one has to take the call as to whether the explanation so given by the assessee can be treated as an acceptable explanation or not.

11. A plain look at the legal opinion obtained from Vakharia & Associates, which learned Accountant Member has reproduced in his order, shows that all that this tax consultant has opined is that the CBDT circular dated 23rd January 2001 ceases to hold good in law in view of Hon'ble Bombay High Court's judgment in the case of Bhor Industries Ltd *(supra).* There cannot indeed be any quarrel with this proposition, but then this expert advice does not deal with the provisions of Section 35 DDA which were introduced on the statute after the issuance of the circular in question. The law was amended with effect from 1st April

2001 and Section 35 DDA was inserted with effect from that date. The assessee himself has followed the prescription of Section 35DDA in the immediately preceding assessment years, and even this expert opinion does not hold that the provisions of Section 35 DDA, for whatever reasons, will not come into play in respect of VRS payments. There was thus no reason for assessee to deviate from the tax treatment being given to the VRS payments in the preceding assessment years. The onus is on the assessee to prove that the explanation is bonafide but there is nothing from the assessee to even indicate, leave aside proving, that there was any reason to believe that the provisions of Section 35 DDA will not apply to the VRS payments. The expert advice did not deal with this aspect at all. One can perhaps even understand ignorance about a legal provision, such as of Section 35 DDA, but once the assessee is on record not only being aware about this provision but also preparing the income tax return in the light of the said provision, there cannot be any justification about assessee ignoring the clear mandate of the same provision in the subsequent assessment years. Such an action on the part of the assessee, in my considered opinion, cannot be said to be bonafide. In my humble understanding, the explanation of the assessee is not acceptable and I reject the same. In any case, expert advice obtained by the assessee from Vakharia & Associates lacks credibility and just because the assessee's claim is supported by a chartered accountant's opinion, this fact *per se* cannot absolve the assessee from penalty under section 271(1)(c). In the case of CIT Vs Escort Finance Limited (328 ITR 44), Hon'ble Delhi High Court has rejected assessee's reliance on expert advice to avoid the penalty and has *inter alia* observed as follows:

> **………..The assessee pleaded bona fide, as according to it, it was based on the opinion of the Chartered Accountant. Learned counsel for the revenue, however, submitted that a bare reading of section 35D would reveal even to a layman that there was no scope for getting benefit of those provisions in respect of expenses incurred in connection with the public issue of shares such as underwriting commission, brokerage and other charges etc., inasmuch as certain expenses are allowable only**

> **when they are incurred with the expansion of assessee's industrial undertakings or in connection with his setting up of a new industrial undertaking or industrial unit whereas the assessee is a finance company.**
>
> **15. We are in agreement with the aforesaid submission of learned counsel for the revenue. We fail to understand as to how the Chartered Accountants who are supposed to be expert in tax laws, could give such an opinion having regard to the plain language of section 35D of the Act. It would be important to note that assessee has nowhere pleaded that return was filed claiming benefit of section 35D of the Act on the basis of the said opinion. What was stated was that in the prospectus it was mentioned that as per the opinion given by the Chartered Accountants, the company would be entitled for relief under section 35D of the Act. Therefore, it is not the case of the assessee that while filing the return it got assistance from the Chartered Accountants who opined that the aforesaid expenses qualify for amortization over a period of 10 years under section 35D of the Act. That apart, when we find that it is not a case where two opinions about the applicability of section 35D were possible. Therefore, it cannot be a case of a bona fide error on the part of the assessee. As has been pointed out above, the relief available under section 35D of the Act to a finance company is ex facie inadmissible as that is confined only to the existing industrial undertaking for their extension or for setting up a new industrial unit. It was, thus, not a 'wrong claim' preferred by the assessee, but is a clear case of 'false claim'.**

12. As regards learned counsel's reliance on Hon'ble Supreme Court judgment in the case of *Reliance Petroproducts Ltd.* (*supra*), we have noticed that it was a case in which Their Lordships were only concerned with the question whether "in this case, as a matter of fact, the assessee has given inaccurate particulars". Their Lordships noted that "in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false" and add that "such being the case, there would be no question of inviting the penalty under section 271(1)(*c*) of the Act" and that "a mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing

inaccurate particulars regarding income of the assessee". Explaining this position, a division bench of this Tribunal, in the case of Samsonite India Pvt Ltd Vs ACIT [(2011) 9 taxman.com 322], observed as follows:

> **…………Hon'ble Supreme Court, in the case of Reliance Petroproducts, was a case in which Their Lordships were only concerned with the question whether "in this case, as a matter of fact, the assessee has given inaccurate particulars". Their Lordships noted that "in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false" and add that "such being the case, there would be no question of inviting the penalty under section 271(1)(*c*) of the Act" and that "a mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of the assessee".**
>
> **9. That, however, is not the end of the matter. Not only that the penalty provisions cover the situations in which the assessee has concealed income or furnished the inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for income in respect of which 'particulars have been concealed'. In addition to normal connotations of 'concealment' thus, a deeming fiction is also implicit in the scheme of penalty provisions. This deeming fiction, by way of *Explanation 1* to section 271(1)(*c*) envisages two situations - (*a*) first, where in respect of any facts material to the computation of total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or the CIT(A); and, (*b*) second, where in respect of any facts material to the computation of total income under the provisions of this Act, the assessee is not able to substantiate the explanation and the assessee fails to prove that such explanation is *bona fide* and that the assessee had disclosed all the facts relating to the same and material to the computation of total income. In the first situation, the deeming fiction is triggered by the inaction of the assessee by his not giving the explanation with respect to any fact material to the computation of total income, or by action of the Assessing Officer or the CIT(A) by giving categorical finding to the effect that the explanation given by the assessee is false. In the second situation, the deeming fiction is triggered by the failure of the assessee leading to satisfaction of conditions laid down**

> **in Clause B of *Explanation 1* to section 271(1)(*c*), namely that the assessee is not able to substantiate an explanation in respect of any fact material to the computation of total income, and, in addition to this, the assessee is also not able to prove that such explanation was given *bona fide* and all the facts relating to the same and material to the computation of total income have been disclosed by the assessee. When this deeming fiction comes into play, the related addition or disallowance in computing the total income of the assessee, for the purposes of section 271(1)(*c*), is deemed to represent the income in respect of which inaccurate particulars have been furnished, but then the levy of penalty hinges on assessee's substantiating the explanation, proving that it is *bona fides* and that all the material facts are disclosed.**

13. On the facts of the present case, we are dealing with not only an inadmissible claim of deduction but a claim of deduction which is contrary to the plain words of the statute and on which no two opinions are possible. This situation cannot be equated with a claim of deduction under section 14 A in respect of which, as Hon'ble Supreme Court had observed in the case of Reliance Petroproducts *(supra)*, the assessee's plea was that "that the disallowance made by the Assessing Authority in the assessment order under section 143(3) of the Act were solely on account of different views taken on the same set of facts and, therefore, they could, at the most, be termed as difference of opinion but nothing to do with the concealment of income or furnishing of inaccurate particulars of such income". In the present case, related quantum addition is not on account of different views being taken on the same set of facts but on account of plain words of the statute which admit no ambiguity. The assessee does not, therefore, derive any help from Hon'ble Supreme Court's judgment in the case of Reliance Petroproducts *(supra)* either. I reject the same.

14. Learned counsel for the assessee has also laid a lot of emphasis on the fact that the assessee's explanation has not been found 'false' but

then this plea overlooks the fact that when an assessee's explanation is found 'false', this case falls in category (A) of Explanation 1 to Section 271(1)(c) whereas the present case is in category (B) thereof and it covers a situation when assessee offers an explanation and not able to prove its bonafides. These two situations are mutually exclusive situation and just because conditions in part (A) of Explanation 1 are not satisfied, the revenue's case in (B) also does not come to an end. The plea of the assessee does not, therefore, merit acceptance.

15. Learned counsel then submits that there is nothing on record to suggest that the expenditure is bogus or not genuine. That is not the case of the revenue either. The impugned penalty is not in respect of a bogus claim but in respect of making a claim which is patently inadmissible. In such a situation, it is difficult to understand, much less approve, this plea of the assessee.

16. Learned counsel 's reliance on Hon'ble Chhatisgarh High Court's judgment in the case of Vijay Kumar Jain *(supra)* is of no avail either. In this case, Their Lordships have only analysed and followed Hon'ble Supreme Court's judgment in the case of Reliance Petroproducts *(supra)* but then, as I have pointed out a short while ago, Hon'ble Supreme Court's judgment in the case of Reliance Petroproducts *(supra)* is on materially different facts and the ratio of the said judgment will not apply to the fact situation that is before me.

17. Learned counsel's armoury is not exhausted. He invites my attention to decision of a division bench in the case of Tapan Bhattacharya Vs Income Tax Officer (ITA Nos. 1024 to 1026/Kol/2010; order dated 18th November 2011) wherein the division bench has deleted the penalty under section 271(1)(c) by noting that the "revenue has

nowhere mentioned that the reopening is made to assessee interest income on NSC, FD and savings account" and that "since revenue has served notice under section 148, the assessee has offered the same voluntarily". It is submitted that the same are the facts of the present case inasmuch as reassessment notice does not mention that the reassessment is made to disallow the claim of deduction for entire expenditure on voluntary retirement scheme, and yet the assessee has voluntarily offered the disallowance in the return filed in response to the reassessment notice. Learned counsel, however, fairly admits that the reasons for reopening clearly indicate the excessive deduction having been allowed in the assessment, but hastens to add that similar were the facts in Tapan Bhattacharya's case inasmuch as the reasons of reopening the assessment were only to tax the interest income , and the bench was persuaded by the fact that no such reasons were set out on the reassessment notice. He then adds that the order is Tapan Bhattacharya's case was authored by the same learned Accountant Member who has now taken the contrary view, and that, on the grounds of propriety, he cannot take a different stand in this case – even if the stand so taken is incorrect.

18. I am not persuaded by this argument either. There is nothing in the order to even remotely suggest that the reassessment proceedings were initiated to bring to tax the interest income or that the assessee was aware about these reasons of reopening the assessment. The assessee does not, therefore, derive any support from the judicial precedent.

19. As for the question about the view taken by the learned Accountant Member and the propriety, or lack of propriety, thereof, it is important to understand that as a Third Member, under the scheme of Section 255(4), I cannot be sitting in judgment about what my esteemed colleagues have decided. Section 255 (4) provides that, "**If the members of a Bench differ in opinion on any point, the point shall be decided according to**

the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it". The scheme thus provides for a mechanism to ensure that majority view is possible even when members on a bench are equally divided in their opinion on a point, and all that a 'third member' is to do is to express his opinion on the point on which division bench members have differed so as a majority opinion is possible. A Third Member appointed under section 255(4) does not hear appeal against the orders passed by the dissenting members and he cannot therefore decide which dissenting member is right and which one is wrong. The very action of advancing arguments in support of or against the views adopted by my dissenting colleagues, which is usually a practice in proceedings before the Third Members, proceeds on the fallacious assumption that the job of the Third Member is to approve or disapprove the views of the dissenting members. While a Third Member has to essentially concur with one of the Members on the original coram of the bench, it is not for him to approve or disapprove the views expressed by the dissenting members. The views of a third member practically end up deciding the point of difference because whatever he decides on the point of difference ends up being majority view, but, as per the scheme of Section 255(4), the views of the third member are on the same pedestal as views of the members in the original coram of the bench. It is very tempting to sit in judgment over the what our colleagues decide, and take a magnified view of one's powers as a third member, but then, irrespective of how senior or how junior these colleagues could be to the Third Member, yielding to such a temptation is not only wholly improper but also plainly contrary to the scheme of Section 255(4). It is

improper because all the Members in the Tribunal are at the same level of judicial hierarchy with the same judicial powers, and it is contrary to the scheme of Section 255(4) because all that this section provides for is an additional judicial opinion so as to form majority and not an appeal against the orders passed by the Members in the original coram of the bench.

20. With greatest respect to my esteemed colleagues, I must remain confined within these limits of the scheme of Section 255(4) which does not require, or permit, me to do anything more than expressing judicial opinion on the point of difference referred to me. In my view, for the detailed reasons set out above, the impugned penalty deserved to be confirmed. I hold so.

21. The matter will now go back to the division bench for a decision in accordance with the majority view.

Sd/xx
Pramod Kumar
(Accountant Member)

Kolkata, the 31st day of May 2012

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(3) CIT
(4) CIT(A)
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By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata

ITA.No.695/Kol/2010
Assessment Year : 2003-04

Darabshaw B.Cursetjee's Sons Ltd. Vs. I.T.O., Wd-6(1) Kolkata
Kolkata

PER C.D.RAO, AM :

8. I have carefully gone through the draft order authored by my learned colleague and have also had the opportunity of discussing the matter with him in detail. Much as I persuade myself to agree with the findings and conclusion arrived at by my learned colleague, I am unable to concur with him and my learned colleague is also not inclined to yield to my suggestions. Accordingly, to come out of this cul de sac and with the leave and consent of my Brother colleague, I proceed to write this separate and dissenting order.

9. The only issue raised by assessee is relating to confirmation of penalty levied by Assessing Officer u/s 271(1)(c) of the IT Act.

10. The brief facts of the issue are that Assessing Officer levied penalty of Rs.6,51,000/- after taking into consideration the written submissions filed by assessee by observing that

> "From the assessee's above submission it is evident that the assessee confined its argument on the assessment order passed u/s. 147/143(3) and Explanation 3 of the Sec.271. In the instant case the provision of that explanation is not applicable. It is a settled issue that imposition of penalty u/s.271(1)(c) is a factual one depending on facts of such case.
>
> The facts of the assessee's case is that original return was filed on 25.11.03 disclosing an income of Rs.26,950/- and claiming refund of Rs.4,44,698/-. The return was assessed u/s. 143(1) and refunds (along with interest) were issued to the assessee. In the said year the assessee in its P&L a/c. has debited towards VRS amounting to Rs.23,25,000/-. As per provision of Sec. 35DDA assessee was eligible to deduct from total income only 1/5th of the said amount and 4/5th of the same required to be offered for taxation. in spite of following the provisions of Sec. 35 DDA in earlier years, in the relevant year the assessee violated the provisions of See.35DDA. In this way the assessee claimed excess deduction of Rs 18,60,000/-. This excess claim has never offered by assessee by submitting any revised return before issuing notice u/s. 148 by the

Department. Accordingly, by recording the reasons in writing, the then A.O. issued notice u/s. 148 for reassessment of the escaped income. Only after receiving the notice u/s. 148, the assessee filed a return including that escaped income of Rs.18,60,000/-.

On receipt of the return u/s.148 the then A.O. passed order u/s. 147/143(3) and penalty proceedings u/s.271(1)(c) had been initiated for furnishing inaccurate particulars of income or suppression of income in the original return filed u/s. 139(1). It is a fact that assessee had not come up voluntarily with the increased income. It is the Department who detected the escaped income and proceedings u/s.147 started. Had the Department not detected the escapement, since the assessment completed u/s. 143(1), the entire amount of Rs. 18,60,000/- would never be assessed to Tax. Therefore, it is a clear case of concealment or submission of inaccurate particulars of income. Accordingly, it is a fit case for imposition of penalty u/s.271(1)(c) and minimum penalty @ 100% of Tax sought to be evaded amounting to Rs.6,51,000/- is imposed upon the assessee."

10.1. On appeal the ld. CIT(A) has forwarded the written submissions filed by assessee and after taking into consideration the facts mentioned in the Remand Report as well as comments made by assessee on the Remand Report confirmed the penalty levied by AO u/s 271(1)(c) of the IT Act by observing as under :-

"I have gone through the submissions of the appellant and also the order of the A.O. The remand report of AC and subsequent submissions of appellant are also perused. The submission of the appellant that AO has not spelt out what was the default for which the penalty was initiated is not acceptable. The AO proved in the order u/s 271(1) (c) , that this case is a clear case of submission of inaccurate particulars of income or concealment. In the assessment order u/s 147/143(3) the AC has clearly recorded the reasons to reach the satisfaction that assessee had furnished inaccurate particulars of income. The satisfaction of the A.O. is apparent from the assessment order. The interpretation given by the appellant to explanation 3 to section 271(1) (c) is contrary to the legal meaning intended by the legislature. I fully agree with the remand report submitted by the A.O. In response to remand report the appellant filed the submissions on 29.12.2009 to counter the argument of the AC that for the earlier A.Y., the assessee added back the total amount of VRS debited to Profit & Loss Account and there after deducted 1/5th of it. This treatment of the assessee clearly indicates that the assessee was fully aware of the provisions of Act in this respect. In the year under appeal, the appellant debited the entire sum of VRS amount to Profit & Loss Account, which clearly proves the intention of the appellant. The appellant neither in the proceedings u/s 271(1) (c) nor in the submissions made on 18.9.2007 before the undersigned brought out the fact regarding advise of M/s Vakharia & Associates and decision of the Bombay High Court in the case of CIT vs. Bhor Industries Ltd. delivered in February 2003 . The CBDT circular dated 23.01.2001 was clearly understood by the appellant and the appellant company filed the return for the AY. 2002-03 as per CBDT circular. It is surprising that for the

A.Y.2003-04, the Director, Mr. Dastur referred the matter to the Tax Consultant, even through return for the AY. 2002-03 was filed as per law understood by the appellant company. The decision of the Bombay High Cc was delivered on February, 2003 and the contents of the decision are clear. The original return was filed by the appellant on 25th November 2003 debiting the VRS expenses to the Profit and Loss Account.

When all the facts of the case and submissions of the appellant are considered, it becomes very clear that the appellant cannot be under mistaken belief of applicability of the Bombay High Court decision for AY. 2003-04. The appellant has claimed expenditure which was not deductible under law knowingly to reduce tax liability. Proceedings for the imposition of penalty are initiated only after the assessment order was made finding default of the assessee. It was held in several decisions like CIT Vs. Vidyagauri 238 ITR 91, CIT Vs. Indian Metals 211 ITR 35, CIT Vs. Harshvardan 259 ITR 212 etc. that if an assessee falsely claims a deduction, it would amount to concealing the particulars of his income or deliberately furnishing inaccurate particulars of such income within the meaning of this clause and he can be penalized u/s 271(1)(c) . Penalty can be imposed for concealment where, after detection made by the A.O., the assessee filed the return in response to notice under section 148 [PC Joseph Vs. CIT 243 ITR 818], [CIT Vs. Sunder Shaw 253 ITR 145].

In this case the appellants submission that under bonafide belief he claimed deduction of VRS expenses is not acceptable. For the previous year the appellant correctly followed the CBDT circular and for this assessment year initially referred the matter to Tax Consultant on CBDT Circular. These facts do not prove the bonafide intention of the appellant. Return furnished u/s 148 considering the income that was not added back in the original computation does not replace the original computation, rather it confirms that particulars furnished in the original return filed u/s 139 was inaccurate. The appellant claimed excessive deduction in the original return filed u/s 139. The assessing officer has jurisdiction in reassessment proceedings for any year to impose penalty for concealment of income in the return filed in original assessment proceedings for that year, not withstanding that the assessee had submitted a correct return in compliance with the notice for reassessment. In view of the above discussion, the penalty order of A.O. is confirmed and grounds of appeal are dismissed."

10.2. Aggrieved by this assessee is in appeal before us.

11. At the time of hearing the ld Counsel appearing on behalf of assessee has reiterated the submissions made before the revenue authorities which are recorded by the ld. CIT(A) at pages 4 to 7 of his order. the main contention of assessee is that the error was neither willful nor deliberate and there being bona fide reasons for error the penalty was not imposable.

12. On the other hand, the ld. DR appearing on behalf of the revenue has relied on the orders of the revenue authorities.

13. After hearing the rival submissions and on careful perusal of materials available on record, it is observed that the provision of section 35DDA was inserted by the Finance Act w.e.f. 1.4.2001 and in terms of the said provision assessee has claimed 1/5th of the VRS expenditure under the said section for immediately preceding assessment years i.e. 2001-02 and 2002-03 whereas when coming to A.Yr. 2003-04 which is the subject matter of the appeal he claimed 1/5th of the preceding two assessment years VRS expenditure along with 100% of the expenditure incurred during the previous financial year relevant to Financial year 2003-04. One of the contentions of assessee is that he has obtained a legal opinion from M/s. Wakharia & Associates on 11.7.2003 regarding allowability of VRS payments which are placed at pages 8 and 9 of the paper book. The same is as under :-

<u>Sub: Allowability of V R S payments</u>

> "This is with reference to my discussion with your Director, Mr. Dastur on 7th of July 2003 in connection with allowability of VRS Payments as revenue expenditure. Mr. Dastur had shown me CBDT Circular dated 23.01.2001 in which a view -has been expressed that the payments under Voluntary Retirement Scheme are to be considered as Capital Expenditure. In the past 2 days, I have done my research on the subject and I am bringing to your notice a very recent judgment of the Bombay High Court in the case of CIT Vs Bhor Industries Ltd dated 26.02.2003. In this judgment the Bombay High Court was concerned with A. Y. 1996-97 in which the assessee claimed deduction for Rs.10,02,23,735/- being VRS payments. The AO partially disallowed such expenditure and CIT (A) confirmed the disallowance. On appeal Tribunal held that VRS expenditure was incurred to reduce operating cost and the expenditure was fully allowable in the year in which the liability had ascertained and accrued. On further appeal, the Bombay High Court held that expenditure was incurred to save the expenses and it was to be allowed in its entirety in the year in which it was incurred and expenditure could not be spread over the number of years even though the assessee might have written it off in its books over a period of 5 years.
>
> In the light of latest decision of the Bombay High Court I am of the view that the CBDT Circular does not lay down correct principle of law. In fact the Bombay High Court has clearly held that the VRS expenditure is fully allowable in the year in which liability to pay VRS has accrued and the liability is not to be spread over the number of years."

13.1. On careful perusal of the said letter it is observed that they have given the opinion based on Bombay High Court judgement which was relevant to A.Yr. 1996-97 and on the

principles of CBDT Circulars the said opinion has never stated that assessee is entitled to 100% VRS expenditure for A.Yr. 2003-04. Neither the said letter discussed with the provisions of section 35DDA of the Act and the applicability for A.Yr. 2003-04. The Chartered Accountant who signed the above has not even mentioned his Membership Number which is one of mandatory requirement as per the Chartered Account Regulations. When once already the provisions of section 35DDA are in existence in the IT Act and assessee is availing the same continuously for the two preceding assessment years I failed to understand the need for assessee to get the opinion from a different Chartered Accountant who is not dealing with tax matters of assessee. It was an admitted fact that only when the notice u/s 148 of the IT Act has been issued then assessee company consulted the regular tax practitioner Shri D.S.Damle who clarified that the decision of Bombay High Court held for upto A.Yr. 2001-02 as provision of section 35DDA were not enacted till then. From this it is evident that assessee has obtained the said above referred letter from different Chartered Accountant in order to support the submissions of the assessee. I am of the opinion that no relevance can be given to the said letter of the Chartered Accountant in view of this specific provision of section 35DDA of the Act which was already followed by assessee since its inception. Under this circumstances I am of the view that claim of entire VRS expenditure based on the opinion given by different Chartered Accountant along with the proportionate claim of VRS expenditure pertaining to immediately two preceding assessment years by applying the provisions of section 35DDA of the Act is not a bona fide act. Under this set of facts I am of the considered view that neither the ratio laid down by the decision of Hon'ble Chattisgarh High Court in the case of CIT vs. Vijay Kumar Jain (2010) 235 ITR 378 (Chattisgarh) nor the Apex Court's decision in the case of CIT vs Reliance Petroproducts P.Ltd. (2010) 322 ITR 158 is not applicable to the facts of the case. Therefore in my opinion the revenue is justified in levying penalty imposed u/s 271(1)(c) of the IT Act.

13.2. In the result I dismiss the appeal of assessee.

Sd/-

(C.D.Rao)

Accountant Member

आयकर अपीलीय अधीकरण, न्यायपीठ – "ऐ" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

(समक्ष)Before **श्री महावीर सिंह,** न्यायीक सदस्य **एवं/and श्री,** सी.डी.राव, लेखा सदस्य)

[Before Sri Mahavir Singh, JM & Shri C. D. Rao, AM]

आयकर अपील संख्या / I.T.A No. 695/Kol/2010

निर्धारण वर्ष/Assessment Year : 2003-04

Darabshaw B. Cursetjee's Sons Ltd. Vs. Income-tax Officer, Wd-6(1), Kolkata
(PAN: AAACD 8670 Q)
(अपीलार्थी/Appellant) (प्रत्यर्थी/Respondent)

Date of hearing: 03.11.2011
Date of pronouncement:

For the Appellant: Shri D. S. Damle
For the Respondent: Shri B. R. Purakayastha

आदेश/ORDER

Per Mahavir Singh, JM (महावीर सिंह, न्यायीक सदस्य)

This appeal by assessee is arising out of order of CIT(A)-VI, Kolkata in Appeal No. CIT(A)-VI/KOL/130/Wd.6(1)/2006-07 dated 18.01.2000. Assessment was framed by ITO, Ward-6(1), Kolkata u/s. 143(3)/147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2003-04 vide dated 07.06.2006. The penalty in dispute was levied by ITO, Ward-6(1), Kolkata u/s 271(1)(c) of the Act vide his order dated 29.12.2006.

2. The only issue involved in this appeal of assessee is against the order of CIT(A) upholding levy of penalty u/s. 271(1)(c) of the Act. For this, assessee has raised following three effective grounds:

> *"1. For that on the facts and in the circumstances of the case, the CIT(A) was unjustified in upholding the order of penalty passed u/s. 271(1)(c) of the Act.*
>
> *2. For that on the facts and in the circumstances of the case, the authorities below were not justified in not appreciating the facts of the assessee's case in proper perspective and erred in holding the assessee guilty of furnishing inaccurate particulars even though in the return of income filed u/s. 148 the appellant had declared correct income.*
>
> *3. For that on the facts and in the circumstances of the case, the order of penalty u/s. 271(1)(c) of the Act be cancelled as the assessee had not concealed particulars of income."*

3. The assessee filed its original return of income on 25.11.2003 for the relevant Assessment Year 2003-04 disclosing an income of Rs.26.950/- and claiming refund of Rs.4,44,698/-. The return was processed u/s. 143(1) of the Act and refund was issued. In

the relevant assessment year assessee in its P&L Account debited towards VRS amounting to Rs.23,25,000/-. As per provision of sec. 35DDA of the Act, assessee was eligible to deduct from total income only 1/5th of the said amount and 4/5th of the same required to be offered for taxation. According to Assessing Officer, inspite of following provisions of Sec. 35DDA of the Act in earlier years, in the relevant year assessee violated provisions of sec. 35DDAof the Act. In this way, assessee claimed excess deduction of Rs.18,60,000/-. According to Assessing Officer, this excess claim has never been offered by assessee by submitting any revised return before issuing notice u/s. 148 of the Act by the department. Accordingly, by recording the reasons in writing, the Assessing Officer issued notice u/s.148 of the Act for reassessment of the escaped income. Only after receiving notice u/s. 148 of the Act, assessee filed return including that escaped income of Rs.18,60,000/-. On receipt of the return u/s. 148 of the Act, Assessing Officer passed order u/s. 147/143(3) of the Act and penalty proceedings u/s. 271(1)(c) of the Act had been initiated for furnishing inaccurate particulars of income or suppression of income in the original return filed u/s. 139(1) of the Act. According to Assessing Officer, the assessee had not come up voluntarily with the increased income and it was detected by department as escaped income and proceedings u/s. 147 of the Act started. Had the department not detected the escapement, since return was processed u/s 143(1) of the Act, the entire amount of Rs.18,60,000/- would never be assessed to tax. Therefore, according to Assessing Officer, it is a clear case of concealment or submission of inaccurate particulars of income and imposed minimum penalty u/s. 271(1)(c) of the Act @ 100% of tax sought to be evaded. In appeal, the CIT(A) confirmed the action of Assessing Officer by observing as under:

> *"I have gone through the submissions of the appellant and also the order of the A.O. The remand report of AO and subsequent submissions of appellant are also perused. The submission of the appellant that AO has not spelt out what was the default for which the penalty was initiated is not acceptable. The AO proved in the order u/s 271(1) (c) , that this case is a clear case of submission of inaccurate particulars of income or concealment. In the assessment order u/s 147/143(3) the AO has clearly recorded the reasons to reach the satisfaction that assessee had furnished inaccurate particulars of income. The satisfaction of the A.O. is apparent from the assessment order. The interpretation given by the appellant to explanation 3 to section 271(1) (c) is contrary to the legal meaning intended by the legislature. I fully agree with the remand report submitted by the A.O. In response to remand report the appellant filed the submissions on 29.12.2009 to counter the argument of the AO that for the earlier AY., the assessee added back the total amount of VRS debited to Profit & Loss Account and there after deducted 1/5th of it. This treatment of the assessee clearly indicates that the assessee was fully aware of the provisions of Act in this respect. In the year under appeal, the appellant debited the entire sum of VRS amount to Profit & Loss Account, which clearly proves the intention of the appellant. The appellant neither in the proceedings u/s 271(1) (c) nor in the submissions made on 18.9.2007 before the undersigned brought out the fact regarding advise of M/s Vakharia & Associates and decision of the Bombay High Court in the case of CIT vs. Bhor Industries Ltd. delivered in February 2003. The CBDT circular dated 23.01.2001 was clearly understood by the appellant and*

the appellant company filed the return for the A.Y. 2002-03 as per CBDT circular. It is surprising that for the A Y 2003-04, the Director, Mr. Dastur referred the matter to the Tax consultant, even though return for the A.Y. 2002-03 was filed as per law understood by the appellant company. The decision of the Bombay High Court was delivered on February, 2003 and the contents of the decision are clear. The original return was filed by the appellant on 25th November 2003 debiting the VRS expenses to the Profit and Loss Account.

When all the facts of the case and submissions of the appellant are considered, it becomes very clear that the appellant cannot be under mistaken belief of applicability of the Bombay High Court decision for A.Y. 2003-04. The appellant has claimed expenditure which was not deductible under law knowingly to reduce tax liability. Proceedings for the imposition of penalty are initiated only after the assessment order was made finding default of the assessee. It was held in several decisions like CIT Vs. Vidyagauri 238 ITR 91, CIT Vs. Indian Metals 211 ITR 35, CIT Vs. Harshvardan 259 ITR 212 etc. that if an assessee falsely claims a deduction, it would amount to concealing the particulars of his income or deliberately furnishing inaccurate particulars of such income within the meaning of this clause and he can be penalized u/s 271(1)(c). Penalty can be imposed for concealment where, after detection made by the A.O., the assessee filed the return in response to notice under section 148 [PC Joseph Vs. CIT 243 ITR 818], [CIT Vs. Sunder Shaw 253 ITR 145].

In this case the appellants submission that under bonafide belief he claimed deduction of VRS expenses is not acceptable. For the previous year the appellant correctly followed the CBDT circular and for this assessment year initially referred the matter to Tax Consultant on CBDT Circular. These facts do not prove the bonafide intention of the appellant. Return furnished u/s 148 considering the income that was not added back in the original computation does not replace the original computation, rather it confirms that particulars furnished in the original return filed u/s 139 was inaccurate . The appellant claimed excessive deduction in the original return filed u/s 139. The assessing officer has jurisdiction in reassessment proceedings for any year to impose penalty for concealment of income in the return filed in original assessment proceedings for that year, not withstanding that the assessee had submitted a correct return in compliance with the notice for reassessment. In view of the above discussion, the penalty order of A.O. is confirmed and grounds of appeal are dismissed."

Aggrieved, assessee is now in appeal before us.

4. We have heard rival submissions and gone through facts and circumstances of the case. We find that the assessee company in order to rationalize its operation offered voluntary retirement scheme (VRS) to its employees during FY 2002-03 and made payment amounting to Rs.23.25 lacs. One of the directors of assessee company Mr. Dastur, who was looking after taxation matters was informed that CBDT vide circular dated 23.01.2001 expressed an opinion that VRS payments were to be considered as capital expenditure and accordingly, CA firm M/s. Vakharia & Associates, who was advising on accounting, company law and taxation matters, clarified vide letter dated 11.07.2003 that the CBDT Instructions were contrary to the decision of Hon'ble Bombay High Court in the case of CIT Vs. Bhor Industries Ltd.(2003) 128 Taxman 626 (Bom)

dated Feb. 2003. According to the decision of Hon'ble Bombay High Court in the case of Bhor Industries Ltd., VRS expenditure was allowable in its entirety and the same was allowable in the year in which liability had accrued but CA firm M/s. Vakharia & Associates, inadvertently, has not clarified that the decision of Hon'ble Bombay High Court is a good law till AY 2001-02 reason being with the insertion of sec. 35DDA of the Act by the Finance Act, 2001, which governs the assessment subsequent to AY 2001-02, the deduction u/s. 35DDA of the Act will be allowed only 1/5th in the relevant year. It was the contention of the assessee before us that based on the advice of M/s. Vakharia & Associates dated 11.07.2003, assessee was under bonafide belief that VRS expenditure of was fully allowable in the year of its accrual and accordingly, in the return of income filed on 25.11.2003, it claimed deduction of VRS expenses in entirety by debiting the same in the P&L Account. It was also argued by Ld. Counsel Shri Damle that assessee has disclosed this information with regard to VRS along with return of income and the same was allowed while processing the return u/s. 143(1) of the Act. The AO subsequently issued notice u/s. 148 of the Act and in the return filed in response to notice u/s. 148 of the Act, assessee after consulting Shri D. S. Damle, FCA, who clarified that a deduction in view of decision of Bhor Industries Ltd. (supra) is allowable upto AY 2001-02 and after that with insertion of the provisions of section 35DDA of the Act, allowability of VRS expenditure was governed by section 35DDA of the Act as per which deduction was to be allowed in five annual installments. In the light of the advice received from Shri D. S. Damle, FCA, the assessee claimed deduction of VRS payment in conformity with the provisions of section 35DDA of the Act in response to notice u/s. 148 of the Act and paid taxes thereon. Ld. Counsel for the assessee here argued that the amount disallowed in AY 2003-04, however, was allowable as deduction in subsequent four years and ultimately the deduction has been allowed for the entire expenditure but in subsequent four years as against AY 2003-04 as originally claimed. The Ld. Counsel before us also argued that even revenue has not doubted the genuineness of VRS expenditure and particulars of VRS expenses were furnished before AO, who did not find any inaccuracy or infirmity in the details. Only issue remains was the quantum of deduction permissible in AY 2003-04 and till the enactment of section 35DDA of the Act whole of VRS expenditure was allowable but after assessment year 2002-03, VRS expenditure was allowable in five equal annual installments. We find, in view of the above arguments, that the assessee was under mistaken belief claimed deduction of VRS expenditure in entirety in AY 2003-04 in view of specialist advice from a CA firm and the decision of Hon'ble Bombay High Court in the case of Bhor Industries Ltd. (supra). We are of the view that the assessee in the P&L Account filed with the original return of income disclosed the fact that it had incurred VRS

expenditure amounting to Rs.23.25 lacs and claimed deduction during the relevant AY in entirety. In our view, the information filed in the return of income was correct and voluntarily furnished but the claim was in excess of the amount under the provisions of section 35DDA of the Act. Accordingly, we are of the view that as such, the assessee cannot be held guilty to be concealing or furnishing inaccurate particulars of income because it has voluntarily furnished information with regard to VRS in the original return and further filed the return in response to notice u/s. 148 of the Act after obtaining opinion of another export and claimed deduction in conformity with the provisions of section 35DDA of the Act. We are of the view that the assessee had acted in bonafide matter and on the first available opportunity rectified the order committed in original return. This view of ours is supported by recent judgment of Hon'ble Chhattisgarh High Court in the case of CIT v Vijay Kumar Jain (2010) 325 ITR 378(Chhattisgarh), wherein it is held as under:

> "*The question for our consideration for deciding this appeal is whether the Commissioner of Income-tax (Appeals) and the Tribunal were justified in cancelling the penalty under section 271(1)(c) of the Act imposed by the Assessing Officer in the admitted facts that the Assessing Officer after rejecting the book results estimated the net profit of the assessee at the rate of 10 per cent. of the total receipt in the return and on difference of profit so estimated, imposed additional tax ?*

> *In Chairman, SEBI [2006] 131 Comp Cas 591 ; [2006] 5 SCC 361, the question before the Supreme Court was whether once it is conclusively established that a mutual fund has violated the terms of certificate of registration and statutory regulations, the imposition of penalty becomes a sine qua non of the violation. Answering in the affirmative and allowing the appeals, the Supreme Court held that mens rea is not an essential ingredient for contravention of the provisions of a civil Act. Unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred and it is wholly unnecessary to ascertain whether such a violation was intentional or not. The breach of a civil obligation which attracts a penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not.*

> *In Dilip N. Shroff v. Joint CIT [2007] 291 ITR 519, the Supreme Court, while considering the nature and applicability of section 271(1)(c) and Explanation 1 thereto, held that even if the statute says that one is liable for penalty if one furnishes inaccurate particulars, the same may not by itself be enough to hold that nothing more is needed if the particulars furnished are found to be inaccurate. An element of mens rea is needed before penalty can be imposed. Concealment and furnishing inaccurate particulars refer to a deliberate act or omission on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Another Division Bench of the Supreme Court, doubting the correctness of the above view expressed in Dilip N. Shroff referred the controversy involved in the appeals to a larger Bench.*

> *In Union of India v. Dharamendra Textile Processors [2008] 306 ITR 277 (SC), it was held by the three-judge Bench of the Supreme Court in paragraph-20 that Dilip*

N. Shroff case was not correctly decided but Chairman, SEBI's case has analyzed the legal position in the correct perspective and accordingly answered the reference.

In Atul Mohan Bindal [2009] 317 ITR 1 (SC), it has been observed that if the Assessing Officer is satisfied that a person has concealed the particulars of his income or furnished inaccurate particulars of such income, such person may be directed to pay penalty. In paragraph 13, it has been further observed that for applicability of section 271(1)(c), conditions stated therein must exist.

The Supreme Court in its latest decision in the matter of CIT v. Reliance Petroproducts P. Ltd. [2010] 322 ITR 158, while considering the applicability of section 271(1)(c) of the Act, held that in order to impose penalty under the aforesaid section, there has to be concealment of particulars of income of the assessee and the assessee must have furnished inaccurate particulars of his income. The meaning of the word "particulars" used in section 271(1)(c) would embrace the details of the claim made. Where no information given in the return is found to be incorrect or inaccurate, the assessee cannot be held guilty of furnishing inaccurate particulars. In order to expose the assessee to penalty, unless the case is strictly covered by the provision, the penalty provision cannot be invoked. By no stretch of imagination can making an incorrect claim tantamount to furnishing inaccurate particulars. There can be no dispute that everything would depend upon the return filed by the assessee, 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. To attract penalty, the details supplied in the return must not be accurate, not exact or correct, not according to the truth or erroneous. Where there is no finding that any details supplied by the assessee in its return are found to be incorrect or erroneous or false there is no question of inviting the penalty under section 271(1)(c). A mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such a claim made in the return cannot amount to furnishing inaccurate particulars.

If we examine the facts of the present case in the light of the principles of law laid down by the Supreme Court in the aforesaid judgments, we find that the assessee furnished accurate particulars of the entire receipt of Rs.21,76,274. After deduction towards expenditure and addition of net profit through other sources, taxable net income was shown at Rs. 70,818. However, since the assessee did not produce any evidence and books of account including the balance-sheet for the assessment year, net profit was estimated at the rate of 10 per cent. of the receipt from all sources and on difference of profit so estimated, additional tax was imposed and it was further directed that proceeding under section 271(1)(c) of the Act for imposition of penalty be separately drawn against the assessee for concealment of income by not producing proper evidence of expenditure. To impose penalty under section 271(1)(c), conditions stated therein must exist meaning thereby the assessee must have concealed the particulars of his income or furnished inaccurate particulars of such income.

In the instant case, it is not the case of the Revenue that the assessee concealed the particulars of his income or any particulars of income furnished by him was found to be inaccurate by the Assessing Officer. The assessee declared the net profit by estimating it at the rate of 6.36 per cent. of his gross receipt as the Assessing Officer in similarly situated cases had accepted lower net profit than 6.36 per cent. declared by the assessee. Considering the aforesaid facts, the Tribunal held that the order of the Commissioner of Income-tax (Appeals) in cancelling penalty cannot be faulted with and accordingly upheld the order.

In our considered opinion, in view of the undisputed facts that particulars furnished by the assessee regarding receipt in the relevant financial year have not been found inaccurate ; it is also not the case of the Revenue that the assessee concealed any income in his return, the order of the Tribunal confirming the order of the

Commissioner (Appeals) cancelling the penalty imposed by the Assessing Officer under section 271(1)(c) of the Act cannot be faulted with."

5. We find that Hon'ble Chhattisgarh High Court in the case of Vijay Kumar Jain (supra) has considered the case law of Hon'ble Apex Court in the case of Reliance Petroproducts Pvt. Ltd. (supra) wherein ratio is laid down that what is concealment and what is furnishing of inaccurate particulars of income. Hon'ble Apex Court has answered that in case a claim of deduction is made and which is not sustainable in law that does not amount furnishing of inaccurate particulars of income in case there are full particulars filed in relation to the claim in the return of income. In the present case before us also the assessee has filed full particulars of VRS payments and claimed deduction and that also based on opinion of expert M/s. Vakharia & Associates, a CA firm. It is not the case of the revenue that the payments are not genuine and for this it is a fact that this claim was allowed in five equal annual installments in five assessment years that means that the payments are genuine and not doubted by revenue. Even the explanation furnished by assessee is not found to be false and assessee furnished bonafide explanation for the error occurred while filing original return of income in the present case and subsequently also the assessee while filing return in response to notice u/s. 148 claimed deduction in conformity with the provisions of section 35DDA of the Act and which was allowed. In view of these facts, we delete the penalty levied u/s. 271(1)© of the Act and allow this appeal of assessee.

6. In the result, appeal of assessee is allowed.

7. Order pronounced in open court on _________.

Sd/-

सी.डी.राव लेखा सदस्य | **महावीर सिंह**, न्यायीक सदस्य
(C. D. Rao) | (Mahavir Singh)
Accountant Member | Judicial Member

(तारीख) Dated : November, 2011

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – Darabshaw B. Curestjee's Sons Ltd., 13, Brabourne Road, 4th floor, Kolkata-700 001.
2. प्रत्यर्थी/ Respondent, ITO, Ward-6(1), Kolkata
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/CIT, Kolkata
5. वभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.

IN THE INCOME TAX APPELLATE TRIBUNAL : "C" BENCH : KOLKATA

[Before Hon'ble Sri Mahavir Singh, JM. & Hon'ble Sri C.D. Rao, A.M.]

I.T.A No. 695/Kol/2010
Assessment Year : 2003-2004

Darwabshaw B. Cursetjee Sons Ltd., **13, Brabourne Road, 4th floor,** **Kolkata-700 001** **(PAN : AAACD 8670 Q)** (Appellant)	**-vs.-**	**Income Tax Officer,** **Ward-6(1), Kolkata** (Respondent)

For the Appellant : S/Shri D.S. Damle & A. Dudhwewala, AR.

For the Department : Shri R.N. Saha, D.R.

ORDER

Per Shri Mahavir Singh, Judicial Member:

Since there was a difference of opinion between the ld. Members constituting the Division Bench of ITAT, Kolkata with regard to the following question, the matter was referred to Third Member under section. 255(4) of the I.T. Act, 1961 for his opinion :-

> ***"Whether in the given facts and circumstances of the case, the learned CIT(A.) is justified in upholding the levy of penalty under section 271(1)(c) of the Income Tax Act, 1961 or not"?***

2. Hon'ble President, ITAT nominated Shri Pramod Kumar, Hon'ble Accountant Member as Third Member. The Third Member vide his order dated 31.05.2012 has confirmed the penalty imposed under section 271(1)(c) of the Act. Therefore, in accordance with the majority view, the appeal of the assessee is dismissed.

Order pronounced in the Open Court on 19.06.2012.

Sd/- **[C.D. Rao]** **Accountant Member**	**Sd/-** **[Mahavir Singh]** **Judicial Member**

Dated : 19/ 06/ 2012

Copy of the order forwarded to:

1. The Appellant;
2. The Respondent,
3. Commissioner of Income-tax (Appeals)- , Kolkata,
4. CIT, Kolkata-
5. DR, Kolkata Benches, Kolkata

(True Copy)

By Order

Assistant Registrar, I.T.A.T., Kolkata

Laha, Sr. P.S.